ASIA-PACIFIC CONFERENCE ON THE PROMOTION OF GENDER-RESPONSIVE JUDICIAL SYSTEMS

Strengthening Formal Justice Systems' Responses to Violence Against Women and Girls

23 May 2022

POST-CONFERENCE BOOKLET

Volume II: Accompanying Materials

ASIAN DEVELOPMENT BANK

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A family promenading along beach in Dili, Timor-Leste (photo by Luis Enrique Ascui/ADB).

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Establishing safe public spaces. Gender-based violence in public spaces—such as rape, sexual remarks, and touching—restricts the freedom of movement of women and girls and their right to participate in their community (photo by Madiha Aijaz/ADB).

1 MATERIALS RELATED TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

A. Text of the Cedaw Convention

Convention on the Elimination of All Forms of Discrimination against Women

Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979

entry into force 3 September 1981, in accordance with article 27(1)

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

PART I

Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to en sure the full development and advancement of women , for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

PART II

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

PART III

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particulary those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;

(g) The same Opportunities to participate actively in sports and physical education;

(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits;

(b) The right to bank loans, mortgages and other forms of financial credit;

(c) The right to participate in recreational activities, sports and all aspects of cultural life.

Article 14

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(a) To participate in the elaboration and implementation of development planning at all levels;

(b) To have access to adequate health care facilities, including information, counselling and services in family planning;

(c) To benefit directly from social security programmes;

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;

(e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;

(f) To participate in all community activities;

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

PART IV

Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

PART V

Article 17

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

Article 18

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

(a) Within one year after the entry into force for the State concerned;

(b) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 19

1. The Committee shall adopt its own rules of procedure. 2. The Committee shall elect its officers for a term of two years.

Article 20

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.

2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

Article 21

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

2. The Secretary-General of the United Nations shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

Article 22

The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

PART VI

Article 23

Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

(a) In the legislation of a State Party; or

(b) In any other international convention, treaty or agreement in force for that State.

Article 24

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

Article 25

1. The present Convention shall be open for signature by all States.

2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.

3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 29

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 30

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations. IN WITNESS WHEREOF the undersigned, duly authorized, have signed the present Convention.

B. General Recommendations

i. General Recommendation No. 19: Violence against Women

IV. GENERAL RECOMMENDATIONS ADOPTED BY THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

Eleventh session (1992)**

General recommendation No. 19: Violence against women

Background

1. Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.

2. In 1989, the Committee recommended that States should include in their reports information on violence and on measures introduced to deal with it (General recommendation 12, Eighth session).

3. At its tenth session in 1991, it was decided to allocate part of the eleventh session to a discussion and study on article 6 and other articles of the Convention relating to violence towards women and the sexual harassment and exploitation of women. That subject was chosen in anticipation of the 1993 World Conference on Human Rights, convened by the General Assembly by its resolution 45/155 of 18 December 1990.

4. The Committee concluded that not all the reports of States parties adequately reflected the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms. The full implementation of the Convention required States to take positive measures to eliminate all forms of violence against women.

5. The Committee suggested to States parties that in reviewing their laws and policies, and in reporting under the Convention, they should have regard to the following comments of the Committee concerning gender-based violence.

General comments

6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

** Contained in document A/47/38.

(a) The right to life;

(b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;

(c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;

(d) The right to liberty and security of person;

(e) The right to equal protection under the law;

(f) The right to equality in the family;

(g) The right to the highest standard attainable of physical and mental health;

(h) The right to just and favourable conditions of work.

8. The Convention applies to violence perpetrated by public authorities. Such acts of violence may breach that State's obligations under general international human rights law and under other conventions, in addition to breaching this Convention.

9. It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2 (e), 2 (f) and 5). For example, under article 2 (e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

Comments on specific articles of the Convention

Articles 2 and 3

10. Articles 2 and 3 establish a comprehensive obligation to eliminate discrimination in all its forms in addition to the specific obligations under articles 5-16.

Articles 2 (f), 5 and 10 (c)

11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to their low level of political participation and to their lower level of education, skills and work opportunities.

12. These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.

Article 6

13. States parties are required by article 6 to take measures to suppress all forms of traffic in women and exploitation of the prostitution of women.

14. Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries, and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.

15. Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.

16. Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.

Article 11

17. Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.

18. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

Article 12

19. States parties are required by article 12 to take measures to ensure equal access to health care. Violence against women puts their health and lives at risk.

20. In some States there are traditional practices perpetuated by culture and tradition that are harmful to the health of women and children. These practices include dietary restrictions for pregnant women, preference for male children and female circumcision or genital mutilation.

Article 14

21. Rural women are at risk of gender-based violence because of traditional attitudes regarding the subordinate role of women that persist in many rural communities. Girls from rural communities are at special risk of violence and sexual exploitation when they leave the rural community to seek employment in towns.

Article 16 (and article 5)

22. Compulsory sterilization or abortion adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children.

23. Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.

Specific recommendations

24. In light of these comments, the Committee on the Elimination of Discrimination against Women recommends:

(a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;

(b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention;

(c) States parties should encourage the compilation of statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence;

(d) Effective measures should be taken to ensure that the media respect and promote respect for women;

(e) States parties in their report should identify the nature and extent of attitudes, customs and practices that perpetuate violence against women, and the kinds of violence that result. They should report the measures that they have undertaken to overcome violence, and the effect of those measures;

(f) Effective measures should be taken to overcome these attitudes and practices. States should introduce education and public information programmes to help eliminate prejudices which hinder women's equality (recommendation No. 3, 1987);

(g) Specific preventive and punitive measures are necessary to overcome trafficking and sexual exploitation;

(h) States parties in their reports should describe the extent of all these problems and the measures, including penal provisions, preventive and rehabilitation measures, that have been taken to protect women engaged in prostitution or subject to trafficking and other forms of sexual exploitation. The effectiveness of these measures should also be described;

(i) Effective complaints procedures and remedies, including compensation, should be provided;

(j) States parties should include in their reports information on sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace;

(k) States parties should establish or support services for victims of family violence, rape, sex assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling;

(l) States parties should take measures to overcome such practices and should take account of the Committee's recommendation on female circumcision (recommendation No. 14) in reporting on health issues;

(m) States parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control;

(n) States parties in their reports should state the extent of these problems and should indicate the measures that have been taken and their effect;

(o) States parties should ensure that services for victims of violence are accessible to rural women and that where necessary special services are provided to isolated communities;

(p) Measures to protect them from violence should include training and employment opportunities and the monitoring of the employment conditions of domestic workers;

(q) States parties should report on the risks to rural women, the extent and nature of violence and abuse to which they are subject, their need for and access to support and other services and the effectiveness of measures to overcome violence;

(r) Measures that are necessary to overcome family violence should include:

Criminal penalties where necessary and civil remedies in case of domestic violence;

Legislation to remove the defence of honour in regard to the assault or murder of a female family member;

Services to ensure the safety and security of victims of family violence, including refuges, counselling and rehabilitation programmes;

Rehabilitation programmes for perpetrators of domestic violence;

Support services for families where incest or sexual abuse has occurred;

(s) States parties should report on the extent of domestic violence and sexual abuse, and on the preventive, punitive and remedial measures that have been taken;

(t) That States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:

Effective legal measures, including penal sanctions, civil remedies compensatory provisions to protect women against all kinds of violence, including, inter alia, violence and abuse in the family, sexual assault and sexual harassment in the workplace;

Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;

Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence;

(u) That States parties should report on all forms of gender-based violence, and that such reports should include all available data on the incidence of each form of violence, and on the effects of such violence on the women who are victims;

(v) That the reports of States parties should include information on the legal, preventive and protective measures that have been taken to overcome violence against women, and on the effectiveness of such measures.

ii. General Recommendation No. 33: Women's Access to Justice

United Nations

CEDAW/C/GC/33

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General recommendation No. 33 on women's access to justice

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I. Introduction and scope

1. The right to access to justice for women is essential to the realization of all the rights protected under the Convention on the Elimination of All Forms of Discrimination against Women. It is a fundamental element of the rule of law and good governance, together with the independence, impartiality, integrity and credibility of the judiciary, the fight against impunity and corruption, and the equal participation of women in the judiciary and other law implementation mechanisms. The right to access to justice is multidimensional. It encompasses justiciability, availability, accessibility, good quality, the provision of remedies for victims and the accountability of justice systems. For the purposes of the present general recommendation, all references to "women" should be understood to include women and girls, unless otherwise specifically noted.

2. In the present general recommendation, the Committee examines the obligations of States parties to ensure that women have access to justice. These obligations encompass the protection of women's rights against all forms of discrimination with a view to empowering them as individuals and as rights holders. Effective access to justice optimizes the emancipatory and transformative potential of the law.

3. In practice, the Committee has observed a number of obstacles and restrictions that impede women from realizing their right to access to justice on a basis of equality, including a lack of effective jurisdictional protection offered by States parties in relation to all dimensions of access to justice. These obstacles occur in a structural context of discrimination and inequality owing to factors such as gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women. All these obstacles constitute persistent violations of women's human rights.

4. The scope of the present general recommendation includes the procedures and quality of justice for women at all levels of justice systems, including specialized and quasi-judicial mechanisms. Quasi-judicial mechanisms encompass all actions of public administrative agencies or bodies, similar to those carried out by the judiciary, which have legal effects and may affect legal rights, duties and privileges.

5. The scope of the right to access to justice also includes plural justice systems. The term "plural justice systems" refers to the coexistence within a State party of State laws, regulations, procedures and decisions on the one hand, and religious, customary, indigenous or community laws and practices on the other. Therefore, plural justice systems include multiple sources of law, whether formal or informal, whether State, non-State or mixed, that women may encounter when seeking to exercise their right to access to justice. Religious, customary, indigenous and community justice systems — referred to as traditional justice systems in the present general recommendation — may be formally recognized by the State, operate with the acquiescence of the State, with or without any explicit status, or function outside of the State's regulatory framework.

6. International and regional human rights treaties and declarations and most national constitutions contain guarantees relating to sex and/or gender equality before the law and obligations to ensure that everyone benefits from the equal

protection of the law.[1] Article 15 of the Convention provides that women and men must have equality before the law and benefit from equal protection of the law. Article 2 stipulates that States parties must take all appropriate measures to guarantee the substantive equality of men and women in all areas of life, including through the establishment of competent national tribunals and other public institutions, to ensure the effective protection of women against any act of discrimination. The content and scope of that provision are further detailed in the Committee's general recommendation No. 28 on the core obligations of States parties under article 2 of the Convention. Article 3 mentions the need for appropriate measures to ensure that women can exercise and enjoy their human rights and fundamental freedoms on a basis of equality with men.

7. Discrimination may be directed against women on the basis of their sex and gender. Gender refers to socially constructed identities, attributes and roles for women and men and the cultural meaning imposed by society on to biological differences, which are consistently reflected within the justice system and its institutions. Under article 5 (a) of the Convention, States parties have an obligation to expose and remove the underlying social and cultural barriers, including gender stereotypes, that prevent women from exercising and claiming their rights and impede their access to effective remedies.

8. Discrimination against women, based on gender stereotypes, stigma, harmful and patriarchal cultural norms and gender-based violence, which affects women in particular, has an adverse impact on the ability of women to gain access to justice on an equal basis with men. In addition, discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women. Grounds for intersecting or compounded discrimination may include ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership and identity as a lesbian, bisexual or transgender woman or intersex person. These intersecting factors make it more difficult for women from those groups to gain access to justice.[2]

9. Other factors that make it more difficult for women to gain access to justice include illiteracy, trafficking, armed conflict, status as an asylum seeker, internal displacement, statelessness, migration, being a female head of household, widowhood, living with HIV, deprivation of liberty, criminalization of prostitution, geographical remoteness and stigmatization of women fighting for their rights. That human rights defenders and organizations are frequently targeted because of their work must be emphasized and their own right to access to justice protected.

10. The Committee has documented many examples of the negative impact of intersecting forms of discrimination on access to justice, including ineffective remedies, for specific groups of women. Women belonging to such groups often do not report violations of their rights to the authorities for fear that they will be humiliated, stigmatized, arrested, deported, tortured or have other forms of violence

[1] See, for example, articles 7 and 8 of the Universal Declaration of Human Rights, articles 2 and 14 of the International Covenant on Civil and Political Rights and articles 2 (2) and 3 of the International Covenant on Economic, Social and Cultural Rights. At the regional level, the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the American Convention on Human Rights and the African Charter on Human and Peoples' Rights all contain relevant provisions.

[2] See paragraph 18 of general recommendation No. 28.

inflicted upon them, including by law enforcement officials. The Committee has also noted that, when women from those groups lodge complaints, the authorities frequently fail to act with due diligence to investigate, prosecute and punish perpetrators and/or provide remedies.[3]

11. In addition to articles 2 (c), 3, 5 (a) and 15 of the Convention, States parties have further treaty-based obligations to ensure that all women have access to education and information about their rights and the remedies that are available and how to gain access to them, and access to competent, gender-sensitive dispute resolution systems, as well as equal access to effective and timely remedies.[4]

12. The Committee's views and recommendations concerning the steps that need to be taken to overcome obstacles encountered by women in gaining access to justice are informed by its experience in considering the reports of States parties, its analysis of individual communications and its conduct of inquiries under the Optional Protocol to the Convention. In addition, reference is made to work on access to justice by other United Nations human rights mechanisms, national human rights institutions, civil society organizations, including community-based women's associations, and academic researchers.

II. General issues and recommendations on women's access to justice

A. Justiciability, availability, accessibility, good quality, provision of remedies and accountability of justice systems

13. The Committee has observed that the concentration of courts and quasi-judicial bodies in the main cities, their non-availability in rural and remote regions, the time and money needed to gain access to them, the complexity of proceedings, the physical barriers for women with disabilities, the lack of access to high-quality, gender-competent legal advice, including legal aid, as well as the often-noted deficiencies in the quality of justice systems (e.g., gender-insensitive judgements or decisions owing to a lack of training, delays and excessive length of proceedings, corruption) all prevent women from gaining access to justice.

14. Six interrelated and essential components — justiciability, availability, accessibility, good quality, provision of remedies for victims and accountability of justice systems — are therefore necessary to ensure access to justice. While differences in prevailing legal, social, cultural, political and economic conditions will necessitate a differentiated application of these features in each State party, the basic elements of the approach are universally relevant and immediately applicable. Accordingly:

(a) Justiciability requires the unhindered access by women to justice and their ability and empowerment to claim their rights as legal entitlements under the Convention;

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[3] See, for example, the concluding observations on the Bahamas (CEDAW/C/BHS/CO/1-5, para. 25 (d)), Costa Rica (CEDAW/C/CRI/CO/5-6, paras. 40-41), Fiji (CEDAW/C/FJI/CO/4, paras. 24-25), Kyrgyzstan (A/54/38/Rev.1, part one, paras. 127-128), the Republic of Korea (CEDAW/C/KOR/CO/6, paras. 19-20, and CEDAW/C/KOR/CO/7, para. 23 (d)) and Uganda (CEDAW/C/UGA/CO/7, paras. 43-44).

[4] See, in particular, general recommendations Nos. 19, 21, 23, 24, 26, 27, 29 and 30.

(b) Availability requires the establishment of courts, quasi-judicial bodies or other bodies throughout the State party in urban, rural and remote areas, as well as their maintenance and funding;

(c) Accessibility requires that all justice systems, both formal and quasi-judicial, be secure, affordable and physically accessible to women, and be adapted and appropriate to the needs of women, including those who face intersecting or compounded forms of discrimination;

(d) Good quality of justice systems requires that all components of the system adhere to international standards of competence, efficiency, independence and impartiality[5] and provide, in a timely fashion, appropriate and effective remedies that are enforced and that lead to sustainable gender-sensitive dispute resolution for all women. It also requires that justice systems be contextualized, dynamic, participatory, open to innovative practical measures, gender-sensitive and take account of the increasing demands by women for justice;

(e) Provision of remedies requires that justice systems provide women with viable protection and meaningful redress for any harm that they may suffer (see art. 2); and

(f) Accountability of justice systems is ensured through monitoring to guarantee that they function in accordance with the principles of justiciability, availability, accessibility, good quality and provision of remedies. The accountability of justice systems also refers to the monitoring of the actions of justice system professionals and of their legal responsibility when they violate the law.

15. **With regard to justiciability, the Committee recommends that States parties:**

(a) **Ensure that rights and correlative legal protections are recognized and incorporated into the law, improving the gender responsiveness of the justice system;**

(b) **Improve women's unhindered access to justice systems and thereby empower them to achieve de jure and de facto equality;**

(c) **Ensure that justice system professionals handle cases in a gender-sensitive manner;**

(d) **Ensure the independence, impartiality, integrity and credibility of the judiciary and the fight against impunity;**

(e) **Tackle corruption in justice systems as an important element of eliminating discrimination against women in gaining access to justice;**

(f) **Confront and remove barriers to women's participation as professionals within all bodies and levels of judicial and quasi-judicial systems and providers of justice-related services, and take steps, including temporary special measures, to ensure that women are equally represented in the judiciary and other law implementation mechanisms as magistrates, judges, prosecutors, public defenders, lawyers, administrators, mediators, law enforcement officials, judicial and penal officials and expert practitioners, as well as in other professional capacities;**

[5] See the Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly in its resolution 40/32.

(g) **Revise the rules on the burden of proof in order to ensure equality between the parties in all fields where power relationships deprive women of fair treatment of their cases by the judiciary;**

(h) **Cooperate with civil society and community-based organizations to develop sustainable mechanisms to support women's access to justice and encourage non-governmental organizations and civil society entities to take part in litigation relating to women's rights;**

(i) **Ensure that women human rights defenders are able to gain access to justice and receive protection from harassment, threats, retaliation and violence.**

16. **With regard to the availability of justice systems, the Committee recommends that States parties:**

(a) **Ensure the creation, maintenance and development of courts, tribunals and other entities, as needed, that guarantee women's right to access to justice without discrimination throughout the entire territory of the State party, including in remote, rural and isolated areas, giving consideration to the establishment of mobile courts, especially to serve women living in remote, rural and isolated areas, and to the creative use of modern information technology solutions, when feasible;**

(b) **In cases of violence against women, ensure access to financial aid, crisis centres, shelters, hotlines and medical, psychosocial and counselling services;**

(c) **Ensure that rules on standing allow groups and civil society organizations with an interest in a given case to lodge petitions and participate in the proceedings;**

(d) **Establish an oversight mechanism by independent inspectors to ensure the proper functioning of the justice system and address any discrimination against women committed by justice system professionals.**

17. **With regard to accessibility of justice systems, the Committee recommends that States parties:**

(a) **Remove economic barriers to justice by providing legal aid and ensure that fees for issuing and filing documents, as well as court costs, are reduced for women with low incomes and waived for women living in poverty;**

(b) **Remove linguistic barriers by providing independent and professional translation and interpretation services, when needed, and provide individualized assistance for illiterate women in order to guarantee their full understanding of judicial and quasi-judicial processes;**

(c) **Develop targeted outreach activities and distribute through, for example, specific units or desks dedicated to women, information about the justice mechanisms, procedures and remedies that are available, in various formats and also in community languages. Such activities and information should be appropriate for all ethnic and minority groups in the population and designed in close cooperation with women from those groups and, especially, from women's and other relevant organizations;**

(d) **Ensure access to the Internet and other information and communications technology (ICT) to improve women's access to justice systems**

at all levels, and give consideration to the development of Internet infrastructure, including videoconferencing, to facilitate the holding of court hearings and the sharing, collection and support of data and information among stakeholders;

(e) **Ensure that the physical environment and location of judicial and quasi-judicial institutions and other services are welcoming, secure and accessible to all women, with consideration given to the creation of gender units as components of justice institutions and special attention given to covering the costs of transportation to judicial and quasi-judicial institutions and other services for women without sufficient means;**

(f) **Establish justice access centres, such as "one-stop centres", which include a range of legal and social services, in order to reduce the number of steps that a woman has to take to gain access to justice. Such centres could provide legal advice and aid, begin the legal proceedings and coordinate support services for women in areas such as violence against women, family matters, health, social security, employment, property and immigration. Such centres must be accessible to all women, including those living in poverty and/or in rural and remote areas;**

(g) **Pay special attention to access to justice systems for women with disabilities.**

18. **With regard to the good quality of justice systems, the Committee recommends that States parties:**

(a) **Ensure that justice systems are of good quality and adhere to international standards of competence, efficiency, independence and impartiality, as well as to international jurisprudence;**

(b) **Adopt indicators to measure women's access to justice;**[6]

(c) **Ensure an innovative and transformative justice approach and framework, including, when necessary, investing in broader institutional reforms;**

(d) **Provide, in a timely fashion, appropriate and effective remedies that are enforced and that lead to sustainable gender-sensitive dispute resolution for all women;**

(e) **Implement mechanisms to ensure that evidentiary rules, investigations and other legal and quasi-judicial procedures are impartial and not influenced by gender stereotypes or prejudice;**

(f) **When necessary to protect women's privacy, safety and other human rights, ensure that, in a manner consistent with due process and fair proceedings, legal proceedings can be held privately in whole or in part or that testimony can be given remotely or using communications equipment, such that only the parties concerned are able to gain access to their content. The use of pseudonyms or other measures to protect the identities of such women during all stages of the judicial process should be permitted. States parties should guarantee the possibility of taking measures to protect the privacy and image of**

[6] See, for example, the United Nations indicators on violence against women (see E/CN.3/2009/13) and the progress indicators for measuring the implementation of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), adopted on 21 May 2013.

victims through the prohibition of image capturing and broadcasting in cases where doing so may violate the dignity, emotional condition and security of girls and women;

(g) **Protect women complainants, witnesses, defendants and prisoners from threats, harassment and other forms of harm before, during and after legal proceedings and provide the budgets, resources, guidelines and monitoring and legislative frameworks necessary to ensure that protective measures function effectively.**[7]

19. **With regard to the provision of remedies, the Committee recommends that States parties:**

(a) **Provide and enforce appropriate and timely remedies for discrimination against women and ensure that women have access to all available judicial and non-judicial remedies;**

(b) **Ensure that remedies are adequate, effective, promptly attributed, holistic and proportional to the gravity of the harm suffered. Remedies should include, as appropriate, restitution (reinstatement), compensation (whether provided in the form of money, goods or services) and rehabilitation (medical and psychological care and other social services).**[8] **Remedies for civil damages and criminal sanctions should not be mutually exclusive;**

(c) **Take full account of the unremunerated domestic and caregiving activities of women in assessments of damages for the purposes of determining appropriate compensation for harm in all civil, criminal, administrative or other proceedings;**

(d) **Create women-specific funds to ensure that women receive adequate reparation in situations in which the individuals or entities responsible for violating their human rights are unable or unwilling to provide such reparation;**

(e) **In cases of sexual violence in conflict or post-conflict situations, mandate institutional reforms, repeal discriminatory legislation and enact legislation providing for adequate sanctions, in accordance with international human rights standards, and determine reparation measures, in close cooperation with women's organizations and civil society, to help to overcome the discrimination that preceded the conflict;**[9]

(f) **Ensure that non-judicial remedies, such as public apologies, public memorials and guarantees of non-repetition granted by truth, justice and reconciliation commissions, are not used as substitutes for investigations and prosecutions of perpetrators when human rights violations occur in conflict or post-conflict contexts; reject amnesties for gender-based human rights**

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[7] International guidance and best practices in the protection of victims and their families from intimidation, retaliation and repeat victimization should be followed. See, for example, article 56 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

[8] See paragraph 32 of general recommendation No. 28 which indicates that "such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation, and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women".

[9] See the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation.

violations, such as sexual violence against women, and reject statutory limitations for the prosecution of such violations (see general recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations);

(g) **Provide effective and timely remedies and ensure that they respond to the different types of violations experienced by women, as well as adequate reparation, and ensure women's participation in the design of all reparation programmes, as indicated in general recommendation No. 30.**[10]

20. **With regard to the accountability of justice systems, the Committee recommends that States parties:**

(a) **Develop effective and independent mechanisms to observe and monitor women's access to justice in order to ensure that justice systems are in accordance with the principles of justiciability, availability, accessibility, good quality and effectiveness of remedies, including the periodic auditing/review of the autonomy, efficiency and transparency of the judicial, quasi-judicial and administrative bodies that take decisions affecting women's rights;**

(b) **Ensure that cases of identified discriminatory practices and acts by justice professionals are effectively addressed through disciplinary and other measures;**

(c) **Create a specific entity to receive complaints, petitions and suggestions with regard to all personnel supporting the work of the justice system, including social, welfare and health workers as well as technical experts;**

(d) **Data should include but need not be limited to:**

(i) **The number and geographical distribution of judicial and quasi-judicial bodies;**

(ii) **The number of men and women working in law enforcement bodies and judicial and quasi-judicial institutions at all levels;**

(iii) **The number and geographical distribution of men and women lawyers, including legal-aid lawyers;**

(iv) **The nature and number of cases and complaints lodged with judicial, quasi-judicial and administrative bodies, disaggregated by the sex of the complainant;**

(v) **The nature and number of cases dealt with by the formal and informal justice systems, disaggregated by the sex of the complainant;**

(vi) **The nature and number of cases in which legal aid and/or public defence were required, accepted and provided, disaggregated by the sex of the complainant;**

(vii) **The length of the procedures and their outcomes, disaggregated by the sex of the complainant;**

(e) **Conduct and facilitate qualitative studies and critical gender analyses of all justice systems, in collaboration with civil society organizations and academic institutions, in order to highlight practices, procedures and jurisprudence that promote or limit women's full access to justice;**

[10] See also A/HRC/14/22.

(f) **Systematically apply the findings of those analyses in order to develop priorities, policies, legislation and procedures to ensure that all components of the justice system are gender-sensitive, user-friendly and accountable.**

B. Discriminatory laws, procedures and practices

21. Frequently, States parties have constitutional provisions, laws, regulations, procedures, customs and practices that are based on traditional gender stereotypes and norms and are, therefore, discriminatory and deny women full enjoyment of their rights under the Convention. The Committee, therefore, consistently calls upon States parties, in its concluding observations, to review their legislative frameworks and to amend and/or repeal provisions that discriminate against women. This is consistent with article 2 of the Convention, which enshrines obligations for States parties to adopt appropriate legal and other measures to eliminate all forms of discrimination against women by public authorities and non-State actors, be they individuals, organizations or enterprises.

22. Women, nonetheless, face many difficulties in gaining access to justice as a result of direct and indirect discrimination, as defined in paragraph 16 of general recommendation No. 28. Such inequality is apparent not only in the discriminatory content and/or impact of laws, regulations, procedures, customs and practices, but also in the lack of capacity and awareness on the part of judicial and quasi-judicial institutions to adequately address violations of women's human rights. In its general recommendation No. 28, the Committee, therefore, notes that judicial institutions must apply the principle of substantive or de facto equality, as embodied in the Convention, and interpret laws, including national, religious and customary laws, in line with that obligation. Article 15 encompasses obligations for States parties to ensure that women enjoy substantive equality with men in all areas of the law.

23. Many of the Committee's concluding observations and views under the Optional Protocol, however, demonstrate that discriminatory procedural and evidentiary rules and a lack of due diligence in the prevention, investigation, prosecution, punishment and provision of remedies for violations of women's rights result in contempt of obligations to ensure that women have equal access to justice.

24. Special consideration is to be given to girls (including the girl child and adolescent girls, where appropriate) because they face specific barriers to gaining access to justice. They often lack the social or legal capacity to make significant decisions about their lives in areas relating to education, health and sexual and reproductive rights. They may be forced into marriage or subjected to other harmful practices and various forms of violence.

25. **The Committee recommends that States parties:**

(a) **Ensure that the principle of equality before the law is given effect by taking steps to abolish any existing laws, procedures, regulations, jurisprudence, customs and practices that directly or indirectly discriminate against women, especially with regard to their access to justice, and to abolish discriminatory barriers to access to justice, including:**

(i) **The obligation or need for women to seek permission from family or community members before beginning legal action;**

(ii) **Stigmatization of women who are fighting for their rights by active participants in the justice system;**

(iii) **Corroboration rules that discriminate against women as witnesses, complainants and defendants by requiring them to discharge a higher burden of proof than men in order to establish an offence or seek a remedy;**

(iv) **Procedures that exclude or accord inferior status to the testimony of women;**

(v) **Lack of measures to ensure equal conditions between women and men during the preparation, conduct and aftermath of cases;**

(vi) **Inadequate case management and evidence collection in cases brought by women, resulting in systematic failures in the investigation of cases;**

(vii) **Obstacles faced in the collection of evidence relating to emerging violations of women's rights occurring online and through the use of ICT and new social media;**

(b) **Ensure that independent, safe, effective, accessible and child-sensitive complaint and reporting mechanisms are available to girls. Such mechanisms should be established in conformity with international norms, especially the Convention on the Rights of the Child, and staffed by appropriately trained officials, working in an effective and gender-sensitive manner, in accordance with general comment No. 14 of the Committee on the Rights of the Child, so that the best interests of the girls concerned is taken as a primary consideration;**

(c) **Take measures to avoid the marginalization of girls owing to conflicts and disempowerment within their families and the resulting lack of support for their rights, and abolish rules and practices that require parental or spousal authorization for access to services such as education and health, including sexual and reproductive health, as well as to legal services and justice systems;**

(d) **Protect women and girls from interpretations of religious texts and traditional norms that create barriers to their access to justice and result in discrimination against them.**

C. Stereotyping and gender bias in the justice system and the importance of capacity-building

26. Stereotyping and gender bias in the justice system have far-reaching consequences for women's full enjoyment of their human rights. They impede women's access to justice in all areas of law, and may have a particularly negative impact on women victims and survivors of violence. Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. Often, judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to those stereotypes. Stereotyping also affects the credibility given to women's voices, arguments and testimony as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws. This has far-reaching consequences, for example, in criminal law, where it results in perpetrators not being held legally accountable for violations of women's rights, thereby upholding a culture of

impunity. In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants.

27. Judges, magistrates and adjudicators are not the only actors in the justice system who apply, reinforce and perpetuate stereotypes. Prosecutors, law enforcement officials and other actors often allow stereotypes to influence investigations and trials, especially in cases of gender-based violence, with stereotypes undermining the claims of the victim/survivor and simultaneously supporting the defence advanced by the alleged perpetrator. Stereotyping can, therefore, permeate both the investigation and trial phases and shape the final judgement.

28. Women should be able to rely on a justice system free of myths and stereotypes, and on a judiciary whose impartiality is not compromised by those biased assumptions. Eliminating stereotyping in the justice system is a crucial step in ensuring equality and justice for victims and survivors.

29. **The Committee recommends that States parties:**

(a) **Take measures, including awareness-raising and capacity-building programmes for all justice system personnel and law students, to eliminate gender stereotyping and incorporate a gender perspective into all aspects of the justice system;**

(b) **Include other professionals, in particular health-care providers and social workers, who potentially play an important role in cases of violence against women and in family matters, in the awareness-raising and capacity-building programmes;**

(c) **Ensure that capacity-building programmes address, in particular:**

(i) **The issue of the credibility and weight given to women's voices, arguments and testimony, as parties and witnesses;**

(ii) **The inflexible standards often developed by judges and prosecutors for what they consider to be appropriate behaviour for women;**

(d) **Consider promoting a dialogue on the negative impact of stereotyping and gender bias in the justice system and the need for improved justice outcomes for women who are victims and survivors of violence;**

(e) **Raise awareness of the negative impact of stereotyping and gender bias and encourage advocacy to address stereotyping and gender bias in justice systems, especially in gender-based violence cases;**

(f) **Provide capacity-building programmes for judges, prosecutors, lawyers and law enforcement officials on the application of international legal instruments relating to human rights, including the Convention and the jurisprudence of the Committee, and on the application of legislation prohibiting discrimination against women.**

D. Education and raising awareness of the impact of stereotypes

30. The provision of education from a gender perspective and raising public awareness through civil society, the media and the use of ICT are essential to overcoming the multiple forms of discrimination and stereotyping that have an

impact on access to justice and to ensuring the effectiveness and efficiency of justice for all women.

31. Article 5 (a) of the Convention provides that States parties must take all appropriate measures to modify social and cultural patterns of conduct, with a view to eliminating prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority of either sex. In its general recommendation No. 28, the Committee emphasized that all provisions of the Convention must be read jointly in order to ensure that all forms of gender-based discrimination are condemned and eliminated.[11]

1. Education from a gender perspective

32. Women who are unaware of their human rights are unable to make claims for the fulfilment of those rights. The Committee has observed, especially during its consideration of periodic reports submitted by States parties, that they often fail to guarantee that women have equal access to education, information and legal literacy programmes. Furthermore, awareness on the part of men of women's human rights is also indispensable to guaranteeing non-discrimination and equality, and to guaranteeing women's access to justice in particular.

33. **The Committee recommends that States parties:**

(a) **Develop gender expertise, including by increasing the number of gender advisers, with the participation of civil society organizations, academic institutions and the media;**

(b) **Disseminate multi-format materials to inform women of their human rights and the availability of mechanisms for access to justice, and inform women of their eligibility for support, legal aid and social services that interface with justice systems;**

(c) **Integrate, into curricula at all levels of education, educational programmes on women's rights and gender equality, including legal literacy programmes, that emphasize the crucial role of women's access to justice and the role of men and boys as advocates and stakeholders.**

2. Raising awareness through civil society, the media and information and communications technology

34. Civil society, the media and ICT play an important role in both reinforcing and reproducing gender stereotypes as well as in overcoming them.

35. **The Committee recommends that States parties:**

(a) **Emphasize the role that the media and ICT can play in dismantling cultural stereotypes about women in connection with their right to access to justice, paying particular attention to challenging cultural stereotypes concerning gender-based discrimination and violence, including domestic violence, rape and other forms of sexual violence;**

(b) **Develop and implement measures to raise awareness among the media and the population, in close collaboration with communities and civil society organizations, of the right of women to have access to justice. Such**

[11] In paragraph 7, it was stated that article 2 of the Convention should be read in conjunction with articles 3, 4, 5 and 24 and in the light of the definition of discrimination contained in article 1.

measures should be multidimensional and directed at girls and women, as well as boys and men, and should take account of the relevance and potential of ICT to transform cultural and social stereotypes;

(c) **Support and involve media bodies and people working with ICT in a continuing public dialogue about women's human rights in general and within the context of access to justice in particular;**

(d) **Take steps to promote a culture and a social environment in which justice-seeking by women is viewed as both legitimate and acceptable rather than as cause for additional discrimination and/or stigmatization.**

E. Legal aid and public defence

36. A crucial element in guaranteeing that justice systems are economically accessible to women is the provision of free or low-cost legal aid, advice and representation in judicial and quasi-judicial processes in all fields of law.

37. **The Committee recommends that States parties:**

(a) **Institutionalize systems of legal aid and public defence that are accessible, sustainable and responsive to the needs of women, ensure that such services are provided in a timely, continuous and effective manner at all stages of judicial or quasi-judicial proceedings, including alternative dispute resolution mechanisms and restorative justice processes, and ensure the unhindered access of legal aid and public defence providers to all relevant documentation and other information, including witness statements;**

(b) **Ensure that legal aid and public defence providers are competent and gender-sensitive, respect confidentiality and are granted adequate time to defend their clients;**

(c) **Conduct information and awareness-raising programmes for women about the existence of legal aid and public defence services and the conditions for obtaining them using ICT effectively to facilitate such programmes;**

(d) **Develop partnerships with competent non-governmental providers of legal aid and/or train paralegals to provide women with information and assistance in navigating judicial and quasi-judicial processes and traditional justice systems;**

(e) **In cases of family conflict or when a woman lacks equal access to family income, the use of means testing to determine eligibility for legal aid and public defence services should be based on the real income or disposable assets of the woman.**[12]

F. Resources

38. Highly qualified human resources, combined with adequate technical and financial resources, are essential to ensure the justiciability, availability,

[12] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, guideline 1 (f): "If the means test is calculated on the basis of the household income of a family, but individual family members are in conflict with each other or do not have equal access to the family income, only the income of the person applying for legal aid is used for the purpose of the means test."

accessibility, good quality, provision of remedies for victims and accountability of justice systems.

39. **The Committee recommends that States parties:**

(a) **Provide adequate budgetary and technical assistance and allocate highly qualified human resources to all parts of justice systems, including specialized judicial, quasi-judicial and administrative bodies, alternative dispute resolution mechanisms, national human rights institutions and ombudsperson offices;**

(b) **Seek support from external sources, such as the specialized agencies of the United Nations system, the international community and civil society, when national resources are limited, while ensuring that, in the medium and long term, adequate State resources are allocated to justice systems to ensure their sustainability.**

III. Recommendations for specific areas of law

40. Given the diversity of institutions and judicial arrangements around the world, some elements placed under one field of law in one country may be placed elsewhere in another. For example, the definition of discrimination may or may not be included in the Constitution; protection orders may appear under family law and/or under criminal law; and asylum and refugee issues may be dealt with by administrative courts or by quasi-judicial bodies. States parties are asked to consider the paragraphs below in that light.

A. Constitutional law

41. The Committee has observed that, in practice, States parties that have adopted constitutional guarantees relating to substantive equality between men and women and incorporated international human rights law, including the Convention, into their national legal orders are better equipped to secure gender equality in access to justice. Under articles 2 (a) and 15 of the Convention, States parties are to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation, including through the establishment of competent national tribunals and other public institutions, and to take measures to ensure the realization of that principle in all areas of public and private life as well as in all fields of law.

42. **The Committee recommends that States parties:**

(a) **Provide explicit constitutional protection for formal and substantive equality and for non-discrimination in the public and private spheres, including with regard to all matters of personal status, family, marriage and inheritance law, and across all areas of law;**

(b) **When provisions of international law do not directly apply, fully incorporate international human rights law into their constitutional and legislative frameworks in order to effectively guarantee women's access to justice;**

(c) **Create the structures necessary to ensure the availability and accessibility of judicial review and monitoring mechanisms to oversee the**

implementation of all fundamental rights, including the right to substantive gender equality.

B. Civil law

43. In some communities, women are unable to approach justice systems without the assistance of a male relative, and social norms hinder their ability to exercise autonomy outside the household. Article 15 of the Convention provides that women and men are to be equal before the law and that States parties must accord to women a legal capacity in civil matters identical to that of men and the same opportunities to exercise that capacity. The civil law procedures and remedies to which women are to have access include those in the fields of contracts, private employment, personal injury, consumer protection, inheritance, land and property rights.

44. **The Committee recommends that States parties:**

(a) **Eliminate all gender-based barriers to access to civil law procedures, such as requiring that women obtain permission from judicial or administrative authorities or family members before beginning legal action, or that they furnish documents relating to identity or title to property;**

(b) **Enforce the provisions set out in article 15 (3) of the Convention that all contracts and all other private instruments of any kind with a legal effect directed at restricting the legal capacity of women shall be deemed null and void;**

(c) **Adopt positive measures to ensure that the freedom of women to enter into contracts and other private law agreements is enforced.**

C. Family law

45. Inequality in the family underlies all other aspects of discrimination against women and is often justified in the name of ideology, tradition and culture. The Committee has repeatedly emphasized that family laws and the mechanisms of their application must comply with the principle of equality enshrined in articles 2, 15 and 16 of the Convention.[13]

46. **The Committee recommends that States parties:**

(a) **Adopt written family codes or personal status laws that provide for equal access to justice between spouses or partners irrespective of their religious or ethnic identity or community, in accordance with the Convention and the Committee's general recommendations;**[13]

(b) **Consider the creation, within the same institutional framework, of gender-sensitive family judicial or quasi-judicial mechanisms to deal with issues such as property settlement, land rights, inheritance, dissolution of marriage and child custody; and**

(c) **In settings in which there is no unified family code and in which there exist multiple family law systems, such as civil, indigenous, religious and customary law systems, ensure that personal status laws provide for individual**

[13] See, in particular, general recommendation No. 29 on article 16 of the Convention (economic consequences of marriage, family relations and their dissolution).

choice as to the applicable family law at any stage of the relationship. State courts should review the decisions taken by all other bodies in that regard.

D. Criminal law

47. Criminal laws are particularly important in ensuring that women are able to exercise their human rights, including their right to access to justice, on the basis of equality. States parties are obliged, under articles 2 and 15 of the Convention, to ensure that women have access to the protection and remedies offered through criminal law, and that they are not exposed to discrimination within the context of those mechanisms, either as victims or as perpetrators of criminal acts. Some criminal codes or acts and/or criminal procedure codes discriminate against women by:

(a) Criminalizing forms of behaviour that are not criminalized or punished as harshly if they are performed by men;

(b) Criminalizing forms of behaviour that can be performed only by women, such as abortion;

(c) Failing to criminalize or to act with due diligence to prevent and provide redress for crimes that disproportionately or solely affect women;

(d) Jailing women for petty offences and/or inability to pay bail in such cases.

48. The Committee has also highlighted the fact that women suffer from discrimination in criminal cases owing to a lack of gender-sensitive, non-custodial alternatives to detention, a failure to meet the specific needs of women in detention and an absence of gender-sensitive monitoring and independent review mechanisms.[14] The secondary victimization of women by the criminal justice system has an impact on their access to justice, owing to their heightened vulnerability to mental and physical abuse and threats during arrest, questioning and detention.

49. Women are also disproportionately criminalized owing to their situation or status, such as being involved in prostitution, being a migrant, having been accused of adultery, identity as a lesbian, bisexual or transgender woman or intersex person, having undergone an abortion or belonging to other groups that face discrimination.

50. The Committee notes that many countries have critical shortages of trained police and legal and forensic staff capable of dealing with the requirements of criminal investigations.

51. **The Committee recommends that States parties:**

(a) **Exercise due diligence to prevent, investigate, punish and provide reparation for all crimes committed against women, whether by State or non-State actors;**

(b) **Ensure that statutory limitations are in conformity with the interests of the victims;**

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[14] Communication No. 23/2009, *Abramova v. Belarus*, views adopted on 25 July 2011; see also the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), adopted by the General Assembly in its resolution 65/229.

(c) **Take effective measures to protect women against secondary victimization in their interactions with law enforcement and judicial authorities, and consider establishing specialized gender units within law enforcement, penal and prosecution systems;**

(d) **Take appropriate measures to create supportive environments that encourage women to claim their rights, report crimes committed against them and actively participate in criminal justice processes, and take measures to prevent retaliation against women seeking recourse in the justice system. Consultations with women's groups and civil society organizations should be sought to develop legislation, policies and programmes in those areas;**

(e) **Take measures, including the adoption of legislation, to protect women from Internet crimes and misdemeanours;**

(f) **Refrain from conditioning the provision of support and assistance to women, including the granting of residency permits, upon cooperation with judicial authorities in cases of trafficking in human beings and organized crime;**[15]

(g) **Use a confidential and gender-sensitive approach to avoid stigmatization, including secondary victimization in cases of violence, during all legal proceedings, including during questioning, evidence collection and other procedures relating to the investigation;**

(h) **Review rules of evidence and their implementation, especially in cases of violence against women, and adopt measures with due regard to the fair trial rights of victims and defendants in criminal proceedings, to ensure that the evidentiary requirements are not overly restrictive, inflexible or influenced by gender stereotypes;**

(i) **Improve the criminal justice response to domestic violence, including through recording of emergency calls taking photographic evidence of destruction of property and signs of violence and considering reports from doctors or social workers, which can show how violence, even if committed without witnesses, has material effects on the physical, mental and social well-being of victims;**

(j) **Take steps to guarantee that women are not subjected to undue delays in applications for protection orders and that all cases of gender-based discrimination subject to criminal law, including cases involving violence, are heard in a timely and impartial manner;**

(k) **Develop protocols for police and health-care providers for the collection and preservation of forensic evidence in cases of violence against women, and train sufficient numbers of police and legal and forensic staff to competently conduct criminal investigations;**

(l) **Abolish discriminatory criminalization and review and monitor all criminal procedures to ensure that they do not directly or indirectly discriminate against women; decriminalize forms of behaviour that are not criminalized or punished as harshly if they are performed by men; decriminalize forms of behaviour that can be performed only by women, such as abortion; and act with due diligence to prevent and provide redress for**

[15] See *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (United Nations publication, Sales No. E.10.XIV.1).

crimes that disproportionately or solely affect women, whether perpetrated by State or non-State actors;

(m) **Closely monitor sentencing procedures and eliminate any discrimination against women in the penalties provided for particular crimes and misdemeanours and in determining eligibility for parole or early release from detention;**

(n) **Ensure that mechanisms are in place to monitor places of detention, pay special attention to the situation of women prisoners and apply international guidance and standards on the treatment of women in detention;**[16]

(o) **Keep accurate data and statistics regarding the number of women in each place of detention, the reasons for and duration of their detention, whether they are pregnant or accompanied by a baby or child, their access to legal, health and social services and their eligibility for and use of available case review processes, non-custodial alternatives and training possibilities;**

(p) **Use preventive detention as a last resort and for as short a time as possible, and avoid preventive or post-trial detention for petty offences and for the inability to pay bail in such cases.**

E. Administrative, social and labour law

52. In accordance with articles 2 and 15 of the Convention, the availability and accessibility of judicial and quasi-judicial mechanisms and remedies under administrative, social and labour law should be guaranteed to women on a basis of equality. The subject areas that tend to fall within the ambit of administrative, social and labour law, and are of particular importance for women, include health services, social security entitlements, labour relations, including equal remuneration, equality of opportunities to be hired and promoted, equality of remuneration for civil servants, housing and land zoning, grants, subsidies and scholarships, compensation funds, governance of Internet resources and policy and migration and asylum.[17]

53. **The Committee recommends that States parties:**

(a) **Ensure that independent review, carried out in accordance with international standards, is available for all decisions by administrative bodies;**

(b) **Ensure that a decision rejecting an application is reasoned and that the claimant is able to appeal to a competent body against the decision, and that the implementation of any prior administrative decisions is suspended pending further judicial review. This is of particular importance in the area of asylum and migration law, where appellants may be deported before having the chance to have their cases heard;**

(c) **Use administrative detention only exceptionally, as a last resort, for a limited time, when necessary and reasonable in the individual case, proportionate to a legitimate purpose and in accordance with national law and international standards; ensure that all appropriate measures, including**

[16] See the Bangkok Rules and also the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, adopted by the Economic and Social Council in its resolution 2005/20.

[17] See general recommendation No. 32 on gender-related dimensions of refugee status, asylum, nationality and statelessness of women.

effective legal aid and procedures, are in place to enable women to challenge the legality of their detention; ensure regular reviews of such detention in the presence of the detainee; and ensure that the conditions of administrative detention comply with relevant international standards for the protection of the rights of women deprived of their liberty.

IV. Recommendations for specific mechanisms

A. Specialized judicial/quasi-judicial systems and international/regional justice systems

54. Other specialized judicial and quasi-judicial mechanisms,[18] including labour,[19] land claims, electoral and military courts, inspectorates and administrative bodies,[20] also have obligations to comply with international standards of independence, impartiality and efficiency and the provisions of international human rights law, including articles 2, 5 (a) and 15 of the Convention.

55. Transitional and post-conflict situations may result in increased challenges for women seeking to assert their right to access to justice. In its general recommendation No. 30, the Committee highlighted the specific obligations of States parties in connection with access to justice for women in such situations.

56. **The Committee recommends that States parties:**

(a) **Take all appropriate steps to ensure that all specialized judicial and quasi-judicial mechanisms are available and accessible to women and exercise their mandates under the same requirements as the regular courts;**

(b) **Provide for independent monitoring and review of the decisions of specialized judicial and quasi-judicial mechanisms;**

(c) **Put in place programmes, policies and strategies to facilitate and guarantee the equal participation of women at all levels in those specialized judicial and quasi-judicial mechanisms;**

(d) **Implement the recommendations on women's access to justice in transitional and post-conflict situations that are set out in paragraph 81 of general recommendation No. 30, taking a comprehensive, inclusive and participatory approach to transitional justice mechanisms;**

(e) **Ensure the national implementation of international instruments and decisions of international and regional justice systems relating to women's rights, and establish monitoring mechanisms for the implementation of international law.**

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[18] Depending on the country, the fields are covered by general or specialized justice systems.

[19] With regard to women's access to justice, relevant conventions of the International Labour Organization conventions include the Labour Inspection Convention, 1947 (No. 81), the Migration for Employment Convention (Revised), 1949 (No. 97), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), the Indigenous and Tribal Peoples Convention, 1989 (No. 169), and the Domestic Workers Convention, 2011 (No. 189).

[20] See the draft principles governing the administration of justice through military tribunals (see E/CN.4/2006/58).

B. Alternative dispute resolution processes

57. Many jurisdictions have adopted mandatory or optional systems for mediation, conciliation, arbitration and collaborative resolutions of disputes, as well as for facilitation and interest-based negotiations. This applies, in particular, in the areas of family law, domestic violence, juvenile justice and labour law. Alternative dispute resolution processes are sometimes referred to as informal justice, which are linked to, but function outside of, formal court litigation processes. Informal alternative dispute resolution processes also include non-formal indigenous courts and chieftancy-based alternative dispute resolution, where chiefs and other community leaders resolve interpersonal disputes, including divorce, child custody and land disputes. While such processes may provide greater flexibility and reduce costs and delays for women seeking justice, they may also lead to further violations of their rights and impunity for perpetrators because they often operate on the basis of patriarchal values, thereby having a negative impact on women's access to judicial review and remedies.

58. **The Committee recommends that States parties:**

(a) **Inform women of their rights to use mediation, conciliation, arbitration and collaborative dispute resolution;**

(b) **Guarantee that alternative dispute settlement procedures do not restrict access by women to judicial or other remedies in any area of the law and do not lead to further violations of their rights;**

(c) **Ensure that cases of violence against women, including domestic violence, are under no circumstances referred to any alternative dispute resolution procedure.**

C. National human rights institutions and ombudsperson offices

59. The development of national human rights institutions and ombudsperson offices may open up further possibilities for women to gain access to justice.

60. **The Committee recommends that States parties:**

(a) **Take steps:**

(i) **To provide adequate resources for the creation and sustainable operation of independent national human rights institutions, in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles);**

(ii) **To ensure that the composition and activities of those institutions are gender-sensitive;**

(b) **Provide national human rights institutions with a broad mandate and the authority to consider complaints regarding women's human rights;**

(c) **Facilitate women's access to individual petition processes within ombudsperson offices and national human rights institutions on a basis of equality and provide the possibility for women to lodge claims involving multiple and intersecting forms of discrimination; and**

(d) **Provide national human rights institutions and ombudsperson offices with adequate resources and support to conduct research.**

D. Plural justice systems

61. The Committee notes that State laws, regulations, procedures and decisions can sometimes coexist, within a given State party, with religious, customary, indigenous or community laws and practices. This results in the existence of plural justice systems. There are, therefore, multiple sources of law that may be formally recognized as part of the national legal order or operate without an explicit legal basis. States parties have obligations under articles 2, 5 (a) and 15 of the Convention and under other international human rights instruments to ensure that women's rights are equally respected and that women are protected against violations of their human rights by all components of plural justice systems.[21]

62. The presence of plural justice systems can, in itself, limit women's access to justice by perpetuating and reinforcing discriminatory social norms. In many contexts, the availability of multiple avenues for gaining access to justice within plural justice systems notwithstanding, women are unable to effectively exercise a choice of forum. The Committee has observed that, in some States parties in which systems of family and/or personal law based on customs, religion or community norms coexist alongside civil law systems, individual women may not be as familiar with both systems or at liberty to decide which regime applies to them.

63. The Committee has observed a range of models through which practices embedded in plural justice systems can be harmonized with the Convention in order to minimize conflicts of laws and guarantee that women have access to justice. They include the adoption of legislation that clearly defines the relationship between existing plural justice systems, the creation of State review mechanisms and the formal recognition and codification of religious, customary, indigenous, community and other systems. Joint efforts by States parties and non-State actors will be necessary to examine ways in which plural justice systems can work together to reinforce protection for women's rights.[22]

64. **The Committee recommends that, in cooperation with non-State actors, States parties:**

(a) **Take immediate steps, including capacity-building and training programmes on the Convention and women's rights, for justice system personnel, to ensure that religious, customary, indigenous and community justice systems harmonize their norms, procedures and practices with the human rights standards enshrined in the Convention and other international human rights instruments;**

(b) **Enact legislation to regulate the relationships between the mechanisms within plural justice systems in order to reduce the potential for conflict;**

(c) **Provide safeguards against violations of women's human rights by enabling review by State courts or administrative bodies of the activities of all**

[21] See, in particular, general recommendation No. 29.

[22] International Development Law Organization, *Accessing Justice: Models, Strategies and Best Practices on Women's Empowerment* (Rome, 2013).

components of plural justice systems, with special attention to village courts and traditional courts;

(d) **Ensure that women have a real and informed choice concerning the applicable law and the judicial forum within which they would prefer their claims to be heard;**

(e) **Ensure the availability of legal aid services for women to enable them to claim their rights within the various plural justice systems by engaging qualified local support staff to provide that assistance;**

(f) **Ensure the equal participation of women at all levels in the bodies established to monitor, evaluate and report on the operations of plural justice systems;**

(g) **Foster constructive dialogue and formalize links between plural justice systems, including through the adoption of procedures for sharing information among them.**

V. Withdrawal of reservations to the Convention

65. Many countries have made reservations to:

(a) Article 2 (c), which indicates that States parties undertake to establish legal protection of the rights of women on an equal basis with men and to ensure, through competent national tribunals and other public institutions, the effective protection of women against any act of discrimination;

(b) Article 5 (a), which indicates that States parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either sex or on stereotyped roles for men and women;

(c) Article 15, which indicates that States parties shall accord to women a legal capacity in civil matters identical to that of men and the same opportunities to exercise that capacity, and that they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals;

(d) Article 16, which indicates that States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

66. **In view of the fundamental importance of women's access to justice, the Committee recommends that States parties withdraw their reservations to the Convention, in particular to articles 2 (c), 5 (a), 15 and 16.**

VI. Ratification of the Optional Protocol to the Convention

67. The Optional Protocol to the Convention creates an additional international legal mechanism to enable women to bring complaints in relation to alleged violations of the rights set forth in the Convention and to enable the Committee to conduct inquiries into alleged grave or systematic violations of the rights set forth in the Convention, thereby reinforcing women's right to access to justice. Through its

decisions on individual communications issued under the Optional Protocol, the Committee has produced noteworthy jurisprudence in relation to women's access to justice, including in relation to violence against women,[23] women in detention,[24] health[25] and employment.[26]

68. **The Committee recommends that States parties:**

(a) **Ratify the Optional Protocol;**

(b) **Conduct and encourage the creation and dissemination of outreach and educational programmes, resources and activities, in various languages and formats, to inform women, civil society organizations and institutions of the procedures available for furthering women's access to justice through the Optional Protocol.**

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[23] See communication No. 19/2008, *Kell v. Canada*, views adopted on 28 February 2012; communication No. 20/2008, *V.K. v. Bulgaria*, views adopted on 25 July 2011; communication No. 18/2008, *Vertido v. the Philippines*, views adopted on 16 July 2010; communication No. 6/2005, *Yildirim v. Austria*, views adopted on 6 August 2007; communication No. 5/2005, *Goekce v. Austria*, views adopted on 6 August 2007; and communication No. 2/2003, *A.T. v. Hungary*, views adopted on 26 January 2005.

[24] See communication No. 23/2009, *Abramova v. Belarus*, views adopted on 25 July 2011.

[25] See communication No. 17/2008, *Teixeira v. Brazil*, views adopted on 25 July 2011.

[26] See communication No. 28/2010, *R.K.B. v. Turkey*, views adopted on 24 February 2012.

iii. General Recommendation No. 35: Gender-Based Violence against Women, Updating General Recommendation No. 19

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I. Introduction

Acknowledgements

The Committee acknowledges the valuable contributions of the more than 100 civil society and women's organizations, States parties to the Convention, representatives of academia, United Nations entities and other stakeholders that provided their views and comments during the elaboration of the present general recommendation. The Committee also acknowledges with gratitude the work of the Special Rapporteur on violence against women, its causes and consequences in the implementation of her mandate and her contribution to the present general recommendation.

1. In its general recommendation No. 19 (1992) on violence against women, adopted at its eleventh session,[1] the Committee clarified that discrimination against women, as defined in article 1 of the Convention, included gender-based violence, that is "violence which is directed against a woman because she is a woman or that affects women disproportionately", and that it constituted a violation of their human rights.

2. For more than 25 years, in their practice, States parties have endorsed the Committee's interpretation. The *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of

[1] Although first addressed through its general recommendation No. 12 (1989) on violence against women, it was in general recommendation No. 19 that the Committee provided a detailed and comprehensive review of violence against women and a basis for its subsequent work on the issue.

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customary international law. General recommendation No. 19 has been a key catalyst for that process.[2]

3. Acknowledging those developments, and the work of the Special Rapporteur on violence against women, its causes and consequences, and of the human rights treaty bodies[3] and the special procedures mandate holders of the Human Rights Council,[4] the Committee has decided to mark the twenty-fifth anniversary of the adoption of general recommendation No. 19 by providing States parties with further guidance aimed at accelerating the elimination of gender-based violence against women.

4. The Committee acknowledges that civil society groups, especially women's non-governmental organizations, have prioritized the elimination of gender-based

[2] In the decades since the adoption of general recommendation No. 19, most States parties have improved their legal and policy measures to address diverse forms of gender-based violence against women. See the report of the Secretary-General on the review and appraisal of the implementation of the Beijing Declaration and Platform for Action and the outcome of the twenty-third special session of the General Assembly (E/CN.6/2015/3), paras. 120-139. In addition, evidence in the practice of non-parties, Iran (Islamic Republic of), Palau, Somalia, the Sudan, Tonga and the United States of America, includes the following: adoption of national legislation on violence against women (United States, in 1994; Somalia, in 2012), invitations extended to and accepted by the Special Rapporteur on violence against women, its causes and consequences (visits to the United States, in 1998 and 2011; Somalia, in 2011; and the Sudan, in 2015); acceptance of the diverse recommendations on strengthening the protection of women from violence made in the context of the universal periodic review mechanism of the Human Rights Council; and endorsement of key resolutions of the Human Rights Council on eliminating violence against women, including resolution 32/19 of 1 July 2016. State practice to address gender-based violence against women is also reflected in landmark political documents and regional treaties adopted in multilateral forums, such as the Vienna Declaration and Programme of Action, in 1993; the Declaration on the Elimination of Violence against Women, in 1993; and the Beijing Declaration and Platform for Action, in 1995, and its five-year reviews; and regional conventions and action plans, such as the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, in 1994; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, in 2003; and the Convention on Preventing and Combating Violence against Women and Domestic Violence, in 2011. Other relevant international instruments are the Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in the Association of Southeast Asian Nations; the Arab Strategy for Combating Violence against Women, 2011-2030; and the agreed conclusions of the fifty-seventh session of the Commission on the Status of Women on the elimination and prevention of all forms of violence against women and girls (E/2013/27, chap. I, sect. A). The Rome Statute of the International Criminal Court, Security Council resolution 1325 (2000) and subsequent resolutions on women and peace and security, as well as many resolutions of the Human Rights Council, including resolution 32/19 of 1 July 2016, contain specific provisions on gender-based violence against women. Judicial decisions of international courts, which are a subsidiary means for the determination of customary international law, also demonstrate such development (see A/71/10, chap. V, sect. C, conclusion 13). Examples include European Court of Human Rights, *Opuz v. Turkey* (application No 33401/02), judgment of 9 June 2009, in which the Court was influenced by what it referred to as "the evolution of norms and principles in international law" (para. 164) through a range of international and comparative materials on violence against women; and Inter-American Court of Human Rights, *González et al. ("Cotton Field") v. Mexico*, judgment of 16 November 2009.

[3] See, for example, Human Rights Committee, general comment No. 28 (2000) on the equality of rights between men and women; Committee against Torture, general comment No. 2 (2007) on the implementation of article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Committee on Economic, Social and Cultural Rights, general comment No. 22 (2016) on the right to sexual and reproductive health; and Committee on the Rights of Persons with Disabilities, general comment No. 3 (2016) on women and girls with disabilities.

[4] In particular, the Working Group on the issue of discrimination against women in law and practice and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

violence against women; their activities have had a profound social and political impact, contributing to the recognition of gender-based violence against women as a human rights violation and to the adoption of laws and policies to address it.

5. In its concluding observations on the periodic reports of States parties under the Convention[5] and the related follow-up procedures, general recommendations, statements, and views and recommendations issued in response to communications[6] and inquiries[7] under the Optional Protocol to the Convention, the Committee condemns gender-based violence against women, in all its forms, wherever it occurs. Through those mechanisms, the Committee has also clarified standards for eliminating such violence and the obligations of States parties in that regard.

6. Despite those advances, gender-based violence against women, whether committed by States, intergovernmental organizations or non-State actors, including private persons and armed groups,[8] remains pervasive in all countries, with high levels of impunity. It manifests itself on a continuum of multiple, interrelated and recurring forms, in a range of settings, from private to public, including technology-mediated settings[9] and in the contemporary globalized world it transcends national boundaries.

7. In many States, legislation addressing gender-based violence against women is non-existent, inadequate or poorly implemented. An erosion of the legal and policy frameworks that aim to eliminate gender-based discrimination or violence, often justified in the name of tradition, culture, religion or fundamentalist ideology, and significant reductions in public spending, often as part of so-called "austerity measures" following economic and financial crises, further weaken States responses. In the context of shrinking democratic spaces and the consequent

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[5] Almost 600 concluding observations have been adopted by the Committee since the adoption of general recommendation No. 19, most of which contain explicit references to gender-based violence against women.

[6] In particular, communications No. 2/2003, *A.T. v. Hungary*, views adopted on 26 January 2005; No. 4/2004, *A.S. v. Hungary*, views adopted on 14 August 2006; No. 6/2005, *Yildirim (deceased) v. Austria*, views adopted on 6 August 2007; No. 5/2005, *Goekce (deceased) v. Austria*, views adopted on 6 August 2007; No. 18/2008, *Vertido v. Philippines*, views adopted on 16 July 2010; No. 20/2008, *V.K. v. Bulgaria*, views adopted on 25 July 2011; No. 23/2009, *Abramova v. Belarus*, views adopted on 25 July 2011; No. 19/2008, *Kell v. Canada*, views adopted on 28 February 2012; No. 32/2011, *Jallow v. Bulgaria*, views adopted on 23 July 2012; No. 31/2011, *S.V.P. v. Bulgaria*, views adopted on 12 October 2012; No. 34/2011, *R.P.B. v. Philippines*, views adopted on 21 February 2014; No. 47/2012, *González Carreño v. Spain*, views adopted on 16 July 2014; No. 24/2009, *X. and Y. v. Georgia*, views adopted on 13 July 2015; No. 45/2012, *Belousova v. Kazakhstan*, views adopted on 13 July 2015; No. 46/2012, *M.W. v. Denmark*, views adopted on 22 February 2016; and No. 58/2013, *L.R. v. Republic of Moldova*, views adopted on 28 February 2017.

[7] See the report on Mexico produced by the Committee under article 8 of the Optional Protocol to the Convention and the reply from the Government of Mexico. Available from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2f2005%2fOP.8%2fMEXICO&Lang=en; report of the inquiry concerning Canada (CEDAW/C/OP.8/CAN/1); and the summary of the inquiry concerning the Philippines (CEDAW/C/OP.8/PHL/1).

[8] This includes all types of armed groups, such as rebel forces, gangs and paramilitary groups.

[9] See General Assembly resolution 68/181, entitled "Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: protecting women human rights defenders"; report of the Working Group for Broadband and Gender of the Broadband Commission for Sustainable Development, co-chaired by the United Nations Development Programme-United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), entitled "Cyber violence against women and girls: a worldwide wake-up call", October 2015; and agreed conclusions of the fifty-seventh session of the Commission on the Status of Women (E/2013/27, chap. I, sect. A).

deterioration of the rule of law, all of those factors contribute to the pervasiveness of gender-based violence against women and lead to a culture of impunity.

II. Scope

8. The present general recommendation complements and updates the guidance to States parties set out in general recommendation No. 19 and should be read in conjunction with it.

9. The concept of "violence against women", as defined in general recommendation No. 19 and other international instruments and documents, has places an emphasis on the fact that such violence is gender-based. Accordingly, in the present recommendation, the term "gender-based violence against women" is used as a more precise term that makes explicit the gendered causes and impacts of the violence. The term further strengthens the understanding of the violence as a social rather than an individual problem, requiring comprehensive responses, beyond those to specific events, individual perpetrators and victims/survivors.

10. The Committee considers that gender-based violence against women is one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated. Throughout its work, the Committee has made clear that such violence is a critical obstacle to the achievement of substantive equality between women and men and to the enjoyment by women of their human rights and fundamental freedoms, as enshrined in the Convention.

11. In general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, it is indicated that the obligations of States are to respect, protect and fulfil women's rights to non-discrimination and the enjoyment of de jure and de facto equality.[10] The scope of those obligations in relation to gender-based violence against women occurring in particular contexts is addressed in general recommendation No. 28 and other general recommendations, including general recommendation No. 26 (2008) on women migrant workers; general recommendation No. 27 (2010) on older women and the protection of their human rights; general recommendation No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations; joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2014) on harmful practices; general recommendation No. 32 (2014) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women; general recommendation No. 33 (2015) on women's access to justice; and general recommendation No. 34 (2016) on the rights of rural women. Further details on the relevant elements of the general recommendations referred to herein may be found in those recommendations.

12. In general recommendation No. 28 and general recommendation No. 33, the Committee confirmed that discrimination against women was inextricably linked to other factors that affected their lives. The Committee, in its jurisprudence, has highlighted the fact that such factors include women's ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital status, maternity, parental status, age, urban or rural location, health status, disability, property ownership, being

[10] General recommendation No. 28, para. 9. Other human rights treaty bodies also use that typology, including the Committee on Economic, Social and Cultural Rights, in its general comment No. 12 (1999) on the right to adequate food.

lesbian, bisexual, transgender or intersex, illiteracy, seeking asylum, being a refugee, internally displaced or stateless, widowhood, migration status, heading households, living with HIV/AIDS, being deprived of liberty, and being in prostitution, as well as trafficking in women, situations of armed conflict, geographical remoteness and the stigmatization of women who fight for their rights, including human rights defenders.[11] Accordingly, because women experience varying and intersecting forms of discrimination, which have an aggravating negative impact, the Committee acknowledges that gender-based violence may affect some women to different degrees, or in different ways, meaning that appropriate legal and policy responses are needed.[12]

13. The Committee recalls article 23 of the Convention, in which it is indicated that any provisions in national legislation or international treaties other than the Convention that are more conducive to the achievement of equality between women and men will prevail over the obligations in the Convention and, accordingly, the recommendations in the present general recommendation. The Committee notes that States parties' action to address gender-based violence against women is affected by reservations that they maintain to the Convention. It also notes that, as a human rights treaty body, the Committee may assess the permissibility of reservations formulated by States parties,[13] and reiterates its view that reservations, especially to article 2 or article 16,[14] the compliance with which is particularly crucial in efforts to eliminate gender-based violence against women, are incompatible with the object and purpose of the Convention and thus impermissible under article 28 (2).[15]

14. Gender-based violence affects women throughout their life cycle[16] and, accordingly, references to women in the present document include girls. Such violence takes multiple forms, including acts or omissions intended or likely to

[11] General recommendation No. 33, paras. 8 and 9. Other general recommendations relevant to intersecting forms of discrimination are general recommendation No. 15 (1990) on the avoidance of discrimination against women in national strategies for the prevention and control of AIDS, general recommendation No. 18 (1991) on disabled women, general recommendation No. 21 (1994) on equality in marriage and family relations, general recommendation No. 24 (1999) on women and health, general recommendation No. 26 (2008) on women migrant workers, general recommendation No. 27 (2010) on older women and protection of their human rights, general recommendation No. 30, joint general recommendation No. 31/general comment No. 18, general recommendation No. 32 and general recommendation No. 34. The Committee has also addressed intersecting forms of discrimination in its views on *Jallow v. Bulgaria*, *S.V.P. v. Bulgaria*, *Kell v. Canada*, *A.S. v. Hungary*, *R.P.B. v. Philippines* and *M.W. v. Denmark*, among others, and inquiries, in particular those concerning Mexico, of 2005, and Canada, of 2015 (see footnote 7 above).

[12] General recommendation No. 28, para. 18; and report of the inquiry concerning Canada (CEDAW/C/OP.8/CAN/1), para. 197.

[13] International Law Commission, Guide to practice on reservations to treaties (A/65/10/Add.1, chap. IV, sect. F, para. 3.2).

[14] Statement of the Committee on reservations (A/53/38/Rev.1, part II, chap. I, sect. A, para. 12); see also general recommendation No. 29 (2013) on the economic consequences of marriage, family relations and their dissolution, para. 54-55. In its concluding observations on the reports of States parties under the Convention, the Committee has also indicated that reservations to articles 2, 7, 9 and 16, as well as to general reservations, are incompatible with the object and purpose of the Convention.

[15] General recommendation No. 28, paras. 41-42.

[16] See general recommendation No. 27 and joint general recommendation No. 31/general comment No. 18.

cause or result in death[17] or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty.[18] Gender-based violence against women is affected and often exacerbated by cultural, economic, ideological, technological, political, religious, social and environmental factors, as evidenced, among other things, in the contexts of displacement, migration, the increased globalization of economic activities, including global supply chains, the extractive and offshoring industry, militarization, foreign occupation, armed conflict, violent extremism and terrorism. Gender-based violence against women is also affected by political, economic and social crises, civil unrest, humanitarian emergencies, natural disasters and the destruction or degradation of natural resources. Harmful practices[19] and crimes against women human rights defenders, politicians,[20] activists or journalists are also forms of gender-based violence against women affected by such cultural, ideological and political factors.

15. Women's right to a life free from gender-based violence is indivisible from and interdependent on other human rights, including the rights to life, health, liberty and security of the person, equality and equal protection within the family, freedom from torture, cruel, inhumane or degrading treatment, and freedom of expression, movement, participation, assembly and association.

16. Gender-based violence against women may amount to torture or cruel, inhuman or degrading treatment in certain circumstances, including in cases of rape, domestic violence or harmful practices.[21] In certain cases, some forms of gender-based violence against women may also constitute international crimes.[22]

17. The Committee endorses the view of other human rights treaty bodies and special procedures mandate holders that, in determining when acts of gender-based violence against women amount to torture or cruel, inhuman or degrading treatment,[23] a gender-sensitive approach is required to understand the level of pain

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[17] Deaths resulting from gender-based violence include murders, killings in the name of so-called "honour" and forced suicides. See the report on the inquiry concerning Mexico; and the report of the inquiry concerning Canada (CEDAW/C/OP.8/CAN/1); as well as the concluding observations of the Committee on the following periodic reports of States parties: Chile (CEDAW/C/CHL/CO/5-6 and Corr.1); Finland (CEDAW/C/FIN/CO/7); Guatemala (CEDAW/C/GUA/CO/7); Honduras (CEDAW/C/HND/CO/7-8); Iraq (CEDAW/C/IRQ/CO/4-6); Mexico (CEDAW/C/MEX/CO/7-8); Namibia (CEDAW/C/NAM/CO/4-5); Pakistan (CEDAW/C/PAK/CO/4); South Africa (CEDAW/C/ZAF/CO/4); Turkey (CEDAW/C/TUR/CO/7); and United Republic of Tanzania (CEDAW/C/TZA/CO/7-8), among others.

[18] General recommendation No. 19, para. 6, and general recommendation No. 28, para. 19.

[19] Joint general recommendation No. 31/general comment No. 18.

[20] See the Inter-Parliamentary Union issues brief entitled "Sexism, harassment and violence against women parliamentarians" (October 2016).

[21] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57); report of the Special Rapporteur (A/HRC/7/3), para. 36; concluding observations of the Committee against Torture on the following periodic reports of States parties under the Convention against Torture: Burundi (CAT/C/BDI/CO/1); Guyana (CAT/C/GUY/CO/1); Mexico (CAT/C/MEX/CO/4); Peru (CAT/C/PER/CO/5-6); Senegal (CAT/C/SEN/CO/3); Tajikistan (CAT/C/TJK/CO/2); and Togo (CAT/C/TGO/CO/1); Human Rights Committee, general comment No. 28 (2000) on the equality of rights between men and women; concluding observations of the Human Rights Committee on the following periodic reports of States parties under the International Covenant on Civil and Political Rights: Slovakia (CCPR/CO/78/SVK); Japan (CCPR/C/79/Add.102); and Peru (CCPR/CO/70/PER), among others.

[22] Including such crimes against humanity and war crimes as rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity, according to articles 7 (1) (g), 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Rome Statute of the International Criminal Court.

[23] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57), para. 11.

and suffering experienced by women,[24] and that the purpose and intent requirements for classifying such acts as torture are satisfied when acts or omissions are gender-specific or perpetrated against a person on the basis of sex.[25]

18. Violations of women's sexual and reproductive health and rights, such as forced sterilization, forced abortion, forced pregnancy, criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, forced continuation of pregnancy, and abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.[26]

19. The Committee regards gender-based violence against women as being rooted in gender-related factors, such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, and the need to assert male control or power, enforce gender roles or prevent, discourage or punish what is considered to be unacceptable female behaviour. Those factors also contribute to the explicit or implicit social acceptance of gender-based violence against women, often still considered a private matter, and to the widespread impunity in that regard.

20. Gender-based violence against women occurs in all spaces and spheres of human interaction, whether public or private, including in the contexts of the family, the community, public spaces, the workplace, leisure, politics, sport, health services and educational settings, and the redefinition of public and private through technology-mediated environments,[27] such as contemporary forms of violence occurring online and in other digital environments. In all those settings, gender-based violence against women can result from acts or omissions of State or non-State actors, acting territorially or extraterritorially, including extraterritorial military actions of States, individually or as members of international or intergovernmental organizations or coalitions,[28] or extraterritorial operations of private corporations.[29]

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[24] For example, to understand that "severe suffering of the victim is inherent in rape, even when there is no evidence of physical injuries or disease. … Women victims of rape also experience complex consequences of a psychological and social nature." Inter-American Court of Human Rights, *Fernández Ortega et al. v. Mexico*, judgment of 30 August 2010, para. 124. See also the reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57), para. 8, and (A/HRC/7/3), para. 36.

[25] Committee against Torture, communication No. 262/2005, *V.L. v. Switzerland*, views adopted on 20 November 2006; reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57), para. 8, and (A/HRC/7/3).

[26] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57); Committee on the Elimination of Discrimination against Women, communication No. 22/2009, *L.C. v. Peru*, views adopted on 17 October 2011, para. 8.18; and Human Rights Committee, communications No. 2324/2013, *Mellet v. Ireland*, views adopted on 31 March 2016, para. 7.4, and No. 2425/2014, *Whelan v. Ireland*, views adopted on 17 March 2017.

[27] See the report of the Secretary-General entitled "In-depth study on all forms of violence against women" (A/61/122/Add.1 and Corr.1).

[28] For example, as part of an international peacekeeping force. See general recommendation No. 30, para. 9.

[29] Concluding observations of the Committee on the periodic reports of Switzerland (CEDAW/C/CHE/CO/4-5) and Germany (CEDAW/C/DEU/CO/7-8).

III. State party obligations in relation to gender-based violence against women

21. Gender-based violence against women constitutes discrimination against women under article 1 and therefore engages all obligations under the Convention. Article 2 provides that the overarching obligation of States parties is to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including gender-based violence against women. That is an obligation of an immediate nature; delays cannot be justified on any grounds, including economic, cultural or religious grounds. In general recommendation No. 19, it is indicated that, with regard to gender-based violence against women, the obligation comprises two aspects of State responsibility for such violence, that which results from the acts or omissions of both the State party or its actors, on the one hand, and non-State actors, on the other.

A. Responsibility for acts or omissions of State actors

22. Under the Convention and general international law, a State party is responsible for acts or omissions of its organs and agents that constitute gender-based violence against women,[30] which include the acts or omissions of officials in its executive, legislative and judicial branches. Article 2 (d) of the Convention provides that States parties, and their organs and agents, are to refrain from engaging in any act or practice of direct or indirect discrimination against women and ensure that public authorities and institutions act in conformity with that obligation. Besides ensuring that laws, policies, programmes and procedures do not discriminate against women, in accordance with articles 2 (c) and (g), States parties must have an effective and accessible legal and legal services framework in place to address all forms of gender-based violence against women committed by State agents, whether on their territory or extraterritorially.

23. States parties are responsible for preventing such acts or omissions by their own organs and agents, including through training and the adoption, implementation and monitoring of legal provisions, administrative regulations and codes of conduct, and for investigating, prosecuting and applying appropriate legal or disciplinary sanctions, as well as providing reparation, in all cases of gender-based violence against women, including those constituting international crimes, and in cases of failure, negligence or omission on the part of public authorities.[31] In so doing, the diversity of women and the risks of intersecting forms of discrimination should be taken into consideration.

B. Responsibility for acts or omissions of non-State actors

24. Under general international law, as well as under international treaties, acts or omissions of a private actor may engage the international responsibility of the State in certain cases, which include the following:

[30] See International Law Commission, articles on responsibility of States for internationally wrongful acts, article 4, Conduct of organs of a State. See also Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, article 91.

[31] See footnote 6 above and general recommendation No. 33.

1. Acts or omissions by non-State actors attributable to the State

(a) The acts or omissions of private actors empowered by the law of that State to exercise elements of governmental authority, including private bodies providing public services, such as health care or education, or operating places of detention, are considered acts attributable to the State itself,[32] as are the acts or omissions of private agents acting on the instruction or under the direction or control of that State,[33] including when operating abroad;

2. Due diligence obligations for acts or omissions of non-State actors

(b) Article 2 (e) of the Convention explicitly provides that States parties are to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.[34] That obligation, frequently referred to as an obligation of due diligence, underpins the Convention as a whole[35] and accordingly States parties will be held responsible should they fail to take all appropriate measures to prevent, as well as to investigate, prosecute, punish and provide reparations for, acts or omissions by non-State actors that result in gender-based violence against women,[36] including actions taken by corporations operating extraterritorially. In particular, States parties are required to take the steps necessary to prevent human rights violations perpetrated abroad by corporations over which they may exercise influence,[37] whether through regulatory means or the use of incentives, including economic incentives.[38] Under the obligation of due diligence, States parties must adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors, including having laws, institutions and a system in place to address such violence and ensuring that they function effectively in practice and are supported by all State agents and bodies who diligently enforce the laws.[39] The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, to prosecute and punish perpetrators and to provide reparations to victims/survivors of such acts, provides tacit permission or encouragement to perpetrate acts of gender-based violence against women.[40] Such failures or omissions constitute human rights violations.

25. In addition, both international humanitarian law and human rights law have recognized the direct obligations of non-State actors in specific circumstances, including as parties to an armed conflict. Those obligations include the prohibition of torture, which is part of customary international law and has become a peremptory norm (*jus cogens*).[41]

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[32] See International Law Commission, articles on responsibility of States for internationally wrongful acts, article 5, Conduct of persons or entities exercising elements of governmental authority.
[33] Ibid., article 8, Conduct directed or controlled by a State.
[34] General recommendation No. 28, para. 36.
[35] Ibid., para. 13.
[36] General recommendation No. 19, para. 9.
[37] See Committee on the Rights of the Child, general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, paras. 43-44, and the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.
[38] See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 39.
[39] *Goekce (deceased) v. Austria*, para. 12.1.2, and *V.K. v. Bulgaria*, para. 9.4.
[40] General recommendation No. 19, para. 9.
[41] General recommendation No. 30.

26. The general obligations described above encompass all areas of State action, including in the legislative, executive and judicial branches and at the federal, national, subnational, local and decentralized levels, as well as action under governmental authority by privatized governmental services. They require the formulation of legal norms, including at the constitutional level, and the design of public policies, programmes, institutional frameworks and monitoring mechanisms aimed at eliminating all forms of gender-based violence against women, whether perpetrated by State or non-State actors. They also require, in accordance with articles 2 (f) and 5 (a) of the Convention, the adoption and implementation of measures to eradicate prejudices, stereotypes and practices that are the root causes of gender-based violence against women. In general terms, and without prejudice to the specific recommendations provided in the following section, the obligations include the following:

Legislative level

(a) According to articles 2 (b), (c), (e), (f) and (g) and 5 (a), States are required to adopt legislation prohibiting all forms of gender-based violence against women and girls, harmonizing national law with the Convention. In the legislation, women who are victims/survivors of such violence should be considered to be right holders. It should contain age-sensitive and gender-sensitive provisions and effective legal protection, including sanctions on perpetrators and reparations to victims/survivors. The Convention provides that any existing norms of religious, customary, indigenous and community justice systems are to be harmonized with its standards and that all laws that constitute discrimination against women, including those which cause, promote or justify gender-based violence or perpetuate impunity for such acts, are to be repealed. Such norms may be part of statutory, customary, religious, indigenous or common law, constitutional, civil, family, criminal or administrative law or evidentiary and procedural law, such as provisions based on discriminatory or stereotypical attitudes or practices that allow for gender-based violence against women or mitigate sentences in that context;

Executive level

(b) Articles 2 (c), (d) and (f) and 5 (a) provide that States parties are to adopt and adequately provide budgetary resources for diverse institutional measures, in coordination with the relevant State branches. Such measures include the design of focused public policies, the development and implementation of monitoring mechanisms and the establishment and/or funding of competent national tribunals. States parties should provide accessible, affordable and adequate services to protect women from gender-based violence, prevent its reoccurrence and provide or ensure funding for reparations to all victims/survivors.[42] States parties must also eliminate the institutional practices and individual conduct and behaviour of public officials that constitute gender-based violence against women, or tolerate such violence, and that provide a context for lack of a response or for a negligent response. This includes adequate investigation of and sanctions for inefficiency, complicity and negligence by public authorities responsible for the registration, prevention or investigation of such violence or for providing services to victims/survivors. Appropriate measures to modify or eradicate customs and practices that constitute discrimination against women, including those that justify or promote gender-based violence against women, must also be taken at the executive level;[43]

[42] See footnote 5 above and general recommendation No. 33.
[43] See joint general recommendation No. 31/general comment No. 18.

Judicial level

(c) According to articles 2 (d) and (f) and 5 (a), all judicial bodies are required to refrain from engaging in any act or practice of discrimination or gender-based violence against women and to strictly apply all criminal law provisions punishing such violence, ensuring that all legal procedures in cases involving allegations of gender-based violence against women are impartial, fair and unaffected by gender stereotypes or the discriminatory interpretation of legal provisions, including international law.[44] The application of preconceived and stereotypical notions of what constitutes gender-based violence against women, what women's responses to such violence should be and the standard of proof required to substantiate its occurrence can affect women's rights to equality before the law, a fair trial and effective remedy, as established in articles 2 and 15 of the Convention.[45]

IV. Recommendations

27. Building on general recommendation No. 19 and the Committee's work since its adoption, the Committee urges States parties to strengthen the implementation of their obligations in relation to gender-based violence against women, whether within their territory or extraterritorially. The Committee reiterates its call upon States parties to ratify the Optional Protocol to the Convention and examine all remaining reservations to the Convention with a view to their withdrawal.

28. The Committee also recommends that States parties take the following measures in the areas of prevention, protection, prosecution and punishment, redress, data collection and monitoring and international cooperation in order to accelerate elimination of gender-based violence against women. All measures should be implemented with an approach centred around the victim/survivor, acknowledging women as right holders and promoting their agency and autonomy, including the evolving capacity of girls, from childhood to adolescence. In addition, the measures should be designed and implemented with the participation of women, taking into account the particular situation of women affected by intersecting forms of discrimination.

A. General legislative measures

29. The Committee recommends that States parties implement the following legislative measures:

(a) Ensure that all forms of gender-based violence against women in all spheres, which amount to a violation of their physical, sexual or psychological integrity, are criminalized and introduce, without delay, or strengthen, legal sanctions commensurate with the gravity of the offence, as well as civil remedies;[46]

(b) Ensure that all legal systems, including plural legal systems, protect victims/survivors of gender-based violence against women and ensure that they have access to justice and to an effective remedy, in line with the guidance provided in general recommendation No. 33;

[44] *Vertido v. Philippines*, para. 8.9 (b); *R.P.B. v. Philippines*, para. 8.3; and general recommendation No. 33, paras. 18 (e), 26 and 29.
[45] See general recommendation No. 33.
[46] See footnote 5 above.

(c) Repeal, including in customary, religious and indigenous laws, all legal provisions that are discriminatory against women and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence.[47] In particular, repeal the following:

(i) Provisions that allow, tolerate or condone forms of gender-based violence against women, including child[48] or forced marriage and other harmful practices, provisions allowing medical procedures to be performed on women with disabilities without their informed consent and provisions that criminalize abortion,[49] being lesbian, bisexual or transgender, women in prostitution and adultery, or any other criminal provisions that affect women disproportionally, including those resulting in the discriminatory application of the death penalty to women;[50]

(ii) Discriminatory evidentiary rules and procedures, including procedures allowing for the deprivation of women's liberty to protect them from violence, practices focused on "virginity" and legal defences or mitigating factors based on culture, religion or male privilege, such as the defence of so-called "honour", traditional apologies, pardons from the families of victims/survivors or the subsequent marriage of the victim/survivor of sexual assault to the perpetrator, procedures that result in the harshest penalties, including stoning, lashing and death, often being reserved for women and judicial practices that disregard a history of gender-based violence to the detriment of women defendants;[51]

(iii) All laws that prevent or deter women from reporting gender-based violence, such as guardianship laws that deprive women of legal capacity or restrict the ability of women with disabilities to testify in court, the practice of so-called "protective custody", restrictive immigration laws that discourage women, including migrant domestic workers, from reporting such violence, and laws allowing for dual arrests in cases of domestic violence or for the prosecution of women when the perpetrator is acquitted;

(d) Examine gender-neutral laws and policies to ensure that they do not create or perpetuate existing inequalities and repeal or modify them if they do so;[52]

(e) Ensure that sexual assault, including rape, is characterized as a crime against the right to personal security and physical, sexual and psychological integrity[53] and that the definition of sexual crimes, including marital and acquaintance or date rape, is based on the lack of freely given consent and takes into account coercive circumstances.[54] Any time limitations, where they exist, should

[47] Following the guidance provided in general recommendation No. 33.
[48] Article 16 (2) of the Convention; and joint general recommendation No. 31/general comment No. 18, para. 42 and para. 55 (f), regarding the conditions under which marriage at an earlier age than 18 years is allowed, in exceptional circumstances.
[49] See the summary of the inquiry concerning the Philippines (CEDAW/C/OP.8/PHL/1); communication No. 22/2009, *T.P.F. v. Peru*, views adopted on 17 October 2011; and Committee on Economic, Social and Cultural Rights, general comment No. 22.
[50] The Committee recalls General Assembly resolutions 62/149, 63/168, 65/206, 67/176, 69/186 and 71/187, in which the Assembly called upon all States that still maintained the death penalty to establish a moratorium on executions with a view to abolishing it.
[51] See, among others, the concluding observations of the Committee on the following periodic reports of States parties: Afghanistan (CEDAW/C/AFG/CO/1-2); Jordan (CEDAW/C/JOR/CO/6); Papua New Guinea (CEDAW/C/PNG/CO/3); and South Africa (CEDAW/C/ZAF/CO/4); and the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/35/23).
[52] General recommendation No. 28, para. 16.
[53] See *Vertido v. Philippines*.
[54] See *Vertido v. Philippines* and *R.P.B. v. Philippines*.

prioritize the interests of the victims/survivors and give consideration to circumstances hindering their capacity to report the violence suffered to the competent services or authorities.[55]

B. Prevention

30. The Committee recommends that States parties implement the following preventive measures:

(a) Adopt and implement effective legislative and other appropriate preventive measures to address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes, inequality in the family and the neglect or denial of women's civil, political, economic, social and cultural rights, and to promote the empowerment, agency and voices of women;

(b) Develop and implement effective measures, with the active participation of all relevant stakeholders, such as representatives of women's organizations and of marginalized groups of women and girls, to address and eradicate the stereotypes, prejudices, customs and practices set out in article 5 of the Convention, which condone or promote gender-based violence against women and underpin the structural inequality of women with men. Such measures should include the following:

(i) Integration of content on gender equality into curricula at all levels of education, both public and private, from early childhood onwards and into education programmes with a human rights approach. The content should target stereotyped gender roles and promote the values of gender equality and non-discrimination, including non-violent masculinities, and ensure age-appropriate, evidence-based and scientifically accurate comprehensive sexuality education for girls and boys;

(ii) Awareness-raising programmes that promote an understanding of gender-based violence against women as unacceptable and harmful, provide information about available legal recourses against it and encourage the reporting of such violence and the intervention of bystanders; address the stigma experienced by victims/survivors of such violence; and dismantle the commonly held victim-blaming beliefs under which women are responsible for their own safety and for the violence that they suffer. The programmes should target women and men at all levels of society; education, health, social services and law enforcement personnel and other professionals and agencies, including at the local level, involved in prevention and protection responses; traditional and religious leaders; and perpetrators of any form of gender-based violence, so as to prevent repeat offending;

(c) Develop and implement effective measures to make public spaces safe for and accessible to all women and girls, including by promoting and supporting community-based measures adopted with the participation of women's groups. Measures should include ensuring adequate physical infrastructure, including lighting, in urban and rural settings, in particular in and around schools;

(d) Adopt and implement effective measures to encourage the media to eliminate discrimination against women, including the harmful and stereotypical portrayal of women or specific groups of women, such as women human rights

[55] See *L.R. v. Republic of Moldova* and general recommendation No. 33, para. 51 (b). Consideration should be given, in particular, to the situation of girls who are victims/survivors of sexual violence.

defenders, from their activities, practices and output, including in advertising, online and in other digital environments. Measures should include the following:

(i) Encouraging the creation or strengthening of self-regulatory mechanisms by media organizations, including online or social media organizations, aimed at the elimination of gender stereotypes relating to women and men, or to specific groups of women, and addressing gender-based violence against women that takes place through their services and platforms;

(ii) Guidelines for the appropriate coverage by the media of cases of gender-based violence against women;

(iii) Establishing or strengthening the capacity of national human rights institutions to monitor or consider complaints regarding any media that portray gender-discriminatory images or content that objectify or demean women or promote violent masculinities;[56]

(e) Provide mandatory, recurrent and effective capacity-building, education and training for members of the judiciary, lawyers and law enforcement officers, including forensic medical personnel, legislators and health-care professionals,[57] including in the area of sexual and reproductive health, in particular sexually transmitted infections and HIV prevention and treatment services, and all education, social and welfare personnel, including those working with women in institutions, such as residential care homes, asylum centres and prisons,[58] to equip them to adequately prevent and address gender-based violence against women. Such education and training should promote understanding of the following:

(i) How gender stereotypes and bias lead to gender-based violence against women and inadequate responses to it;[59]

(ii) Trauma and its effects, the power dynamics that characterize intimate partner violence and the varying situations of women experiencing diverse forms of gender-based violence, which should include the intersecting forms of discrimination affecting specific groups of women and adequate ways of interacting with women in the context of their work and eliminating factors that lead to their revictimization and weaken their confidence in State institutions and agents;[60]

(iii) National legal provisions and national institutions on gender-based violence against women, the legal rights of victims/survivors, international standards and associated mechanisms and their responsibilities in that context, which should include due coordination and referrals among diverse bodies and the adequate documentation of such violence, giving due respect for women's privacy and right to confidentiality and with the free and informed consent of the victims/survivors;

(f) Encourage, through the use of incentives and corporate responsibility models and other mechanisms, the engagement of the private sector, including

[56] Concluding observations of the Committee on the combined periodic reports of Croatia (CEDAW/C/HRV/CO/4-5).

[57] See footnote 5 above and the World Health Organization clinical and policy guidelines on responding to intimate partner violence and sexual violence against women (2013).

[58] See *Abramova v. Belarus*; communication No. 53/2013, *A. v. Denmark*, views adopted on 19 November 2015; and General Assembly resolution 65/229 on the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

[59] See, among others, *Belousova v. Kazakhstan*, *R.P.B. v. Philippines*, *Jallow v. Bulgaria* and *L.R. v. Republic of Moldova*.

[60] See *M.W. v. Denmark*, *R.P.B. v. Philippines*, *Jallow v. Bulgaria* and *Kell v. Canada*.

businesses and transnational corporations, in efforts to eradicate all forms of gender-based violence against women and in enhancing its responsibility for such violence in the scope of its action,[61] which should entail protocols and procedures addressing all forms of gender-based violence that may occur in the workplace or affect women workers, including effective and accessible internal complaints procedures, the use of which should not exclude recourse to law enforcement authorities, and should also address workplace entitlements for victims/survivors.

C. Protection

31. The Committee recommends that States parties implement the following protective measures:

(a) Adopt and implement effective measures to protect and assist women complainants of and witnesses to gender-based violence before, during and after legal proceedings, including by:

(i) Protecting their privacy and safety, in line with general recommendation No. 33, including through gender-sensitive court procedures and measures, bearing in mind the due process rights of victims/survivors, witnesses and defendants;

(ii) Providing appropriate and accessible protective mechanisms to prevent further or potential violence, without the precondition that victims/survivors initiate legal action, including through removal of communication barriers for victims with disabilities.[62] Mechanisms should include immediate risk assessment and protection comprising a wide range of effective measures and, where appropriate, the issuance and monitoring of eviction, protection, restraining or emergency barring orders against alleged perpetrators, including adequate sanctions for non-compliance. Protective measures should avoid imposing an undue financial, bureaucratic or personal burden on women who are victims/survivors. The rights or claims of perpetrators or alleged perpetrators during and after judicial proceedings, including with respect to property, privacy, child custody, access, contact and visitation, should be determined in the light of women's and children's human rights to life and physical, sexual and psychological integrity and guided by the principle of the best interests of the child;[63]

(iii) Ensuring access to financial assistance, gratis or low-cost, high-quality legal aid,[64] medical, psychosocial and counselling services,[65] education, affordable housing, land, childcare, training and employment opportunities for women who are victims/survivors and their family members. Health-care services should be responsive to trauma and include timely and comprehensive mental, sexual and reproductive health services,[66] including emergency

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[61] General recommendation No. 28, para. 28. See the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (A/HRC/17/31).

[62] For example, protective orders in some countries allow for the banning of travel of people who are believed to be at risk of female genital mutilation.

[63] *Yildirim v. Austria*, *Goekce v. Austria*, *González Carreño v. Spain*, *M.W. v. Denmark* and *Jallow v. Bulgaria*.

[64] General recommendation No. 33, para. 37, and general recommendation No. 28, para. 34; see also *Kell v. Canada, Vertido v. Philippines*, *S.V.P. v. Bulgaria* and *L.R. v. Republic of Moldova*, among others.

[65] General recommendation No. 33, para. 16.

[66] Committee on Economic, Social and Cultural Rights, general comment No. 22.

contraception and post-exposure prophylaxis against HIV. States should provide specialized women's support services, such as gratis helplines operating around the clock and sufficient numbers of safe and adequately equipped crisis, support and referral centres and adequate shelters for women, their children and other family members, as required;[67]

(iv) Providing women in institutions, including residential care homes, asylum centres and places of deprivation of liberty, with protective and support measures in relation to gender-based violence;[68]

(v) Establishing and implementing appropriate multisectoral referral mechanisms to ensure effective access to comprehensive services for survivors of such violence, ensuring the full participation of and cooperation with non-governmental women's organizations;

(b) Ensure that all legal proceedings, protective and support measures and services concerning victims/survivors respect and strengthen their autonomy. They should be accessible to all women, in particular those affected by intersecting forms of discrimination, take into account any specific needs of their children and other dependants,[69] be available throughout the State party and be provided irrespective of residency status or ability or willingness to cooperate in legal proceedings against the alleged perpetrator.[70] States should also respect the principle of non-refoulement;[71]

(c) Address factors that heighten the risk to women of exposure to serious forms of gender-based violence, such as the ready accessibility and availability of firearms, including their export,[72] a high crime rate and pervasive impunity, which may increase in situations of armed conflict or heightened insecurity.[73] Efforts should be undertaken to control the availability and accessibility of acid and other substances used to attack women;

(d) Develop and disseminate accessible information, through diverse and accessible media and community dialogue, aimed at women, in particular those affected by intersecting forms of discrimination, such as those with disabilities, those who are illiterate or those who have no or limited knowledge of the official languages of a country, on the legal and social resources available to victims/survivors, including reparations.

D. Prosecution and punishment

32. The Committee recommends that States parties implement the following measures with regard to prosecution and punishment for gender-based violence against women:

[67] See joint general recommendation No. 31/general comment No. 18.
[68] See footnote 54 above.
[69] *R.P.B. v. Philippines*, *Jallow v. Bulgaria* and *V.K. v. Bulgaria*.
[70] General recommendation No. 33, para. 10.
[71] In accordance with the Convention relating to the Status of Refugees, of 1951, and the Convention against Torture. See also general recommendation No. 32 and *A. v. Denmark*.
[72] See article 7 (4) of the Arms Trade Treaty. See also the concluding observations of the Committee on the following periodic reports of States parties: Pakistan (CEDAW/C/PAK/CO/4); to Democratic Republic of the Congo (CEDAW/C/COD/CO/6-7); France (CEDAW/C/FRA/CO/7-8); Switzerland (CEDAW/C/CHE/CO/4-5); and Germany (CEDAW/C/DEU/CO/7-8); and Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 9.
[73] General recommendation No. 30.

(a) Ensure effective access for victims to courts and tribunals and that the authorities adequately respond to all cases of gender-based violence against women, including by applying criminal law and, as appropriate, ex officio prosecution to bring alleged perpetrators to trial in a fair, impartial, timely and expeditious manner and imposing adequate penalties.[74] Fees or court charges should not be imposed on victims/survivors;[75]

(b) Ensure that gender-based violence against women is not mandatorily referred to alternative dispute resolution procedures, including mediation and conciliation.[76] The use of those procedures should be strictly regulated and allowed only when a previous evaluation by a specialized team ensures the free and informed consent of victims/survivors and that there are no indicators of further risks to the victims/survivors or their family members. Procedures should empower the victims/survivors and be provided by professionals specially trained to understand and adequately intervene in cases of gender-based violence against women, ensuring adequate protection of the rights of women and children and that interventions are conducted with no stereotyping or revictimization of women. Alternative dispute resolution procedures should not constitute an obstacle to women's access to formal justice.

E. Reparations

33. The Committee recommends that States parties implement the following measures with regard to reparations:

(a) Provide effective reparations to victims/survivors of gender-based violence against women. Reparations should include different measures, such as monetary compensation, the provision of legal, social and health services, including sexual, reproductive and mental health services for a complete recovery, and satisfaction and guarantees of non-repetition, in line with general recommendation No. 28, general recommendation No. 30 and general recommendation No. 33. Such reparations should be adequate, promptly attributed, holistic and proportionate to the gravity of the harm suffered;[77]

(b) Establish specific funds for reparations or include allocations in the budgets of existing funds, including under transitional justice mechanisms, for reparations to victims of gender-based violence against women. States parties should implement administrative reparations schemes without prejudice to the rights of victims/survivors to seek judicial remedies, design transformative reparations programmes that help to address the underlying discrimination or disadvantaged position that caused or significantly contributed to the violation, taking into account the individual, institutional and structural aspects. Priority should be given to the agency, wishes, decisions, safety, dignity and integrity of victims/survivors.

F. Coordination, monitoring and data collection

34. The Committee recommends that States parties implement the following measures with regard to coordination and monitoring and the collection of data regarding gender-based violence against women:

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[74] See, among others, *Vertido v. Philippines*, *S. V. P. v. Bulgaria* and *L.R. v. Republic of Moldova*.
[75] General recommendation No. 33, para. 17 (a).
[76] As indicated in general recommendation No. 33, para. 58 (c).
[77] See footnote 5 above and general recommendation No. 33, para. 19.

(a) Develop and evaluate all legislation, policies and programmes in consultation with civil society organizations, in particular women's organizations, including those that represent women affected by intersecting forms of discrimination. States parties should encourage cooperation among all levels and branches of the justice system and the organizations that work to protect and support victims/survivors of gender-based violence against women, taking into account their views and expertise.[78] States parties should encourage the work of human rights organizations and women's non-governmental organizations;[79]

(b) Establish a system to regularly collect, analyse and publish statistical data on the number of complaints about all forms of gender-based violence against women, including technology-mediated violence, the number and type of orders of protection issued, the rates of dismissal and withdrawal of complaints, prosecution and conviction and the amount of time taken for the disposal of cases. The system should include information on the sentences imposed on perpetrators and the reparations, including compensation, provided to victims/survivors. All data should be disaggregated by type of violence, relationship between the victim/survivor and the perpetrator, and in relation to intersecting forms of discrimination against women and other relevant sociodemographic characteristics, including the age of the victim/survivor. The analysis of the data should enable the identification of failures in protection and serve to improve and further develop preventive measures, which should, if necessary, include the establishment or designation of observatories for the collection of administrative data on the gender-based killings of women, also referred to as "femicide" or "feminicide", and attempted killings of women;

(c) Undertake or support surveys, research programmes and studies on gender-based violence against women in order to, among other things, assess the prevalence of gender-based violence against women and the social or cultural beliefs exacerbating such violence and shaping gender relations. Studies and surveys should take into account intersecting forms of discrimination, on the basis of the principle of self-identification;

(d) Ensure that the process of collecting and maintaining data on gender-based violence against women complies with established international standards[80] and safeguards, including legislation on data protection. The collection and use of data and statistics should conform to internationally accepted norms for the protection of human rights and fundamental freedoms and ethical principles;

(e) Set up a mechanism or body, or mandate an existing mechanism or body, to regularly coordinate, monitor and assess the national, regional and local implementation and effectiveness of the measures, including those recommended in the present recommendation and other relevant regional and international standards and guidelines, to prevent and eliminate all forms of gender-based violence against women;

(f) Allocate appropriate human and financial resources at the national, regional and local levels to effectively implement laws and policies for the prevention of all forms of gender-based violence against women, provision of protection and support to victims/survivors, investigation of cases, prosecution of perpetrators and provision of reparations to victims/survivors, including support to women's organizations.

[78] *Yildirim v. Austria* and *Goekce (deceased) v. Austria*.
[79] General recommendation No. 28, para. 36.
[80] General Assembly resolution 68/261 on the Fundamental Principles of Official Statistics.

G. International cooperation

35. The Committee recommends that States parties implement the following measures with regard to international cooperation to combat gender-based violence against women:

(a) Seek support, where necessary, from external sources, such as the specialized agencies of the United Nations system, the international community and civil society, in order to meet human rights obligations by designing and implementing all appropriate measures required to eliminate and respond to gender-based violence against women,[81] taking into consideration, in particular, the evolving global contexts and the increasingly transnational nature of such violence, including in technology-mediated settings and other extraterritorial operations of domestic non-State actors.[82] States parties should urge business actors whose conduct they are in a position to influence to assist the States in which they operate in their efforts to fully realize women's right to freedom from violence;

(b) Prioritize the implementation of the relevant Sustainable Development Goals, in particular Goals 5, to achieve gender equality and empowerment of all women and girls, and Goal 16, to promote peaceful and inclusive societies for sustainable development, provide access to justice and build effective, accountable and inclusive institutions at all levels; and support national plans to implement all the Goals in a gender-responsive manner, in accordance with the agreed conclusions of the sixtieth session of the Commission on the Status of Women on women's empowerment and the link to sustainable development, enabling meaningful participation of civil society and women's organizations in the implementation of the Goals and the follow-up processes, and enhance international support and cooperation for knowledge-sharing and effective and targeted capacity-building.[83]

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[81] General recommendation No. 28, para. 29, and general recommendation No. 33, paras. 38 and 39.
[82] General recommendation No. 34, para. 13.
[83] General Assembly resolution 70/1, entitled "Transforming our world: the 2030 Agenda for Sustainable Development".

C. Complaints Decided by the CEDAW Committee (CEDAW Case Law)

i. Goekce v. Austria (Communication No. 5/2005)

United Nations CEDAW/C/39/D/5/2005

Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women
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23 July-10 August 2007

Views

Communication No. 5/2005

Submitted by:	The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Hakan Goekce, Handan Goekce, and Guelue Goekce (descendants of the deceased)
Alleged victim:	Şahide Goekce (deceased)
State party:	Austria
Date of communication:	21 July 2004 with supplementary information dated 22 November and 10 December 2004 (initial submissions)

On 6 August 2007 the Committee on the Elimination of Discrimination against Women adopted the annexed text as the Committee's views under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 5/2005. The views are appended to the present document.

07-49543 (E) 260907

Annex

Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (thirty-ninth session)

Communication No. 5/2005*

Submitted by:	The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Hakan Goekce, Handan Goekce, and Guelue Goekce (descendants of the deceased)
Alleged victim:	Şahide Goekce (deceased)
State party:	Austria
Date of communication:	21 July 2004 with supplementary information dated 22 November and 10 December 2004 (initial submissions)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 6 August 2007,

Having concluded its consideration of communication No. 5/2005, submitted to the Committee on the Elimination of Discrimination against Women by the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Hakan Goekce, Handan Goekce and Guelue Goekce, descendants of Şahide Goekce (deceased) under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Ms. Ferdous Ara Begum, Ms. Magalys Arocha Dominguez, Ms. Meriem Belmihoub-Zerdani, Ms. Saisuree Chutikul, Ms. Mary Shanthi Dairiam, Mr. Cees Flinterman, Ms. Naela Mohamed Gabr, Mr. Françoise Gaspard, Ms. Violeta Neubauer, Ms. Pramila Patten, Ms. Silvia Pimentel, Ms. Fumiko Saiga, Ms. Heisoo Shin, Ms. Glenda P. Simms, Ms. Dubravka Šimonović, Ms. Anamah Tan, Ms. Maria Regina Tavares da Silva and Ms. Zou Xiaoqiao.

Views under article 7, paragraph 3, of the Optional Protocol

1. The authors of the communication dated 21 July 2004 with supplementary information dated 22 November and 10 December 2004, are the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice, two organizations in Vienna, Austria, that protect and support women victims of gender-based violence. They claim that Şahide Goekce (deceased), an Austrian national of Turkish origin and former client of the Vienna Intervention Centre against Domestic Violence, is a victim of a violation by the State party of articles 1, 2, 3 and 5 of the Convention on the Elimination of All Forms of Discrimination against Women. The Convention and its Optional Protocol entered into force for the State party on 30 April 1982 and 22 December 2000, respectively.

The facts as presented by the authors

2.1 The first violent attack against Şahide Goekce by her husband, Mustafa Goekce, that the authors are aware of took place on 2 December 1999 at approximately 4 p.m. in the victim's apartment at which time Mustafa Goekce choked Şahide Goekce and threatened to kill her. Şahide Goekce spent the night with a friend of hers and reported the incident to the police with the help of the Youth Welfare Office of the 15th district of Vienna the following day.

2.2 On 3 December 1999, the police issued an expulsion and prohibition to return order against Mustafa Goekce covering the Goekce apartment, pursuant to Section 38a of the Security Police Act (Sicherheitspolizeigesetz).[1] In the documentation supporting the order, the police officer in charge of the case stated that two light red bruises were visible under Şahide Goekce's right ear that, according to her, were from the choking.

2.3 Under section 107, paragraph 4, of the Penal Code (Strafgesetzbuch), a threatened spouse, direct descendant, brother or sister or relative who lives in the same household of the accused must give authorization in order to prosecute the alleged offender for making a criminal dangerous threat. Şahide Goekce did not authorize the Austrian authorities to prosecute Mustafa Goekce for threatening her life. Mustafa Goekce was, therefore, charged only with the offence of causing bodily harm. He was acquitted because Şahide Goekce's injuries were too minor to constitute bodily harm.

2.4 The next violent incidents of which the authors have knowledge occurred on 21 and 22 August 2000. When the police arrived at the Goekce's apartment on 22 August 2000, Mustafa Goekce was grabbing Şahide Goekce by her hair and was pressing her face to the floor. She later told the police that Mustafa Goekce had threatened to kill her the day before if she reported him to the police. The police issued a second expulsion and prohibition to return order against Mustafa Goekce covering the Goekce's apartment and the staircase of the apartment building, which was valid for 10 days. They informed the Public Prosecutor that Mustafa Goekce had committed aggravated coercion (because of the death threat) and asked that he be detained. The request was denied.

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[1] This act has been translated as both the Security Police Act and the maintenance of Law and Order Act.

2.5 On 17 December 2001, 30 June 2002, 6 July 2002, 25 August 2002 and 16 September 2002 the police were called to the Goekce's apartment because of reports of disturbances and disputes and/or battering.

2.6 The police issued the third expulsion and prohibition to return order against Mustafa Goekce (valid for 10 days) as a result of an incident on 8 October 2002 that Şahide Goekce had called in; she claimed that Mustafa Goekce called her names, tugged her by her clothes through the apartment, hit her in the face, choked her and again threatened to kill her. Her cheek was bruised and she had haematoma on the right side of her neck. Şahide Goekce pressed charges against her husband for causing bodily harm and making a criminal dangerous threat. The police interrogated Mustafa Goekce and again requested that he be detained. Again, the Public Prosecutor denied the request.

2.7 On 23 October 2002, the Vienna District Court of Hernals issued an interim injunction for a period of three months against Mustafa Goekce, which forbade Mustafa Goekce from returning to the family apartment and its immediate environs and from contacting Şahide Goekce or the children. The order was to be effective immediately and entrusted to the police for execution. The children are all minors (two daughters and one son) born between 1989 and 1996.

2.8 On 18 November 2002, the Youth Welfare Office (which had been in constant contact with the Goekce family because of the violent assaults that took place in front of the children) informed the police that Mustafa Goekce had not obeyed the interim injunction and was living in the family apartment. The police did not find him there when they checked.

2.9 The authors indicate that the police knew from other sources that Mustafa Goekce was dangerous and owned a handgun. At the end of November 2002, Remzi Birkent, the father of Şahide Goekce, informed the police that Mustafa Goekce had frequently phoned him and threatened to kill Şahide Goekce or another family member; no police report was filed by the police officer taking the statement of Mr. Birkent. Mustafa Goekce's brother also informed the police about the tension between Şahide Goekce and her husband and that Mustafa Goekce had threatened to kill her several times. His statement was not taken seriously by the police or recorded. The police did not check whether Mustafa Goekce had a handgun even though a weapons prohibition was in effect against him.

2.10 On 5 December 2002, the Vienna Public Prosecutor stopped the prosecution of Mustafa Goekce for causing bodily harm and making a criminal dangerous threat on grounds that there was insufficient reason to prosecute him.

2.11 On 7 December 2002, Mustafa Goekce shot Şahide Goekce with a handgun in their apartment in front of their two daughters. The police report reads that no officer went to the apartment to settle the dispute between Mustafa Goekce and Şahide Goekce prior to the shooting.

2.12 Two-and-a-half hours after the commission of the crime, Mustafa Goekce surrendered to the police. He is reportedly currently serving a sentence of life imprisonment in an institution for mentally disturbed offenders.[2]

[2] He is reportedly of sound mind (compos mentis) vis-à-vis the murder but was diagnosed to be mentally disturbed to a higher degree generally.

The complaint

3.1 The authors complain that Şahide Goekce is a victim of a violation by the State party of articles 1, 2, 3 and 5 of the Convention on the Elimination of All Forms of Discrimination against Women because the State party did not actively take all appropriate measures to protect Şahide Goekce's right to personal security and life. The State party failed to treat Mustafa Goekce as an extremely violent and dangerous offender in accordance with criminal law. The authors claim that the Federal Act for the Protection against Violence within the Family (Bundesgesetz zum Schutz vor Gewalt in der Familie) does not provide the means to protect women from highly violent persons, especially in cases of repeated, severe violence and death threats. Instead, the authors insist that detention is necessary. The authors also allege that had the communication between the police and Public Prosecutor been better and faster, the Public Prosecutor would have known about the ongoing violence and death threats and may have found that he had sufficient reason to prosecute Mustafa Goekce.

3.2 The authors further contend that the State party also failed to fulfil its obligations stipulated in the general recommendations Nos. 12, 19 and 21 of the Committee on the Elimination of Discrimination against Women, the United Nations Declaration on the Elimination of Violence against Women, the concluding comments of the Committee (June 2000) on the combined third and fourth periodic report and the fifth periodic report of Austria, the United Nations Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence against Women, several provisions of the outcome document of the twenty-third special session of the General Assembly, article 3 of the United Nations Universal Declaration of Human Rights, articles 6 and 9 of the International Covenant on Civil and Political Rights, several provisions of other international instruments, and the Austrian Constitution.

3.3 With regard to article 1 of the Convention, the authors contend that women are far more affected than men by the failure of public prosecutors to take domestic violence seriously as a real threat to life and their failure to request detention of alleged offenders as a matter of principle in such cases. Women are also disproportionately affected by the practice of not prosecuting and punishing offenders in domestic violence cases appropriately. Furthermore, women are disproportionately affected by the lack of coordination of law enforcement and judicial personnel, the failure to educate law enforcement and judicial personnel about domestic violence and the failure to collect data and maintain statistics on domestic violence.

3.4 With regard to article 1 together with article 2 (a), (c), (d) and (f) and article 3 of the Convention, the authors maintain that the lack of detention of alleged offenders in domestic violence cases, inadequate prosecution and lack of coordination among law enforcement and judicial officials and the failure to collect data and maintain statistics of incidences of domestic violence resulted in inequality in practice and the denial of Şahide Goekce's enjoyment of her human rights. She was exposed to violent assault, battery, coercion and death threats and when Mustafa Goekce was not detained, she was murdered.

3.5 With regard to articles 1 together with 2 (e) of the Convention, the authors state that the Austrian criminal justice personnel failed to act with due diligence to

investigate and prosecute acts of violence and protect Şahide Goekce's human rights to life and personal security.

3.6 With regard to article 1 together with article 5 of the Convention, the authors claim that the murder of Şahide Goekce is one tragic example of the prevailing lack of seriousness with which violence against women is taken by the public and by the Austrian authorities. The criminal justice system, particularly public prosecutors and judges, consider the issue a social or domestic problem, a minor or petty offence that happens in certain social classes. They do not apply criminal law to such violence because they do not take the danger seriously and view women's fears and concerns with a lack of gravity.

3.7 The authors request the Committee to assess the extent to which there have been violations of the victim's human rights and rights protected under the Convention and the responsibility of the State party for not detaining the dangerous suspect. The authors also request the Committee to recommend that the State party offer effective protection to women victims of violence, particularly migrant women, by clearly instructing public prosecutors and investigating judges about what they ought to do in cases of severe violence against women.

3.8 The authors further request the Committee to recommend to the State party to implement a "pro-arrest and detention" policy in order to effectively provide safety for women victims of domestic violence and a "pro-prosecution" policy that would convey to offenders and the public that society condemns domestic violence and ensure coordination among the various law enforcement authorities.

3.9 The authors also request the Committee to recommend to the State party to ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with organizations that work to protect and support women victims of gender-based violence and to ensure that training programmes and education on domestic violence be compulsory for criminal justice personnel.

3.10 As to the admissibility of the communication, the authors maintain that there are no other domestic remedies that could possibly have been used to protect Şahide Goekce's personal security and to prevent her homicide. Both the expulsion and prohibition to return orders and the interim injunction proved ineffective. All of the deceased's own attempts to obtain protection (calling the Vienna Police several times when Mustafa Goekce assaulted and choked her; three formal complaints to the police; pressing charges against Mustafa Goekce) and the attempts of others (neighbours calling the Vienna Police; the victim's father reporting on the death threats; Mustafa Goekce's brother reporting that Mustafa Goekce had a handgun) were in vain.

3.11 In the submission of 10 December 2004, the authors indicate that no civil action has been brought by the heirs under the Act on Official [State] Liability. The authors contend that such an action would not be an effective remedy against the lack of protection of Şahide Goekce and the failure to prevent her homicide. Suing the State for omissions and negligence would not bring her back and would serve the different purpose of providing the heirs with compensation for sustaining a loss and other damages. The two approaches, compensation on the one hand and protection on the other are opposites. They differ in respect of the beneficiary (the heirs versus the victim), what the intentions are (to compensate for loss versus to save a life) and timing (after death rather than prior to death). If the State party

protected women effectively, there would be no need to establish State liability. Additionally, compensation suits entail huge costs. The authors state that they have submitted the communication in order to call the State party to account for its omissions and negligence rather than to obtain compensation for the heirs. Finally, suing the State party would be unlikely to bring effective relief in accordance with article 4 of the Optional Protocol.

3.12 The authors also state that they have not submitted the communication to any other body of the United Nations or any regional mechanism of international settlement or investigation.

3.13 On the issue of *locus standi*, the authors maintain that it is justified and appropriate for them to submit the complaint on behalf of Şahide Goekce — who cannot give consent because she is dead. They consider it appropriate to represent her before the Committee because she was a client of theirs and had a personal relationship with them and because they are special protection and support organizations for women victims of domestic violence; one of the two organizations is an intervention centre against domestic violence that was reportedly established pursuant to Section 25, paragraph 3, of the Federal Security Police Act. They are seeking justice for Şahide Goekce and to improve the protection of women in Austria from domestic violence so that her death would not be in vain. This being said, the authors have obtained the written consent of the City of Vienna Office for Youth and Family Affairs, the guardian of Şahide Goekce's three minor children.

The State party's submission on admissibility

4.1 By its submission of 4 May 2005, the State party describes the sequence of events leading up to the murder of Şahide Goekce. Mustafa Goekce was not prosecuted for making a criminal dangerous threat against Şahide Goekce on 2 December 1999 because she did not authorize the authorities to do so. The authorities proceeded to prosecute him for maliciously inflicting bodily harm. According to the court records, Şahide Goekce did not want to testify against Mustafa Goekce and expressly asked the court not to punish her husband. He was acquitted because of an absence of evidence.

4.2 On 23 August 2000, the police issued an expulsion and prohibition to return order against Mustafa Goekce. They reported by phone to the Public Prosecutor about an incident involving aggravated coercion and making a criminal dangerous threat that had occurred the previous day.

4.3 On 18 September 2000, the Public Prosecutor received a written complaint (Anzeige) regarding the incident of 22 August 2000. When interrogated, Şahide Goekce said that she had suffered an epileptic fit and bouts of depression and denied that Mustafa Goekce had threatened to kill her. As a consequence, the Public Prosecutor discontinued the proceedings against Mustafa Goekce for aggravated coercion and making a criminal dangerous threat.

4.4 On 13 January 2001, the court with competence over guardianship matters restricted Mustafa Goekce's and Şahide Goekce's role in the care and upbringing of their children and required them to comply with measures agreed upon in cooperation with the Youth Welfare Office. In its decision, the court noted that Mustafa Goekce and Şahide Goekce always tried to give an impression of living a well-ordered life. When asked about the charges of inflicting bodily harm and

making a criminal dangerous threat, both Mustafa Goekce and Şahide Goekce considered it important to note that they had reconciled fully shortly after each incident.

4.5 Mustafa Goekce and Şahide Goekce agreed to go into partner therapy and to stay in contact with the Youth Welfare Office. Until summer 2002, they were in therapy. The city administration also offered them a new and more spacious apartment to meet their pressing accommodation needs. In spite of these arrangements, the police repeatedly intervened in the couple's disputes on 17 December 2001, 30 June 2002, 6 July 2002, 25 August 2002 and 16 September 2002.

4.6 On 23 October 2002 the Hernals District Court issued an interim injunction against Mustafa Goekce pursuant to section 382b of the Act on the Enforcement of Judgments (Exekutionsordnung) that prohibited him from returning to the apartment and its immediate surroundings and from contacting the children and Şahide Goekce. She gave testimony before the judge in the presence of Mustafa Goekce (although she had been informed of her rights) that she would make every effort to keep the family together, that Mustafa Goekce had a very good relationship with the children and that he assisted her in the household because of her epilepsy.

4.7 A police report of 18 November 2002 showed that the Youth Welfare Office requested the police to come to the Goekce apartment because he had violated the interim injunction and was in the apartment. Mustafa Goekce was no longer there when the police arrived. Şahide Goekce seemed angry that the police had come and asked them why they came almost on a daily basis although she had expressly declared that she wished to spend her life together with her husband.

4.8 On 6 December 2002, the Vienna Public Prosecutor's Office withdrew the charges of making a criminal dangerous threat that related to an incident that took place on 8 October 2002, because Şahide Goekce gave a written statement to the Police in which she claimed that a scrap had caused her injury. She also stated that her husband had repeatedly over a number of years threatened to kill her. The Public Prosecutor proceeded on the assumption that the threats were a regular feature of the couple's disputes and would not be carried out. Şahide Goekce repeatedly tried to play down the incidents in the interest of preventing the prosecution of Mustafa Goekce. By doing this and refusing to testify in the criminal proceedings, she contributed to the fact that he could not be convicted of a crime.

4.9 On 7 December 2002, Mustafa Goekce came to the apartment in the early hours of the morning and opened the door with a key given to him by Şahide Goekce one week earlier. He left the apartment at 8.30 a.m. only to return at noon. Şahide Goekce shouted at him that he was not the father of all her children and Mustafa Goekce shot her dead with a handgun that he had purchased three weeks earlier, despite a valid weapons prohibition against him.

4.10 According to an expert witness at the trial of Mustafa Goekce, he had committed the murder under the influence of a paranoid jealousy psychosis which absolved him of criminal responsibility. For this reason, the Vienna Public Prosecutor's Office requested that he be placed in an institution for the criminally insane. On 23 October 2003, the Vienna Regional Criminal Court ordered Mustafa Goekce to be placed in such an institution.

4.11 As to admissibility, the State party disputes that domestic remedies have been exhausted. Firstly, Şahide Goekce did not give the competent authorities her authorization to prosecute Mustafa Goekce for making a criminal dangerous threat. Nor was she prepared to testify against him. She asked the court not to punish her husband and, after filing charges, regularly made great efforts to play down the incidents and deny their criminality.

4.12 The State party further argues that the Federal Act for the Protection against Violence within the Family constitutes a highly effective system to combat domestic violence and establishes a framework for effective cooperation among various institutions. Details are provided about aspects of the system, including the role of intervention centres. In addition to criminal measures, there are a number of police and civil-law measures to protect against domestic violence. Shelters supplement the system. It is possible to settle disputes in less severe cases under the Maintenance of Law and Order Act (Sicherheitspolizeigesetz).

4.13 Şahide Goekce never made use of section 382b of the Act on the Enforcement of Judgments to request an interim injunction against Mustafa Goekce. Instead, she made it clear that she was not interested in further interference with her family life. She never made a clear decision to free herself and the children from their relationship with her husband (for example, she gave him the keys to the apartment, despite there being a valid interim injunction). Without such a decision on the part of Ms. Goekce, the authorities were limited in the actions that they could take to protect her. Effective protection was doomed to fail without her cooperation.

4.14 Against this background, the use of detention was not justified in relation to the incident of 8 October 2002. Mustafa Goekce had no criminal record and the Public Prosecutor did not know at the time that Mustafa Goekce had a weapon. The Public Prosecutor did not consider that the known facts indicated an imminent danger of Mustafa Goekce committing a homicide; detention could only be justified *ultima ratio*. In light of Şahide Goekce's apparent anger at the police intervention on 18 November 2002 (see above paragraph 4.7), the Public Prosecutor could not assume that the charge would lead to a conviction and prison sentence. The court must take the principle of proportionality into account when detaining a defendant and must, in any event, set aside the detention if the duration becomes disproportionate to the expected sentence.

4.15 Furthermore, Şahide Goekce would have been free to address the Constitutional Court (Verfassungsgerichtshof) with a complaint in accordance with article 140, paragraph 1, of the Federal Constitution (Bundes-Verfassungsgesetz) that would challenge the provision that did not allow her to appeal against the decisions of the Public Prosecutor not to issue a warrant for the arrest of Mustafa Goekce. Assuming that they can show a current and direct interest in the preventive effect of the repeal of the pertinent provision for the benefit of victims of domestic violence, such as Şahide Goekce, it may still be possible for her surviving heirs to address the Constitutional Court on this question.

4.16 The State party also argues that special training courses are held on a regular basis for judges and the police on domestic violence. Cooperation between judges and the police is constantly reviewed in order to ensure more rapid intervention by organs of the State — the aim being to prevent as far as possible tragedies such as that of Şahide Goekce without improper interference into a person's family life and other basic rights.

The author's comments on the State party's observations on admissibility

5.1 By their submission of 31 July 2005, the authors contend that the victim and the authors have exhausted all domestic remedies, which would have been likely to bring sufficient relief. They claim that there is no legal obligation to apply for civil measures — such as an interim injunction.

5.2 The authors also are of the view that the idea of requiring a woman who is under threat of death to file an application to the Constitutional Court was not an argument put forward by the State party in good faith. The procedure lasts for some two to three years and, for this reason, would be unlikely to bring sufficient relief to a woman who has been threatened with death.

5.3 The authors consider that the State party has wrongfully placed the burden and responsibility of taking steps against a violent husband on the victim and has failed to understand the danger the victim faces and the power of the perpetrator over the victim. The authors, therefore, believe that section 107, paragraph 4, of the Penal Code covering authorization for prosecutions against persons who make criminal dangerous threats should be repealed so that the burden will be placed on the State — where it belongs — and would reinforce the fact that making a criminal threat is a crime against the community as well as a crime against an individual victim.

5.4 The authors clarify that Şahide Goekce was afraid to leave her violent husband. Victims try to avoid actions that might increase the danger they face (the "Stockholm Syndrome") and often feel compelled to act in the interest of the perpetrator. She should not be blamed for not being in a position to separate due to psychological, economic and social factors.

5.5 The authors also dispute the State party's description of certain facts; Mustafa Goekce (and not Şahide Goekce) stated that she had an epileptic fit and suffered from depression. She did not, as claimed by the State party, deny the threats of her husband. She refused to testify against Mustafa Goekce only once. If Şahide Goekce played down the incidents in front of the Youth Welfare Office, it was because she was afraid to lose her children. The authors also point out that Mustafa Goekce quit therapy and that it would have been easy for the police to discover that Mustafa Goekce was carrying a gun. They also point out that Şahide Goekce called the police the night before she was killed — a fact that demonstrates how great her fear was and that she was willing to take steps to prevent him from coming to the apartment.

5.6 As to the State party's comments about effective cooperation among various institutions, the police and the Public Prosecutor only began to talk to the Vienna Intervention Centre against Domestic Violence after Şahide Goekce's death.

Additional comments of the State party on admissibility

6.1 By its submission of 21 October 2005, the State party firmly rejects the arguments put forward by the authors and maintains its previous submission. The State party points out that the authors not only refer to alleged failures on the part of the competent Public Prosecutor and investigating judge but to the law itself. Their criticism relates to the legal framework, the application of legal provisions that protect the right to life, physical integrity and the right to respect for private and family life and the failure to take enough effective measures in a general, abstract way.

6.2 Under article 140, paragraph 1, of the Federal Constitution any individual may challenge legal provisions for being unconstitutional if he/she alleges direct infringement of individual rights insofar as the law has been operative for that individual without the delivery of a judicial decision or ruling. There are no time limits for filing such applications.

6.3 The aim of the procedure would be to redress an alleged violation in law. The Constitutional Court only considers the application legitimate if in repealing the provision at issue, the legal position of the applicant would be changed to such an extent that the alleged negative legal implications no longer exist. Furthermore, the legally protected interests of the applicant must be actually affected. This must be the case both at the time that the application is filed and when the Constitutional Court takes its decision. Successful applicants are entitled to compensation.

6.4 Section 15 of the Constitutional Court Act (Verfassungsgerichtshofgesetz) contains the general requirements as to form when addressing the Constitutional Court. These requirements include: that the application must be in writing; that the application must refer to a specific provision in the Constitution; the applicant must set out the facts; and the application must contain a specific request. Under section 62, paragraph 1 of the Act, the application must state precisely which provisions should be repealed. Moreover, the application must explain in detail why the challenged provisions are unlawful and to what extent the law had been operative for the applicant without the delivery of a judicial decision or ruling. Under section 17, paragraph 2 of the Act, applications must be filed by an authorized lawyer.

6.5 If the Constitutional Court agrees with the applicant, it issues a ruling setting aside these provisions. The Federal Chancellor is then under an obligation to promulgate the repeal of these provisions in the Federal Law Gazette, which comes into force at the end of the day of its promulgation. The Constitutional Court may also set a maximum deadline of 18 months for the repeal — which does not necessarily apply to the applicants, themselves. A time limit is fixed if the legislature is to be given an opportunity to introduce a new system that complies with the constitutional framework. In light of its previous decisions, it can be assumed that the Constitutional Court would make use of the latter possibility if it were to decide that a provision should be repealed.

6.6 The procedure under article 140, paragraph 1, of the Federal Constitution may indeed take two to three years, as stated by the authors. However, proceedings may be shorter if their urgency is explained to the Constitutional Court. Constitutional Court proceedings do not provide rapid redress. However, article 4, paragraph 1, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women prescribes the exhaustion of all available domestic remedies unless the proceedings would be unreasonably prolonged or no effective relief could be expected.

6.7 The requirement of exhausting domestic remedies reflects a general principle of international law and a usual element of international human rights mechanisms. It gives the State concerned an opportunity to remedy human rights violations first at the domestic level.

6.8 The State party argues that Şahide Goekce or her surviving relatives should have made use of the possibility of filing an individual application before the Constitutional Court before submitting a communication to the Committee, as

required by article 4, paragraph 1, of the Optional Protocol. The proceedings before the Constitutional Court are not unreasonably prolonged. Moreover, it cannot be said, in light of the case law of the Court, that the surviving relatives would not be entitled to file an individual application because — as far as can be seen — no similar cases have been brought before the Court.

6.9 The State party further maintains that article 4, paragraph 1, of the Optional Protocol does not include only remedies that are successful in any event. If successful, the application could lead to the repeal of the procedural provisions in dispute or to the introduction by the legislature of a new system in the field of domestic violence in line with the intentions of the authors. It is true that now, after the death of Şahide Goekce, there is no effective relief with respect to the effective protection of her personal security and life. However, in the present proceedings, the Committee should examine at the admissibility stage whether Şahide Goekce had an opportunity under domestic law to subject the legal provisions which prevented her from asserting her rights to a constitutional review and whether her surviving relatives have an opportunity to make use of the same mechanism to repeal the legal provisions of concern at the domestic level in order to realize their aims.

Issues and proceedings before the Committee concerning admissibility

7.1 During its thirty-fourth session (16 January to 3 February 2006), the Committee considered the admissibility of the communication in accordance with rules 64 and 66 of its rules of procedure. It ascertained that the matter had not already been or was being examined under another procedure of international investigation or settlement.

7.2 With regard to article 4, paragraph 1, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (the domestic remedies rule), the Committee noted that authors must use the remedies in the domestic legal system that were available to them and would enable them to obtain redress for the alleged violations. The substance of their complaints that were subsequently brought before the Committee should first be made to an appropriate domestic body. Otherwise, the motivation behind the provision would be lost. The domestic remedies rule was designed so that States parties have an opportunity to remedy a violation of any of the rights set forth under the Convention through their legal systems before the Committee addresses the same issues. The Human Rights Committee had recently recalled the rationale of its corresponding rule in Panayote Celal, on behalf of his son, Angelo Celal, v. Greece (1235/2003), paragraph 6.3:

> "The Committee recalls that the function of the exhaustion requirement under article 5, paragraph 2 (b), of the Optional Protocol is to provide the State party itself with the opportunity to remedy the violation suffered …"

7.3 The Committee noted that, in communications denouncing domestic violence, the remedies that came to mind for purposes of admissibility related to the obligation of a State party concerned to exercise due diligence to protect; investigate the crime, punish the perpetrator, and provide compensation as set out in general recommendation 19 of the Committee.

7.4 The Committee considered that the allegations made relating to the obligation of the State party to have exercised due diligence to protect Şahide Goekce were at the heart of the communication and were of great relevance to the heirs. Thus, the

question as to whether domestic remedies had been exhausted in accordance with article 4, paragraph 1, of the Optional Protocol must be examined in relation to these allegations. The allegations essentially related to flaws in law as well as the alleged misconduct or negligence of the authorities in applying the measures that the law provided. With regard to alleged flaws in law, the authors claimed that, according to the Penal Code, Şahide Goekce was unable to appeal against the decisions made by the Public Prosecutor not to detain her husband for making a criminal dangerous threat against her. The State party argued that a procedure, the aim of which would be to redress an alleged violation in law, was set out under article 140, paragraph 1, of the Federal Constitution and would have been available to the deceased and remained available to her descendants. The State party submitted that the failure of the deceased and her descendants to use the procedure should have barred the admissibility of the communication.

7.5 The Committee noted that the procedure under article 140, paragraph 1, of the Federal Constitution could not be regarded as a remedy, which was likely to bring effective relief to a woman whose life was under a criminal dangerous threat. Neither did the Committee regard this domestic remedy as being likely to bring effective relief in the case of the deceased's descendants in light of the abstract nature of such a constitutional remedy. Accordingly, the Committee concluded that, for purposes of admissibility with regard to the authors' allegations about the legal framework for the protection of women in domestic violence situations in relation to the deceased no remedies existed which were likely to bring effective relief and that the communication in this respect was therefore admissible. In the absence of information on other available, effective remedies, which Şahide Goekce or her heirs could have pursued or still might have pursued, the Committee concluded that the authors' allegations relating to the actions or omissions of public officials were admissible.

7.6 On 27 January 2006, the Committee declared the communication admissible.

The State party's request for a review of admissibility and submission on the merits

8.1 By its submission of 12 June 2006, the State party requests the Committee to review its decision on admissibility. The State party reiterates that the descendants of Şahide Goekce should avail themselves of the procedure under article 140, paragraph 1, of the Federal Constitution in order to try to bring about an amendment to the legal provision that barred Şahide Goekce from appealing against the decisions made by the Public Prosecutor not to detain Mustafa Goekce. It maintains that this remedy is quite effective to pursue the aim of the communication at the domestic level.

8.2 The State party also submits that, after the Public Prosecutor dropped the charges against Mustafa Goekce, Şahide Goekce would have been free to bring an action, known as "associated prosecution" (Subsidiaranklage), against her husband. The Austrian legal system provides that an injured person may bring an action instead of the Public Prosecutor if the latter drops the charges and refuses to prosecute the offender. The Public Prosecutor is under an obligation to inform the injured person of this option.

8.3 The State party revisits the sequence of events leading up to the murder of Şahide Goekce. The State party indicates that a comprehensive report on the case of

Mustafa Goekce by the Vienna Senior Public Prosecutor's Office confirms that Şahide Goekce did not authorize the prosecution of her husband for making a criminal dangerous threat against her on 2 December 1999 and that the charges against him had to be dropped as a result. With regard to the ex officio prosecution of Mustafa Goekce for maliciously inflicting bodily harm in relation to the same incident, Şahide Goekce confirmed in the Fünfhaus District Court what her husband had stated, i.e. that she was epileptic and was suffering bouts of depression and that the bruising on her neck was caused by her husband holding her. Mustafa Goekce was acquitted of the charges of maliciously inflicting bodily harm in the absence of further evidence against him.

8.4 The State party provides more information relating to the incident that occurred on 21 August 2000: records show that Şahide Goekce was not injured and that Mustafa Goekce did not hit her; she was informed about possible means of protection that the Federal Act for the Protection against Violence within the Family provides and given a leaflet with information for victims of violence; the Vienna Intervention Centre and the Youth Welfare Office were also informed ex officio about this incident; and on 24 August 2000, Mustafa Goekce went to the Schmelz police office together with the couple's son, Hakan Goekce, who stated that his mother had started quarrelling with his father and had attacked him.

8.5 The State party asserts that, on 1 September 2000, Şahide Goekce (who, according to the record was questioned in her husband's absence) stated that her husband never threatened to kill her. She had had an epileptic fit and perhaps in her confusion made the accusations against her husband; during such fits she made weird statements, which she could not remember afterwards. On 20 September 2000, the Public Prosecutor withdrew the charges against Mustafa Goekce.

8.6 The State party submits that the Public Prosecutor brought charges against Mustafa Goekce for causing bodily harm and threatening to kill Şahide Goekce immediately following the 8 October 2002 incident. However, he did not request that Mustafa Goekce be arrested. Şahide Goekce reported to the police without her husband being present that he had choked her and threatened to kill her. She was again informed in detail about the possibility of filing a request for an interim injunction under section 382b of the Act on the Enforcement of Judgments and was given an information sheet for victims of violence. Mustafa Goekce completely denied the charges against him. There was evidence that Mustafa Goekce was slightly injured during the quarrel on 8 October 2002.

8.7 The State party submits that Şahide Goekce was given the opportunity to testify without her husband being present at the interim injunction hearings at the Hernals District Court. At those hearings Şahide Goekce stated that she would make every effort to keep the family together. She also stated that he had a very good relationship with the children and helped her with the household. According to a report of the police inspectorate Kriminalkommissariat West, Mustafa Goekce subsequently repeatedly disregarded the interim injunction and the police responded by coming to the Goekce home several times to the annoyance of Şahide Goekce.

8.8 The State party submits that the Public Prosecutor withdrew the charges against Mustafa Goekce on 6 December 2002 because it could not be proved with sufficient certainty that Mustafa Goekce was guilty of making criminal dangerous threats against his wife that went beyond the harsh statements resulting from his background. As regards the physical evidence, the State party maintains that it could

not be ascertained which spouse started the aggressive acts. The State party also submits that proceedings against Mustafa Goekce for causing bodily harm were discontinued because he had no criminal record and because it could not be excluded that Şahide Goekce had attacked her husband.

8.9 By judgement of 17 October 2003, the Vienna Regional Criminal Court ordered that Mustafa Goekce be placed in an institution for mentally deranged offenders for killing Şahide Goekce. According to the expert opinion obtained by the Court, Mustafa Goekce committed the offence under the influence of a jealousy psychosis that absolved him of criminal responsibility.

8.10 The State party notes that it is difficult to make a reliable prognosis as to how dangerous an offender is and that it is necessary to determine whether detention would amount to a disproportionate interference in a person's basic rights and fundamental freedoms. The Federal Act for the Protection against Violence within the Family aims to provide a highly effective yet proportionate way of combating domestic violence through a combination of criminal and civil-law measures, police activities and support measures. Close cooperation is required between criminal and civil courts, police organs, youth welfare institutions and institutions for the protection of victims, including in particular, intervention centres for protection against violence within the family, as well as rapid exchange of information between the authorities and institutions involved.

8.11 The State party points out that, aside from settling disputes, the police issue expulsion and prohibition to return orders, which are less severe measures than detention. Section 38a, paragraph 7, of the Security Police Act requires the police to review compliance with expulsion and prohibition to return orders at least once in the first three days. According to the instructions of the Vienna Federal Police Directorate, it is best for the police to carry out the review through personal contact with the person at risk in the home without prior warning at a time when it is likely that someone will be at home. Police inspectorates in Vienna must keep a domestic violence index file in order to be able to rapidly access reliable information.

8.12 The State party indicates that its legislation is subject to regular evaluation as is the electronic register of judicial proceedings. Increased awareness has led to significant law reform and enhanced protection of victims of domestic violence, such as the abolition of the requirement in section 107, paragraph 4, of the Penal Code that a threatened family member must authorize the prosecution of a perpetrator who has made a criminal dangerous threat.

8.13 The State party maintains that the issue of domestic violence and promising counterstrategies have regularly been discussed at meetings between the heads of the Public Prosecutor's Offices and representatives of the Federal Ministry of the Interior, including in connection with the case at issue. It also maintains that considerable efforts are being made to improve cooperation between Public Prosecutor's Offices and intervention centres against violence within the family. The State party also refers to efforts in the area of statistics made by the Federal Ministry of the Interior and its subordinate bodies.

8.14 The State party indicates that the Federal Act for the Protection against Violence within the Family and its application in practice are key elements of the training of judges and public prosecutors. Examples of seminars and local events on victim protection are given. Future judges are provided each year with information

on "violence within the family", "protection of victims" and "law and the family". Programmes cover the basics of the phenomenon of violence against women and children, including forms, trauma, post-traumatic consequences, dynamics of violent relationship, psychology of offenders, assessment factors of how dangerous an offender is, institutions of support, laws and regulations and the electronic registers. Interdisciplinary and comprehensive training has also been carried out.

8.15 The State party recognizes the need for persons affected by domestic violence to be informed about legal avenues and available counselling services. The State party reports that judges provide information at district courts free of charge once a week to anyone interested in the existing legal protection instruments. Psychological advice is also provided, including at the Hernals District Court. The State party also indicates that pertinent information is offered (posters and flyers in Arabic, German, English, French, Polish, Russian, Serbo-Croat, Spanish and Hungarian) at district courts. A toll-free Hotline for Victims has also been installed where lawyers provide legal advice around the clock free of charge. The State party further submits that women's homes act as shelters where women victims of violence are offered counselling, care and assistance in dealing with public authorities. In domestic violence cases where an expulsion and prohibition to return order has been issued, police officers must inform persons at risk of the possibility of obtaining an interim injunction under section 382a of the Act on the Enforcement of Judgments. In Vienna, the person concerned is given an information sheet (available in English, French, Serbian, Spanish and Turkish).

8.16 The State party submits that the authors of the present communication give abstract explanations as to why the Federal Act for the Protection Against Violence in the Family as well as practice regarding detentions in domestic violence cases and prosecution and punishment of offenders allegedly violate articles 1, 2, 3 and 5 of the Convention. The State party considers that it is evident that its legal system provides for comprehensive measures to combat domestic violence adequately and efficiently. The State party maintains that Şahide Goekce was offered numerous forms of assistance by the State in the case at issue.

8.17 The State party further submits that detention is ordered when there are sufficiently substantiated fears that a suspect would carry out a threat if he/she were not detained. It maintains that mistakes in assessing how dangerous an offender is cannot be excluded in an individual case. The State party asserts that, although the present case is an extremely tragic one, the fact that detention must be weighed against an alleged perpetrator's right to personal freedom and a fair trial cannot be overlooked. Reference is made to the case law of the European Court of Human Rights that depriving a person of his or her freedom is, in any event, *ultima ratio* and may be imposed only if and insofar as this is not disproportionate to the purpose of the measure. The State party also contends that, were all sources of danger to be excluded, detention would need to be ordered in situations of domestic violence as a preventive measure. This would reverse the burden of proof and be in strong contradiction with the principles of the presumption of innocence and the right to a fair hearing. Protecting women through positive discrimination by, for example, automatically arresting, detaining, prejudging and punishing men as soon as there is suspicion of domestic violence, would be unacceptable and contrary to the rule of law and fundamental rights.

8.18 The State party maintains that it would have been possible for the author to file a complaint at any time against the Public Prosecutor for his/her conduct pursuant to section 37 of the Public Prosecutors Act. Furthermore, Şahide Goekce did not avail herself of any of the various available avenues of redress. Her failure to authorize the prosecution of Mustafa Goekce for making a criminal dangerous threat in December 1999 and the fact that she largely refused to testify and asked the Court not to punish her husband resulted in his acquittal. Şahide Goekce claimed that her allegations regarding the August 2000 incident were made while she was in a state of confusion as a result of depression and again, the Public Prosecutor determined that there was no adequate basis to prosecute Mustafa Goekce. The State party further submits that the facts that were available concerning the incident of 8 October 2002 did not indicate that Mustafa Goekce should be detained either. The Public Prosecutor was unaware that Mustafa Goekce was in possession of a firearm. Lastly, the State party submits that it could not be deduced from police reports and other records that there was a danger that Mustafa Goekce would actually commit the criminal act.

8.19 The State party summarizes its position by asserting that Şahide Goekce could not be guaranteed effective protection because she had not been prepared to cooperate with the Austrian authorities. In light of the information available to the public authorities, any further interference by the State in the fundamental rights and freedoms of Mustafa Goekce would not have been permissible under the Constitution.

8.20 The State party asserts that its system of comprehensive measures[3] aimed at combating domestic violence does not discriminate against women and the authors' allegations to the contrary are unsubstantiated. Decisions, which appear to be inappropriate in retrospect (when more comprehensive information is available) — are not discriminatory *eo ipso*. The State party maintains that it complies with its obligations under the Convention concerning legislation and implementation and that there has been no discrimination against Şahide Goekce as a woman.

8.21 In the light of the above, the State party asks the Committee to reject the present communication as inadmissible; *in eventu*, to reject it for being manifestly ill-founded and, *in eventu*, to hold that the rights of Şahide Goekce under the Convention have not been violated.

Authors' comments on the State party's request for a review of admissibility and submission on the merits

9.1 By their submission of 30 November 2006, the authors argue that neither the children of the victim nor the authors intended to have statutory provisions reviewed by the Constitutional Court — a motion that would be deemed inadmissible. They would have lacked standing to bring such an action before the Constitutional Court. The authors note that the main focus of the communication is that legal provisions were not applied — not that those provisions should be amended or repealed. Furthermore, the authors claim that their suggestions for improvements to the existing laws and enforcement measures could never be realized by means of a constitutional complaint. Therefore, bringing a constitutional complaint should not

[3] To illustrate the effectiveness of the measures, which are applied, the State party submits the statistics on prohibition orders to enter the common home and other legal measures.

be regarded as a domestic remedy for purposes of article 4, paragraph 1, of the Optional Protocol.

9.2 The authors consider that it is inadmissible at this stage for the State party to introduce an argument concerning the remedy of "associated prosecution" in light of the fact that the State party was given two earlier opportunities to comment on the question of admissibility, besides which this remedy would be costly and would not bring any effective relief. The authors are of the view that the Optional Protocol and the rules of procedure of the Committee as well as general legal principles ("ne bis in idem") do not provide for reversing the admissibility decision of 27 January 2006.

9.3 The authors note that the State party refers to actions taken and legal provisions that entered into force years after the murder of Şahide Goekce.

9.4 The authors submit that the observations of the State party place the burden and responsibility for dealing with the violent husband on the victim and place the blame on her for not having taken appropriate action. The authors assert that this position demonstrates how little the authorities understand about the dynamics of partner violence, the dangerous situation of the victim and the power that the perpetrator has over the victim, whom he ended up killing.

9.5 The authors note that the State party acknowledged every violent incident that took place. However, the authors maintain that the State party did not describe some of the details accurately. The authors claim that it was Mustafa Goekce who stated that Şahide Goekce had had an epileptic fit — the explanation for the bruising on her neck — and that he comforted her.

9.6 The authors dispute the State party's contention that Şahide Goekce asked the Court not to punish her husband or denied that he had threatened to kill her. They claim that the record of the interrogation shows that Mustafa Goekce repeatedly said that he would kill Şahide Goekce. Moreover, Şahide Goekce only once refused to testify against her husband and the reason for there being no further criminal proceedings was that the Public Prosecutor did not initiate them. As to the State party's assertion that Şahide Goekce played down the incidents before the Youth Welfare Office, the authors submit that Şahide Goekce would have been afraid of losing her children and of the social and cultural contempt for a woman of Turkish descent whose children had been taken away.

9.7 The authors point out that the State party admits that Mustafa Goekce repeatedly ignored the interim injunction issued by the District Court of Hernals. The authors criticize the police for not having taken seriously the information that they received from the brother of Mustafa Goekce about the weapon.

9.8 The authors argue that the State party has not taken responsibility for the failures of the authorities and officers. They submit that when making a determination about detaining Mustafa Goekce, the State party should have conducted a comprehensive assessment of how dangerous Mustafa Goekce would become. Furthermore, the State party should have considered the social and psychological circumstances of the case. The authors consider that the exclusive use of civil remedies was inappropriate because they do not prevent very dangerous violent criminals from committing or repeating offences.

9.9 The authors draw attention to flaws in the system of protection. One such flaw is that the police and public prosecutors are unable to communicate with each other rapidly enough. Another such flaw is that police files regarding domestic violence are not made available to the officers who operate the emergency call services. The authors also complain that systematically coordinated and/or institutionalized communication between the Public Prosecutor's Office and the Family Court does not exist. They also maintain that government funding remains inadequate to provide extensive care for all victims of domestic violence.

9.10 The authors refer to an exchange of information between representatives of the police and a representative of the Intervention Centre shortly after Şahide Goekce was killed, during which the Chief of Police admitted to deficits in the emergency call service. The authors state that in the instant case, Şahide Goekce called this service a few hours before she was killed, yet no patrol car was sent to the scene. While the Chief of Police requested representatives of the Intervention Centre to instruct victims about the information that they should provide to the police, the authors argue that it would not be reasonable to expect victims of violence to provide in an emergency all information that may be relevant considering their mental state. Furthermore, regarding the instant case, German was not Şahide Goekce's mother tongue. The authors maintain that the authorities should gather data about dangerous violent offenders in a systematic manner that can be retrieved anywhere in an emergency.

9.11 The authors submit that it is incorrect to claim that Şahide Goekce did not avail herself of the available avenues of redress. In 2002, the year she was killed, Şahide Goekce repeatedly tried to obtain help from the police — but she and her family were not taken seriously; often their complaints were not recorded. Further, the authors argue that several physical attacks by Mustafa Goekce were known to the police but not adequately documented such that the information could be retrieved for use in assessing how dangerous he might become. The authors maintain that the potential for violence on the part of a spouse who does not accept being separated from the other spouse/family is extremely high. In the specific case of Şahide Goekce, her spouse was unreasonably jealous and unwilling to accept a separation, which constituted a high risk that was not taken into account.

The State party's supplementary observations

10.1 By its submission of 19 January 2007, the State party provides detailed information about the so-called "associated prosecution", whereby a private party takes over the prosecution of the defendant. The State party submits that the requirements are more stringent than those that apply to the Public Prosecutor in order to prevent chicanery. Under this procedure, a person whose rights have allegedly been violated through the commission of a crime becomes a private party to the proceedings.

10.2 The State party indicates that Şahide Goekce was informed of her right to "associated prosecution" on 14 December 1999, 20 September 2000 and 6 December 2002.

10.3 The State party also submits that Şahide Goekce would have been entitled to bring a complaint under section 37 of the Public Prosecutor's Act (Staatsanwaltschaftsgesetz) to either the head of the Public Prosecutor's Office in Vienna, the Senior Public Prosecutor's Office or the Federal Ministry of Justice, had

she considered the official actions of the responsible Public Prosecutor to have been unlawful. There are no formal requirements and complaints may be filed in writing, by e-mail or by fax or telephone.

10.4 The State party indicates that an interim injunction for protection against domestic violence may be sought by persons who live or have lived with a perpetrator in a family relationship or a family-like relationship under section 382b of the Act on the Enforcement of Judgments, when there have been physical attacks, threats of physical attacks or any conduct that severely affects the mental health of the victim and when the home fulfils the urgent accommodation needs of the applicant. The perpetrator may be ordered to leave the home and the immediate surroundings and prohibited from returning. If further encounters become unacceptable, the perpetrator may be banned from specifically defined places and given orders to avoid encounters as well as contact with the applicant so long as this does not infringe upon important interests of the perpetrator. In cases where an interim injunction has been issued, the public security authorities may determine that an expulsion order (Wegweisung) is also necessary as a preventive measure.

10.5 The State party states that interim injunctions can be issued during divorce proceedings, marriage annulment and nullification proceedings, during proceedings to determine the division of matrimonial property or the right to use the home. In such cases, the interim injunction is valid for the duration of the proceedings. If no such proceedings are pending, an interim injunction may be issued for a maximum of three months. An expulsion and prohibition to return order expires after 10 days but is extended for another 10 days if a request for an interim injunction is filed.

Review of admissibility

11.1 In accordance with rule 71, paragraph 2, of its rules of procedure, the Committee has re-examined the communication in light of all the information made available to it by the parties, as provided for in article 7, paragraph 1, of the Optional Protocol.

11.2 As to the State party's request to review admissibility on the grounds that Şahide Goekce's heirs did not avail themselves of the procedure under article 140, paragraph 1, of the Federal Constitution, the Committee notes that the State party has not introduced new arguments that would alter the Committee's view that, in light of its abstract nature, this domestic remedy would not be likely to bring effective relief.

11.3 As to the State party's argument that Şahide Goekce, as a private individual, would have been free to bring an action, known as "associated prosecution" against her husband after the Public Prosecutor decided to drop the charges against him, the Committee does not regard this remedy as having been de facto available to the author, considering that the requirements for a private individual to take over the prosecution of the defendant are more stringent than those for the Public Prosecutor, that German was not Şahide Goekce's mother tongue and, most importantly, that she was in a situation of protracted domestic violence and threats of violence. Moreover, the fact that the State party introduced the notion of "associated prosecution" late in the proceedings indicates that this remedy is rather obscure. Accordingly, the Committee does not find the remedy of "associated prosecution" to be a remedy that Şahide Goekce would have been obliged to exhaust under article 4, paragraph 1, of the Optional Protocol.

11.4 As to the State party's contention that Şahide Goekce would have been entitled to bring a complaint under section 37 of the Public Prosecutor's Act, the Committee considers that this remedy — designed to determine the lawfulness of official actions of the responsible Public Prosecutor — cannot be regarded as a remedy which is likely to bring effective relief to a woman whose life is under a dangerous threat, and should thus not bar the admissibility of the communication.

11.5 The Committee will proceed to consideration of the merits of the communication.

Consideration of the merits

12.1.1 As to the alleged violation of the State party's obligation to eliminate violence against women in all its forms in relation to Şahide Goekce in articles 2 (a) and (c) through (f), and article 3 of the Convention, the Committee recalls its general recommendation 19 on violence against women. This general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "… discrimination under the Convention is not restricted to action by or on behalf of Governments …" and that "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".

12.1.2 The Committee notes that the State party has established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness-raising, education and training, shelters, counselling for victims of violence and work with perpetrators. However, in order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors, who adhere to the State party's due diligence obligations.

12.1.3 In the instant case, the Committee notes that during the three-year period starting with the violent episode that was reported to the police on 3 December 1999 and ending with the shooting of Şahide Goekce on 7 December 2002, the frequency of calls to the police about disturbances and disputes and/or battering increased; the police issued prohibition to return orders on three separate occasions and twice requested the Public Prosecutor to order that Mustafa Goekce be detained; and a three-month interim injunction was in effect at the time of her death that prohibited Mustafa Goekce from returning to the family apartment and its immediate environs and from contacting Şahide Goekce or the children. The Committee notes that Mustafa Goekce shot Şahide Goekce dead with a handgun that he had purchased three weeks earlier, despite a valid weapons prohibition against him as well as the uncontested contention by the authors that the police had received information about the weapon from the brother of Mustafa Goekce. In addition, the Committee notes the unchallenged fact that Şahide Goekce called the emergency call service a few hours before she was killed, yet no patrol car was sent to the scene of the crime.

12.1.4 The Committee considers that given this combination of factors, the police knew or should have known that Şahide Goekce was in serious danger; they should have treated the last call from her as an emergency, in particular because Mustafa

Goekce had shown that he had the potential to be a very dangerous and violent criminal. The Committee considers that in light of the long record of earlier disturbances and battering, by not responding to the call immediately, the police are accountable for failing to exercise due diligence to protect Şahide Goekce.

12.1.5 Although, the State party rightly maintains that, it is necessary in each case to determine whether detention would amount to a disproportionate interference in the basic rights and fundamental freedoms of a perpetrator of domestic violence, such as the right to freedom of movement and to a fair trial, the Committee is of the view, as expressed in its views on another communication on domestic violence, that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity.[4] In the present case, the Committee considers that the behaviour (threats, intimidation and battering) of Mustafa Goekce crossed a high threshold of violence of which the Public Prosecutor was aware and as such the Public Prosecutor should not have denied the requests of the police to arrest Mustafa Goekce and detain him in connection with the incidents of August 2000 and October 2002.

12.1.6 While noting that Mustafa Goekce was prosecuted to the full extent of the law for killing Şahide Goekce, the Committee still concludes that the State party violated its obligations under article 2 (a) and (c) through (f), and article 3 of the Convention read in conjunction with article 1 of the Convention and general recommendation 19 of the Committee and the corresponding rights of the deceased Şahide Goekce to life and physical and mental integrity.

12.2 The Committee notes that the authors also made claims that articles 1 and 5 of the Convention were violated by the State party. The Committee has stated in its general recommendation 19 that the definition of discrimination in article 1 of the Convention includes gender-based violence. It has also recognized that there are linkages between traditional attitudes by which women are regarded as subordinate to men and domestic violence. At the same time, the Committee is of the view that the submissions of the authors of the communication and the State party do not warrant further findings.

12.3 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women is of the view that the facts before it reveal a violation of the rights of the deceased Şahide Goekce to life and physical and mental integrity under article 2 (a) and (c) through (f), and article 3 of the Convention read in conjunction with article 1 of the Convention and general recommendation 19 of the Committee and makes the following recommendations to the State party:

(a) Strengthen implementation and monitoring of the Federal Act for the Protection against Violence within the Family and related criminal law, by acting with due diligence to prevent and respond to such violence against women and adequately providing for sanctions for the failure to do so;

(b) Vigilantly and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence as well as ensure that criminal and civil remedies are utilized in

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[4] See paragraph 9.3 of the Committee's views on communication No. 2/2003, A.T. v. Hungary.

cases where the perpetrator in a domestic violence situation poses a dangerous threat to the victim; and also ensure that in all action taken to protect women from violence, due consideration is given to the safety of women, emphasizing that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity;

(c) Ensure enhanced coordination among law enforcement and judicial officers and also ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with non-governmental organizations that work to protect and support women victims of gender-based violence;

(d) Strengthen training programmes and education on domestic violence for judges, lawyers and law enforcement officials, including on the Convention on the Elimination of All Forms of Discrimination against Women, general recommendation 19 of the Committee, and the Optional Protocol thereto.

12.4 In accordance with article 7, paragraph 4, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them translated into the German language and widely distributed in order to reach all relevant sectors of society.

ii. Jallow v. Bulgaria (Communication No. 32/2011)

United Nations

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Committee on the Elimination of Discrimination against Women
Fifty-second session
9-27 July 2012

Communication No. 32/2011

Views adopted by the Committee at its fifty-second session, 9-27 July 2012

Submitted by:	Isatou Jallow (represented by counsel, Albena Koycheva)
Alleged victims:	The author and her minor daughter
State party:	Bulgaria
Date of communication:	15 November 2010 (initial submission)
References:	Transmitted to the State party on 5 May 2011 (not issued in document form)
Date of adoption of views:	23 July 2012

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Annex

Views of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

Communication No. 32/2011, Isatou Jallow v. Bulgaria

Submitted by:	Isatou Jallow (represented by counsel, Albena Koycheva)
Alleged victims:	The author and her minor daughter
State party:	Bulgaria
Date of communication:	15 November 2010 (initial submission)
References:	Transmitted to the State party on 5 May 2011 (not issued in document form)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 23 July 2012,

Adopts the following:

Views under article 7, paragraph 3, of the Optional Protocol

1. The author of the communication is Ms. Isatou Jallow, a Gambian citizen born on 4 July 1982. She submits the communication on her behalf and on that of her daughter M.A.P., a Gambian and Bulgarian national, born on 28 October 2007.[1] She claims that she and her daughter are victims of violations by Bulgaria of their rights under articles 1, 2, 3, 5 and 16, paragraphs 1 (c), (d), (f) and (g), of the Convention on the Elimination of All Forms of Discrimination against Women. The Convention and its Optional Protocol entered into force for Bulgaria on 8 May 1982 and 20 December 2006, respectively. The author is represented by counsel, Ms. Albena Koycheva.

Facts as presented by the author

2.1 The author previously lived in the Gambia. She is an illiterate woman with no education who can speak only her native language and English at an average level. In 2006, she met Mr. A.P., a Bulgarian national, who was doing business in the Gambia. In January 2007, he returned to the Gambia. On 23 February 2007, when she was already pregnant, they got married. Her husband then returned to Bulgaria, leaving her alone with no means of subsistence. She gave birth on 28 October 2007. After visiting the Gambia in the spring of 2008, and notwithstanding his initial reluctance to recognize the child as his, her husband declared on 10 June and

[1] Her daughter was born in Serrekunda, the Gambia. Bulgarian birth certificate No. 0494 was issued on 10 June 2008.

21 August 2008, respectively, the birth of their daughter and their marriage, so that they could be registered in the official population register of Bulgaria. On 28 September 2008, the author and her daughter arrived in Bulgaria and began living with her husband in Sofia.

2.2 From her arrival in Bulgaria, the author experienced problems with her husband, who was aggressive, often under the influence of alcohol. He attempted to force her to take part in pornographic films and photographs, which she refused. He kept all her documents with him and began subjecting her to psychological and physical violence, including sexual abuse. She was not allowed to leave the house without her husband's permission or to seek employment. He constantly told her that her stay in Bulgaria depended on him and threatened that, if she resisted, he could have her imprisoned, confined to a mental institution or deported to the Gambia, without her daughter. He also made harsh comments about her physical appearance, black skin and illiteracy. He began abusing their daughter and kept pornographic photographs all over the apartment. He would masturbate in front of her and their daughter and watch pornographic films at home in their presence. He also taught their daughter to touch his penis.

2.3 In November 2008, the husband called the Child Protection Department and requested the authorities to convince the author to stop breastfeeding their daughter. He had previously often insisted that he wanted her to feed their daughter with ordinary food and to stop breastfeeding in order for her to lose weight.[2] When social workers from the Department visited the home, they saw pornographic photographs and learned of her husband's domestic violence, causing them to call the police. Police officers came immediately, seized the pictures and informed the Sofia Regional Prosecutor's Office. They also advised the author to take her daughter and stay away from her husband, but provided no guidance about where to go, her vulnerable situation notwithstanding. No specific measure was taken to protect her and her daughter from domestic violence. The author therefore decided to take her daughter and seek shelter at the premises of a non-governmental organization, Animus Association, where they were sheltered from 7 to 9 November 2008.[3] Subsequently, they were accommodated at a mother and child municipal shelter from 10 to 15 November 2008. Her husband, however, found them and convinced her to return to the apartment.[4]

2.4 On 30 March 2009, the Sofia Regional Prosecutor's Office refused to continue with a pretrial investigation into the husband's alleged offence because the evidence collected was insufficient to presume the existence of an offence. The Office concluded that the seized photographs did not constitute an offence insomuch as they were part of the husband's own private collection and taken with the consent of the pictured women, who were adults. The decision was based on the information provided by the police and the social services. The author was never questioned.

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[2] According to the husband's submission to the Sofia Regional Court dated 29 July 2009, after the author's refusal to give the baby ordinary food, he requested the authorities to explain to the author that the child needed other forms of nutrition than breastfeeding.

[3] According to the certificate issued by Animus Association, on 28 October 2008, the Child Protection Department requested the Association to provide shelter to the author and her daughter, who stayed at its centre from 7 to 11 November 2008.

[4] According to the shelter's certificate, provided by the author, she and her daughter were sheltered from 10 to 17 November 2008, when she voluntarily decided to leave.

2.5 On 5 June 2009, the author was admitted to a crisis centre maintained by Animus Association.[5] A few hours after her arrival, the crisis centre was telephoned by the director of a kindergarten, who reported that the husband had attempted to force the kindergarten to accept their daughter, saying that her mother had left her alone and escaped to the centre. The author took her daughter back with her to the centre. On 12 June 2009, the author and her daughter returned home.[6] Police officers were called several times to stop domestic violence against the author. The evident risks to the author and her daughter notwithstanding, they limited themselves to orally warning her husband.

2.6 On 6 July 2009, 10 months after her arrival, the author received her Bulgarian residence permit. The situation escalated such that the author suggested to her husband that they should begin divorce proceedings. He refused, however, as he wished to maintain custody of their daughter.

2.7 On 27 July 2009, the husband filed an application with the Sofia Regional Court under the Protection against Domestic Violence Act, alleging that he was a victim of physiological and physical violence. He submitted that he and his daughter had been victims of domestic violence on several occasions, requesting the Court to grant an emergency protection order. On 28 July 2009, the Court refused the husband's application and gave him one month to file a detailed complaint, to provide specific information and witnesses or evidence concerning each violent event and to explain how those events had affected his daughter. On 29 July 2009, the husband filed a new application, in which he alleged that the author had attacked and insulted him and his daughter on 3, 4, 5, 6 and 20 November and on 26 December 2008, and on 25, 26 and 27 July 2009. He accused the author of having on one occasion attempted to use a knife. Furthermore, he reported that she would slap their daughter across the face, even in front of others. He also accused the author of having fought with people in the neighbourhood and having threatened to kill his mother and their daughter and to commit suicide. He attached to the application a medical certificate dated 24 November 2008 describing personal injuries that had caused him pain and suffering. He also attached a picture showing the back of an injured child. According to the author, the girl in the picture was evidently much older than her 2-year-old daughter. The husband requested that the Court should grant a protection order to forbid the author from coming close to him or their daughter and to force her to be admitted to a mental hospital.

2.8 On 29 July 2009, the Sofia Regional Court, on the basis of the evidence presented by the husband, issued an emergency protection order pursuant to section 5 of the Protection against Domestic Violence Act. Among other measures, the Court ordered the removal of the author from the family home, a ban on her being near the home and the temporary relocation of their daughter with the husband. It considered that the application showed the existence of a direct and imminent threat to the life and health of the husband and their daughter. The emergency protection order was issued on the basis of the husband's statement

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[5] The author argues that her husband left her there, against her will. According to her submission to the Sofia Regional Court dated 14 September 2009, however, in June 2009, at her husband's insistence, the author voluntarily accepted to go to the centre and left him with their daughter to give him the opportunity to realize how demanding childcare was.

[6] According to the certificate issued by Animus Association dated 19 August 2009, the author left the centre at her husband's insistence.

alone.[7] The police executed the protection order and notified the author about the application and future court hearings. No translation of the order was provided, however. According to the author, the order was unappealable and was valid until the court proceedings under the Protection against Domestic Violence Act were completed.[8]

2.9 On 21 August 2009, the author learned that the husband had removed their daughter from their home. She contacted the police, the State Agency for Child Protection and the Sofia Regional Prosecutor's Office to enquire about her daughter, stressing that a child of her daughter's age needed to be near her mother. The police refused the author's request, aware of the emergency protection order, saying that her husband was not obliged to inform her about the whereabouts of her daughter, whom he could send elsewhere or designate another person to look after. The police also refused to assist her to take her personal belongings from the family home. On 27 August 2009, she submitted a request for information about her daughter to the Sofia Regional Prosecutor's Office and to the State Agency for Child Protection. The former never replied to her request and the latter forwarded her complaint to the local Child Protection Department, which informed her only that her daughter was well under her father's care. For several months, these institutions neither took action nor informed the author about the conditions in which her daughter lived.[9]

2.10 On 7 September 2009, the judge adjourned the initial hearing owing to an irregular notification and the absence of an interpreter. On 16 and 18 September and 15 October 2009, hearings took place in the presence of the author, her counsel, a representative of the social services and an interpreter. At the first hearing, the author requested the lifting of the emergency protection order that had separated her from her daughter. She denied the allegations against her, claiming that the order lacked evidence and did not meet the requirements laid down in the Protection against Domestic Violence Act. She claimed that, in her vulnerable condition, she and her daughter had been victims of psychological and physical violence by her husband. She had not previously lodged a complaint against him because she did not know the law. The author also submits that the social report prepared by the Child Protection Department on the parental capacity of the father, which had been provided to the Court, made no mention of the incidents of domestic violence and the husband's pornographic material. Furthermore, it failed to analyse the author's

[7] According to section 13 (3) of the Protection against Domestic Violence Act, where no other evidence exists, the court shall issue a protection order solely based on the statement by virtue of section 9 (3), which provides that a statement by the applicant concerning the violence applied shall also be enclosed to the application under section 8, point 1, which notes that the proceedings for issuing an order may be instituted on the application of the victim.

[8] According to section 19 of the Protection against Domestic Violence Act, an emergency protection order shall have effect until a protection order is issued or until the court refuses the application or request.

[9] From the information available in the case file provided by the author, it appears that, according to a report by the State Agency for Child Protection, the author's lawyer was informed on 10 September 2009 that the State Agency had requested the police to answer and investigate the author's request for information about her child's whereabouts and condition. In addition, on 1 September 2009, the husband informed the Sofia Regional Court that he had decided to move his daughter for her safety to the home of a close friend, who lived in the municipality of Kostenets, where he would spend the weekends. He further noted that neither the municipality nor non governmental organizations could offer quick access to a kindergarten for the child.

parental capacity as mother of the child and the effect that her absence might have on her daughter's life.

2.11 On 23 December 2009, the Sofia Regional Court dismissed the husband's application and his request for a permanent protection order for lack of evidence. The medical certificate dated 24 November 2008 offered by the husband was rejected pursuant to section 10 of the Protection against Domestic Violence Act, which states that a request should be filed within one month of the date on which the act of domestic violence occurred. Since the husband appealed against the Court's decision, however, the emergency protection order against the author continued to apply.[10] When the author continued her efforts to see and take care of her daughter, she was informed by the State Agency for Child Protection that the father was taking sufficient care of their daughter.[11]

2.12 In the third quarter of 2009, the husband initiated divorce proceedings before the Sofia Regional Court, seeking custody of their daughter.

2.13 On 25 January 2010, the author filed a request for interim measures regarding the custody of her daughter within the divorce proceedings. She informed the Court that, while she agreed to divorce, she disagreed with the grounds adduced by her husband. On 14 February 2010, her husband and daughter visited her. Her husband behaved aggressively and was under the influence of alcohol. He made a scene, shouting at her and beating her several times in front of their daughter, who was crying. No one was around to help her. The author consulted a doctor, but could not pay the cost of a medical certificate attesting to the physical violence.

2.14 On 15 March 2010, the Sofia Regional Court held a divorce hearing. The Court received a new social report from the Child Protection Department that included broader information about the child and the parental capacity of the two parents. The child's interests were considered with utmost attention and a social worker from the Department was present. After listening to the parties and the social worker, the judge strongly advised the parties and their counsel to endeavour to reach an agreement. Two hours after the completion of the hearing, the author was visited by immigration officials to verify her address and employment.

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[10] According to section 17 (2) of the Protection against Domestic Violence Act, the appeal should not stay the execution of the judgement.

[11] On 20 January 2010, the author submitted a new request for information to the Agency. On 1 February 2010, the Agency informed the author that social workers periodically checked the child's condition and had assisted the father to enrol the child in a kindergarten. The child had a family doctor and no sickness had been recorded. The apartment where the child lived appeared clean, with a correct atmosphere. She had begun speaking some words, in Bulgarian. The father had his mother's help to take care of the child, who showed no sign of being subjected to violence. In addition, the author was informed that she could request more information from the district office of the Child Protection Department, but should be accompanied by an interpreter. The Agency also wrote to the Department, requesting it to follow up on the case and to assist the author with information. On 15 February 2010, the district office of the Child Protection Department wrote to the author, noting that it had been unable to transmit to her any information previously because it had not had her address. The letter confirmed the information provided by the Agency. The child had spent a period outside Sofia at the home of her husband's friends. Her husband had stayed with them during weekends and decided to move the child back to Sofia before the winter. On 7 December 2009, he had sought help to enrol the child in a kindergarten. She was also informed that the husband was not against her visiting the child, if such visits were regulated. Lastly, she was invited to visit the district office of the Child Protection Department, accompanied by an interpreter.

2.15 The authorities' failure to provide her and her daughter with effective protection and the harassment and violence that she underwent notwithstanding, the author felt compelled to agree to a divorce (by mutual agreement) because she thought that it was the only way to regain custody of her daughter. She accepted almost all the unfavourable conditions that her husband imposed on her.[12] On 22 March 2010, the Court approved the divorce and custody agreement, with custody awarded to the mother.[13]

2.16 The author states that she has exhausted all available domestic remedies.

Complaint

3.1 The author claims that articles 1, 2, 3, 5 and 16, paragraphs 1 (c), (d), (f) and (g), of the Convention were violated by the State party as a result of the discriminatory treatment that she and her daughter, as women, received from its authorities, and its failure to protect them from domestic gender-based violence and to sanction the perpetrator.

3.2 The author argues that the State party's failure to prevent domestic violence affects women more than men, in violation of article 1 of the Convention. She claims that the State party does not consider domestic violence to be a real and serious threat. Its legislation and the practice of its public institutions, including the judicial system, do not recognize gender-based violence. For example, the Protection against Domestic Violence Act contains no special protective measure for women or mothers, even though the prevailing majority of applicants are women and their children and the perpetrators men.

3.3 As to the alleged violations of article 2, it is argued that the State party has taken no measures to introduce legal provisions governing violence against women, in particular psychological violence. In addition, judicial practice and procedural rules do not clearly recognize this form of violence. The Protection against Domestic Violence Act and the Child Protection Act are gender neutral, although the most affected are women and girls abused by men. Within domestic violence proceedings, the legal requirement to show a direct and immediate danger to the applicant's life is arbitrarily considered by judges, given that they base their decision on the applicant's statement. Judges are not authorized to revise an emergency protection order when new evidence is collected and/or the respondent is heard in court.[14] The courts are obliged to complete the case in one hearing and to announce the final decision to the parties immediately. The State party has thus failed to implement its obligations pursuant to paragraphs (f) and (g) of article 2.

3.4 The author argues that the exercise and enjoyment of her and her daughter's rights were affected by the State party's failure to take appropriate measures, in violation of article 3 of the Convention. She had no or limited access to the

[12] The case file contains no further details or documentation on the alleged unfavourable conditions that her husband imposed in order to obtain a divorce.

[13] According to the Court decision, the father had the right to contact the child each first and third weekend, from 10 a.m. on the Saturday to 6 p.m. on the Sunday. During the summer, he had the right to spend one month with the child. He should also pay 50 euros as a monthly allowance for the child.

[14] According to section 17 (2) of the Protection against Domestic Violence Act, the appeal should not stay the execution of the judgement. While the Act contains no provision with regard to this affirmation, the author maintains that, in practice, the courts handle cases in this manner.

institutions dealing with issues relating to gender-based violence (the police, the courts, the health-care system and the State Agency for Child Protection) because her lack of knowledge of Bulgarian prevented her from addressing those institutions directly unless she secured an interpreter at her own expense. She could not have access to the forensic medical services because victims of domestic violence are not entitled to free medical care and forensic medical certificates, nor to legal aid. All this disproportionately affects women, in particular those with low social status and income, who are dependent on their partners even though those partners are often the offenders. The State party also failed to take appropriate measures to protect women, especially mothers, from domestic violence. The law and the practice of the authorities do not recognize many forms of violence against women, resulting in inequality with men and lack of protection of motherhood. There is no effective support for victims. The author's requests notwithstanding, the State Agency for Child Protection never questioned the forced separation of mother and daughter. It is further argued that women victims often do not seek protection from public institutions, in part because of the stigma that may mark them and the general negative reaction of society, and, when they do do so, often the authorities offer no adequate protection. When the victim requests a criminal investigation, the general response by the prosecutors is that the victim should address a civil court and seek protection under the Protection against Domestic Violence Act. The State party has also failed to provide training to law enforcement and judicial staff about domestic violence against women, in particular mothers.

3.5 Regarding the alleged violation of article 5, it is submitted that the authorities are firmly convinced that equality between women and men has been already achieved. In public discussions, some concerns have been expressed about the possible misuse of the Protection against Domestic Violence Act by women against men, but never the reverse. Judicial proceedings regarding child custody usually take more than one year. There is no effective mechanism to monitor the child's condition and the care given by the parent or parents. A formalistic reading of the regulations on the equality of parents' rights prevails over other notions, such as the best interests of the child. In this framework, maternity as a social function is neglected.

3.6 It is also claimed that the State party contravened its obligations enshrined in article 16, paragraphs 1 (c), (d), (f) and (g), of the Convention. While married, the author was separated from her daughter and deprived of any information about her. Her requests notwithstanding, various public institutions did not consider her extreme vulnerability and the real risk of losing her connection with her daughter. Similarly, these institutions refused to protect her and to assist her to contact her daughter, even when she warned that her daughter might be subjected to sexual abuse by her father. Furthermore, the authorities' social reports submitted as part of the judicial proceedings under the Protection against Domestic Violence Act contained only the information provided by the father and did not consider those elements and the fact that the author was kept under her husband's full control. Her rights as a wife and mother therefore went unrecognized and unprotected, putting the author in a situation in which she had to accept all the conditions imposed by her husband in order to obtain a divorce and to regain custody of her daughter.

3.7 With regard to the remedy, the author requests fair compensation, appropriate child support and legal assistance, in addition to reparation proportionate to the physical and mental harm caused to her and her daughter and to the gravity of the

violation of their rights. Furthermore, the author requests effective measures to guarantee their security.

3.8 The author also requests that the State party take specific measures to change the law and practice in the State party in order for there to be effective protection for women victims of gender-based violence. These measures include training of judges and authorities in general and free legal aid and translation services for victims.

State party's submissions on admissibility and the merits

4.1 On 11 July 2011, the State party challenged the admissibility of the communication. It stated that the author's allegations were ill founded and that the application before a court pursuant to the Protection against Domestic Violence Act was a special procedure that did not exclude other civil, administrative and criminal proceedings that might determine the responsibility of the alleged perpetrator.

4.2 The State party contends that it has taken adequate measures to implement its obligations under the Convention and other fundamental legal instruments on discrimination, notably the European Union rules and standards. Equality between men and women is a constitutional principle and forms the basis of the functioning of social and political life. This includes equal rights during marriage and with regard to the custody of children. Institutional mechanisms, such as the Commission for Protection against Discrimination and the State Agency for Child Protection, were established as part of the implementation of these international obligations.

4.3 The authorities of the Ministry of the Interior that dealt with the author's case acted within their respective competences and without any discriminatory attitude. The author received all the necessary assistance from the police pursuant to the Protection against Domestic Violence Act.

4.4 On 7 November 2011, the State party submitted its observations on the admissibility and the merits of the communication. As to the exhaustion of domestic remedies, it reiterates that different means for protection against domestic violence and discrimination are available and regulated by the Penal Code, the Protection against Domestic Violence Act and the Protection against Discrimination Act, among other legislation. The author, as a victim of discrimination on the grounds of gender, could also have submitted a complaint to the Commission for Protection against Discrimination pursuant to the Protection against Discrimination Act. Victims are also entitled to seek special anti-discrimination court action to ensure that discriminatory practices against them are discontinued and to receive compensation for such violations.

4.5 The State party states that it has continuous and targeted policies against domestic violence. In this framework, on 29 March 2005, it enacted the Protection against Domestic Violence Act, which defines domestic violence.[15] Its protection is extended to a wide range of persons in various situations, including in terms of marriage, guardianship and child custody.

[15] According to section 2 of the Protection against Domestic Violence Act, domestic violence is any act of physical, mental or sexual violence, and any attempted such violence, as well as the forcible restriction of individual freedom and of privacy, carried out against individuals who have or have had family or kinship ties or cohabit or dwell in the same home.

4.6 Victims of domestic violence may seek protection under the Protection against Domestic Violence Act. The procedure is judicial-administrative in nature. It contains elements of criminal proceedings but remains under civil law, which makes it possible to shift the burden of proof in favour of the victims. A court can impose on the perpetrator measures for a period of one month to one year. Judgements should be rendered within one month. If the victim's life or health is at serious risk, an emergency protection order can be issued immediately (within 24 hours as part of ex parte court proceedings). Documents issued by organizations working to support victims of domestic violence are admissible.

4.7 In addition to the special protection under the Protection against Domestic Violence Act, the Penal Code also provides protection to victims of domestic violence if that violence may constitute a criminal offence or offences. Specific provision is made in many cases for circumstances in which the victim is the spouse of the perpetrator, and the close relationship between the victim and the perpetrator can be considered an aggravating circumstance. Pursuant to article 152, paragraph 1, of the Penal Code, sexual intercourse against the will of the woman remains an offence even if the perpetrator and the victim are married or in a de facto conjugal cohabitation.

4.8 The State party, together with relevant non-governmental organizations and the media, carries out public campaigns and initiatives to raise awareness of domestic violence. Such activities are part of a national programme to prevent and protect against domestic violence, which is adopted annually. In addition, on the basis of agreements between the Ministry of the Interior and non-governmental organizations, many joint initiatives have been implemented to strengthen efforts to prevent gender-based violence and human trafficking.

Author's comments on the State party's observations on admissibility and the merits

5.1 The author submitted her comments on the State party's observations on admissibility and the merits on 24 November 2011. She points out that the State party's observations do not refer to the facts of the case and therefore neither challenge her allegations nor provide evidence against them. She also submits the final judgement by the Sofia City Court of 14 March 2011, in which the Court dismissed her husband's appeal and declared the judgement from the Sofia Regional Court of 23 December 2009 effective and final.

5.2 The author states that the State party failed to identify the legal guarantees of special protection for mothers and children in the event of domestic violence and how they would protect motherhood. She reiterates her previous allegations as to the gender-neutral feature of the Protection against Domestic Violence Act and points out that, since she did not speak Bulgarian, in practice she had no access to a court.

5.3 Judges and law enforcement personnel are not trained to identify and respond urgently to the gender-based nature of domestic violence. In the present case, the judge of the Sofia Regional Court was incapable of assessing adequately her husband's application for a protection order and the consequence of that order on her daughter. During the period in which the author and her daughter were separated, she sought help from many authorities, but received the stereotypical answer that the father enjoyed equal rights as a parent. Moreover, the judge never considered the allegations of violence submitted by the author, even after receiving written evidence of the husband's criminal record.

5.4 The author challenges the State party's allegation that she did not exhaust domestic remedies. The court proceedings and the emergency protection order were of a longer duration than established by law. The court of first instance should have heard the matter within one month, yet the proceedings actually lasted five months. The court of second instance was supposed to hold hearings within 14 days. By the time of the author's submission to the Committee (after 14 months), the case remained pending, meaning that the remedy has been unreasonably prolonged. As other proceedings do not protect the victim against domestic violence and, within them, the author could not request protection for her daughter, they do not provide an effective remedy.

5.5 On 5 January 2012, the author transmitted additional comments to the Committee. She submits that no legislation mentioned by the State party, including the Protection against Domestic Violence Act, contains provisions on the effective protection of victims of domestic violence who are dependent on the perpetrator.

5.6 She claims that the authorities failed to protect her under the Child Protection Act. On several occasions, the author sought help from the State Agency for Child Protection to find out where the father had hidden the daughter. Given that the authorities were aware that the author and her daughter were subject to domestic violence, in a vulnerable position and depended on the aggressor, they failed to act with due diligence in providing the maximum effective protection of the law. The Director of the Social Assistance Directorate was entitled to initiate proceedings to issue a protection order pursuant to the Protection against Domestic Violence Act, but did not do so.[16] Consequently, the father's parental rights were accorded highest priority by the State party's authorities, regardless of the harmful effect on the author and her daughter.

5.7 The author notes that, while the State party's observations stress that the husband had also made complaints against the author, they do not consider the outcome of these complaints and their main and final purpose. This illustrates that the authorities are much more inclined to trust a husband or father than a wife or mother. In the present case, the Sofia Regional Court was not in a position to assess who needed to be protected from domestic violence and therefore to issue the emergency protection order requested by her husband.

5.8 The State party shows its strong stereotypes in relation to domestic violence as a gender-neutral issue, and ignores the fact that it disproportionately affects women, in most cases mothers. Consequently, the law is applied in a way that purports to be equal for men and women, regardless of its obvious inadequate effects.[17]

State party's further submission on admissibility

6.1 By further submission of 27 January 2012, the State party reiterates that the communication is inadmissible on the ground of non-exhaustion of domestic remedies pursuant to article 4, paragraph 1, of the Optional Protocol, stating that there is no record of any request to review any circumstances alleging domestic

[16] According to section 8 (2) of the Protection against Domestic Violence Act, the proceeding for issuing an order may be instituted at the request of the Director of the Social Assistance Directorate.

[17] The author refers to the Committee's general recommendations No. 19, para. 11, and No. 28, para. 37.

violence or gender discrimination submitted by the author. It points out the Bulgarian judicial system can offer clear and effective protection in cases of domestic violence.

6.2 It reiterates that various initiatives have been launched to raise awareness of domestic violence and protection procedures. The social services offer support, including crisis centres and mother and baby units, to women and their children who are victims of violence. They provide various kinds of support, including social, psychological and legal counselling, to victims of violence for six months and temporary accommodation for up to six months to pregnant women and mothers at risk of abandoning their children.

6.3 The Constitution and legislation protect the rights of foreign residents. In April 2010, the Penal Procedure Code was amended to guarantee that any accused person without a command of Bulgarian would have access to the necessary assistance. The State party has launched various initiatives to provide information about the right to legal aid in foreign languages. It is further asserted that the author did not contact the State Agency for Refugees and the Migration Directorate of the Ministry of the Interior, which deal with migration issues.

Issues and proceedings before the Committee concerning admissibility

7.1 Pursuant to rule 72, paragraph 4, of its rules of procedure, the Committee shall consider the applicability of the admissibility grounds referred to in articles 2, 3 and 4 of the Optional Protocol before considering the merits of the communication.

7.2 In accordance with article 4, paragraph 2, of the Optional Protocol, the Committee is satisfied that the same matter has not been nor is being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's argument that the author has failed to exhaust domestic remedies since the proceedings to seek protection from domestic violence pursuant to the Protection against Domestic Violence Act do not prevent the author from lodging a civil, criminal or administrative application or complaint within the framework of other proceedings regulated by the Penal Code and the Protection against Discrimination Act. The Committee also notes the author's claims that the court proceedings under the Protection against Domestic Violence Act were unreasonably prolonged and that other proceedings mentioned by the State party are not aimed at protecting victims against domestic violence. The Committee further notes the author's argument that she had no other effective remedy available as other proceedings do not protect victims against domestic violence and that she could not request specific protection for her daughter.

7.4 The Committee notes that, on at least one occasion, on the advice of the police, the author stayed at a shelter for victims of domestic violence. It further notes that, on several occasions, the author contacted the police, the Child Protection Department and the Sofia Regional Prosecutor's Office to obtain information on her daughter's whereabouts and well-being and to protect her daughter's interests. The Committee observes that the authorities took no measures to address her concerns and that, on the contrary, on 30 March 2009, the Sofia Regional Prosecutor's Office discontinued the preliminary investigation into her husband's alleged offence, without hearing the author.

7.5 The Committee observes that the Sofia Regional Court granted the husband's application for an emergency protection order on 29 July 2009 and that this included a separation of the author from her daughter without the possibility of appeal. The Committee further notes that, while the husband's application for a permanent protection order under the Protection against Domestic Violence Act was rejected on 23 December 2009, the emergency protection order that imposed a separation of the author from her daughter remained valid during the appeal proceedings initiated by the husband under the Act. The final decision remained pending at the time of submission of the author's communication, almost 14 months after the proceedings had begun, and was only finally decided on 14 March 2011, when the Sofia City Court dismissed her husband's appeal and declared the judgement of the Sofia Regional Court of 23 December 2009 effective and final. The Committee observes that, in the absence of any explanation by the State party as to the length of these appeal proceedings, the delay cannot be attributed to the author.

7.6 In the absence of any details of the remedies that the State party claimed would be available to the author in the circumstances of her case or of any sufficient explanation as to how these remedies would be effective in protecting the rights of the author and her daughter, and considering the authorities' failure to take measures to address the author's concerns with regard to reported domestic violence and concerns of child protection, the Committee finds that it would be unlikely that the remedies referred to by the State party would bring effective relief for the author and her daughter, and therefore concludes that article 4, paragraph 1, of the Optional Protocol does not preclude it from considering the communication.

7.7 The Committee notes that the State party maintains that the communication should be considered inadmissible because the author's claims are manifestly ill founded and not sufficiently substantiated. The Committee considers, however, that the author's allegations have been sufficiently substantiated for the purposes of admissibility in accordance with the requirements of article 4, paragraph 2 (c), of the Optional Protocol, and proceeds with their consideration on the merits.

Consideration on the merits

8.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

8.2 The Committee takes note of the author's allegations that the State party did not provide her and her husband with the same protection from domestic violence. In contrast with her husband's application under the Protection against Domestic Violence Act that was duly heard, the State party's authorities failed to act with due diligence, to provide her with effective protection and to take into account her vulnerable position, as an illiterate migrant woman with a small daughter without a command of Bulgarian or relatives in the State party. It further notes that no translation of the emergency protection order was provided to the author. The Committee also takes note of the author's allegation that the unnecessary prolonged proceedings under the Protection against Domestic Violence Act, in particular the delays and the issuance of the permanent protection order, after the issuance of an emergency order without hearing both parties or the possibility of appealing against it, were discriminatory. It further notes the author's argument that judicial proceedings regarding child custody usually take more than one year and that there

is no effective mechanism to monitor a child's condition in the care of the other parent. The Committee also notes that the author's averment that, because of the lack of effective protection, she felt obliged to agree to a divorce by mutual consent on disadvantageous terms in order to regain custody of her daughter.

8.3 The Committee takes note of the State party's observations that the authorities that dealt with the author's case acted within their competence and without any discriminatory attitude towards the author, providing her with the necessary assistance. It also takes note of the State party's assertion that its judicial system can offer clear and effective protection in cases of domestic violence and that various initiatives have been launched to raise awareness of domestic violence and protection procedures.

8.4 The Committee also observes that, in November 2008, when social workers from the Child Protection Department were called by her husband to convince the author to stop breastfeeding their daughter, the author informed them that she and her daughter had been subjected to psychological and physical violence by her husband. It notes that the police, having been called by the social workers, recommended that the author and her daughter should seek shelter protection, which they did from 7 to 15 November 2008. Although the police and the Prosecutor's Office had been informed by the social workers about the author's claims of domestic violence, they limited their investigation to the husband's pornographic pictures and failed to hear the author in the pre-investigation procedure. Moreover, the State party's authorities neither investigated nor instituted proceedings regarding the alleged domestic violence against the author and her daughter, notwithstanding the power of the Director of the Social Assistance Directorate to institute proceedings pursuant to section 8 of the Protection against Domestic Violence Act.[18] The Committee recalls that its general recommendation No. 19 (1992) states that the definition of discrimination enshrined in article 1 of the Convention includes gender-based violence; that it is not restricted to action by or on behalf of Governments; and that States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.[19] Furthermore, as established in general recommendation No. 28 (2010), States parties are obliged to react actively against discrimination against women. In the present case, the Committee considers that the author's allegations of domestic violence gathered by the social workers and transmitted to the police in November 2008 were not followed by a suitable and timely investigation, either at that moment or within the context of the domestic violence proceedings instituted by her husband. The Committee therefore concludes that the facts before it reveal a violation of the State party's obligations under article 2, paragraphs (d) and (e), read in conjunction with articles 1 and 3, of the Convention.

8.5 The Committee observes that the husband's applications submitted to the Sofia Regional Court on 27 and 29 July 2009 led to the issuance of an emergency protection order on 29 July 2009 that forcibly separated the author and her daughter

[18] Section 8 (2) of the Protection against Domestic Violence Act states that the proceeding for issuing an order may be instituted at the request of the Director of the Social Assistance Directorate.

[19] See communication No. 5/2005, *Sahide Goekce (deceased) v. Austria*, views adopted on 6 August 2007; communication No. 6/2005, *Fatma Yildirim (deceased) v. Austria*, views adopted on 6 August 2007.

until the Regional Court, in separate proceedings, approved the divorce agreement on 22 March 2010, which gave her custody of her daughter. The Committee notes that, in issuing the emergency protection order that included a temporary determination of the custody of the author's daughter, the Court relied on the husband's statement and did not consider or was not alerted by the competent authorities to the incidents of domestic violence reported by the author during the visit by social workers and her several requests for help from the police in order to protect herself and her daughter. The Committee also notes that the first-instance proceedings lasted almost five months and that, regardless of the author's request, the emergency protection order was not removed, even after the first-instance court had dismissed the husband's application for a permanent protection order. During this considerable period, the information provided to the author on the whereabouts and condition of her daughter was limited and she was unable to gather more information since interpreting services were unavailable to her. The Committee considers that the State party failed to provide a reasonable explanation as to why the emergency protection order was not removed after the Sofia Regional Court dismissed the husband's application for a permanent protection order on 23 December 2009 and as to why the appeal proceedings in the circumstances of the present case were prolonged. Considering that the author and her daughter were in a vulnerable position, in particular because the author is an illiterate migrant woman without a command of Bulgarian or relatives in the State party, and dependent on her husband, the Committee concludes that the State party failed to comply with its obligations established in article 2, paragraphs (b) and (c), read in conjunction with articles 1 and 3, of the Convention.

8.6 With regard to the author's allegation of a violation of article 5, paragraph (a), and article 16, paragraphs 1 (c), (d), (f) and (g), of the Convention, the Committee observes that it addressed those articles in its general recommendation No. 19 (1992) on violence against women. In its general recommendation No. 21, the Committee stressed that the provisions of general recommendation No. 19 had great significance for women's abilities to enjoy rights and freedoms on an equal basis with men. It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. In respect of the case before the Committee, it notes that, in issuing the emergency protection order and taking other decisions, the State party's authorities relied on the husband's statement and actions, despite being aware of the author's vulnerable position and dependency on him. The Committee also observes that the authorities based their activities on a stereotyped notion that the husband was superior and that his opinions should be taken seriously, disregarding the fact that domestic violence proportionally affects women considerably more than men. The Committee also notes that the author was separated from her daughter for almost eight months, during which time she received no information on the care that her daughter was receiving and was granted no visitation rights. Under such circumstances, the Committee considers that both the author and her daughter are victims of gender-based discrimination because the State party failed to protect the author's equal rights in marriage and as a parent and to regard her daughter's interests as paramount. That the emergency protection order that separated the author from her daughter was issued without due consideration of earlier incidents of domestic violence and of the author's claim that she and her daughter were in fact the ones in need of protection against domestic violence, and that the emergency protection order was not removed by the Sofia Regional Court when a permanent protection

order was rejected, lead the Committee to conclude that the State party failed to take all appropriate measures under article 5, paragraph (a), and article 16, paragraphs 1 (c), (d), and (f), of the Convention.

8.7 The Committee would like to recognize that the author and her daughter have suffered serious moral and pecuniary damage and prejudice. The author had to continue a relationship with a violent husband since she was in a vulnerable position and did not receive adequate protection. For a considerable period, the author and her daughter were forcibly separated. Furthermore, the Committee has taken note of the author's statement that she had to accept disadvantageous terms for a divorce by mutual consent in order to obtain custody of her daughter.

8.8 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention, and in the light of the above considerations, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author and her daughter under article 2, paragraphs (b), (c), (d), (e) and (f), article 5, paragraph (a), and article 16, paragraphs (c), (d) and (f), read in conjunction with articles 1 and 3, of the Convention, and makes the following recommendations to the State party:

1. Concerning the author of the communication and her daughter:

To provide them with appropriate compensation commensurate with the gravity of the violations of their rights;

2. General:

(a) To take measures to ensure that women victims of domestic violence, in particular migrant women, have effective access to services related to protection against domestic violence and to justice, including interpretation or translation of documents, and that the manner in which domestic courts apply the law is consistent with the State party's obligations under the Convention;

(b) To take the legislative or other measures necessary to ensure that, in the determination of custody and visitation rights of children, incidents of violence are taken into account and that the rights and safety of the victim or children are not jeopardized;

(c) To provide for appropriate and regular training on the Convention, its Optional Protocol and its general recommendations for judges, prosecutors, the staff of the State Agency for Child Protection and law enforcement personnel in a gender-sensitive manner, having particular regard to multiple discrimination, so as to ensure that complaints regarding gender-based violence are received and considered adequately.

8.9 In accordance with article 7, paragraph 4, of the Optional Protocol, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them widely distributed in order to reach all relevant sectors of society.

iii. M.W. v. Denmark (Communication No. 46/2012)

United Nations

CEDAW/C/63/D/46/2012

Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women

Communication No. 46/2012

Views adopted by the Committee at its sixty-third session (15 February-4 March 2016)

Submitted by:	M.W. (not represented by counsel)
Alleged victims:	The author and her child
State party:	Denmark
Date of the communication:	21 August 2012
References:	Decision of admissibility of 3 November 2014 (CEDAW/C/59/D/46/2012)
Date of adoption of views:	22 February 2016

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Annex

Views of the Committee on the Elimination of Discrimination against Women under article 7 (3) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (sixty-third session)

concerning

Communication No. 46/2012*

Submitted by:	M.W.
Alleged victims:	The author and her child
State party:	Denmark
Date of the communication:	21 August 2012

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 22 February 2016,

Adopts the following:

Views under article 7 (3) of the Optional Protocol

1. During its fifty-ninth session, on 3 November 2014, the Committee declared the communication admissible. The decision of admissibility, contained in document CEDAW/C/59/D/46/2012, is being made public, together with the present views.

Additional information from the author

2. On 21 October 2014, the author asserted that the Danish authorities continued to ignore her queries concerning her son O.W. and her pending appeal. Her lawyer's requests for oral hearings in the pending appeal regarding the enforcement of the Austrian Supreme Court's decision had been denied. As the courts did not reply, she had filed a new application for leave to appeal to the Supreme Court in October 2014. She noted that her application for leave to appeal to the Supreme Court had

* The following members of the Committee participated in the examination of the present communication: Ayse Feride Acar, Gladys Acosta Vargas, Bakhita al-Dosari, Magalys Arocha Dominguez, Barbara Bailey, Niklas Bruun, Louiza Chalal, Naéla Gabr, Hilary Gbedemah, Nahla Haidar, Yoko Hayashi, Ismat Jahan, Dalia Leinarte, Lia Nadaraia, Pramila Patten, Silvia Pimentel, Biancamaria Pomeranzi, Patricia Schulz and Xiaoqiao Zou.
An individual opinion by Committee member Patricia Schulz (dissenting) is attached to the present views.
In line with rule 61 of the Committees rules of procedure, Committee member Lilian Hofmeister did not take part in the examination of the communication.

already been rejected six times. Her repeated requests for a copy of the records on her custody case from the Ministry of Foreign Affairs had met with no success. In October 2014, she had no other choice than to report several officials for abuse of office, defamation and discrimination to the Danish police. She added that she had recently discovered that her son had received no medical treatment for more than 860 days, but that she had received no response to her enquiry to the authorities of Fredensborg for information. On 1 October 2014, she was informed that she could obtain no further information about O.W. Lastly, she reiterated that O.W. had been severely traumatized by his kidnapping, but had received no assistance. She asserted that he had only recently, at 8 years of age, begun first grade at school, whereas children in Denmark normally began first grade at the age of 6.

State party's observations on the merits

3.1 On 8 June 2015, the State party explained that the Danish authorities had not violated the author's rights under the Convention. The matter did not, as claimed by the author, relate to the issue of whether the Danish authorities had discriminated against the author because she was a woman, but concerned a very unfortunate and complex case, where two legal systems had made contradictory custody decisions. The author was trying to obtain another review of issues, such as custody, already thoroughly evaluated by the national authorities. The State party also indicated that the Committee was not a supranational body with the task of ruling on disagreements between such recognized and equal legal systems.

3.2 The State party rejects a number of facts set out in paragraphs 2.1 to 2.3 of the Committee's decision of admissibility and observes that the Appeals Permission Board rejected the author's application for leave to appeal against the order of the High Court to the Supreme Court, on the ground that the condition that the case must concern a matter of general public importance had not been met.

3.3 The State party notes that, in March 2014, the author sought the enforcement of the custody order of the Austrian Supreme Court. On 10 July 2014, her request was denied by the Bailiff's Court of Helsingør, which noted that S. had been awarded custody by court order and that the circumstances had not changed since the Eastern High Court determined, on 21 December 2012, that, until 3 April 2012, when O.W. was brought back to Denmark, he had been domiciled and had his habitual residence in Denmark, and that his residence with S. could therefore not be considered unlawful retention under section 10 of the Danish Act on International Child Abduction. On 2 September 2014, the High Court upheld the order of the Bailiff's Court, agreeing with its reasoning.

3.4 The author subsequently applied for leave to appeal to the Supreme Court against the order delivered by the Eastern High Court. Her application was rejected on 13 November 2014, as the condition that the case must concern a matter of general public importance had not been met. On 6 April 2015, the author filed a request for reconsideration by the Board, which was denied on 21 April 2015, given that no essential new information had been provided.

3.5 On 1 October 2014, the Regional State Administration decided, upon an application filed by S., that the author would no longer be entitled to be kept informed about her son under section 23 of the Danish Act on Parental Responsibility. Under this provision, a parent who is not a joint custodial parent is entitled to request and receive information on circumstances relating to the child

from schools, child-care institutions, the social and health sectors, private hospitals, general practitioners and dentists. He or she is also entitled to receive a copy of any documents on the circumstances of the child that schools and child-care institutions may have. Under the same provision, the State may decide, in special situations, at the request of the custodial parent or any of the aforementioned institutions, to deprive the non-custodial parent of the entitlement to be kept informed and to request copies of documents. According to the State Administration's decision, S. had maintained in his request that it might be particularly harmful to the son's well-being if any kind of information on the son were disclosed to the author. S. further stated that the author published any and all information on the son on various Internet pages, campaign sites and Facebook, which he believed was not in their son's best interests.

3.6 The State party considers that the author's claims under articles 1, 2 (d), 5 and 16 (d) of the Convention are unsubstantiated. Concerning her claims under articles 1 and 2 (d), the author has provided no evidence or documents (such as copies of police reports) to support her assertions that S. abused, threatened, stalked and harassed her and that he has been violent towards her and O.W. Moreover, although the author asserts that O.W. was violently kidnapped on 3 April 2012, the Eastern High Court established on 21 December 2012 that O.W.'s habitual residence was in Denmark at the time of the kidnapping and continued to be in Denmark. O.W. was thus not unlawfully retained by S. Furthermore, in its decision dated 11 June 2012, the Ministry of Justice refused to surrender S. to Austria because the offence covered by the arrest warrant was regarded as having been partly committed in Denmark and was not regarded as a criminal offence in Denmark.

3.7 Concerning the author's claims under articles 5 and 16 (d), the State party considers that legislation in Denmark is gender-neutral as a principle and applies equally to women and men. Exemptions from this principle are granted in only a few cases, and only in specific circumstances such as where the purpose of the exemption is to meet a particular need of either women or men. Denmark makes about 24,000 decisions in cases on parental responsibility each year, under the Act on Parental Responsibility. Under the Act, in all decisions, the best interests of the child are of paramount importance. Danish legislation is also based on the principle that a child must have contact with both parents, regardless of their countries of habitual residence or nationality. The Act stipulates that the predominant principle is the child's right to access to both parents, not the parents' right to access to the child. Accordingly, the Act is in full compliance with the State party's international obligations, including those set forth in the Convention, the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and the Convention on the Rights of the Child.

3.8 The State party refers to paragraph 8.6 of the Committee's decision on admissibility and contends that the author's assertion that since 7 September 2010 a Danish court had confirmed that her move to Austria was legal and that she had sole custody of O.W, is misleading. Custody had, in fact, been transferred to S. on 22 December 2010. Furthermore, the preliminary statutory hearing on 7 September 2010 concerned only the issue of whether there was any basis for remanding the author in police custody, as the author had been provisionally charged with violating section 215 of the Criminal Code at that time. As mentioned in the State party's observations of 14 January 2013, the author was released.

3.9 Regarding the author's assertion that the Danish police terrorized her by arresting and wrongfully imprisoning her without due process, the State party considers that there is no basis for this claim, given the information presented in its observations of 14 January 2013, as set out in paragraph 4.4 of the Committee's decision of admissibility. The State party emphasizes that the author was represented by assigned defence counsel at the court hearing on 21 December 2011, at which she was not present herself, and that counsel had the opportunity to represent her interests during the proceedings.

3.10 Concerning the Committee's position that the author had no opportunity to attend court hearings in Denmark because she justifiably feared being imprisoned upon her return to the country, the State party comments that the author was arrested by the North Zealand Police on 6 September 2010 and charged with violating section 215 of the Criminal Code. On 7 September 2010, she was arraigned before the District Court of Helsingør for a statutory hearing at which the prosecutor requested that she should be remanded in custody. The District Court found no basis for remanding her in custody, and consequently she was released. The North Zealand Police have subsequently requested on three occasions that the author should be remanded in custody, in absentia, for the purpose of issuing a European arrest warrant. The Eastern High Court found by orders of 24 May, 19 July and 23 December 2011 that the conditions for doing so had not been satisfied. In those circumstances, the author risked being arrested between 7 September 2010 and 23 December 2011 if she returned to Denmark. However, under section 771 (2) of the Danish Administration of Justice Act, a remand prisoner may be granted accompanied leave for a short time (e.g., to attend court proceedings with an escort) if justified by special circumstances and if the police have consented to such leave. The North Zealand Police have stated concerning the matter that they would have transported the author to court for the civil proceedings in accordance with the usual procedures to allow her to defend her interests despite her detention.

3.11 Concerning the period following 23 December 2011, the State party emphasizes that the Public Prosecutor ceased to request the author's detention after the Eastern High Court made its order of 23 December 2011. The author was thus not at risk of imprisonment after 23 December 2011. The Division of Family Affairs of the National Social Appeals Board informed the Austrian Ministry of Justice on 17 July 2012 that the author was not in fact at risk of being arrested in connection with the child abduction case if she travelled to Denmark for two hearings on 4 and 6 September 2012 before the District Court of Helsingør concerning her request for the surrender of her son. Subsequently, on 18 July 2012, the Board resent to the Austrian Ministry of Justice an opinion dated 17 July 2012 from the Prosecutor's Office at the North Zealand Police. In the opinion, the North Zealand Police confirmed that the author was not in fact at risk of arrest or a request that she be remanded in custody on charges of violating section 215 of the Criminal Code (child abduction) should she enter Denmark, including in the period from 31 August to 9 September 2012.

3.12 The State party contends that the author has made numerous unsupported allegations against the Danish authorities and individual officials involved at all levels of the national proceedings. The material that the author submitted concerning the proceedings proves that her claims and submissions have been taken seriously and been the subject of evaluation and review by the relevant national

bodies. The municipal authorities, the Regional State Administration, the police, the Prosecutor and courts have regularly examined, assessed and ruled on the matter.

3.13 Regarding the access to the author's son, the State party refers to its additional observations dated 9 August 2013, adding that, from August 2013 to December 2014, the author made repeated requests to the Ministry of Children, Gender Equality, Integration and Social Affairs for access to her son on specific dates. It appeared from all those requests that the request for access was directed to the State party, and could by no means be seen as an application for visitation to the Regional State Administration. On 2 August 2013, 17 December 2013, 15 April 2014, 7 May 2014 and 5 May 2015, the Ministry informed the author by e-mail that the State Administration was the only authority with the competence to make decisions concerning access. The Ministry has also informed the author that, since she has informed the Ministry that her request cannot be seen as an application for access to the State Administration, no decision on her access to O.W. can be taken and the authorities cannot therefore help her establish personal contact with her son. Because the author does not want the State Administration, which is the only authority with the competence to make decisions concerning access, to process her application for access to O.W., the State party has been unable to provide the author with reasonable access to O.W. in Denmark, as requested by the Committee on 9 July and 4 April 2014.

3.14 Concerning O.W.'s safety, the State party refers to the information presented in paragraph 6.2 of the Committee's decision of admissibility. It adds that, in the second quarter of 2013, the Ministry of Children, Gender Equality, Integration and Social Affairs received another request from the Austrian authorities concerning O.W.'s well-being. As requested by the Austrian authorities, that request was forwarded to the local authorities in Fredensborg. O.W.'s safety is thus adequately ensured by the Danish social authorities. Moreover, under Danish law, all public employees have an enhanced duty to inform the social authorities if they become concerned about the well-being of a child.

Author's comments on the State party's observations on the merits

4.1 On 11 August 2015, the author asserts that the Danish authorities removed her and her son's names from the Danish Civil Registration System on 17 July 2010, and therefore recognized them as Austrian residents. The Regional State Administration could not transfer temporary sole custody of her son from a foreign mother to a Dane. On 13 October 2014, she filed a complaint with the police against officials for giving false allegations concerning the citizenship of her son and for illegally registering him as a Danish resident. Her complaints had been systematically ignored by the Danish authorities. The Austrian Supreme Court held that she has always been the sole custody holder.

4.2 The author reiterates that her rights under articles 1, 2 (a) to (f), 3, 4, 5 (a) and (b), 9, 15 (1) and (4), and 16 (d) to (g) of the Convention have been violated.

4.3 She further asserts that a caseworker from the Danish Central Authority or Family Affairs Department has telephoned the Austrian Family Affairs Department several times and illegally threatened the author that she should withdraw her request for O.W.'s return because she had no chance of ever seeing her own child again.

4.4 S. had no agreement on visitation rights. The author further states that S. did not maintain his custody application dated 2 July 2010, as averred by the State party. Rather, he withdrew his application for joint custody on 19 July 2010 and then filed a new application for sole custody on 22 July 2010. The author informed the Danish authorities and S. in advance that she would be moving to Austria. S. had known about that since 2009, and the Danish National Social Appeals Board, which assisted foreign parents in recovering their children under the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption, confirmed this in a statement of 16 April 2012. S. confirmed that he was aware of the author's relocation to Austria with O.W. in a telephone conversation between him and O.W. on 19 July 2010. He sought advice on 6 May 2010 concerning his custody and visitation rights. He also wrote blog entries on 14 May and 26 May 2010 stating that the author wanted to quit her job, sell the house and return to Austria. On 8 August 2011, on national television, S. again confirmed this.

4.5 Concerning the State party's observation that, on 7 September 2010, she was arraigned for having violated S.'s custody rights, the author reiterates that a judge has closed the case, confirming the legality of her move to Austria. She was registered in Austria and O.W. had been registered there on 19 July 2010, and no Danish court had jurisdiction over her case on 22 July 2010.

4.6 O.W. has not received proper care and S. sends shocking videos to her, showing that O.W. is engaging in regressive behaviour. On 5 September 2012, she saw O. briefly, in the presence of S., and the child behaved as though he was severely traumatized. Concerning telephone contact with O., the author asserts that, while initially she was able to call her son daily, subsequently she was allowed only one telephone call per week, if any. The author also avers that, since 13 February 2013, she has had no contact with O.W.

4.7 Concerning her arrest, the author maintains that, in September 2010, she went to Denmark to meet a real estate broker. On 6 September 2010, S. stormed into her house, asking for his son's return. After she requested him to leave several times, he finally left. Half an hour later, the author was arrested by the police, who searched her house. From around 11 a.m. to 6.30 p.m., she was held at a police station until she was taken to the worst female jail in Copenhagen. According to her, until the next day, after a court hearing, she was treated like the worst criminal. She was offered only some water and a piece of candy by the police officer who questioned her. On her arrival at the jail, a female officer executed a complete body search. The officer left the room and made bad jokes about the author and her belongings with another officer, even after the author made it clear that she could hear. The author asserts that this was an extreme assault. The same day, two of the author's friends visited S. at his home; he acknowledged that he obviously enjoyed that the author had been imprisoned. On 7 September 2010, the police took her to the Helsingør District Court, where the judge confirmed that she had sole custody.

4.8 The author's case before the Helsingør District Court was decided by a *retsassessor*, not a judge. The *retsassessor* never spoke to her, but nevertheless accused her of being solely interested in herself and of having no empathy. According to the author, he never took into account O.W.'s best interests; gave her no visitation rights; and falsely stated that she had received three invitations to appear in court, whereas she received none.

4.9 The author claims that the Regional State Administration disregarded the best interests of her child and based its decision only on S.'s story. Specifically, the State Administration accepted at face value S.'s allegation that he had been O.W.'s primary caregiver, but failed to consider that S. had paid child support for O.W. until July 2010; that O.W. had always resided with the author; that O.W.'s mother tongue was German and not Danish; and that the author had custody of O.W. according to Austrian and Danish law. The author reiterates that the State Administration based its decision on a false statement by O.W.'s kindergarten teacher, who must have a close relationship with S. as S. had stated that she knew exactly what information S. had forwarded to the author. The author also claims that the deciding official of the State Administration committed an abuse of office by determining that the State Administration had the competence to decide on S.'s custody application. She believes that the State Administration applied a discriminatory double standard by denying her the right to have information about O.W. on the ground that she would publish it on the Internet, whereas S. and his helpers have since 2010 used a variety of media to publish defamatory comments about the author. The author states that she will continue to publish everything about the case, as transparency is the only way to ensure that her child will be returned to her. She alleges that the State party supports only its nationals, without protecting children from abusive Danish parents,[1] and that the State Administration has shown a pattern of accusing foreign mothers of fabricating stories. The author claims that the State Administration's decision was full of lies and inaccuracies.

4.10 The author asserts that the State party has demonstrated bad faith by repeatedly requesting extensions from the Committee and providing incorrect and contradictory observations. She maintains that the discrimination that she and O.W. have faced from the State party is evidenced by, among other things, official findings of the European Parliament.[2]

Issues and proceedings before the Committee concerning the merits

Consideration of the merits

5.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided for in article 7 (1) of the Optional Protocol.

5.2 The Committee notes that the author's claims under articles 1 and 2 (d) of the Convention are grounded in the alleged gender-based violence perpetrated by S. towards her and her son, the biased proceedings conducted by the Danish authorities and courts, the discrimination against her on the basis of her sex and her foreign nationality, and the failure of the State party to take appropriate and immediate steps to protect her and her son O.W. and to put an end to the alleged discrimination against them.

[1] The author cites excerpts from Libbie Bouffon, *The Biggest Power Pig Wins — on Custody Law, and How to Protect Yourself from the Game*.

[2] The author cites the European Parliament Committee on Petitions, working document on the fact-finding visit to Denmark 20-21 June 2013 (17 September 2013), available from www.europarl.europa.eu/meetdocs/2009_2014/documents/peti/dt/1003/1003121/1003121en.pdf (in which it is stated, inter alia, "As regards equal treatment of Danish and non-Danish parents it was acknowledged that this was a serious problem. However, the Danish authorities did their utmost to mediate between parents and obtain an agreement in the best interest of the child. If there is no agreement the court decides and there was no reason to assume that Danish courts discriminate against foreign parents.").

5.3 The Committee recalls that it does not replace the national judicial authorities in the assessment of the facts and evidence, unless the assessment was clearly arbitrary or amounted to a denial of justice.[3]

5.4 The Committee recalls that, in accordance with paragraphs 6 and 9 of its general recommendation No. 19 (1992) on violence against women, the definition of discrimination in article 1 of the Convention includes gender-based violence, and, further, that States may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.[4]

5.5 The Committee notes the author's detailed allegations that, during her cohabitation with S., after their separation and even after she moved to Austria, she was subjected to verbal and physical violence, harassment and stalking by S., and that O.W. was violently kidnapped by S. in Austria. The Committee further takes note of the author's contention that the law enforcement authorities not only failed to protect her against the threats, stalking, harassment and mental and physical abuse of S., but also discriminated against her as a foreign woman, as when she reported a break-in at her home by S. on 6 September 2010 to the police, but that they did not take her version of events into account and instead arrested and detained her without due process for allegedly illegally taking O.W. out of the country, even though she was the sole custody holder; and that the police refused to investigate her claim that S. had trespassed on her property and threatened her in her home. The Committee also takes note of the details provided by the author concerning the inhuman and degrading treatment meted out to her during her detention on 6 September 2010, such as the forced stripping and complete body search carried out on her by a female officer, in addition to the denial of access to legal counsel. The Committee has also given due consideration to the actions of the Danish authorities, such as how the North Zealand Police acted solely on the version of S. and charged her under section 215 of the Criminal Code; how, when she was arraigned before the District Court of Helsingør on 7 September 2010 for a statutory hearing, the Prosecutor requested that she should be remanded in custody and that, although the District Court found no basis for remanding her in custody and that she was released, the North Zealand Police have requested on three subsequent occasions that the author be remanded in custody, in absentia, for the purpose of issuing a European arrest warrant.

5.6 With regard to the violent kidnapping of O.W. by S. in Austria, the bias of the Danish authorities, including its judiciary, and the lack of an effective response to the kidnapping of O.W., the Committee takes note of the author's contention that the Danish authorities have completely ignored the international arrest warrant issued by the Austrian authorities against S., under which he is charged with the serious assault and kidnapping of O.W., and all her requests to be provided with access to the child and for O.W.'s safety to be ensured since the kidnapping and that, in the process, they have damaged a previously completely healthy and well-developed child in order to cover up the fact that they violated international and Danish law

[3] See, inter alia, communications No. 37/2012, T.*N. v. Denmark*, decision of inadmissibility adopted on 3 November 2014, para. 12.7; and No. 34/2011, *R.P.B. v. the Philippines*, views adopted on 21 February 2014, para. 7.5.

[4] See also communication No. 6/2005, *The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gülen Khan, and Melissa Özdemir*, views adopted on 6 August 2007, para. 12.1.1.

when removing custody of the child from her and granting it to S. in 2010. The Committee also takes note that, while, on 16 April 2012, the National Social Appeals Board did request the Bailiff's Court of Helsingør to consider handing over O.W. to the author in Austria, on 21 September 2012, the latter issued an order in which it dismissed the author's request to have O.W. handed over; that the said order was upheld on appeal to the High Court of Eastern Denmark; and that the author's subsequent applications to the Appeals Permission Board for leave to appeal against that decision to the Supreme Court were systematically denied.

5.7 The Committee notes that the State party's contention that the author's allegations concerning S.'s violent behaviour towards her are unsubstantiated inasmuch as she has not provided evidence or documents to support her assertions that S. abused, threatened, stalked and harassed her and has been violent towards her and O.W. The Committee notes that it was difficult for the author, from Austria, to submit such documents, especially since all her requests for documents from the Danish authorities have been ignored and/or denied. Besides, the Committee observes that the State Party has itself failed to provide detailed information and documents concerning the acts and omissions of the police, especially the author's arbitrary arrest and detention on 6 and 7 September 2010; and the failure of the law enforcement authorities to take action against S. for trespassing on the author's property and his threatening behaviour. The Committee is of the view that, in the present circumstances, the Danish authorities, more especially the police, the Prosecutor and the courts, have not only completely failed to provide effective protection to the author and O.W., of whom the author had lawful custody, but that they have also engaged in a series of wrongful acts and doings, inter alia the transfer of custody of O.W., albeit temporary, from the author to S. in ex parte proceedings, during the course of which the Regional State Administration relied solely on the version of S; the transfer of O.W.'s custody to S. by the District Court of Helsingør on 22 December 2010, again solely on the basis of a statement of facts by S., which contained erroneous facts such as that S. was the primary caregiver of O.W., and the clear failure on the part of both authorities to take into account the best interests of O.W.; the arbitrary arrest and detention of the author in September 2010 and her arraignment under section 215 (2) of the Danish Criminal Code and the withdrawal of the charge against her over two years later on 20 December 2012, as a result of which she could not attend custody proceedings for fear of being imprisoned and was thereby denied access to justice. With regard to the kidnapping of O.W by S. in Austria, the Committee also takes note of the lack of collaboration on the part of the State Party with the Central Authority in Austria and its refusal to surrender S. to the Austrian authorities pursuant to the international arrest warrant issued on 3 April 2012. The Committee recalls that, under the Hague Convention, central authorities have a duty to cooperate with each other and to secure the prompt return of children wrongfully removed and to ensure that rights of custody and of access under the law of one contracting State are effectively respected in the other contracting State. The Committee also expresses its concern at the poor justification provided by the Ministry of Justice, acting as the Danish Central Authority, for its refusal to surrender S. to Austria further to the issue of an arrest warrant by the Austrian authorities on 3 April 2012 in relation to the abduction of O.W. by S., on the ground that, first, since O.W. had remained in the custody of S. in Denmark, the offence covered by the arrest warrant was regarded as having been partially committed in Denmark, and, second, that the count was not regarded as a criminal offence in Denmark because S. had custody of O.W. under Danish law.

5.8 In those circumstances, the Committee concludes, on the basis of the information before it, that the State party has failed to exercise due diligence in preventing, investigating and punishing the acts of violence and in protecting the author and O.W. before and after the kidnapping. The Committee recalls that States parties have an obligation not to cause discrimination against women through acts or omissions and that they are obliged to react actively to discrimination against women, regardless of whether such acts or omissions are perpetrated by the State or by private actors. Similarly, States parties have an obligation to ensure that women are protected against discrimination committed by the judiciary and by public authorities. With regard to the contention of the author that she suffered discrimination as a foreign mother, the Committee further recalls that discrimination against women on the basis of sex and gender is inextricably linked with other factors that affect women, such as nationality, and that States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned, and prohibit them. Accordingly, the Committee considers that the State party has violated the rights of the author and O.W. under article 2 (d), read in conjunction with article 1, of the Convention.

5.9 The Committee also takes note of the author's claims under articles 5 (a) and (b) and 16 (1) (d) that the State party did not consider O.W.'s best interests when awarding custody to S. and discriminated against her as a foreign mother during proceedings relating to custody and visitation rights. The Committee recalls that, under article 5 (a), States parties have an obligation to modify the social and cultural patterns of conduct of men and women, with a view to achieving, inter alia, the elimination of prejudices and practices that are based on the idea of the inferiority or superiority of either sex or on stereotyped roles for men and women. Under article 16 (1) (d), States parties have an obligation to take all appropriate measures to eliminate discrimination against women in all matters relating to family relations, and to ensure that men and women shall enjoy the same rights and responsibilities as parents in matters relating to their children, taking into account that in all cases the interests of the children shall be paramount.

5.10 The Committee notes the author's assertions that, in removing custody of O.W from her and awarding it to S., the Danish authorities, acting through the Regional State Administration and the District Court of Helsingør, failed to give paramount consideration to the best interests of O.W. as well as to the legal rights of the author as the rightful custody holder, and thereby discriminated against her as a woman and as a foreign mother. Specifically, the Committee notes the author's claims of wrongful acts on the part of the Danish authorities, which failed to give due consideration to the following facts: that O.W. was solely an Austrian national, that S. had not even acknowledged O.W. when he was born; that although S. legally acknowledged the child on 22 May 2007, it resulted in no change to O.W.'s citizenship; that the author, as an unmarried mother, has always been the sole custody holder of O.W. under both Danish and Austrian law; that there has never been any agreement between her and S. concerning visitation rights for S. and that she and O.W. have never applied for Danish citizenship. The Committee also takes note of the author's contention that, while S. withdrew his application for shared custody on 19 July 2010 before the Regional State Administration and filed a new application for sole custody on 22 July 2010, the Danish authorities failed to take into account that it had no jurisdiction over an Austrian child born of an Austrian mother who had sole custody from birth. More importantly, the Committee takes

note of the author's assertion that both the Regional State Administration and the District Court of Helsingør failed to take O.W.'s best interests into account and relied exclusively on the biased version given by S; that the District Court of Helsingør based its decision on the principle that a child must have contact with both parents and was blatantly biased against the author as a foreign woman inasmuch as, while she never met and spoke to the *retsassessor*, who heard the case, the latter accused her of being solely interested in herself and of having no empathy and consequently did not even give her visitation rights to O.W. The Committee also takes note of the author's contention that, since 1 October 2014, the Regional State Administration has further divested her of all her rights as a mother pursuant to an application by S. under section 23 of the Danish Act on Parental Responsibility.

5.11 The Committee takes note of the information provided by the State party concerning the compliance of its Act on Parental Responsibility, with its international obligations, including those under the Convention and the Convention on the Rights of the Child, as well as its contention that, in the present case, the Regional State Administration had found that it would be in O.W.'s best interests to maintain the status quo and for him to remain in his usual environment and school in Denmark during the proceedings.

5.12 The Committee notes from the copy of the decision provided by the State party that the Regional State Administration itself stated that it had made no assessment as to what would be in O.W.'s best interests in the long term. With regard to the Act on Parental Responsibility, the Committee notes that, while in all decisions the best interests of the child are a paramount principle, Danish legislation is also based on the principle that a child must have contact with both parents, a consideration which weighed heavily in the decision given by the District Court of Helsingør, which concluded that, in view of the fact that the author's actions had resulted in O.W.'s being unable to see his father for more than four months, it would be in O.W.'s best interests to have S. retain full custody in order to ensure that O.W. has stable contact with both his parents. The Committee is of the view that, in both decisions, the courts failed to give paramount consideration to the best interests of O.W. and failed to adopt a balanced approach, thereby resulting in discriminatory treatment of the author. The Committee observes that the decision of the District Court of Helsingør refers to the need for stable contact with both parents, when it is fully aware that the author lives in Austria and did not even grant her any visitation rights. The Committee recalls its interim measures dated 9 July 2013 and 4 April 2014, whereby it requested the State Party to provide the author with reasonable access to O.W. in Denmark and to ensure that all appropriate authorities facilitated such access, and notes with concern that the State party has failed to do so, purportedly on the ground that the author ought to have submitted an application for visitation to the Regional State Administration, which, under Danish law, is the only authority with the competence to make decisions concerning access and that, therefore, since 13 February 2013, the author has had no contact with her child. The Committee is further concerned that, since 1 October 2014, the situation of the author has further deteriorated following the decision of the Regional State Administration, acting on another application by S, to the effect that the author would no longer be entitled to be kept informed about her son O.W., although, under section 23 of the Act on Parental Responsibility, a parent who is not a joint custodial parent is entitled to request and receive information on the child from schools,

child-care institutions, social and health sectors, private hospitals, general practitioners and dentists.

5.13 The Committee is of the view that the expression "paramount" in the Convention means that the child's best interests may not be considered on the same level as all other considerations. The Committee is also of the view that, in order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary/paramount consideration, has been respected, any decision concerning a child must be reasoned, justified and explained.

5.14 The Committee takes note of the State party's observations that the author was afforded adequate opportunity during custody proceedings to present her version of the facts but failed to do so; that the author would not have been arrested if she had attended court proceedings in Denmark as the Public Prosecutor ceased to request the author's detention after the Eastern High Court issued its order of 23 December 2011. The Committee also takes note of the circumstances in which the author was arbitrarily arrested and detained in September 2010, with inhuman and degrading treatment allegedly meted out to her during her detention, and is of the view that the author had a justifiable ground for not returning to Denmark for the custody proceedings, having reason to have lost all confidence in the fairness and integrity of the State party's authorities. The Committee recalls the letter transmitted to the Austrian Central Authority by the Ministry of Justice, Department of Family Affairs, Danish Central Authority, dated 18 April 2011, in which it confirmed that criminal proceedings were still pending against the author; that child abduction is a criminal offence punishable with a maximum sentence of 4 years imprisonment; that if the author travels to Denmark she risks being arrested, and that there might be a European arrest warrant for the author within a short time. The Committee has also taken note of the unchallenged averment of the author to the effect that intimidation tactics were used against her, including through several telephone calls made to the Austrian Family Affairs Department by a case worker from the Danish Central Authority/Family Affairs Department threatening the author to withdraw her request for the return of O.W. to Austria. The Committee is of the view that all those circumstances taken together not only explained the author's reluctance to come to Denmark for the proceedings but also constituted an obstacle to her access to justice.

5.15 The Committee further views with deep concern the systematic rejection of the author's applications to the Appeals Permission Board, which also constituted an impediment to the author's access to justice. In applying the "general public importance rule", the State party's authorities ought to have given due consideration to the nature of the case, namely the custody of a minor child of tender age; the international dimension of the case, with conflicting decisions from two different legal systems and the substantial and broad-based impact and consequences of the issue, to be canvassed on appeal, which transcend the litigation interests of the author, O.W and S., given the repeated averments of the author that she has suffered sex-based discrimination as well as discrimination on the basis of her foreign nationality and the fact that many foreign nationals are in a similar situation and indeed the number of complaints involving foreign parents in the same situation as the author.

5.16 On the basis of the information before it, the Committee concludes that the author did not enjoy equal treatment before the Danish authorities in matters

concerning her son. In the light of the foregoing, the Committee considers that the State party has violated the rights of the author and O.W. under articles 2 (d), 5 (a) and (b) and 16 (1) (d) of the Convention.

6. Acting under article 7 (3) of the Optional Protocol to the Convention, the Committee is of the view that the facts before it reveal a violation of the rights of the author and her minor son O.W. under article 2, read in conjunction with article 1 and articles 5 (a) and (b), and 16 (1) (d), of the Convention, and makes the following recommendations to the State party:

(a) Take steps to ensure that the central judicial authority of the State Party, namely its Ministry of Justice, promptly collaborate with the Austrian central authority in order to ensure the immediate return of O.W. to the author in Austria, where, if necessary, new proceedings concerning his custody and visitation may be conducted in the best interests of the child.

(b) In general:

(i) Take all appropriate measures to avoid reoccurrence of similar violations in the future;

(ii) Review and amend the Act on Parental Responsibility so as to ensure that (a) the requirement to consider the child's best interests as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere, is reflected both as a substantive right and as a rule of procedure, and (b) that the "best interests of the child" principle applies to all administrative and judicial proceedings, whether staffed by professional judges or lay persons or other officials in all procedures concerning children, including conciliation, mediation and arbitration processes;

(iii) Develop legal principles which fully comply with the rule of law, and ensure that the justice system provides for a robust and effective appellate system in order to correct both legal and factual errors, especially in custody cases and the determination and assessment of the principle of the best interests of the child;

(iv) Conduct a comprehensive review based on research of Danish custody law and the Act on Parental Responsibility, in particular assessing its impact on foreign parents, especially foreign mothers;

(v) Combat all negative attitudes and stereotypes which foster intersecting forms of discrimination against women, especially mothers of foreign nationality and ensure the full realization of the rights of their children to have their best interests assessed and taken as a primary consideration in all decisions;

(vi) Design specialized and mandatory training programmes for judges, prosecutors and lawyers as well as other professionals involved in administrative and judicial proceedings on the dynamics of violence against women, custody and visitation rights and the "best interests of the child" principle, non-discrimination against foreign nationals and gender stereotypes in order to equip them with the necessary knowledge and skills to discharge their duties in conformity with the State party's international obligations.

7. In accordance with article 7 (4), the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them translated into Danish and widely disseminated in order to reach all relevant sectors of society.

Attachment

Opinion of Committee member Patricia Schulz (dissenting)

The Committee was faced with an extremely complex case, in which both parents of a child, went to the highest courts of their respective countries in order to obtain sole child custody, both faced criminal proceedings at some point and contradictory custody decisions were rendered in both countries. The Committee was faced with conflicting laws and conflicting judgments on the custody of a child: this was and remains at the heart of the communication, and, in my view, sex discrimination was alleged by the author in order to obtain a further examination of the case.

If I am not mistaken, the author had legal aid during the proceedings before the Danish authorities, and it is only at the stage of the communication that she had no counsel. This should have been better taken into consideration when assessing her allegations, regarding the actions and omissions from the State party authorities that she criticizes. Indeed, having counsel, the author has been in a position to defend her rights throughout the proceedings and could have received support also to properly substantiate her allegations.

Although some of the reasons leading me to a dissenting opinion are already present in the decision on admissibility, taken in November 2014 (CEDAW/C/59/D/46/2012), I will concentrate on the argumentation on the merits contained in the present decision (CEDAW/C/63/D/46/2012), from paragraph 4.5 to the end.

Two reasons brought me to present a dissenting opinion.

1. Biased assessment of allegations/information in favour of the author and reversal of the burden of proof

I find that the decision assesses the information provided and/or alleged by M.W. in a more favourable light than that from the State party. M.W. has repeatedly criticized the Danish authorities, in a sweeping fashion, for various acts or omissions but did not bring clear substantiation, in my eyes, to justify a consideration on the merits.

However, the Committee accepted these allegations. It did not consider that the Danish authorities had provided sufficient explanation with regard to all the proceedings held and the procedures under Danish laws, either regarding the aspects of violence or the custody issue.

1.1. On the issue of violence

The author claimed that the Danish authorities did not protect her properly from the violence of S. against her, and accused the police and prosecutors of failing to act or of acting inadequately, or during the kidnapping of O.W and that she was arrested and detained in a fashion that amounted to a denial of justice (inhuman and degrading treatment). These allegations are of a grave nature.

In paragraphs 4.5 to 4.8, the various allegations are detailed concerning the verbal and physical violence and the stalking and harassment that S. inflicted on the author, the inhuman and degrading treatment that the author received during her

detention, the violent kidnapping of the child by S and the lack of protection by the police and prosecutors.

I consider that the author did not bring the proof needed for such grave allegations against the functioning of the Danish police and prosecution in her case; there is no proof that she tried to lodge a complaint (or complaints) against S.; no proof either of complaints against the police or other authorities which she claims failed to act and/or that the police had refused to do so or that she herself had been brutalized by the police or prisons guards; there is no evidence of any such grave allegations. Yet the State party has a procedure — through the Independent Police Complaints Authorities — that is open for persons wanting to complain about such acts; the author had counsel to support her.

Although there is no trace in the file showing that the author tried to report the various aspects of the alleged dysfunctioning of the police or prosecution, the Committee treats all the allegations of the author as proven facts and dismisses the detailed explanations given by the State party regarding the reasons for and the conditions in which the arrest and detention were carried out, and the regular action of the police, prosecutors and other services (see paras. 2.2, 2.3, 2.7, 2.10, 2.11 and 2.12).

In paragraph 4.7 the Committee "observes that the State party has itself failed to provide detailed information and documents concerning the acts and omissions of the police, especially the authors' arbitrary arrest and detention on 6 and 7 September 2010". It considers that it was difficult for the author, as a foreigner, and from Austria (after she left Denmark), to provide proof of certain acts or omission by some State authorities — but the lack of any evidence that she had at least tried to obtain the documents that she says she requested from the Danish authorities is not counted against her.

The Committee then goes on in paragraph 4.7 to reproach the Danish authorities for having also engaged in a series of wrongful acts and doings", a summary of the complaints of the author being presented to conclude that the State party has failed to exercise due diligence regarding the violence alleged.

The reasoned arguments of the State party convinced me (see paras. 2.2, 2.3, 2.7, 2.10, 2.11 and 2.12) that there has been no violation of article 1 or 2 (d) of the Convention. I also note that it is probably impossible for a State party to provide negative proof against allegations made by an author, that is, the proof that acts or omissions have not happened; the absence of any evidence — when some could have been provided in this case had the author written to request action, copies of documents, protest against the treatment she says was inflicted on her — that these acts might have taken place should not be to the advantage of the author but to that of the State party.

1.2. On the issue of custody

The list of acts constituting "a series of wrongful acts and doings" in paragraph 4.7 also concerns the alleged failure of the State party to prevent the judiciary and social services (and kindergarten) from acting in a discriminatory way in the custody issue. The Committee takes as fact that the judiciary and social services neglected their duties and also acted in a discriminatory fashion, and even that some persons lied (the kindergarten employee supposed to be very close to S.).

Here again, the detailed answer of the State party, for instance its reminder of the date from which the author no longer had to fear being detained and thus being able to go to Denmark and take part in the proceedings, or its explanation of how the court system functions in the country for custody cases, with the involvement of social services, and how it functioned in this case specifically, with the presentation of all the steps taken by the various Danish authorities, is neglected.

I do not see either what violations of the rights of the author under article 5 (a) and/or 16 (1) (d) have been committed. The author repeatedly refused to avail herself of the procedure that would have allowed her access to her son, access that the Danish authorities were willing to provide following the interim measures recommended in the decision of 2014 on admissibility, as they made abundantly clear (para. 2.14). The author did not explain why she refused to respect the procedure that is in place in the State party and of which she was repeatedly made aware by the Danish authorities. She should therefore not have been allowed to invoke this to her own advantage when she, in effect, wanted the State party to violate its own rules and provide her with a possibility that is not open to anyone else. Yet the Committee accepted her version on this account also in paragraph 4.12, further proof in my eyes of its biased assessment of the allegations and information in favour of the author and the reversal of the burden of proof.

2. Role of the Committee and need not to go beyond its competence and substitute itself for the national authorities nor attempt to rewrite the rules on judicial organization

I cannot concur either with what I see as the Committee's interfering in the very complex case, as seen in paragraph 4.8, when it affirms that "the Danish authorities have also engaged in a series of wrongful acts and doings, inter alia the transfer of custody of O.W. albeit temporary"; the Committee lists a whole series of the wrongdoings by the State party in the civil aspects of the case, that is, the custody itself and the access to the child following the interim measures. This interfering in the custody case continues in paragraphs 4.10 to 4.13.

These paragraphs, 4.10-4.13, are focused on the "paramount consideration of the best interest of O.W as well as the legal rights of the author as the rightful custody holder" and the discriminatory treatment of M.W. "as a women and as a foreign mother". In my eyes, the Committee substitutes its views for those of the Danish authorities and enters into a detailed discussion of what the paramount interest of the child means and how the legal proceedings dealing with the custody of the child should have been conducted; it also includes a refutation of the "general public importance rule". I find this discussion only artificially, and insufficiently, linked to the sex discrimination the author alleges; the discussion is contrary to what the Committee affirms in paragraph 4.3 it should not be doing, that is, substituting its views for those of the national authorities — in a case where the strict conditions for doing this are not fulfilled, in my view.

The issue of access to justice is discussed in paragraphs 4.14-4.15, which partially repeat some of the elements previously addressed under another heading (allegations of violence and violation of articles 1 and 2 of the Convention). In view of the explanations the State party gave on the possibilities for the author to defend herself and on the judicial system of the country, I cannot concur with the conclusion that the author's access to justice was curtailed. Indeed, in paragraph

4.16, calls into question the system of appeals: the argument presented that "the custody of a minor child of tender age" amounts to a case where the "general public importance rule" should apply is disconcerting, and does not relate to sex-based discrimination. Not every tragic individual case of custody fulfils the condition of "general public importance rule", and not every case of poor treatment of a female claimant amounts to discrimination based on sex, or foreign nationality or the intersection of both grounds.

Further, as explained above in the last paragraph of 1.2 regarding alleged violation of articles 5 (a) and/or 16 (1) (d), the author refused to use the regular procedure put at her disposal, and of which she was repeatedly made aware by the Danish authorities, to access her son in accordance with the recommendation on interim measures.

In addition, the second part of paragraph 4.15 should have led the majority to another conclusion, which would have been that it has no competence to engage in a case involving, as the State party argued in paragraph 2.2, "two recognized and equal legal systems (that) have made contradictory decisions concerning custody of the son"; the Committee should have heeded the reminder that it "is not a supranational body with the task of ruling on disagreements between such recognized and equal legal systems". Further, the State party had, in my view, given ample examples of the care with which it had examined the various aspects of the issues related to custody and access to the child.

I therefore find that, although it is stated in paragraph 4.3 that the Committee "does not replace the national authorities in the assessment of the facts and evidence, unless the assessment was clearly arbitrary or amounted to a denial of justice", the Committee has forgotten this rule of prudence and this proper understanding of its role, function and competence. Despite that fact that, in my eyes, the author has not substantiated the various acts and/or omissions amounting to arbitrary discrimination or denial of justice, and the Committee has substituted itself for the national authorities and entered a hugely complicated case of child custody under the guise of sex discrimination.

3. Conclusion

I do not mean to say that there were no problems, that S. was right to get his son in Austria and that the Danish authorities did everything right: certainly not. In particular I find the State party's argument concerning whether S. unlawfully retained O.W. after kidnapping him in Austria very weak see para. 2.7). I also wonder if the decision to deprive the author of access to information regarding her son on the ground that "the author published any and all information on the son on various Internet pages, campaign sites and Facebook" (see para. 2.6) took into consideration what S. may have also done in this regard?

However, what I mean to say is that, on the basis of the allegations made by the author and the information that she provided and the answers by the State party, the Committee was not in a position to interfere in the complexity of this tragic case, as there is not enough substantiation to indicate that the State party has committed sex discrimination amounting to arbitrariness or denial of justice.

I therefore cannot concur either with the approach adopted by the Committee, which has practically reversed the burden of proof, requesting the State party to

disprove the allegations of the author, instead of asking the author to prove her allegations or at least substantiate them, or with the result of what I see as a biased approach.

In view of the foregoing, I believe that the communication should have been rejected on the ground that the author has failed to substantiate her numerous allegations against the State party.

iv. Angela González Carreño v. Spain (Communication No. 47/2012)

United Nations

CEDAW/C/58/D/47/2012

Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women
Fifty-eighth session
20 June-18 July 2014

Communication No. 47/2012

Decision adopted by the Committee at its fifty-eighth session

Submitted by:	Angela González Carreño (represented by counsel Women's Link Worldwide)
Alleged victims:	The author and her deceased daughter, Andrea Rascón González
State party:	Spain
Date of communication:	19 September 2012 (initial submission)
Document references:	Transmitted to the State party on 15 November 2012 (not issued in document form)
Date of adoption of decision:	16 July 2014

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Annex

Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (fifty-eighth session)

Communication No. 47/2012* *González Carreño v. Spain*

Submitted by:	Angela González Carreño (represented by counsel Women's Link Worldwide)
Alleged victims:	The author and her deceased daughter, Andrea Rascón González
State party:	Spain
Date of communication:	19 September 2012 (initial submission)
Document references:	Transmitted to the State party on 15 November 2012 (not issued in document form)
Date of adoption of decision:	16 July 2014

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of all Forms of Discrimination against Women,

Meeting on 16 July 2014,

Adopts the following:

Decision under article 7 of the Optional Protocol

1. The author of the communication is Angela González Carreño, of Spanish nationality, born on 22 April 1960. She alleges that she was the victim of violations by the State party of articles 2 (a-f), 5 (a) and 16, singly and jointly with articles 2 and 5 of the Convention on the Elimination of All Forms of Discrimination against Women. The author is represented by counsel. The Convention and its Optional Protocol entered into force for Spain on 4 February 1984 and 6 October 2001 respectively.

Facts as presented by the author

2.1 The author married F.R.C. in 1996. Her daughter, Andrea, was born in February of that year. During their time together, before and after the marriage, the author was subjected to physical and psychological violence by F.R.C. For that reason the author left the marital residence several times during 1999.

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* The following members of the Committee participated in the examination of the present communication: Ms. Nicole Ameline, Ms. Barbara Bailey, Ms. Olinda Bareiro-Bobadilla, Mr. Niklas Bruun, Ms. Náela Gabr, Ms. Hilary Gbedemah, Ms. Nahla Haidar, Ms. Ruth Halperin-Kaddari, Ms. Yoko Hayashi, Ms. Ismat Jahan, Ms. Dalia Leinarte, Ms. Theodora Nwankwo, Ms. Pramila Patten, Ms. Silvia Pimentel, Ms. Maria Helena Pires, Ms. Biancamaria Pomeranzi, Ms. Patricia Schulz, Ms, Dubravka Šimonović and Ms. Xiaoqiao Zou.

2.2 On 3 September 1999, after an episode in which F.R.C. threatened her life with a knife in Andrea's presence, the author left the marital residence definitively. On 3 and 7 September 1999 she reported the facts to the Guardia Civil (police) and the Juzgado de Primera Instancia e Instrucción núm. 2 de Arganda del Rey (Madrid) (Court of First Instance No. 2 of Arganda del Rey (Madrid)). On 10 September 1999, the author filed before the Juzgado de Primera Instancia e Instrucción de Navalcarnero (Court of First Instance of Navalcarnero (Madrid)) to report the abuses against her and her husband's psychiatric problems. At the same time she applied for a trial separation, with her daughter remaining under her guardianship and custody and a limited regime of visits between father and daughter, supervised by social services personnel. The author gave up the use of the marital residence.

2.3 On 22 November 1999, the court ordered a trial separation for a period of 30 days, pending submission of a formal petition for separation; granted care and custody of Andrea to the author; established a regime of visits between father and daughter limited to Fridays from 5 to 8 p.m. and Sundays from 10 a.m. to 2 p.m.; established an economic contribution of 360 euros which F.R.C. was to pay for the benefit of Andrea; and granted use of the marital residence to F.R.C.

2.4 After the trial separation the author continued to be subjected to harassment and intimidation by F.R.C., including death threats in the street and by telephone. During his visits with Andrea, F.R.C. questioned the child about the author's relationships, spoke ill of her, repeatedly called her a "whore" and accused her of having relationships with other men. This caused tension and anxiety in Andrea, who was afraid of her father and began to reject spending time with him. He, in turn, accused the author of manipulating the girl and instigating the rejection. On one occasion, in 2000, he approached them at the entrance to the building where they lived, insulting the author and attempting to pull the girl away. The author managed to get into her car with Andrea and go to the police. F.R.C. followed them and, upon reaching the police station, in front of a police officer, continued to insult her, threatening to kidnap the girl. Seizing her by the hair while the author had Andrea in her arms, he tried to throw her to the ground. Another time, on 30 August 2000, when the author was in her car with Andrea, F.R.C. followed them in his car, putting them in a dangerous situation. The author stopped and F.R.C. approached her, shouting and demanding that she hand over the girl, while banging on the car. This triggered a nervous outburst in the child, who began crying that her father should leave. When the visits stopped being supervised (see para. 2.13), F.R.C. took the lead in several violent incidents at the social services centre where he went to pick up and return the child.

2.5 The author asserts that she filed more than 30 complaints before the Guardia Civil and the courts of mixed jurisdiction (juzgados en materia civil y penal), and repeatedly sought protective orders to keep F.R.C. away from her and her daughter. She had also sought a regime of monitored visits and payment of child support. Systematic non-compliance by F.R.C. with the obligation to pay support placed the author in a difficult position in light of her modest means, as she had difficulty finding work given her poor educational level and work experience, her age and her family responsibilities. For that reason, in 2000, as part of the separation procedure under way, she found it necessary to apply to the court for the use of the family residence, which she had previously given up. Article 96 of the Civil Code provides that the use and enjoyment of the family dwelling, in divorce proceedings, is granted to the spouse who has the guardianship and custody of a minor.

2.6 Despite many complaints, F.R.C. was only convicted once, on 24 October 2000, on a charge of harassment. The Juzgado de Instrucción núm. 1 de Coslada (Trial Court No. 1 of Coslada) considered it proved that F.R.C. had been stalking and disturbing the author, constantly harassing her. However, the penalty imposed was only a fine of 45 euros.

2.7 The courts issued protective orders for the author. However, only one of them, issued on 1 September 2000 by the Juzgado de Instrucción núm. 5 de Coslada (Trial Court No. 5 of Coslada) and valid for two months, included Andrea. F.R.C. appealed it and the court left it unenforced with respect to Andrea, considering that the order hampered the visit regime and could seriously harm relations between father and daughter. Other court orders protecting the author were violated by F.R.C. without legal consequence to him.

2.8 In the framework of the guardianship and custody of Andrea, the author asserted that visits with her father were negatively affecting the child's mental health and requested a psychological examination. For that reason the court called Andrea to appear on 11 December 2000. During the appearance the girl said, among other things, that she did not like being with her father "because he did not treat her well" and "tore up her paintings".

2.9 On 31 January 2001, the Juzgado de Primera Instancia núm. 1 de Navalcarnero (Court of First Instance No. 1 of Navalcarnero) drew up a provisional schedule of supervised visits monitored by social services, starting on 8 February 2001 and limited to Thursdays from 6 to 7 p.m. at the Mejorada Velilla social services centre.

2.10 On 30 May 2001, the social worker in charge of monitoring sent a report to the court suggesting that the interaction between father and daughter might best take place in another context, so that they could relate to each other more naturally. She also said that F.R.C., through his daughter, transmitted messages indirectly to the author, to which Andrea did not know how to react. The author wrote to the court to express her disagreement with the report and requested that the supervised visit regime be continued.

2.11 In September 2001, at the author's request, the court authorized a psychological evaluation of herself, Andrea and F.R.C. The corresponding report, dated 24 September 2001, proposed that visits should gradually be normalized so that by the end of six months, Andrea should be able to spend almost a full day with her father, with no overnight and without the social worker; and making it possible to be with her father a full weekend with no overnight. If at the end of a year the relationship had been completely normalized, the possibility for Andrea to begin spending the night in the father's home might be considered.[1]

2.12 On 27 November 2001, the court entered the order of marital separation, which disregarded the numerous complaints of abuse made by the author and did not refer to habitual ill-treatment as being the cause of the separation. Regarding the regime of visits, the order retained the restricted regime with supervision for a period of one month, gradually expanding it in accordance with the behaviour of F.R.C. Depending on a favourable report from the visit supervision centre, a second stage of six months was envisaged, during which the Thursday visits would last from school dismissal until 8 p.m. and would be unsupervised. After six months, depending on a favourable report from social

[1] With regard to F.R.C., the report observes "an obsessive-compulsive disorder with aspects of pathological jealousy and a tendency to distort reality which could degenerate into a disorder similar to paranoia".

services, the visits would take place on alternate weekends, with no overnights, and would last from noon to 7 p.m. on Saturdays and Sundays. After another six months, depending on a favourable report from social services, the visits would be expanded to alternate weekends, with overnights, with the possibility of also including half of vacations. At the same time, F.R.C. was granted use and enjoyment of the family dwelling. The decision did not make reference to the continued non-payment of support by F.R.C.

2.13 Despite numerous incidents of violence by F.R.C. during the year and a half of supervised visits, the Juzgado núm. 1 de Navalcarnero (Court No. 1 of Navalcarnero) entered an order of 6 May 2002 authorizing unsupervised visits. The court based itself on a report of social services which did not expressly recommend that there be no change in the system of supervised visits. In that report, social services indicated that F.R.C. "was affectionate with the child, constantly showing love and affection ... The dynamic of the relationship reveals that he does not adapt to the child's stage of growth, asking questions and making statements that are inappropriate in form and content, giving rise to situations that are far from beneficial to the child. It often seems that he cannot put himself in the other's place, that there is a lack of empathy. This is shown in his failure to adjust to the child's young age and failure to understand normal situations that occur in this context."

2.14 The author appealed this decision without success. On 17 June 2002, the court decided that although "social services cannot predict how the visits will go without their presence and although they do point to some shortcomings in the father's behaviour, they also stress that relations between him and his daughter are gradually normalizing". The court designated the social services office as the pick-up and drop-off point for the child. The decision indicates that it is not subject to appeal.

2.15 During the months of unsupervised visits, social services issued several reports which referred to Andrea's wish, for the moment, not to spend more time with her father beyond the existing regime; that there were probably objectionable situations consisting of repeated questions about the private and emotional life of the mother and confusing comments by the father to the girl; and that the regime of visits had to be closely monitored. In a report of 5 February 2003, social services informed the court that, as reported by the child to her mother, during the visit of 30 January 2003, F.R.C. had insistently questioned the child about the author's current partner and proffered insults against that partner, and that similar things had happened on other occasions.

2.16 On 24 April 2013, three years after the author had petitioned for the use of the family residence, a judicial hearing on the matter was held. At the end of that hearing, as the author was leaving the building, F.R.C. approached her and told her that he was going take away what mattered most to her.

2.17 On the afternoon of the same day, the author took Andrea to social services for the planned visit with her father. When she later returned to pick her up, they had not arrived. After waiting for an hour, and there being no answer from F.R.C. to her telephone calls, the author went to the police to report the facts and ask that the police go to F.R.C.'s home. When police officers appeared at the dwelling, they found the lifeless bodies of Andrea and F.R.C. F.R.C. had a weapon in his hand. The police investigation concluded that F.R.C. had shot the girl and then committed suicide. On 12 June 2003, the Juzgado de Instrucción núm. 3 de Navalcarnero (Investigative Court No. 3 of Navalcarnero) declared F.R.C.'s criminal liability for Andrea's death extinguished as he had committed suicide.

2.18 On 23 April 2004, the author filed with the Ministry of Justice a claim for compensation for miscarriage of justice, alleging negligence by the administrative and judicial authorities. The author maintained that both the judicial organs and the social services had failed in their obligation to protect the life of her daughter, despite the many occasions when she had informed the courts and police about the danger the girl faced with her father. The author claimed the right to receive compensation as the only viable form of redress.

2.19 On 3 November 2005, the Ministry of Justice denied the claim, taking the view that the judicial organ had acted properly regarding the regime of visits; and that the author's disagreement fell within the category of a judicial dispute and had to be processed accordingly. The claim for compensation could only go forward once a judicial error had been found by the Supreme Court. To take that decision the Ministry held consultations with the Consejo General del Poder Judicial (General Council of the Judiciary) and the Consejo de Estado (Council of State), and the author was heard. On 15 December 2005, the author submitted an administrative appeal with the Ministry of Justice which was denied on 22 January 2007 for the same reason.

2.20 On 14 June 2007 the author lodged an administrative appeal before the Audiencia Nacional (High Court) alleging improper functioning of the administration of justice, not only through the action of the courts which granted the regime of unsupervised visits, but through the functioning of the social services and the Ministerio Fiscal (Attorney General's Office) in eliminating the regime of supervised visits. The appeal was denied on 10 December 2008. On 27 February 2009, the author filed an appeal in cassation with the Tribunal Supremo (Supreme Court), which denied the appeal on 15 October 2010.

2.21 On 30 November 2010 the author appealed in *amparo* before the Constitutional Court, alleging violation of her constitutional rights to an effective remedy, to security, to life and physical and moral integrity, not be subjected to torture or cruel or degrading treatment or punishment, and to equality before the law. On 13 April 2011 the Court denied the appeal as lacking constitutional relevance.

The complaint

3.1 The author alleges that the facts described constitute a violation of articles 2, 5 and 16 of the Convention.

3.2 The actions of the police and the administrative and judicial authorities constitute a violation of her right not to suffer discrimination, protected by article 2 (a-f). This violation occurred on two levels. Firstly, the State failed to act with due diligence, with all means available to it and without delay to prevent, investigate, prosecute and punish the violence against the author and her daughter by F.R.C. and which culminated in the daughter's murder. Secondly, after the child's death the State party did not provide an effective judicial response or appropriate redress to the author for the damages suffered through the negligence of the State.

3.3 The State party violated article 2 (e) of the Convention because it did not protect the author and her daughter as victims of domestic violence. The author repeatedly informed authorities of the violence they had been suffering and of her fears for their lives and physical and mental integrity. Despite more than 30 appeals for protection and complaints filed with authorities and courts, mother and daughter continued to be the object of verbal, physical and psychological assaults. On many occasions, the author requested mediation from social

services, fearing the abuser would harm the child as a form of mistreatment against her. However, the authorities took no effective measures of protection.

3.4 During the years in which the author was a victim of domestic violence, there existed in Spain a lack of protection and investigation of domestic violence by authorities and the judiciary. In a 2001 report, the General Council of the Judiciary criticized this situation and called attention to the neglect of victims and the impunity enjoyed by perpetrators. Although measures were adopted between 1993 and 2003, the inequality and discrimination against victims continued. The State's inability to forge effective tools to combat domestic violence has led to situations such as the present case, which constitutes a violation of article 2 (a), (b) and (f).

3.5 The unresponsiveness of the administration and courts to the violence suffered by the author points to the persistence of prejudices and negative stereotypes, taking the form of an inadequate appreciation of the seriousness of her situation. That situation arose in a social context marked by a high incidence of domestic violence. The attitude of public authorities towards the author as a woman victim of violence and mother of a child murdered by her father, and towards her daughter as a child victim of intra-family violence, was inadequate. Accordingly, the action of the administration and courts constituted a violation of article 2 (d).

3.6 The courts never carried out an effective investigation to clarify responsibilities arising from the administrative and judicial negligence that culminated in the murder of Andrea. Moreover, the author has received no redress, which constitutes a violation of article 2 (b and c).

3.7 The State party failed to discharge its obligations under article 2, subparagraphs (a), (b) and (f) through the lack of a normative framework protecting women from domestic violence at the time when the events took place. Moreover, despite legislative reforms introduced since 2004, the legal framework still has not established a system of redress in cases of negligence by institutions and adequate protection of minors who live in an environment of violence and who are consequently also victims. The State's duty of diligence requires the adoption of legal and other measures to protect victims effectively.

3.8 With regard to article 5 of the Convention, the author asserts that the existence of prejudices by the authorities showed itself in their inability to correctly gauge the gravity of the situation she and her daughter were facing and her suffering due to the situation of the child. Further, no inquiry was ever conducted into the consequences for the child of living in an atmosphere of violence and her condition as a direct and indirect victim of that violence. Instead, the authorities responsible for providing protection chose to follow the stereotypical view that even the most abusive should enjoy visitation rights and that it is always better for a child to be raised by its father and mother; thus failing to appreciate the rights of the child and disregarding the fact that she had expressed fear of her father and rejected the contact. The courts took it for granted that it is better to have contact even with a violent father. The circumstances of the case called for the authorities and courts to evaluate whether the visits respected the child's right to life, to live free of violence, and the principle of the best interests of the child.

3.9 States have the obligation to protect children's right to be heard. In the present case, the judicial decisions did not respect that right. Several reports from social services indicated that F.R.C. did not appreciate the age of the child and interacted inappropriately with her, but this point was not considered by the

courts. Based on stereotypes, the right of visitation was seen merely as a right of the father and not as a right of the child as well. The best interests of the child would have required if not eliminating the visits, at least limiting them to supervised visits of short duration.

3.10 F.R.C. was not sanctioned for his repeated assaults on the author or his non-payment of child support. Despite a request by the author, F.R.C. was also not required to engage in therapy with a view to normalizing his relationship with his daughter. The authorities' assessment of the risk to the author and her daughter seems to have been obscured by prejudice and stereotypes that lead to questioning the credibility of women victims of domestic violence.

3.11 Based on the foregoing, the author maintains that the State party did not discharge its duty of diligence and violated article 5 (a), together with article 2 of the Convention.

3.12 Regarding article 16, the author alleges that she was discriminated against in the decisions relating to her separation and divorce. The authorities, bowing to their prejudices, did not take into account the situation of violence being experienced by the author and her daughter in making decisions about the terms of the separation and the visiting regime. Nor did they take steps to ensure that F.R.C. would carry out his obligation to contribute to the support of the child, despite the author's repeated demands. All of this placed the author in an extremely vulnerable position. Not until 21 April 2003, three days before the child's murder and three years after the author had first filed her complaint against F.R.C. for non-payment of support, did the office of the prosecutor take action against him. At that point, the debt he owed to the author amounted to 6,659 euros. These facts constitute a violation of article 16, especially with respect to the lack of regard for the principle of the best interests of the child, singly and jointly with articles 2 and 5 of the Convention.

3.13 F.R.C. used his daughter to hurt both of them and used his right of visitation for that purpose. There was continued insistence by social services and the courts seeking to "normalize" the relationship between the child and the abuser, without taking into account the child's interests and opinions. The authorities did not effectively evaluate whether the abuser was a person who deserved having visits, supervised or not, with a child whom he constantly abused. To the contrary, the authorities assumed the right of a father to maintain contact regardless of his actions in the family context. The administrative and judicial authorities allowed F.R.C. to shirk his obligations under article 16, paragraph 1 (c), (d) and (f). This occurred in a context of discrimination in which prejudices and stereotypes influenced the decisions of these authorities, in violation of articles 2, 5 and 16 of the Convention.

State party's submission on admissibility

4.1 On 14 January 2013, the State party made a submission on admissibility, maintaining that the communication was inadmissible because domestic remedies had not been properly exhausted. It alleged as a subsidiary argument that the communication was unsubstantiated.

4.2 In all of the answers to the claim of pecuniary responsibility of the State, the administration and courts informed the author that the appropriate way to seek and obtain, as the case may be, compensation for a miscarriage of justice was not to seek damages for the malfunctioning administration of justice but

rather through judicial error, as provided for in article 292.1[2] and following of the Organic Law on the Judiciary. In the decision of 15 October 2010, the Supreme Court recalled its jurisprudence that judicial error occurs when "the judge disregards unquestionable facts in a relationship that breaks the harmony of the legal order or the decision which mistakenly interprets the legal order, if it is an interpretation that cannot be sustained by any interpretative method in judicial practice". Abnormal operation of the administration of justice encompasses any defect in the action of judges or tribunals, conceived as an organic complex in which persons, services and activities are encompassed. Each calls for a different procedure. Whereas compensation for error should be preceded by a judicial decision expressly acknowledging it, a claim for abnormal operation of the administration of justice does not require a prior judicial decision and is brought directly before the Ministry of Justice as prescribed by article 292 of the Organic Law on the Judiciary.

4.3 The author alleges that the action of the courts and social services was erroneous and that the tragedy should have been avoided because court decisions on the visiting regime and the reports on which they were based reveal that they were mishandled, showing that there were 47 complaints against her ex-husband which went unanswered. These circumstances clearly imply judicial error, whose recognition should be established through a review appeal before the Supreme Court.[3] Not having filed it, the author has not exhausted domestic remedies.

4.4 As a subsidiary argument, the State party maintains that no infringement of the Convention, particularly articles 2 and 5, was committed since the Spanish authorities did not act negligently. The facts can be attributed only to F.R.C. Nor can one ascribe to the State negligence in the protection of integrity with regard to events prior to the entry into force of the Optional Protocol in Spain, which cannot be considered because they are not continuing acts.

4.5 The State party approves the assessment of the Audiencia Nacional (High Court) to the effect that the judicial organ that dealt with the separation considered the circumstances and psychological reports and adopted decisions on guardianship and custody of the child and the regime of visits, choosing a gradual and very detailed regime with successive stages which the father-daughter contacts would go through and the number of hours and supervision to which the relationship would be subject. During the months when the regime of unsupervised visits was being applied, there were positive reports about the regime, to the extent that the possibility was envisaged of moving to a broader system of visits without perceived risks to the child.

4.6 The High Court concluded that it did not find the existence of a miscarriage of justice but rather a set of judicial decisions which, considering the concrete circumstances and consistently following the regime of visits and psychological reports on the parents and child, with involvement by the Ministerio Fiscal (Attorney General's Office) throughout and with constant writings of allegations by the parents and follow-up reports issued by social services, reached such conclusions as they saw fit regarding the manner in which communication between a separated father and his daughter should be channelled. The murder thus did not seem connected with abnormal functioning of a court or its personnel.

[2] Article 292.1: Damages caused to any assets or rights through judicial error, as well as those resulting from abnormal operation of the Administration of Justice, shall grant those who have suffered damage the right to compensation from the State, except in cases of force majeure, pursuant to the terms of this Title.

[3] According to article 293.1 of the Organic Law on the Judiciary.

Author's comments on the State party's submission concerning admissibility

5.1 On 11 March 2013, the author made comments on the observations of the State party, indicating that she had litigated in the domestic courts in order to show that there was a miscarriage of justice and not merely a judicial error. Her litigation strategy was in keeping with the concept of miscarriage of justice contained in the Organic Law on the Judiciary, which characterized it as "any defect in the operation of the courts or tribunals, conceived of as an organic complex comprising various persons, services, means and activities".[4] The various authorities had acted in a negligent and uncoordinated manner, including the psychosocial personnel related to the courts and social services. Accordingly, it was decided to litigate in order to show the malfunctioning of the administration of justice.

5.2 The State party alleges that the author should have used the procedure for pecuniary liability for judicial error. However, it does not provide information on the effectiveness of the procedures, for example through statistical data or examples of similar cases in which victims have obtained redress through this means. In the final analysis, the State party has not shown that this remedy would have been more effective than the one used.

5.3 With regard to the State party's argument relating to lack of substantiation, the author maintains that it should be rejected in the framework of admissibility, since the considerations expressed by the State in that regard pertain to the substance of the case. The author further expresses disagreement with those considerations and believes that the version of events presented by the State party is distorted.

5.4 Regarding the State party's contention that the acts involved are not continuing acts, the author points out that the violence endured by her and her daughter was continuous and culminated in the child's death, which occurred after the entry into force of the Protocol. The violence persists down to the present, in that she has not received compensation of any kind.

State party's observations on the merits

6.1 On 14 May 2013, the State party submitted observations on the merits of the communication. The State party asserts that, before the domestic courts, the author submitted a pecuniary liability claim in the amount of 1 million euros for miscarriage of justice in regard to the visiting regime that had been authorized. The author did not allege a violation of the Convention. Her claim did not include issues relating to miscarriage of justice in relation to herself. Therefore, the reply of the administrative authority was only to that petition and it is to that issue that the complaint before the Committee should be confined, since otherwise domestic remedies would not have been exhausted.

6.2 In reference to the visit scheme, the authorities conducted continuous monitoring of father-daughter relations and subjected the daughter and the parents to an exhaustive psychological evaluation on 24 September 2001. The resulting report indicated that "the father was observed to have an obsessive-compulsive disorder with aspects of pathological jealousy and a tendency to distort reality" which affected his relationship with his wife. However, in his conclusions, the psychologist did not find "warning signs or risks to the child in the interaction" with her father. The report recommended a gradual rapprochement between the child and her father.

[4] See para. 2.18, supra.

6.3 In the light of the circumstances, the decree of separation, issued on 27 November 2001, assigned guardianship and custody to the mother and provided for continued exercise of joint parental authority. In the months that followed, after observation of father-daughter relations, a report was requested from social services on how well the visits had gone and whether it was advisable to move on to the second system provided for in the decision (unsupervised visits). The report stated that although the father was very insistent and dominant in his relationship with his daughter, not adapting well to her age, there was nothing unusual about the father-daughter relationship. In the light of that report, on 6 May 2002, the court considered that there was no reason to prevent starting the second visitation scheme. The author appealed this decision but the court maintained it. However, the court determined that the decision was not irrevocable and would be reconsidered if there were signs of harm to the child. At the court's request, social services issued a new report on 3 December 2002 which concluded that "there was satisfactory psychosocial development in the child"; that "it was important to bear in mind the child's wish, for the moment, not to spend more time with the father than that allocated in the visit scheme"; and that "it was felt necessary to maintain continuous monitoring of the visit regime". In the light of this report, the office of the Attorney General considered that the time had not yet come to transition to an overnight regime. In a new report, on 8 January 2003, it was decided to continue the existing regime. On 13 February 2003, the court decided to continue the existing visit scheme and adopted measures for garnishment of the father's wages.

6.4 The authorities did not act negligently and the events can only be attributed to F.R.C. The decision of the High Court expresses the view of the Government and also firmly makes clear that the procedural approach followed by the author was inadequate, that the judicial organ which dealt with the separation considered the concurrent circumstances and psychological reports and adopted decisions on care and guardianship of the child and on the visit scheme, opting for a gradual and very detailed scheme with different stages through which the father-daughter relationship might go. In May 2002, by judicial decision, supervised visits were replaced by unsupervised visits. This regime was maintained for several months, during which it was continuously monitored and positive reports were issued. It was even contemplated to move on to a broader system of visits, without any perceived danger to the child, until, in the afternoon of 24 April 2003, the father murdered her.

6.5 Despite the complex family context and the deadly conclusion, there is not the slightest clue among the exhaustive psychological reports and the reports of each and every one of the supervised visits that there existed a danger to the life or physical or mental health of the child. There was never a moment in which the child was not being monitored and watched over by the social services under the court, always working in her interest. Nothing in her immediate setting could have foreshadowed the dramatic reaction of F.R.C. The weapon in his possession was illegal, since he did not have a weapons licence, nor was he known to be a gun enthusiast.

6.6 With regard to the author's complaints of a general character, under articles 2, 5 and 16 of the Convention relating to structural questions concerning discrimination against women in Spain, the State party rejects the author's assertions that at the time of the events there was in Spain no defence against gender violence and that discriminatory practices, actions and stereotypes prevailed on an institutional and judicial scale. The State party provides a list of actions undertaken to eradicate all forms of discrimination against women since 1987, including the Comprehensive Plans of Action against Domestic Violence I

and II; amendments to the Penal Code and the Law on Criminal Justice aimed at precisely defining crimes against freedom and sexual security and the adoption of measures of protection for victims of ill-treatment. The law of 2004 on Measures of Comprehensive Protection against Gender Violence contains procedural measures allowing for prompt and expeditious procedures in both the civil and penal sphere, with measures of protection for women and their children side by side with urgent precautionary measures. Courts dealing with violence against women (Juzgados de Violencia sobre la Mujer) have been created, as a specialized investigative court, as well as specialized prosecutorial offices. Law 35/1995 was also adopted, on 11 December, providing aid and assistance to victims of violent crimes against sexual freedom.

6.7 With regard to articles 5 and 16 of the Convention, the State party mentions activities carried out with a view to the training of justice system employees, the development in 2004 of a Practical Guide for application of the law, the creation in 1994 of a Monitoring Centre on the Image of Women (Observatorio de la Imagen de las Mujeres), and the creation of Family Meeting Points. Noteworthy measures applying the law of 2004 are those aimed at awareness-raising; prevention and detection; the creation of administrative units to deal with gender violence; and amended definitions of offences.

Author's comments concerning the State party's observations

7.1 The author presented her comments on the State party's observations on 9 August 2013.

7.2 The author rejects the State party's argument that the complaint before the Committee is rooted in the claim of pecuniary compensation formulated on 27 April 2004, and points out that the State deliberately does not respond to the many complaints she submitted for persecution, harassment and violence, which she had mentioned in her claim of compensation. Those complaints were not taken into consideration when the authorities decided to authorize unsupervised visits. The State also does not respond to the author's complaints concerning continuous violence suffered by the child, also a victim of domestic violence, with respect to whom no protection was provided by the authorities.

7.3 Contrary to what is stated by the State party, the initial communication includes all the complaints, criminal and civil, that the author interposed from 1999 to 2003, i.e. before Andrea's death, in addition to actions initiated after her death. In the civil sphere, the author filed a complaint for each failure to pay child support since March 2000, but not until 21 April 2003, three days before Andrea's death, did the prosecutor file charges against F.R.C. The courts also dismissed the author's petition to be allowed to use the family residence in light of the non-payment of support. The first such complaint was on 24 April 2000 but the hearing did not take place until 24 April 2003, the day of Andrea's death. In the criminal sphere, of the more than 30 complaints filed by the author, only one led to a misdemeanour conviction, the sentence being a fine of 45 euros. Regarding the administrative proceeding begun after Andrea's death, its purpose was to address the miscarriage of justice, in the broad sense, in which both had been involved, including the procedures for separation, custody, the visit scheme, use of the family dwelling, non-payment of support, and complaints regarding threats, abuse and violence.

7.4 The author disagrees with the statement of the State party that she did not exhaust domestic remedies in regard to the acts of which she herself was the victim. Both she and her daughter were victims of the same violence, so it is pointless to draw distinctions between them.

7.5 The information included by the author in her initial communication regarding the context of the events is important to show that the lack of diligence in her case is typical of the lack of diligence that habitually characterizes domestic violence cases. When there is evidence of systematic patterns of violence against women, or when the incidence of violence against women is inordinately high, as reflected in a high rate of domestic violence, it is clear that the State knows or should know of the risks faced by women who have complained of violence from their partners or former partners. Consequently it is unacceptable for the State to argue that the risk faced by the author and her daughter was unforeseeable. The State not only knew of the situation in Spain with regard to domestic violence, but also knew specifically about the situation of the author and her daughter.

7.6 In order to discharge its duty of diligence, it is not enough for the State to adopt legislation on the subject; it is necessary for the legislation to be applied. In Spain, State negligence in protecting women and minors from domestic violence persists to the present time, despite the adoption of legislative measures. In addition, legislation is still lacking to establish a system of redress for victims when there has been negligence. The law is also deficient in regard to protecting minors who live in violent settings and who are therefore also victims of the violence.

7.7 The State party makes no comment on the lack of a satisfactory assessment of the best interests of the child or the violation of her right to be heard in judicial proceedings. On many occasions Andrea showed fear of her father, owing to the climate of violence to which she had been exposed and she consistently rejected physical and emotional contact with him. This meant that the authorities and courts had to evaluate whether the visits with her father respected her right to life and to live free of violence, in addition to the principle of giving priority to the interests of the child.

7.8 The author requests the Committee to make the following recommendations to the State party: (a) complete redress and/or appropriate compensation, including, inter alia, payment with interest of unpaid child support; reimbursement with interest for the rent the author had to pay during the three years she was denied use of the family dwelling; pecuniary and non-pecuniary costs; symbolic redress, including, inter alia, the creation of a fund in memory of Andrea for child victims of domestic violence, tailored to organizations active in that field; (b) compensation to the author for physical and mental damages; (c) impartial and exhaustive investigation into the failures that occurred in implementing orders of protection, including ascertaining the responsibility of public officials; (d) public apology to the author for the failures in protecting her and her daughter; (e) impartial and exhaustive investigation into the failures that occurred regarding Andrea's right to be heard; (f) impartial and exhaustive investigation into the failures that occurred regarding the authorization of unsupervised visits. The author also asks that a recommendation be made to the State party to review its legislation on domestic violence, including aspects relating to the application of measures of protection, response to complaints of domestic violence and visiting and custody rights of an abusive parent.

Deliberations of the Committee

Consideration of admissibility

8.1 In accordance with rule 64 of its rules of procedure, the Committee is to decide whether the communication is admissible under the Optional Protocol to

the Convention. In accordance with article 72 (4) of its rules of procedure, it must do so before considering the merits of the communication.

8.2 In accordance with article 4 (2) (a) of the Optional Protocol, the Committee is satisfied that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

8.3 The author complains before the Committee that she and her daughter were the object of violence by her ex-spouse and the father of her daughter during several years and that this violence culminated on 24 April 2003 with the murder of the child during one of the unsupervised visits authorized by judicial decision some months previously. She asserts that prior to the murder she had made known to the administrative and judicial authorities the abuses she was enduring from her ex-husband and asked for protection.

8.4 The Committee notes that some of the abuses and complaints before the authorities occurred before 6 October 2001, the date of entry into force of the Optional Protocol for Spain. The Committee lacks jurisdiction *ratione temporis* to examine these facts individually, in accordance with article 4, paragraph 2 (e) of the Optional Protocol. Accordingly, the Committee will take them into account only to the extent that they explain the context of events that occurred after the entry into force of the Protocol for Spain.

8.5 The Committee also observes that after the entry into force of the Protocol there were two especially important judicial decisions regarding the events leading up to the child's death, namely, the order of 5 May 2002 of the Juzgado núm. 1 de Navalcarnero (Court No. 1 of Navalcarnero) authorizing the regime of unsupervised visits; and the decision of 17 June 2002, denying the appeal by which the author had objected to said regime. The latter decision was not subject to appeal. Since these two decisions were taken after the entry into force of the Protocol, the Committee is not barred under article 4, paragraph 2 (e) of the Protocol from examining facts deriving from those decisions.

8.6 With respect to the exhaustion of internal remedies, the Committee notes the observations of the State party that the author did not exhaust those remedies, since she should have alleged before the courts the apparent existence of a judicial error instead of a miscarriage of justice. With regard to this objection, the Committee considers that it must determine whether, in light of the Convention, the author exerted reasonable efforts to bring before national authorities her complaints regarding the violation of rights arising from the Convention. In that regard the Committee notes that, after the death of her daughter, the author interposed several administrative and judicial appeals alleging miscarriage of justice on the part of the State. In particular, two appeals were addressed to the Ministry of Justice, one to the High Court (Audiencia Nacional) and one appeal in cassation to the Supreme Court. In those appeals, the author alleged improper functioning of the administration of justice because the courts, the social services and the Fiscalía (attorney general) had failed in their obligation of due diligence and had erred in allowing an unsupervised visiting scheme between father and daughter. All of those appeals were rejected. In addition, the author filed an appeal in *amparo* before the Constitutional Court in which she alleged the violation of her fundamental rights with regard to the circumstances that led to the death of her daughter and the lack of redress by the State. This appeal was also rejected, as the Court found that it lacked constitutional relevance. In light of the author's explanations about the purpose of her appeals, not limited to identifying judicial error, and considering that the State party has not pointed to other possible legal avenues that could have been effective to respond to the specific and complete demands of the author, the

Committee considers that internal remedies have been exhausted with regard to the complaint concerning the establishment by the authorities of an unsupervised visiting regime and the lack of redress for the negative consequences resulting from that regime.

8.7 Regarding the State party's objection to admissibility under article 4 (2) of the Optional Protocol, the Committee considers that the author's complaints regarding the introduction of the unsupervised visit scheme and redress for the death of Andrea have been sufficiently substantiated for purposes of admissibility. Consequently, and there being no other reasons to prevent it, the Committee considers that the communication is admissible and proceeds to consider it on the merits.

Consideration of the merits

9.1 The Committee has considered the present communication in light of all the information placed at its disposal by the author and by the State party, in accordance with the provisions of article 9, paragraph 1, of the Optional Protocol.

9.2 The question before the Committee is that of the responsibility of the State for not having fulfilled its duty of diligence in connection with the events that led to the murder of the author's daughter. The Committee is satisfied that the murder took place in a context of domestic violence which continued for several years and which the State party does not question. This context also includes the refusal of F.R.C. to pay support and the dispute concerning the use of the family dwelling. The Committee considers that its task is to review, in light of the Convention, decisions taken by the national authorities within their purview and to determine whether, in making those decisions, the authorities took into account the obligations arising from the Convention. In the present case, the decisive factor is therefore whether those authorities applied principles of due diligence and took reasonable steps with a view to protecting the author and her daughter from possible risks in a situation of continuing domestic violence.

9.3 The Committee notes the State party's argument to the effect that the behaviour of F.R.C. was unforeseeable and that nothing in the psychological and social services reports could lead one to predict a danger to the life or physical or mental health of the child. In light of the information contained in the record the Committee cannot agree with this assertion for the following reasons. In the first place, the Committee notes that the final separation of the spouses, decreed on 27 November 2001, was preceded by many violent incidents directed at the author, which the child often witnessed. The courts issued protective orders, which F.R.C. would disregard without this implying any legal consequences for him. The only time he was convicted was in 2000, for conduct constituting harassment, but the punishment was limited to a fine amounting to 45 euros. In the second place, despite the author's requests, the orders of protection issued by the authorities did not include the child, and an order issued in 2000 in the child's favour was left without effect, as the result of an appeal filed by F.R.C., in order not to jeopardize relations between father and daughter. In the third place, the social services reports repeatedly stressed that F.R.C. was using his daughter to transmit messages of animosity to the author. They also pointed to F.R.C.'s difficulties in adjusting to the child's young age. In the fourth place, a psychological report of 24 September 2001 observed in F.R.C. "an obsessive-compulsive disorder with aspects of pathological jealousy and a tendency to distort reality which could degenerate into a disorder similar to paranoia". In the fifth place, during the months of unsupervised visits, several reports from social

services pointed to the likelihood that there were inappropriate situations consisting of repeated questions by the father of the daughter concerning the private life of the mother, as well as the need to maintain continuous monitoring of the visit regime. The Committee also observes that F.R.C., from the start of the separation, systematically and without reasonable justification shirked his obligation to provide child support. Although the author complained of this situation repeatedly, adducing her difficult economic situation, it was not until 13 February 2003 that the judicial authorities took measures to garnish F.R.C.'s wages. Similarly, the author had to wait three years for the court to hold a hearing concerning her request for the use of the marital dwelling.

9.4 The Committee observes that during the time when the regime of judicially determined visits was being applied, both the judicial authorities and the social services and psychological experts had as their main purpose normalizing relations between father and daughter, despite the reservations expressed by those two services on the conduct of F.R.C. The relevant decisions do not disclose an interest by those authorities in evaluating all aspects of the benefits or harms to the child of the regime applied. It is also noteworthy that the decision which ushered in a regime of unsupervised visits was adopted without a prior hearing of the author and her daughter, and that the continued non-payment of child support by F.R.C. was not taken into account in that context. All of these elements reflect a pattern of action which responds to a stereotyped conception of visiting rights based on formal equality which, in the present case, gave clear advantages to the father despite his abusive conduct and minimized the situation of mother and daughter as victims of violence, placing them in a vulnerable position. In this connection, the Committee recalls that in matters of child custody and visiting rights, the best interests of the child must be a central concern and that when national authorities adopt decisions in that regard they must take into account the existence of a context of domestic violence.

9.5 The Committee considers that the authorities of the State party initially took actions to protect the child in a context of domestic violence. However, the decision to allow unsupervised visits was taken without the necessary safeguards and without taking into account that the pattern of domestic violence that had characterized family relations for years, unquestioned by the State party, was still present. It is enough to recall in that regard that the judicial decision of 17 June 2002 referred to certain improper actions by F.R.C. in regard to his daughter; that at the time F.R.C. continued not to pay child support with impunity; and that he continued using the family dwelling in spite of the author's claims in that regard.

9.6 The Committee recalls its general recommendation No. 19 (1992), according to which gender-based violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.[5] This discrimination is not limited to acts committed by or on behalf of Governments. Thus, for example, under article 2 (e) of the Convention, States parties commit to taking all appropriate steps to eliminate discrimination against women practised by any person, organization or enterprise. On this basis, the Committee considers that States may also be responsible for acts of private persons if they do not act with due diligence to prevent violations of rights or to investigate and punish acts of violence and to compensate victims.[6]

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[5] General recommendation No. 19 (1992) on violence against women, paras. 6 and 7.

[6] Ibid, para. 9.

9.7 The Committee recalls that under article 2 (a) of the Convention, States parties have the obligation to ensure by law or other appropriate means the realization and practise of the principle of equality of men and women, and that pursuant to articles 2 (f) and 5 (a), States parties have the obligation to adopt appropriate measures to amend or abolish not only existing laws and regulations but also customs and practices that constitute discrimination against women. States parties also have the obligation, in accordance with article 16 (1), to adopt all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relationships. In that regard, the Committee stresses that stereotypes affect women's right to impartial judicial process and that the judiciary should not apply inflexible standards based on preconceived notions about what constitutes domestic violence.[7] In this case, the Committee considers that the authorities of the State party, in deciding on the establishment of an unsupervised scheme of visits, applied stereotyped and therefore discriminatory notions in a context of domestic violence and failed to provide due supervision, infringing their obligations under articles 2 (a), (d), (e) and (f); 5 (a); and 16, paragraph 1 (d) of the Convention.

9.8 The Committee notes that the author of the communication has suffered harm of the utmost seriousness and an irreparable injury as a result of the loss of her daughter and the violations described. Moreover, her efforts to obtain redress have been futile. The Committee therefore concludes that the absence of reparations constitutes a violation by the State party of its obligations under article 2 (b) and (c) of the Convention.

9.9 The Committee notes that the State party has adopted a broad model for dealing with domestic violence which includes legislation, awareness-raising, education and capacity-building. However, in order for a woman victim of domestic violence to see the practical realization of the principle of non-discrimination and substantive equality and enjoy her human rights and fundamental freedoms, the political will expressed by that model must have the support of public officials who respect the obligations of due diligence by the State party.[8] These include the obligation to investigate the existence of failures, negligence or omissions on the part of public authorities which may have caused victims to be deprived of protection. The Committee considers that, in the present case, that obligation was not discharged.

10. In accordance with article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and taking into account all of the foregoing considerations, the Committee considers that the State party has infringed the rights of the author and her deceased daughter under articles 2 (a-f); 5 (a); and 16, paragraph 1 (d) of the Convention, read jointly with article 1 of the Convention and general recommendation No. 19 of the Committee.

11. The Committee makes the following recommendations to the State party:

(a) With regard to the author of the communication:

(i) Grant the author appropriate reparation and comprehensive compensation commensurate with the seriousness of the infringement of her rights;

[7] Communication No. 20/2008, *V.K. v. Bulgaria*, Decision of 25 July 2011, para. 9.11.

[8] Communication No. 5/2005, *Goecke v. Austria*, Decision of 6 August 2007, para. 12.1.2.

(ii) Conduct an exhaustive and impartial investigation to determine whether there are failures in the State's structures and practices that have caused the author and her daughter to be deprived of protection;

(b) In general:

(i) Take appropriate and effective measures so prior acts of domestic violence will be taken into consideration when determining custody and visitation rights regarding children and so that the exercise of custody or visiting rights will not endanger the safety of the victims of violence, including the children. The best interests of the child and the child's right to be heard must prevail in all decisions taken in this regard;

(ii) Strengthen application of the legal framework to ensure that the competent authorities exercise due diligence to respond appropriately to situations of domestic violence;

(iii) Provide mandatory training for judges and administrative personnel on the application of the legal framework with regard to combating domestic violence, including training on the definition of domestic violence and on gender stereotypes, as well as training with regard to the Convention, its Optional Protocol and the Committee's general recommendations, particularly general recommendation 19.

12. In accordance with article 7, paragraph 4, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have and have them widely distributed in order to reach all relevant sectors of society.

[Adopted in Arabic, Chinese, English, French, Russian and Spanish, the Spanish text being the original version.]

v. L.R. (Promo-LEX) v. Moldova (Communication No. 58/2013)

United Nations — CEDAW/C/66/D/58/2013

Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women

Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 58/2013*,**

Communication submitted by:	L.R. (represented by counsel, Alexandru Postica, Promo-LEX)
Alleged victims:	The author
State party:	Republic of Moldova
Date of communication:	1 September 2011 (initial submission)
References:	Transmitted to the State party on 3 September 2013 (not issued in document form)
Date of adoption of views:	28 February 2017

* Adopted by the Committee at its sixty-sixth session (13 February-3 March 2017).

** The following members of the Committee participated in the examination of the present communication: Ayse Feride Acar, Gladys Acosta Vargas, Nicole Ameline, Magalys Arocha Dominguez, Gunnar Bergby, Marion Bethel, Louiza Chalal, Naéla Gabr, Hilary Gbedemah, Nahla Haidar, Yoko Hayashi, Dalia Leinarte, Rosario Manalo, Lia Nadaraia, Theodora Nwankwo, Pramila Patten, Bandana Rana, Patricia Schulz, Wenyan Song and Aicha Vall Verges.

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1. The author of the communication is L.R., a Moldovan national born in 1959. She claims that the Republic of Moldova has violated articles 1, 2, 5 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women. The author is represented by Alexandru Postica of the non-governmental organization Promo-LEX. The Optional Protocol entered into force for the Republic of Moldova on 28 February 2006.

Facts as submitted by the author

2.1 The author married V.R., in 1985 and they had two daughters, born in 1986 and 1988. V.R., who drank heavily, was violent towards her and their daughters. The violence was physical, psychological and economic in nature.[1] The author made many complaints to the police, but V.R.'s behaviour did not change.

2.2 The author divorced V.R. on 28 October 2003, but the Ciocana District Court ruled on 29 December that the apartment was to be shared between the author and him. Given that they were forced to continue to live together, the violence persisted. The author's continuous complaints were met with accusations by the police of improper conduct on her part, and she was even placed under police supervision and labelled a "family troublemaker" in respect of whom preventive measures needed to be taken.

2.3 On 3 June 2010, V.R. attempted to strangle the author, which resulted in her losing consciousness. Ambulance and police services were called and an administrative case was opened. Given that the author was not updated on the status of that case, notwithstanding her numerous requests for information, she contacted Promo-LEX for assistance.

2.4 On 4 and 9 June 2010, complaints were sent on the author's behalf by Promo-LEX to the Ciocana District Police Inspectorate, under Law No. 45 on Preventing and Combating Domestic Violence and under Ordinance No. 350 of 2 October 2008 of the Ministry of Internal Affairs, and to police station No. 4 of Ciocana district requesting them to act immediately to stop the violence against the author. On 11 June 2010, an application for a protection order was submitted to the Ciocana District Court to prevent V.R. from committing acts of domestic violence and to compel him to stay away from the rooms that the author occupied, to stop damaging her property, to refrain from bringing guests home to drink with, to refrain from other acts that made the author's life intolerable and to make regular financial contributions for upkeep. The application was for a 30-day period. Even though Law No. 45 mandates that a decision be made on such applications within 24 hours,[2] it was not until 15 June 2010 that the District Court rejected the application, stating that the measures requested were not provided for by law and on the grounds that there was a civil dispute between the parties.[3] The author found this out only when she contacted the District Court on 16 June 2010.

2.5 On 21 June 2010, the author submitted a new application to the Ciocana District Court to obtain a protection order. The application was accompanied by a petition to the head judge. On 22 June 2010, the District Court declared the claim

[1] Beginning in 2003, he brought women home with whom he would consume alcohol and have sexual relations in the presence of the children. The author would call the police and administrative sanctions would be applied, but the behaviour continued. His guests would also insult and intimidate the author. He refused to pay for the upkeep of common areas, paid only one third of the bills, damaged the author's property and left the common areas in a state of poor hygiene.

[2] Article 15 (1) of Law No. 45 provides that the court shall, within 24 hours of receipt of the claim, issue a protection order to assist the victim.

[3] Author's comments, 4 June 2014.

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admissible in part and ordered protection measures for a period of 30 days, asking V.R. to leave the apartment and to stay away from the victim.

2.6 On 23 June 2010, in response to the initial complaint of 3 June 2010, the police issued an official warning to V.R. concerning any violence against the author and placed him under supervision.[4]

2.7 Given that the protection order remained unenforced, with V.R. remaining in the apartment, a petition was submitted to the Ciocana District Police Inspectorate requesting the enforcement of the decision of the Ciocana District Court. On 28 June 2010, the Inspectorate simply reminded V.R. of the protection order but refused to evict him from the apartment.

2.8 On 13 August 2010, the author complained to the chief of police station No. 4 about acts of intimidation by V.R. In September 2010, the author was subjected to several acts of violence by V.R..[5] On 18 and 27 September 2010, when the author filed two complaints with police station No. 4 following more threats by V.R., she was told that she should not file another complaint because her statements did not match the accounts made by V.R.

2.9 On 22 September 2010, the author submitted a petition to the Ciocana District Prosecutor's Office under article 262 of the Code of Criminal Procedure[6] requesting the initiation of criminal proceedings against V.R. for domestic violence and for failure to abide by the protection order issued on 22 June 2010. On 21 January 2011, the Prosecutor's Office notified the author of its decision of 19 November 2010 not to initiate criminal proceedings against V.R. on the grounds that there was no medical evidence and no evidence of mental suffering and that her testimony contradicted the accounts given by V.R. It also stated that disciplinary sanctions had been imposed on a police officer from police station No. 4 who had threatened her. On 27 September and 6 October 2010, the author appealed to the General Prosecutor's Office and to the Ministry of Social Affairs, calling for the enforcement of domestic violence legislation.[7] On 13 October 2010, she complained to the police about V.R.'s antisocial and disorderly behaviour, his state of drunkenness and the damage that he was causing to her property and the fact that he had nailed shut a window.

2.10 Throughout the proceedings, the author was intimidated by the police as a result of an officer being disciplined after she had submitted a complaint. She was placed under supervision as a "family troublemaker" on 11 November 2010. On 29 November 2010, after having been insulted and intimidated by V.R., she called the police but was threatened with retaliation, in the presence of her lawyer, by the police officer facing disciplinary measures, who was responding to her call. She was told that her numerous complaints, which had not been resolved, had resulted in a reduction in his salary. This was the second such incident with the same officer.[8]

[4] The violence continued, including psychological abuse by V.R. and his girlfriend, who were often inebriated, played music very loudly, insulted and shouted at the author and behaved in an intimidating manner, and economic violence, given that the author's goods and food were destroyed and stolen and that V.R. did not make fair financial contributions and left the shared apartment in an unhygienic state.

[5] These included intimidation, shouting, with his girlfriend, at the author when drunk and an attempt to assault the author, forcing her to stay with a friend.

[6] In the author's comments of 4 August 2014, the legislative provision is given as article 201 (1) of the Criminal Code.

[7] The reply from the Social Assistance Division of the Ministry was that a call had been made to the house to talk to the author, but she was not there (she had had to move out to protect herself).

[8] A complaint was made on 8 December.

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2.11 On 7 December 2010, the same police officer charged her with "moderate disorderly conduct" under article 354 of the Code of Administrative Offences and a fine was imposed. Three other administrative charges were also brought against her by the officer, and all were subsequently quashed. The author submits that the charges were designed to intimidate her so that she would no longer lodge complaints against V.R.

2.12 On 8 December 2010, the author submitted a new petition to the Ciocana District Prosecutor's Office with regard to the domestic violence to which she was continuously being subjected.

2.13 On the same day, the author also submitted a complaint to the Ministry of Internal Affairs regarding the police officer's abusive behaviour on 29 November 2010.

2.14 On 10 December 2010, the author submitted another application to the Ciocana District Court seeking a protection order within 24 hours under Law No. 45. On 13 December 2010, having received no response, her lawyer learned that the complaint had not been registered. A complaint was submitted to the head judge of the District Court, the Ministry of Justice and the Superior Council of Magistracy. After a 54-day delay, on 2 February 2011, the District Court refused to grant the author a protection order, owing to a lack of evidence of V.R.'s violence towards her.

2.15 On 16 February 2011, the author lodged an appeal with the Chisinau Court of Appeal against the decision of the Ciocana District Court, which was rejected on 24 May 2011 on the grounds that the conflict between the parties had originated in the division of the shared apartment, that V.R. benefited from good references provided by the Union of Afghanistan War Veterans and that he had no record of administrative or criminal sanctions. The Court of Appeal considered that, because the author had been placed under supervision as a "family troublemaker" on 11 November 2010 and fined on 7 December 2010 for moderate disorderly conduct, notwithstanding the fact that those proceedings had been quashed by the District Court on 12 January 2011, her credibility was in doubt. On 3 February 2011, further administrative proceedings were brought against the author as a result of a complaint on fabricated charges, which, she asserts, V.R. had been advised to do by the police officer who wished to discredit her for his own benefit. She was convicted of committing the offence of "insult" towards her husband even though she was not living in the property. That decision was later annulled on appeal, on 2 March 2011.

2.16 The author initiated a lawsuit to divide the apartment through the sale of shares. Notwithstanding a decision of the Ciocana District Court in her favour on 11 March 2011, the judgment was quashed by the Chisinau Court of Appeal on 25 May 2011, which ruled that V.R., as a war veteran with a disability, would have insufficient money to buy another dwelling with his share. The matter was remanded to the District Court for re-examination.

2.17 After the present communication had been submitted to the Committee, the Deputy Prosecutor General quashed the order of 13 April 2012 made by the Ciocana District Prosecutor not to begin criminal action and ordered that domestic violence proceedings against V.R. should begin on 24 October 2013.

Complaint

3.1 The author claims that the State party has violated articles 1, 2 (a), (c), (d) and (e), 5 and 16 of the Convention by failing to effectively protect her from domestic violence. She asserts that domestic violence disproportionately affects women in the

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State party and therefore amounts to discrimination against women contrary to article 1 of the Convention, read in accordance with the Committee's general recommendation No. 19 (1992) on violence against women.

3.2 The author claims that women in the State party, compared with men, face unresponsive attitudes from law enforcement bodies, who often purposely fail to provide protection to women. Women are affected to a greater extent by the attitude of prosecutors, who choose not to prosecute cases of domestic violence unless they involve medium to severe injuries, attempted murder or murder. Such scenarios occur notwithstanding the existence of explicit legal provisions prescribing prosecution for such acts. Furthermore, women are disproportionately affected by a lack of coordination among police officers, prosecutors and courts, which is a result of inadequate training on how to implement legislation correctly. This means that, even where a protection order is issued, women continue to be exposed to risk, given that the police often fail to execute such orders. They often fail to act in cases in which the order provides for the perpetrator to be evicted from the shared home, citing a lack of housing.

3.3 In relation to article 2 (a), (c), (d) and (e), the author claims that the authorities failed to protect her, a victim of domestic violence, and thus fell short of their obligations under the Convention. In particular, V.R. was not prosecuted or punished and the continuing abuses were not prevented. The authorities did not abstain from the discriminatory practice of questioning the credibility of the female victim, yet they did not question the statement by her assailant. The authorities did not process her applications for protection orders in a timely manner. They consider domestic violence a private matter and thus limited their intervention to reminding V.R. of the terms of the protection order of June 2010, which remained unenforced. Subsequent attempts to renew the order were denied because the author's credibility was questioned. Her applications were not treated with urgency, in violation of national legal provisions.

3.4 In relation to article 5, read in conjunction with article 16, the author claims that the authorities do not ensure prompt or adequate prosecution of perpetrators of domestic violence. Law enforcement bodies and health-care and social assistance professionals are not fully familiar with relevant legal provisions and all the forms of domestic violence and therefore do not react adequately to complaints. The author states that she was discriminated against because of prejudices prevailing in society, according to which it is inappropriate for a woman to air in public what happens inside the home, and that this attitude pervades law enforcement bodies. The author refers to the Committee's findings of 2006 regarding the prevalence of domestic violence against women in the State party and the attitude of public officials who continue to consider it a private matter (see CEDAW/C/MDA/CO/3) and notes that they are still relevant. Because she was faced with hostile attitudes on the part of law enforcement bodies when she requested protection, with her credibility being systematically challenged, the author argues that the State party failed to eliminate prejudices towards women in the justice system, in breach of its obligations under article 5 of the Convention.

State party's observations on admissibility and the merits

4.1 By a note verbale dated 12 May 2014, the State party submitted its observations on admissibility and the merits. It asserted that the relevant national institutions had investigated the author's complaints of domestic violence, intimidation and harassment.

4.2 On 24 October 2013, the General Prosecutor's Office opened a criminal case under article 201 of the Criminal Code, on domestic violence, which was submitted

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to the criminal investigation body of the Ciocana District Police Inspectorate. On 5 December 2013, the author was recognized and heard as an aggrieved party. During the criminal investigation, law enforcement personnel took action to recognize and hear the aggrieved party and the suspect, witnesses were interviewed and materials relating to the case were prepared.

4.3 On 20 February 2014, V.R. was recognized as a suspect under article 201 of the Criminal Code. On 10 March 2014, V.R. appealed against the decision, which was subsequently dismissed by a prosecutor's order. In addition, psychiatric and psychological examinations of both parties were ordered. The State party indicated that the criminal investigation had been made difficult owing to its complexity and the behaviour of the parties, which caused delays.

4.4 Concerning the protection measures and compensation available for ensuring the author's well-being, the State party claims that the Ministry of Labour, Social Protection and Family and the Directorate of Social Assistance and Family Protection conducted a joint investigation, reporting that the author was a person with an average degree of disability who benefited from a pension in the amount of some $18 monthly and State financial support amounting to $2.50 monthly.

Authors' comments on the State party's observations on admissibility and the merits

5.1 On 4 August 2014, the author's counsel submitted her comments on the State party's observations.

5.2 The author reiterates that the State party's actions amount to a violation of articles 1, 2 (a), (c), (d) and (e), 5 and 16 of the Convention.

5.3 The author recalls the factual and procedural background, emphasizing the failure of the authorities to implement Law No. 45, the failure to act in a timely fashion on requests for protection, the failure to enforce protection orders and the fact that she was not believed and not treated as a victim and was prosecuted on fabricated charges and intimidated by the police.

5.4 Regarding the State party's assertions that her case was investigated in 2013, the author notes that, although an order was issued recognizing her as a victim on 5 December, only two of her witnesses were heard and the criminal investigation bodies in no way commented on the documents adduced by her lawyer, which included protection orders, a forensic report and court rulings. An out-patient psychiatric-psychological examination was ordered for both parties. The author and V.R. both attended. The result was inconclusive with regard to the author. On 29 April 2014, a new examination was ordered, requiring the author to be admitted to the clinical psychiatric hospital in Chisinau for 10 days. V.R. was not subject to the same test. Fearing serious abuse,[9] the author refused to be admitted. The criminal investigator did not propose alternative institutions for the examination and therefore none was undertaken.

5.5 The author adds that, on 19 May 2014, the Ciocana District Prosecutor ordered that the criminal prosecution of V.R. should be discontinued owing to a lack of corpus delicti. On 3 June 2014, an appeal was filed to the Prosecutor General, in which the author's counsel challenged the decision to discontinue the criminal proceedings and requested their resumption. On 10 June 2014, the appeal was dismissed by the Ciocana District Deputy Prosecutor on the ground that it was unfounded and the order to suspend proceedings upheld.

[9] Report by the Moldovan Centre for Human Rights on a visit to a clinical psychiatric hospital. Available from: www.ombudsman.md/sites/.

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5.6 Several complaints were filed by the author and, on 14 July 2014, the Ciocana District Court ordered the dismissal of her complaint, stating that all the acts of violence had occurred from 2003 to 3 June 2010 and that, after 3 June 2010, there had been no more acts of violence by V.R. other than verbal abuse. The statutory limit for criminal responsibility for such minor offences is two years and had therefore expired. The District Court also held that it had not been established that the author had suffered distress or moral or material damage. Moreover, the author had refused hospitalization to undergo psychiatric tests, thus preventing prosecutors from establishing the actual cause of her mental anguish. On 15 July 2014, the author appealed against that decision before the Court of Appeal.[10] She therefore asserts that all domestic remedies have been exhausted, both at the time at which the complaint was made and after the proceedings had been resumed by the State party and concluded.

5.7 The author reiterates the facts, stating that, even after having filed many complaints, a formal accusation by the Ciocana District Prosecutor against V.R. was made only on 22 September 2010. After an examination of the accusation, it was decided not to press charges. The order of the Deputy Prosecutor General of 24 October 2013, by which it was decided to reopen the investigation, noted that the previous investigation by the prosecutorial bodies had been superficial. Consequently, three years after the notification of the crime and three years after its commission, prosecutors admitted having examined the allegations of domestic violence only superficially.

5.8 The author refers to the orders to cease criminal proceedings of 19 May and 10 June and the conclusion of the Ciocana District Court of 14 July 2014, asserting that it can be seen that her arguments and evidence were ignored as insufficient, even though witnesses confirmed the abuse. She also refers to the approach of the authorities, in which they ordered a psychiatric evaluation to determine whether she suffered from mental health issues, as being unacceptable, given that V.R. was not subjected to the same test. She refers to reports in which it is stated clearly that placing a healthy person in a psychiatric unit without the right to leave constitutes inhumane and degrading treatment[11] and another that provides criticism of the way in which examinations of this type are undertaken in the State party.[12] The author states that the implication that she has a mental disability is indicative of the bias against the victim in such cases.

5.9 The author also notes the lack of a prompt investigation, especially given that the statute of limitation for such offences is only two years. Therefore, by the time the case is resolved by the Committee there could be no criminal liability on a finding of violation. She refers to reports from non-governmental organizations reflecting such procedural deficiencies,[13] which ensure that perpetrators cannot be sanctioned.

5.10 The author recalls that the 24-hour time limit for consideration of a protection order was flouted by the prosecutorial authorities in her case, with her applications taking 11 and 54 days to be considered. In addition, the way in which such

[10] The proceedings were continuing at the time of the submission of the comments.

[11] A link is provided by the author's counsel to a foreign-language report.

[12] Report by the Moldovan Centre for Human Rights on a visit to a clinical psychiatric hospital. Available from: www.ombudsman.md/sites/.

[13] The Equal Rights Trust and Promo-LEX reported on ill-treatment on the grounds of discrimination in Chisinau in 2012, citing key issues with domestic violence provisions under Law No. 45 and noting delays in beginning criminal cases, the biased attitude of the authorities, failure to ascribe credibility to a victim's statements and the refusal to receive complaints.

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applications are considered has also been repeatedly criticized by the European Court of Human Rights.[14]

5.11 The author also claims that protection orders should be issued in cases in which there is a minimum of direct evidence indicating an act of violence. She claims that, in her case, she was discriminated against, compared with the treatment of V.R., given that his statements carried more weight than hers with the prosecutorial authorities, notwithstanding the existence of a number of eyewitnesses to verbal aggression on his part, which the Ciocana District Court considered insufficient.

5.12 The author states that, in 2011, a report by the National Bureau of Statistics of the Republic of Moldova on family violence against women revealed that prejudice against women was common in the State party and that the authorities admitted that there was a discriminatory attitude towards women.[15] Furthermore, she cites two reports on domestic violence,[16] stating that 1 in 4 Moldovan women is a victim of domestic violence and that the widespread behaviour of the police discourages and revictimizes women seeking help. In addition, the author claims that courts frequently refuse to issue protection orders and that there are significant problems with regard to the supervision and execution of orders.[17]

5.13 The author adds that the State party has failed to provide her with a minimum of decency in her living arrangements following the acts of violence. While V.R. remained in the apartment, she was left unprotected. The authorities did not create proper living conditions or provide her with information on social services, such as those that offer shelter or food. Although there are foster care centres in some regions, they lack the capacity required to cover the large number of victims.[18] Moreover, the State party did not succeed in protecting her. In fact, the police even threatened her with retaliation and warned her to stop complaining.

5.14 With regard to her disability pension, the author claims that it cannot be regarded in any way as a measure to compensate for the lack of protection and safety or for her discriminatory treatment. By contrast, data provided by the authorities[19] show that a payment of $20.50 is insufficient for subsistence, let alone for covering damages of any kind.

5.15 The author argues that reopening the criminal proceedings after the statutory limitation period for that crime had expired and the subsequent termination of the case cannot be equated with a prompt and effective investigation of her claim, given that it occurred only as a reaction to the registration of her case by the Committee.

5.16 Although the laws on domestic violence have been in place for six years, no measures have been taken to implement them, such as setting up adequate shelters and services for victims and centres for the rehabilitation of perpetrators. In addition, there are insufficient foster care centres for children.[20] The author asks the Committee to deem the application admissible and to find a violation of articles 1, 2 (a), (c), (d) and (e), 5 and 16 of the Convention.

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[14] See *Eremia v. the Republic of Moldova*, application No. 3564/11; *Mudric v. the Republic of Moldova*, application No. 74839/10; *B. v. the Republic of Moldova*, application No. 61382/09; and *T.M. and C.M v. the Republic of Moldova*, application No. 26608/11.

[15] The author does not clarify which authorities made that statement.

[16] "Report on human rights in Moldova: a retrospective of the years 2009-2010" (2012) and Central Association for the Protection and Promotion of International Women's Rights "La Strada", "The activity report of the hotline for women" (2012).

[17] The author gives no source for this information.

[18] The author gives no source for this information.

[19] The author does not clarify which data.

[20] The author sent her children away to live.

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5.17 The author also specifically requests the Committee to order that she be compensated and, in general, that the State party take steps to ensure the effective protection of women who are victims of domestic violence, including by bringing practice in line with national legislation and the Convention, training law enforcement authorities and judges, providing services and undertaking public-awareness campaigns.

State party's additional observations

6.1 By a note verbale dated 11 November 2014, the State party submitted additional observations. It notes that, according to the author, the criminal proceedings were dismissed by the Ciocana Prosecutor's Office on 19 May on grounds of a lack of corpus delicti in V.R.'s actions. The author appealed and, on 2 October, the Chisinau Court of Appeal quashed the previous decision dismissing the criminal proceedings. It was drafting a decision at the time that the comments were submitted. The State party asserted that, according to that decision, the criminal prosecution would continue and that the delay was due to the complexity of the case and the behaviour of both parties.

6.2 On 4 July 2014, the Ciocana District Court ordered the sale of the family's apartment. The author received three quarters of the proceeds of sale and V.R. one quarter.

Author's comments on the State party's additional observations

7.1 On 21 November 2014, the author submitted additional comments. She quotes from the decision of the Chisinau Court of Appeal dated 2 October, which states that "the court of law did not take all necessary measures to examine the case objectively and from every angle, and pronounced an unmotivated decision". Furthermore, the Court of Appeal ruled that prosecutors had not correctly assessed the evidence proving guilt, notwithstanding a decision of the Ciocana District Court of 22 June 2010 finding that V.R. had been violent towards her, citing examples of physical, psychological and economic abuse. It also held that the Ciocana Prosecutor's Office had documented the case in a faulty way and it criticized the actions of the instructing judge, who examined the case superficially.

7.2 On 7 November 2014, the first hearing was set at the Ciocana District Court. However, the author demanded to have the judge recused on the grounds that the judge lacked impartiality, because the same judge had issued a ruling refusing to admit her application on 15 June 2010. In response to the State party's observations, the author notes that the case has not therefore been protracted because of her or the perpetrator, but rather as a result of the inefficient actions of the prosecutorial bodies.

7.3 In response to the State party's observations on the research carried out by the Ministry of Labour, Social Protection and Family and the Ciocana Directorate for Social Aid and Family Protection, the author claims that no written evidence has been presented to this end. Furthermore, she reiterates that the obligation to pay disability allowance should not be confused with that to ensure social aid to women who are victims of domestic violence. She claims that there is no legal framework to guarantee such aid.

7.4 With regard to the co-ownership of the apartment, the author states that no such decision has been taken. It does not appear in the database of the Ciocana District Court and there were no hearings in July on that topic. Regarding the legal aid mentioned by the State party, the author states that the Legal Centre for Women is a non-governmental organization and not a State institution.

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7.5 The author claims that the new arguments adduced by the State party do not change the initial position expressed in her communication of 4 August 2014.

Additional observations

From the State party

8.1 On 4 February 2015, the State party submitted additional observations. It recognizes the phenomenon of domestic violence as a social problem of a criminal nature and a serious breach of human rights. The national authorities display a strong willingness to adjust national provisions to international and European standards. Moreover, in 2014, the Ministry of Labour, Social Protection and Family, the General Prosecutor's Office, the General Police Inspectorate and civil society jointly prepared a bill to amend and supplement certain acts to prevent and combat domestic violence in accordance with the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. The bill has been sent for approval to the relevant ministries and non-governmental organizations. It contains provisions regarding compensation, ensuring free legal assistance for victims, combating victim persecution, failure to comply with protection orders and the execution of emergency restraining orders. Approving such legislation will, according to the State party, bring national policy into line with the Committee's recommendations made in 2013.

8.2 With regard to the present communication, the State party notes that the relevant national institutions are monitoring the evolution of the case and providing all necessary assistance in accordance with the law.

From the author

9.1 On 9 September 2015, the author provided additional comments on the State party's observations. She states that, on 16 January, the Ciocana District Court ordered the withdrawal of her complaint, given that the required investigations into her psychological sufferings or moral damage could be undertaken only by an expert review, which she refused to undergo. The author filed a second appeal focusing on the fact that no alternative had been given to her for the examination other than being admitted to a psychiatric hospital for 10 days.

9.2 On 30 March 2015, the Chisinau Court of Appeal quashed the decision of the Ciocana District Court, obliging the Ciocana District Deputy Prosecutor to remedy the violations and resume the prosecution. On 12 August, the author was subpoenaed to appear before prosecutors, but the hearing was postposed so that the psychological evaluation could be conducted.

9.3 The author also provides statistics showing that 90 per cent of the victims of domestic violence at the national level are women and three case studies showing the systemic problems with obtaining and enforcing protection orders and the failure of authorities to act in serious cases of domestic violence. She reiterates that women are affected disproportionately by the failure to effectively apply criminal and administrative provisions in place to protect the victims of domestic violence.

From the State party

10.1 By a note verbale dated 6 January 2016, the State party provided additional observations. It reiterates that changes are being made to national law and procedure to improve the situation for victims of domestic violence, while conceding that it remains a significant issue. It also provides statistics regarding criminal investigations into domestic violence. It reiterates that legislation is being updated to bring it into line with the Council of Europe Convention on Preventing and

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Combating Violence against Women and Domestic Violence and that training is being provided to prosecutors.

10.2 The State party notes that, on 24 April 2015, the criminal investigation into the author's case was resumed in order to ascertain and prove domestic violence, including through a psychiatric examination of the author for the proper assessment of the crime that she had reported.

From the author

11.1 On 11 February 2016, the author submitted further comments. She agrees with the statistical data provided by the State party and its explanation of the progress made, but states that this is insufficient. She asserts that the complaints procedure under the Optional Protocol is not the correct forum for generalizations regarding progress. It should be used to explain specific progress in her case.

11.2 The author confirms that, on 24 April 2015, the case was reopened for re-examination by the same prosecutor. Since then, more than six orders extending the duration of the prosecution have been issued, as have orders for in-patient psychological and lie detector tests and a psychological test in the form of a 30-day in-patient assessment. When the author refused and suggested that she should be seen by another board of doctors, the State party required the National Forensic Centre to provide a report on the author in response to set questions. The Centre refused to produce such a report, noting that it had no expertise in psychiatry. The case had therefore reached a deadlock.

11.3 The author also notes that the criminal investigation period had already exceeded the limitation period for establishing criminal liability under article 201 (1) of the Criminal Code. It is therefore futile to continue with the prosecution.

11.4 The author also asserts that the request for a psychological or psychiatric evaluation to determine her mental state has caused her unjustified suffering and renewed trauma.

11.5 The author agrees with the State party's summary of the legislative and procedural amendments. She agrees that the legal framework and amendments are fairly comprehensive, but notes that the adoption of the amendments has been delayed by the authorities. Swift responses and the uneven application of the law by national courts are issues that still need to be acted upon by standardizing jurisprudence.

11.6 The author refers the Committee to recommendations made in her submission of 4 August 2014 and requests the Committee to recommend that the State party review and adopt the package of legislative amendments and incorporate them into national law, find alternative solutions to psychiatric testing, which should be financially covered by the Government, and standardize judicial practice, ensuring an equitable balance between the interests of society and the individual while providing legal certainty to the victim.

11.7 With reference to her submission of 13 June 2016, the author adds that, on 29 February 2016, the criminal case, which had been resumed on 24 April 2015, was discontinued and she was notified thereof at the end of April 2016. No alternatives were provided for the psychological testing and none of her other witness were heard. Nevertheless, the final decision was not challenged by the author, given that the criminal liability of V.R. could not be pursued in any case, owing to the statute of limitations.

11.8 The author reiterates that the State party has failed to discharge its positive obligation under the Convention to protect her from domestic violence and prevent

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its reoccurrence. It has also failed to ensure the timely enforcement of legislation, continued to treat her case as unimportant and blamed her for her inability to adduce further evidence. The failure to understand the intimidation that the author was experiencing and the effects of an ineffective investigation meant impunity for V.R. Furthermore, the Ciocana District Prosecutor's Office did not meet its obligations to open and carry out its investigations in a timely fashion.

11.9 The author notes that the actions of the State party's authorities, including allowing the accused to remain in the same house as his victim and the discontinuance of proceedings, have, at all times, failed to protect her. The State party's treatment of her has therefore been discriminatory.

Issues and proceedings before the Committee

Consideration of admissibility

12.1 In accordance with rule 64 of its rules of procedure, the Committee is to decide whether the communication is admissible under the Optional Protocol to the Convention. Pursuant to rule 72 (4), it is to do so before considering the merits of the communication.

12.2 With regard to article 4 (1) of the Optional Protocol, the Committee observes that the State party raises no preliminary objections to the admissibility of the communication. Noting that the author did not appeal against the decision of 29 February 2016 to discontinue the case, the Committee recalls that the obligation to exhaust domestic remedies is not applicable where the application of such remedies is unreasonably prolonged or unlikely to bring effective relief. The Committee is of the view that, in the present case, having recourse to such remedy could not bring effective relief to the author, given that the two-year statutory limitation on bringing criminal prosecutions has elapsed. The Committee thus considers that it is not precluded by article 4 (1) from considering the communication.

12.3 With regard to article 4 (2), the Committee has ascertained that the matter has not already been or is not being examined under another procedure of international investigation or settlement.

12.4 The Committee notes that, in relation to article 4 (2) (e), the acts of violence against the author began before the entry into force of the Optional Protocol for the State party, in February 2006, but after the entry into force of the Convention in 1981. Given that those acts continued after the entry into force of the Optional Protocol for the State party, and having regard to the fact that the incident of 3 June 2010 and the exhaustion of domestic remedies occurred after the entry into force of the Optional Protocol for the State party, the Committee considers that it is not precluded from examining the communication based on article 4 (2) (e).

12.5 The Committee considers that the communication is not inadmissible on any other grounds and declares it admissible as raising issues under articles 1, 2 (a), (c), (d) and (e), 5 (a) and 16 of the Convention.

Consideration of the merits

13.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided for under article 7 (1) of the Optional Protocol.

13.2 The author asserts that the State party has violated her rights under articles 1, 2 (a), (c), (d) and (e), 5 and 16. The issue is therefore to determine whether the State party, through its public authorities and institutions, adequately addressed the

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author's repeated complaints and provided her with effective legal protection and whether it met its positive obligations under the Convention.

13.3 The Committee takes note of the author's contention concerning the history of violence perpetrated by V.R. throughout their marriage and after their divorce and the numerous complaints that she made to the police and to prosecutorial authorities and the requests to initiate criminal proceedings against him, which were not acted upon, and the intimidation that she was subjected to by the law enforcement authorities through administrative charges as reprisals for her complaints about the lack of progress in her case. The author has also claimed that the authorities have failed to promptly deal with her applications for protective orders, contrary to national legislation, failed to update her on her case, rejected her applications on the basis of prejudices and stereotypes contrary to the Convention and failed to enforce the one and only protection order that was finally granted to her.

13.4 The Committee also takes note of the author's averment that, when the State party eventually reopened criminal proceedings, after the present matter had been referred to the Committee, it failed to carry out a prompt and effective investigation did not give sufficient weight to her statements compared with those of her former husband, did not hear all her witnesses and did not assess her supporting documentary evidence and that the prosecutorial authorities focused on her mental state, and not that of V.R., and even attempted to force her to undergo in-patient psychiatric testing, thereby clearly demonstrating gender bias towards victims of domestic violence.

13.5 The Committee also takes note of the State party's observations that the author's complaints were investigated in accordance with the law, that the author was duly treated as an aggrieved party and that her witnesses were heard. It also noted that efforts were being made to ensure that legislation was fully compatible with the standards and norms set out in the Convention. In that connection, the Committee welcomes the detailed information provided by the State party concerning the preparation of a bill in 2014 in consultation with different stakeholders, including civil society, that seeks to better prevent and combat domestic violence and to bring national legislation and policy into line with the Convention on Preventing and Combating Violence against Women and Domestic Violence and the Committee's recommendations made in its concluding observations in 2013. It notes with appreciation that the bill, which has been sent for approval to the relevant ministries and non-governmental organizations, contains specific provisions regarding compensation, guarantees of legal aid assistance for victims and measures to combat victim persecution, and addresses non-compliance with protection orders and the execution of emergency restraining orders.

13.6 With regard to the submission of the author that the decisions of the authorities were based on gender stereotypes, in violation of articles 5 and 16 (1) of the Convention, the Committee reaffirms that the Convention places obligations on all State organs and that States parties can be responsible for judicial decisions that violate provisions of the Convention. It recalls that, under articles 2 (a), (c), (d) and (e) and 5 (a), the State party has a duty to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women, while under article 16 (1) it must take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. In this regard, the Committee stresses that stereotyping affects women's rights to a fair trial and that the judiciary must be careful not to create inflexible standards on the basis of preconceived notions of what constitutes domestic or gender-based violence, as noted in general recommendation No. 33 (2015) on women's access to justice.

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13.7 In the present case, the compliance of the State party with its obligations under article 2 (a), (c), (d) and (e) to eliminate gender stereotypes needs to be assessed in the light of the level of gender sensitivity applied in the judicial handling of the author's case. The Committee notes with concern that the divorce judgment did not provide for the sale of the marital home and that, the complaints of domestic violence notwithstanding, the courts appear to have privileged the husband's right to property, owing to his financial circumstances, over the author's right to physical integrity and well-being. The Committee further notes the biased reasoning of the judges for the denial of the author's applications for protection orders, which included: there was a civil dispute between the parties; there was no medical or forensic evidence or evidence of mental suffering on the part of the author; her testimony contradicted the accounts given by V.R.; there was a lack of evidence of V.R.'s violence; the conflict between the parties originated in the division of the shared apartment; V.R. benefited from good references provided by the Union of Afghanistan War Veterans and had no record of administrative or criminal sanctions; the author was placed under supervision as a "family troublemaker" on 11 November 2010; and the author was fined on 7 December 2010 for moderate disorderly conduct, even if these proceedings were later quashed by the Ciocana District Court on 12 January 2011.

13.8 The Committee observes that such reasoning prevailed, notwithstanding a protection order against V.R. being granted on account of his violent behaviour supported by witness statements and of records of ambulance and police services having attended when V.R. attempted to strangle the author. The Committee notes with concern the intimidation tactics used against the author; her being labelled a "family troublemaker"; the fact that, notwithstanding her complaints, the same police officer was able to file arbitrary administrative charges against her several times, in addition to the failure to process her applications for protection orders in a timely fashion; and the failure to effectively implement the protection order when it was finally issued. The Committee expresses its concern at the disturbing practice of subjecting victims of domestic violence to psychiatric examination for a "proper assessment of the crime reported" and, as in the present case, ordering a mandatory 10-day stay for the author in a psychiatric hospital for the purpose of establishing her mental anguish, a request to which the author refused to submit.

13.9 The Committee observes that the Deputy Prosecutor General, in his decision to have the criminal investigation reopened on 24 October 2013, admitted that the proceedings initially brought by the author against V.R. had been dismissed after only a superficial review by the prosecutorial authorities and that, on 2 October 2014, the Chisinau Court of Appeal[21] had held that "the [lower] court of law did not take all necessary measures to examine the case objectively and from every angle, and pronounced an unmotivated decision". It also ruled that the prosecutorial authorities did not correctly assess the evidence proving guilt, notwithstanding a decision of the Ciocana District Court of 22 June 2010 to issue a protection order, finding that V.R. had been violent towards the author and the decision of the District Court cited examples of physical, psychological and economic abuse.

13.10 The Committee notes with concern that, although the Chisinau Court of Appeal also held that the Ciocana District Prosecutor's Office had documented the case in a faulty manner and severely criticized the instructing judge who had examined the case superficially, the very same judge was assigned to hear the case when it was remanded to the lower court, and the matter was discontinued owing to

[21] In its admittance of the author's appeal, it ruled to quash the decision of the Ciocana District Court of 14 July 2014.

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a deadlock caused by the State party's insistence that the author be subjected to an in-patient psychiatric examination.

13.11 The Committee notes that none of these facts have been disputed by the State party and that, read as a whole, they indicate that the decisions made by the Ciocana District Prosecutor, the Ciocana District Court judge and the police were based on stereotyped, preconceived and therefore discriminatory notions of what constitutes domestic violence. The Committee therefore concludes that the State party's authorities failed to act in a timely and adequate manner and to protect the author from violence and intimidation in violation of its obligations under the Convention.

13.12 In the light of the foregoing, the Committee considers that the manner in which the author's case was addressed by the State party's authorities constitutes a violation of her rights under articles 1, 2 (a), (c), (d) and (e), 5 (a) and 16 of the Convention. Specifically, the Committee recognizes that the author has suffered moral and pecuniary damage and prejudice. She was subjected to considerable fear and anguish when she was left without State protection and forced to live with her aggressor and was exposed to considerable renewed trauma when the State organ that ought to have been her protector, especially the police, instead victimized and intimidated her.

14. Acting under article 7 (3) of the Optional Protocol to the Convention, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under articles 1, 2 (a), (c), (d), (e), 5 (a) and 16 of the Convention, and, while appreciating the State party's efforts to institute a comprehensive package of legislative and policy amendments in order to combat domestic violence, makes the following recommendations to the State party:

(a) Concerning the author of the communication:

(i) Take immediate and effective measures to guarantee the physical and mental integrity of L.R.;

(ii) Ensure that L.R. receives reparation proportionate to the physical and mental harm suffered and to the gravity of the violations of her rights;

(b) General:

(i) Fulfil its obligations to respect, protect, promote and fulfil the human rights of women, including the right to be free from all forms of gender-based violence, including domestic violence, intimidation and threats of violence;

(ii) Expedite the passage of the bill to prevent and combat domestic violence in order to bring national legislation into full compliance with Convention and the Convention on Preventing and Combating violence against Women and Domestic Violence;

(iii) Amend relevant provisions of article 60 (1) of the Criminal Code to address statutory limitation periods in domestic violence cases proportionate to the gravity of each case;

(iv) Investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence, ensure that criminal proceedings are initiated in all cases of domestic violence, bring the alleged perpetrators to trial in a fair, impartial, timely and expeditious manner and impose appropriate penalties;

(v) Provide victims of domestic violence with safe and prompt access to justice, including free legal aid where necessary, in order to ensure that they have access to available, effective and sufficient remedies and rehabilitation in line with the guidance provided in general recommendation No. 33;

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(vi) Provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods and prioritize housing options for perpetrators subject to protection orders;

(vii) Provide mandatory and effective capacity-building, education and training for the judiciary, lawyers and law enforcement officers, including police officers, prosecutors and health-care professionals, on the impact of gender stereotypes and unconscious bias, including their contribution to gender-based violence against women and inadequate responses to it, in order to better equip them to adequately prevent and address domestic violence against women;

(viii) Develop and implement effective measures, with the active participation of all relevant stakeholders, such as women's organizations, to address the stereotypes, prejudices, customs and practices that condone or promote domestic violence;

(ix) Eliminate the practice of subjecting victims of domestic or gender-based violence to a compulsory in-patient psychiatric examination;

(x) Take all measures necessary to ensure that the national strategy for the prevention and effective treatment of violence within the family is implemented and evaluated promptly;

(xi) Implement expeditiously and without delay the Committee's concluding observations[22] of October 2013 on the combined fourth and fifth periodic reports of the Republic of Moldova in respect of violence against women and girls. In particular the Committee recommends that the State party:

a. Strengthen the enforcement of the Criminal Code and Law No. 45-XVI on preventing and combating domestic violence and other relevant national legislation; ensure that all women and girls, including in particular older women, Roma women and girls and women and girls with disabilities, are protected from violence and have access to immediate means of redress; and launch ex officio investigations into all such crimes and ensure that perpetrators are prosecuted and punished commensurate with the gravity of the crime;

b. Expedite its efforts to amend Law No. 45-XVI so as to supplement court-ordered protection with a system of police-ordered protection and enable the issuance of police emergency protection orders;

c. Remove any impediments faced by women in gaining access to justice; ensure that legal aid is made available to all victims of violence; encourage women to report incidents of domestic and sexual violence by raising awareness about the criminal nature of such acts; provide adequate assistance and protection to women who are victims of violence, including Roma women; and increase the number and funding of shelters and guarantee national coverage extending to women from rural areas and Transnistria.

15. In accordance with article 7 (4), the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them translated into the official language of the State party and disseminated widely in order to reach all relevant sectors of society.

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[22] CEDAW/C/MDA/CO/4-5.

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vi. S.L. v. Bulgaria (Communication No. 99/2016)

United Nations | CEDAW/C/73/D/99/2016

Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women

Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 99/2016*, **, ***

Communication submitted by:	S.L. (represented by counsel, Milena Kadieva and Zhaneta Borisova)
Alleged victim:	The author
State party:	Bulgaria
Date of communication:	23 February 2016 (initial submission)
References:	Transmitted to the State party on 24 February 2016 (not issued in document form)
Date of adoption of views:	19 July 2019

* Adopted by the Committee at its seventy-third session (1–19 July 2019).

** The following members of the Committee participated in the examination of the present communication: Gladys Acosta Vargas, Hiroko Akizuki, Tamader Al-Rammah, Nicole Ameline, Gunnar Bergby, Marion Bethel, Louiza Chalal, Esther Eghobamien-Mshelia, Naéla Mohamed Gabr, Hilary Gbedemah, Nahla Haidar, Dalia Leinarte, Rosario G. Manalo, Lia Nadaraia, Aruna Devi Narain, Ana Pelaez Narvaez, Bandana Rana, Rhoda Reddock, Elgun Safarov, Wenyan Song and Aicha Vall Verges.

*** Under rule 61, Genoveva Tisheva did not take part in the examination of the communication.

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Background

1. The author of the communication is S.L., a Bulgarian national born in 1982. She claims that Bulgaria has violated her rights under article 2 (a)–(c) and (e)–(g), article 5 (a) and article 16 (1) (c), (g) and (h) of the Convention, read in conjunction with article 1 thereof and the Committee's general recommendation No. 19 (1992) on violence against women, on account of the authorities' failure to prevent and effectively investigate the severe physical and psychological violence committed by her former husband against her. The Convention and the Optional Protocol thereto entered into force for the State party on 10 March 1982 and 20 December 2006, respectively. The author is represented by counsel, Milena Kadieva and Zhaneta Borisova.

Facts as submitted by the author

2.1 The author married M on 4 June 2000, when she was a 17-year-old schoolgirl. They moved into the house of M's parents, where they lived together with their son H, born on 31 October 2000.

2.2 The author claims that, for years, she has been a victim of domestic violence perpetrated by M and subjected to psychological, emotional and physical violence. In January 2001, M smacked the author three times because she refused to wear a certain outfit. Since then, his violence against the author has become frequent. Whenever the author expressed a differing opinion from that of M, he responded violently and aggressively, shouting at her and pushing and shoving her. He also threw and hit objects and broke doors. In March 2002, M beat the author, inflicting multiple blows to the head, because she turned off the television at 11 p.m. so that she and their son could sleep. As a consequence, she suffered from headaches for months. In October 2006, M beat the author again in the presence of their son. The author was not allowed to visit her parents and was locked up and isolated in the house.

2.3 In March 2007, the spouses split up, but they resumed their marital life after a month, when the author found out that she was pregnant. Despite her pregnancy, the husband continued to abuse the author, pushing her down the stairs in the house, alleging that the author "annoyed" him. M also accused his son of being lazy, not cleaning up and not helping his mother. He once beat his son because his arm had gotten stuck under the couch. M also became aggressive towards their old dog; he kicked the dog in the presence of the child and lifted the dog into the air and threw it to the ground just because the pet had started eating without permission. The dog became ill and could hardly stand on its legs.

2.4 In September 2007, the author discovered that M had a mistress. On 7 September 2007, M left home, leaving the pregnant author with their 7-year-old child. When the author tried to talk to M and his mistress, he pushed her down the stairs and tried to hit his mother, who was accompanying the author. On 26 November 2007, their second son, A, was born.

2.5 In January 2008, the spouses filed a divorce application with the Plovdiv Regional Court and were divorced by mutual consent under the conditions set by the author, namely, that M would pay 100 leva per month for each child as child support.[1] They also agreed upon a limited schedule of personal contact between the father and the children.

2.6 After the divorce, M did not maintain any contact with his sons and did not pay the child support on time. The author filed a complaint with the Plovdiv Regional Court for enforcement proceedings for unpaid child support over the preceding five

[1] The lev is the currency of Bulgaria; 100 leva is equal to about 58 United States dollars.

months. When her former husband appeared in front of the author and their children, he was aggressive and violent. He kicked stools and shattered the phone against the floor in the children's presence. H was so traumatized that he had to be seen by a psychologist. M refused to take part in the therapy process and has not seen H since 2009.

2.7 In May 2010, M filed a claim with the Plovdiv Regional Court for a reduction of the amount of the child support from 100 leva to 60 leva and broader visitation rights. The Court decided to leave the amount of child support and visitation rights unchanged as defined in its decision in 2008. M lodged an appeal with the Plovdiv District Court.

2.8 In August 2011, M took A, in disregard of the visitation schedule, and abandoned the child alone at 8 p.m. in the parking lot close to the house of the author's parents, instead of bringing him to the author's home.

2.9 On 31 August 2011, the author lodged a complaint with the Child Protection Department of Plovdiv about M's abusive behaviour towards his children. The Department assigned a social worker, M.P., to the case. The Department indicated that there was no violation of the child's rights because the author and M had given contradictory information.

2.10 On 20 September 2011, the author submitted a complaint to the State Agency for Child Protection in Sofia against the Child Protection Department of Plovdiv. It found that M was not informed of the regulations concerning family law and that the social worker working on the case, M.P., had reported that the children were at risk owing to the strained relations between the parents. From that date, the attitude of the social worker towards the author became hostile and aggressive, and her former husband started to come and shout and insult the author in front of her house. The author filed a harassment complaint with the police, which issued a warning to M on 26 October 2011.

2.11 On 23 February 2012, the Plovdiv District Court delivered a judgment establishing broader visitation rights for M, to be carried out in the presence of the social worker. The author lodged an appeal against the District Court's decision to the Supreme Court of Cassation, which considered the District Court's decision to be not appealable.

2.12 Later in 2012, the author lodged another complaint against the Child Protection Department, because M had discontinued A's medical treatment and had set off firecrackers in the hands of the 4-year-old child. In response to the complaint, M.P. stated that she could not sit all the time by the father's side and observe what he was doing with the child. The author filed a complaint with the police, and M was warned for the second time not to endanger A's life and health.

2.13 In January 2013, during M's visit set by the Court, the author called A and found that he was crying because he had begged his father to take him back home but the father had refused to do so. Against A's will, the father forced the child to spend the night at his house. The author filed a complaint with the police, and a third warning was issued to M.

2.14 In February 2013, the author filed a complaint with the Child Protection Department to seek help once again about M, who was trying to establish forced contact with the children without taking into consideration their emotions and the fact that he had not built any relationship with them over the years. On 15 February 2013, the parents attended a "reconciliation" meeting at the Department, along with two social workers. During the meeting, M.P. forced H to explain in his father's presence why he was not willing to have contact with him. When H did not manage to explain clearly enough, M.P., addressing the child directly, stated that the most probable

reason for him to have refused contact with his father was that his mother spoke ill of his father every day. She then forced the author and her other son to leave the room, which left H alone with his father and the social workers. Moments later, H came out of the room in tears indicating that, despite his attempts to explain the abusive and violent behaviour of his father, the adults present in the room explained that, whether he wanted to or not, he would be forced to visit his father. In that regard, the social workers strongly suggested that the author should let the child visit his father even if he did not want to do so.

2.15 As a result of the traumatizing meeting at the Child Protection Department, H refused to go back there. The author complained to the State Agency for Child Protection about M.P.'s "inappropriate behaviour" towards a child who had suffered violence and nervous breakdowns owing to the traumatizing aggression of his father.

2.16 On 1 March 2013, the author took H to see a psychologist, who concluded that H felt deeply hurt as a result of his father's violence towards his mother and that a coercive approach would be counterproductive. She recommended that the parents pay attention to H's emotions and that they all undergo family therapy, which M declined to do.

2.17 In June 2013, the State Agency for Child Protection acknowledged the violation of the rights of the children and the risk posed by the relationship between the father and his sons, but did not pursue the case any further.

2.18 From June to November 2013, M disappeared from his children's lives. In September 2013, M.P. called the author to encourage her to use social services. After that call, the author transmitted to the Child Protection Department the psychologist's report about her children's emotional state, noting also the recent abandonment by their father.

2.19 On 15 February 2014, M met A at his own parents' residence, in accordance with the court-scheduled visitation schedule. M called the author, insulted her in A's hearing and blamed her for the behaviour of their son, who spent the duration of the visitation crying.

2.20 On 1 March 2014, during a visitation, M took a mobile phone away from A and did not allow him to attend his friend's birthday party. M also shouted at H over the phone, accusing him of turning his brother against him. When the grandmother saw that A was limping and asked M whether he had taken the child to a doctor, M lost his temper and started yelling that A was overacting and pretending to be injured and that everybody was nagging him on purpose.

2.21 On 4 March 2014, the author had a long conversation with her former husband over the phone, suggesting that he should see a psychologist in order to facilitate effective communication. M agreed but did not go to the appointment.

2.22 On 19 April 2014, M forced A to stay overnight and did not allow H to talk to A over the phone. He threatened to sue H for turning A against his father. In the presence of A, M also insulted the author, saying that she was "sexually unsatisfied" and that she "should find 10 other men". H was very angry at M and was upset and shaking.

2.23 Worried about her sons' condition, the author took them to a therapeutic centre on 25 April and 8 May 2014. The father was invited but refused to attend. The psychologist's opinion was that A was willing to have contact with his father, but it would be traumatizing for the child to be forced to spend nights at the father's home, and that it would take time to build a fully functioning relationship with the father. The opinion regarding H was that there was a parental alienation towards the father, and that he had a secure attachment bond with the mother. The psychologist did not find any signs indicating that the mother had influenced her child in that regard.

2.24 On 30 April 2014, A cried hysterically and had difficulty breathing, because he did not want to meet with his father. During the visitation with A, M again, in his child's presence, insulted the author and her mother, calling them "stupid fool", "bitch" and "insane". M filed a harassment complaint with the police, alleging that the author was turning A against him and was bothering him over the phone. When A came back from the visit with his father, he said that he witnessed his father shouting at and insulting his grandmother as "bitch" and "stupid gull". The author filed a complaint with the police. On 9 May 2014, she was summoned to the Third Plovdiv Police District, along with the two children, who were questioned about the circumstances related to the two complaints, namely, the father's and the mother's.

2.25 On 14 May 2014, the author, in her personal capacity and on behalf of her two children, lodged a complaint with the Plovdiv Regional Court, requesting the Court to issue an emergency protection order applying the measures under article 5 (1) (1), (3) and (4) of the Protection against Domestic Violence Act of March 2005 (amended in 2009), with a view to protecting her and her children from M's violence.[2] The Court issued a writ to suspend the procedure and requested the author to specify the exact violence, because article 10 (1) of the Act set a one-month time limit on filing an application for a protection order and the description of the accidents should have been specifically factual rather than portraying the overall strained relations between the parties.[3] The author submitted additional information, also citing the applicable judicial standards on domestic violence, related cases of the United Nations treaty bodies and the European Court of Human Rights and the Child Protection Act. The Court issued an emergency protection order on 15 May 2014, on the basis of article 18 of the Protection against Domestic Violence Act. On 17 May 2014, a copy of the emergency protection order was served on M, and a fourth police warning was issued to him.

2.26 On 19 May 2014, M lodged a complaint with the police against the author. On 24 May 2014, the police issued a fifth warning against M to refrain from engaging in unlawful acts towards the author and the minor children and to observe strictly the Plovdiv Regional Court's emergency protection order. On 2 June 2014, the Plovdiv Regional Prosecutor's office ordered a complementary inquiry. H and the author provided explanations at the police station regarding the father's complaint. The psychologist warned that the children became visibly anxious when they talked about their father. On 26 June 2014, the police delivered an opinion on M's complaint, indicating that no pretrial proceedings were to be instituted.

2.27 On 25 June 2014, the Court did not allow the author's witnesses to discuss any acts of violence that had occurred more than one month prior to the allegation, as prescribed under article 10 of the Protection against Domestic Violence Act. The author's attorney raised an objection that, according to the international standards that had already been presented to the Court, the one-month period was not to be taken into account, which was not considered by the Court. Throughout the proceedings,

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[2] Protection against Domestic Violence Act, article 5 (1): Protection against domestic violence shall be implemented through any of the following: 1. Placing the respondent under an obligation to refrain from applying domestic violence; … 3. Prohibiting the respondent from getting in the vicinity of the home, the place of work, and the places where the victim has his or her social contacts or recreation, on such terms and conditions and for such a period as is specified by the court; 4. Temporarily relocating the residence of the child with the parent who is the victim or with the parent who has not carried out the violent act at stake, on such terms and conditions and for such a period as is specified by the court, provided that this is not inconsistent with the best interests of the child. Available through the Global Database on Violence against Women of the United Nations Entity for Gender Equality and the Empowerment of Women, at https://bit.ly/2UPxCFa. The case was registered as civil case No. 7444/2014.

[3] Ibid., article 10 (1): The application or request shall be filed within one month as from the date on which the act of domestic violence occurred. See Global Database on Violence against Women.

the Court was more lenient towards M's witnesses. On 1 July 2014, the author's attorney filed an application for the judge to recuse himself, which was refused.

2.28 On 28 August 2014, the Plovdiv Regional Court delivered a judgment rejecting the author's application for a protection order to be issued against M on the basis of the psychological and emotional violence. In its decision, the Court indicated that, in her application, the author had described circumstances that had happened outside the one-month time period set under article 10 (1) of the Protection against Domestic Violence Act and had expected the Court to take into account acts of violence that had taken place outside of that period. The Court also indicated that article 10 (1) was based on the principle of specificity, which would require that a particular act of domestic violence occur in a specified time frame, place and form or manifestation, rather than general and abstract allegations, and that the Court did not take into consideration violence that had occurred outside the time limit. In breach of the rules set out in the Civil Procedure Code, the Court refused to consider or to comment on the testimony given by the author's friend and did not recognize it as having evidentiary value because it was not coming from direct observation. Regarding the psychologist's opinions, the Court noted that the children were psychologically traumatized as a result of the strained relationship between their parents. Those opinions did not contain information about the father's aggression or any other form of domestic violence. The Court accepted the social worker's standpoint that the mother had influenced the children, burdening them with her own negative attitude towards the father. The Court also noted that the evidence showed an interpersonal conflict that had seriously damaged the relationship between the parents and that had had an impact on the children. The Court concluded that the author did not succeed in proving her claim of domestic violence beyond reasonable doubt. The Court found that the parental alienation seen in H towards his father was caused by the mother, who should have maintained a positive attitude towards the father, given that there was no reason for a minor child to become hostile against his father without having been subjected to aggression or other negative behaviour from him. The Court found, however, that such allegations were neither brought nor proven in the case before it. The Court considered that M's violent acts were a defensive reaction provoked by the behaviour of the author, who constantly called A on the phone and turned her sons against their father.

2.29 On 12 September 2014, the author lodged an appeal before the Plovdiv District Court against the Plovdiv Regional Court's decision, with a detailed analysis of all the proceedings. On 20 November 2014, the Plovdiv District Court dismissed the author's appeal, upholding the decision by which the District Court had refused to issue a permanent protection order under article 5 of the Protection against Domestic Violence Act.

Complaint

3.1 The author claims a violation of article 2 (a)–(c) and (e)–(g), article 5 (a) and article 16 (1) (c), (g) and (h) of the Convention, read in conjunction with article 1 thereof and the Committee's general recommendation No. 19,[4] on account of the State party's failure to effectively respond to the domestic violence committed against her by her former husband.

3.2 The author claims that the State party neglected its positive obligations under the Convention and supported the continuation of a situation of domestic violence against her, contrary to its obligations under the Convention. The author alleges that

[4] The Committee's general recommendation No.19 stipulates that States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

Bulgarian women are disproportionately negatively affected by the failure of the courts to take domestic violence seriously as a threat to their lives and health and as a factor that hampers the realization of their human rights. She also alleges that Bulgarian women are disproportionally affected by the practice of not appropriately prosecuting or punishing perpetrators of domestic violence. She further alleges that women are disproportionately affected by the failure to educate law enforcement officers, judicial personnel and all relevant professionals about domestic violence and by the failure to collect data and maintain statistics on domestic violence.

3.3 Concerning the violation of article 2 (a) and (b) of the Convention, the author submits that there is a lack of: (a) a special law on equality between women and men; (b) recognition of violence against women as a form of discrimination; and (c) positive measures in favour of women who are victims of domestic violence, all of which results in inequality in practice and the denial of the enjoyment by women of their human rights.

3.4 The author recalls the Committee's concluding observations on the combined second and third periodic reports of Bulgaria, in which the Committee urged the Government to develop an array of medical, psychological and other measures to assist women who are victims of violence and to change prevailing attitudes to domestic violence, which view it as a private problem, and to encourage women to seek redress (A/53/38/Rev.1, part one, para. 255).

3.5 The author also recalls the Committee's concluding observations on the combined fourth to seventh periodic reports of Bulgaria (CEDAW/C/BGR/CO/4-7, paras. 11–16), in which the Committee expressed concern about the State party's failure to specifically prohibit discrimination against women and to incorporate the principle of gender equality in all areas covered by the Convention and about the fact that a gender equality law had not yet been adopted. It called upon the State party to adopt a gender equality law prohibiting all forms of discrimination on the grounds of sex and gender, to ensure sanctions in cases of violations of the law and to embody the principle of equality between women and men. The Committee urged the State party to strengthen its legal complaint mechanisms to ensure that all women had effective access to justice. It also recommended that the State party expeditiously strengthen the national machinery for the advancement of women by increasing its authority and visibility.

3.6 The author further recalls the Committee's general recommendation No. 19, establishing that gender-based violence, which impairs or nullifies the enjoyment by women of their human rights, constitutes discrimination against women within the meaning of article 1 of the Convention. The author notes that the Committee has observed that States parties can be held responsible for private acts if they fail to act with due diligence to prevent violations of women's rights or to investigate and punish acts of violence against women. The Committee had made it clear that the obligations of States parties to implement the Convention effectively require them to eradicate violence against women, including domestic violence, through a set of preventive, protective, rehabilitative and punitive measures, which are outlined in the text of the general recommendation. The author also notes that the Committee has stated that, if States parties fail to act with due diligence to prevent violations of women's rights or to investigate and punish those responsible for committing violence in the private sphere, they may be held responsible. The Committee has advanced the principle of State responsibility for domestic violence in numerous concluding observations. In particular, it has reiterated that States parties must develop the capacity to understand the meaning of substantive equality and non-

discrimination, that domestic violence is gender-based violence that constitutes discrimination against women and that it is therefore a human rights violation.[5]

3.7 The author recalls that, in its general recommendation No. 21 (1994) on equality in marriage and family relations, the Committee observed that custom, tradition and failure to enforce laws ensuring equality and protection against violence contravene the Convention.[6]

3.8 The author alleges that there is no law on the equality of men and women and that the Protection against Domestic Violence Act does not recognize domestic violence as gender-based violence that constitutes discrimination against women. She also alleges that the law does not recognize that domestic violence in Bulgaria disproportionately affects women and lessens and nullifies the enjoyment by women of their human rights. Some of the procedures and norms of the Act contribute in practice to the perpetuation of the phenomenon by not treating it according to its specificity and according to the requirements of international law. In order for an individual woman who is a victim of domestic violence to enjoy the practical realization of the principle of the equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in a State's system must be supported by State actors that adhere to the State party's due diligence obligations. Taking into consideration all the information provided in the present communication, Bulgaria should therefore be held responsible for the violation of article 2 (a) and (b) of the Convention.

3.9 As regards the violation of article 2 (c) and (e) of the Convention, the author asserts the State party's lack of protection from domestic violence owing to a series of failures, namely: (a) the lack of criminalization of domestic violence; (b) the lack of effective implementation of the Protection against Domestic Violence Act, including the lack of clarity as to which acts of domestic violence should be assessed during judicial proceedings and the lack of clarity under the Act as to which party bears the burden of proof; (c) the lack of coordination among law enforcement and judicial officials; (d) the failure to educate law enforcement personnel, judicial personnel and social workers about domestic violence; and (e) the failure to collect data and maintain statistics on incidents of domestic violence. Consequently, the author was exposed to long-lasting physical, psychological and emotional domestic violence and to assault, battery, coercion and threats to her life. Her two sons were emotionally abused by their father and institutionally abused by the social services, which are aimed at protecting children and their rights, as well as by the court, which is required to implement the international and European human rights standards for the protection of the rights of victims of domestic violence.

3.10 The author notes with concern that the Plovdiv courts did not take into account the long history of physical and psychological abuse suffered by her and her children. The Plovdiv Regional Court did not allow the author to present all the acts of domestic violence that took place during her marital relationship or those occurring after her divorce, despite the fact that she had listed them in her application for an order of protection against domestic violence. During the proceedings, the Court did not consider the evidence of emotional and psychological violence presented with the application and mistreated the oral evidence presented by the witnesses. In deciding the case, the Court took into account only events that had taken place in the 30 days

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[5] See the Committee's concluding observations on the periodic reports, inter alia, of Italy (see A/52/38/Rev.1, part two, chap. IV, sect. B), Algeria (see A/54/38/Rev.1, part one, chap. IV, sect. B), Belarus (see A/55/38, part one, chap. IV, sect. B), Burkina Faso (ibid.), Germany (ibid.), Cameroon (ibid., part two, chap. IV, sect. B), Egypt (see A/56/38, part one, chap. IV, sect. B), Guinea (ibid., part two, chap. IV, sect. B) and Viet Nam (ibid.).

[6] General recommendation No. 21, para. 15; see also paras. 13, 14, 16 and 17 thereof.

preceding the initiation of the proceedings under article 10 (1) of the Protection against Domestic Violence Act. The entire history of domestic violence perpetrated against the author and her children was therefore completely neglected and underestimated. The Court converted a pattern of domestic violence and abuse into a series of scandals between the parties on the basis that their relationship was violent owing to the author's "provocative behaviour". Such an assessment displays a total misunderstanding of the situation and disregard for the suffering of the author.

3.11 The author recalls that the Committee has noted that the Bulgarian courts have applied an overly restrictive definition of domestic violence that was not warranted by the Protection against Domestic Violence Act and deprived themselves of the opportunity to take into account the history of domestic violence by interpreting the purely procedural requirement of article 10 (1) of the Act in a very strict manner.[7] The Committee has recommended that the State party amend article 10 (1) of the Act so as to remove the one-month time limit and ensure that protection orders are available without placing undue administrative and legal burden on applicants.[8] The lack of clarity in the Protection against Domestic Violence Act as to which acts of domestic violence should be taken into account during judicial proceedings is therefore incompatible with the State's duty to provide protection against domestic violence and is discriminatory in that the shortcomings of the Act have a disproportionate impact on women. Bulgarian law is deficient in that it treats domestic violence as a mostly family-related matter that does not warrant great public attention or criminal prosecution and therefore does not ensure that the victims are able to institute proceedings that would effectively protect them.

3.12 The author alleges a lack of effective implementation of the Protection against Domestic Violence Act owing to the lack of clarity as to which of the parties bears the burden of proof in judicial proceedings and the role of the evidence presented. The author argues that the lack of clarity in the Act as to the burden of proof is incompatible with the duty of the State party to protect against domestic violence and is discriminatory because the shortcomings of the Act have a disproportionate impact on women, who are typically the victims of domestic violence. Although the Act provides for a shift of the burden of proof in domestic violence cases, it is not sufficiently clear on that point. Instead, it defers to the rules of evidence of the Civil Procedure Code. As a result of inadequate legal training, many judges have continued to apply a "beyond reasonable doubt" standard in cases involving requests for protection orders and required the author to prove her case beyond reasonable doubt before the courts. The author asserts that, by interpreting and applying the Act in a way that disregards any evidence of domestic violence suffered prior to the beginning of the one-month period, the courts failed to shift the burden of proof in her favour, thereby depriving her of effective judicial protection. The author explains that the aim of the Act is to ensure the effective protection of victims of domestic violence by taking into account the entire history of violence, whereas the 30-day time limit in article 10 of the Act is a purely procedural time frame for filing complaints. She recalls the jurisprudence of the Committee, in which it has indicated that the Bulgarian courts applied a very high standard of proof by requiring that the act of domestic violence must be proven beyond reasonable doubt, thereby placing the burden of proof entirely on the victim.[9] Such a standard of proof is excessively high

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[7] See *V.K. v. Bulgaria* (CEDAW/C/49/D/20/2008), *Jallow v. Bulgaria* (CEDAW/C/52/D/32/2011) and the Committee's concluding observations on the combined fourth to seventh periodic reports of Bulgaria (CEDAW/C/BGR/CO/4-7). See also European Court of Human Rights, *Bevacqua and S. v. Bulgaria* (application no. 71127/01), judgment of 12 June 2008, in which the Court found the State to be in violation of article 8 of the European Convention on Human Rights, in a domestic violence case.

[8] See *V.K. v. Bulgaria* and CEDAW/C/BGR/CO/4-7.

[9] See *V.K. v. Bulgaria*.

and is not in line with the Convention or with current non-discrimination standards, which ease the burden of proof in favour of the victim in civil proceedings relating to domestic violence complaints. Accordingly, the Committee recommended to the State party that it amend the Act to ease the burden of proof in favour of the victim.

3.13 Regarding the violation of article 2 (f) and (g), the author reiterates that, under the Protection against Domestic Violence Act, domestic violence is not recognized as a crime or as a form of gender-based discrimination. It contains elements of criminal procedure but remains within the framework of the civil procedure. The main challenge for its effective implementation is the lack of understanding of the specificity of domestic violence as a form of gender-based discrimination, of its roots, causes and effects being harmful to women and children or of the cost to society as a whole. The lack of adequate training of those involved with the enforcement of the Act is hampering its practical realization and the enjoyment by women of their human rights. In addition, the penal laws in Bulgaria still exempt from State prosecution certain types of assault if committed by a family member, although the State prosecutes the same act if committed by a stranger (article 161 of the Penal Code). The State does not assist in prosecuting domestic assault unless the woman has been killed or permanently injured. Furthermore, the State has failed to adopt and implement national legislation emphasizing the prevention of violence and the prosecution of offenders or to periodically review and analyse its legislation to ensure its effectiveness in eliminating violence against women. In addition, the lack of State-funded and State-supported research on the prevalence, causes and consequences of violence indirectly perpetuates the negative phenomenon of domestic violence owing to the lack of information on the number of such cases and on the prevalence and pervasiveness of the phenomenon and, therefore, neither the State nor society perceive it as being a serious human rights violation affecting a wide group of people, mainly women and children, including the author and her children. The lack of official statistics affirms the State's neglect and underestimation of the problem and is an illustration of one of the State's violations of its international legal obligations in the sphere of violence against women.

3.14 As for the violation of article 5 (a) and article 16 (1) (c), (g) and (h), read in conjunction with article 1, of the Convention, the author claims that the lack of a State-adopted comprehensive approach to overcoming traditional stereotypes regarding the role of women in the family and in society, including political, legal and awareness-raising measures involving State officials, civil society and the media, contributes to violence against women and, in reality, violates the author's right to equality.

3.15 The author requests that the State party: (a) take immediate and effective measures to protect her physical and mental integrity and that of her children; (b) ensure the safety of her home and that she receives adequate child maintenance and legal assistance; and (c) provide her with adequate compensation for the physical and mental harm suffered, proportionate to the gravity of the violations of her rights under the Convention.

3.16 The author also claims that the State party should adopt general measures in favour of women who are victims of domestic violence, including: amending the Protection against Domestic Violence Act in order to criminalize acts of domestic violence and breaches of protection orders and to provide for the issuance of protection orders for acts of violence committed prior to the one-month period referred to in article 10 of the Act; detaining perpetrators according to the gravity of the offence; amending criminal laws to allow ex officio prosecution in cases of low- and medium-level assaults when the victim and the perpetrator are relatives; clarifying on whom the burden of proof is placed in domestic violence proceedings by explicitly stating that the Act requires that the burden of proof be shifted in favour of the victim;

continuously training public officials responsible for the application of the Act; providing adequate support to non-governmental organizations working to combat domestic violence; and raising public awareness of the negative impact of domestic violence on women and children, as well as of its financial consequences for society.

3.17 The author submits that she has exhausted all available domestic remedies and that the same matter has not been examined under another procedure of international investigation or settlement.

State party's observations on admissibility and the merits

4.1 On 10 March 2015, the State party submitted its observations on the admissibility and merits of the communication.

4.2 On the admissibility of the communication, the State party concedes that, after the confirmation of the judgment by the appellate court dismissing, on 20 November 2014, the author's allegation of domestic violence against her former husband, the author could not further appeal to another court in Bulgaria. However, the State party claims that the author did not take any steps to seek protection or assistance under the Protection against Discrimination Act or under the State and Municipal Liability for Damage Act.

4.3 Concerning the merits of the communication, the State party provided information on its efforts to combat violence against women, including the action plan adopted in July 2013 to implement the Committee's concluding observations on the combined fourth to seventh periodic reports of Bulgaria (CEDAW/C/BGR/CO/4-7) and the adoption of the Gender Equality Act in April 2016 to better align national legislation and policy with European Union standards and international legal instruments on gender equality.

4.4 The State party also introduced a project funded by Norway from 2009 to 2014 in which the Ministry of Labour and Social Policy implemented a number of activities aimed at improving the capacity of institutions and the professional qualifications of experts that address domestic violence cases, including the development of training materials and training workshops for social workers.

4.5 The State party contends that it is implementing the Child Protection Act, in line with the Convention on the Rights of the Child, which stipulates that each child has the right to protection against educational methods that are degrading to their dignity, against physical and psychological or other violence and against any forms of influence running counter to the child's interests. The State party refers to the Child Benefits Act and the Social Assistance Act, which are aimed at providing social protection measures for and community social services to children. Protective measures for women and children who are vulnerable to domestic violence were also introduced, such as crisis centres, mother and baby units, social support centres and social rehabilitation and integration centres. Coordination of the agencies is managed under a cooperation agreement, signed in 2010, applicable to the work of territorial structures of child protection bodies in cases of children who are victims of violence or at risk of violence and in cases of crisis intervention.

4.6 The State party notes that the report by the Social Assistance Agency enclosed with the complaint was prepared in line with a uniform procedure, drawn up on the recommendation of the Ombudsman, for the conduct of social inquiries and the preparation of social reports required by judicial institutions in relation to legal proceedings involving children. The State party also notes in that context that regional and territorial units of the Agency do not deliver a final opinion on custody rights, which is exclusively within the competence of the relevant court.

4.7 The State party asserts that the Plovdiv Social Assistance Directorate, which is in charge of the implementation of measures for protection against domestic violence, was aware of the situation of the author and her children on the basis of the multiple reports submitted by the author. Through inquiries into those reports, it was found that the arrangement of personal contacts between the father and the two children as ordered by the court were not always respected. The State party indicates that the competent child protection body did not find any risks to the children and therefore no cases relating to a child being at risk were opened under the Child Protection Act. The State party also notes that the parents were advised of their rights and obligations under the provisions of the Child Protection Act and the Family Code. Furthermore, after M submitted the application to use social services to improve his relationship with his sons, the case was referred to the Plovdiv child and family social services complex.

4.8 The State party notes that the author has been receiving benefits for her two children under article 4 of the Child Benefits Act since 2013. She currently receives 85 leva per month and was granted aid on the grounds of the Child Benefits Act, amounting to 250 leva.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 7 July 2017, the author submitted comments on the State party's observations on admissibility and the merits.

5.2 The author considers that the State party does not contest the admissibility of the communication. Regarding the comments on the protection and assistance provided for under the Protection against Discrimination Act, the author alleges that that Act is not effective or applicable to her case because: (a) there is a special law on protection against domestic violence, which the author invoked in her case; (b) the understanding of the Commission on Protection against Discrimination is that domestic violence is not a form of discrimination against women; and (c) the Act does not offer any measures for protection against domestic violence except for the levying of a fine of between 250 and 2,000 leva on the perpetrator. As to the State and Municipal Liability for Damages Act, the author alleges that it is not applicable in the current case.

5.3 On the merits of the communication, the author claims that the institutional action plan adopted in July 2013 and referred to by the State party has not been implemented, four years after its adoption. With regard to the Gender Equality Act of 2016, the author alleges that the law is ineffective, because it only confirms the existing State structure and does not create a body that would design and implement the State policy on gender equality and does not enumerate sanctions to be imposed for lack of implementation of the legislation; moreover, there is no financial framework for the implementation of the legislation.

5.4 The author claims that the project funded by Norway from 2009 to 2014 was of limited duration and that no financial measures were taken to ensure the continuation of the activities implemented or the sustainability of the project.

5.5 The author asserts that, since the adoption of the Protection against Domestic Violence Act, despite her numerous requests as a mother of two children and a victim of domestic violence, no effective measures to protect her and her sons were taken by the Social Assistance Directorate in Plovdiv.

5.6 The author concludes that the State party focused on the legal framework that is in place, without responding to the factual claims she raised. She therefore reiterates her complaint under article 2 (a)–(c) and (e)–(g), article 5 and article 16 (1) (c),

(g) and (h) of the Convention, read in conjunction with article 1 thereof and the Committee's general recommendation No. 19, regarding the State party's failure to provide her with effective protection against domestic violence.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol. Pursuant to rule 66 of the rules of procedure, the Committee may decide to examine the admissibility of the communication together with its merits. Pursuant to rule 72 (4), it is to do so before considering the merits of the communication.

6.2 In accordance with article 4 (2) (a) of the Optional Protocol, the Committee is satisfied that the matter has not already been and is not being examined under another procedure of international investigation or settlement.

6.3 The Committee recalls that, under article 4 (1) of the Optional Protocol, it is precluded from considering a communication unless it has ascertained that all available domestic remedies have been exhausted or that the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.[10] In that connection, the Committee notes the State party's argument that the author did not take any steps to seek protection and assistance under the Protection against Discrimination Act or the State and Municipal Liability for Damage Act. Nevertheless, the Committee notes the author's submission that she has exhausted all available domestic remedies that would have been likely to bring sufficient relief and the application of which would not have been unreasonably prolonged. As conceded by the State party, she appealed to the court and, in its judgment, the appellate court dismissed the author's appeal on the basis that the judgment of the Plovdiv District Court was not appealable. The Committee also notes the author's assertion that proceedings under the Protection against Discrimination Act and under the State and Municipal Liability for Damage Act are unlikely to provide adequate effective relief in the present gender-based violence and domestic violence case.

6.4 The Committee further notes that the State party provides no explanation or details as to how the proceedings under those laws would have been effective in securing the rights of the author. The Committee, therefore, considers, in the present case, that it cannot conclude that the domestic remedies referred to by the State party would bring effective relief to the author; it also considers that such remedies would amount to an additional unreasonable delay in the proceedings. Accordingly, the Committee is not precluded, by virtue of the requirements of article 4 (1) of the Optional Protocol, from considering the present communication. The committee also considers that it has no reason to find the communication inadmissible on any other grounds and accordingly finds it admissible.

6.5 Having found no impediment to the admissibility of the communication, the Committee proceeds to its consideration of the merits.

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided for in article 7 (1) of the Optional Protocol.

[10] *E.S. and S.C. v. United Republic of Tanzania* (CEDAW/C/60/D/48/2013), para. 6.3; and *L.R. v. Republic of Moldova* (CEDAW/C/66/D/58/2013), para. 12.2.

7.2 The Committee considers that, at the heart of the present communication, lies the author's allegation that the State party has failed to provide her with effective protection against domestic violence, in violation of article 2 (a)–(c) and (e)–(g), article 5 (a) and article 16 (1) (c), (g) and (h), read in conjunction with article 1, of the Convention.

7.3 The Committee recalls its general recommendation No. 19 and general recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, according to which gender-based violence and domestic violence, which impair or nullify the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, constitute discrimination within the meaning of article 1 of the Convention. Under the obligation of due diligence, in particular in the private sphere, States parties must adopt and implement constitutional and legislative measures to tackle gender-based violence against women committed by non-State actors, also in the private sphere, in particular when it relates to domestic violence, including having laws, institutions and a system in place to address such violence and ensuring that they function effectively in practice and are supported by all State agents and bodies, which must diligently enforce the laws. The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, prosecute and punish perpetrators and provide reparations to victims and survivors of such acts, provides tacit permission or encouragement to perpetrate acts of gender-based violence against women. Such failures or omissions constitute human rights violations.[11] Failing to effectively address gender-based violence and domestic violence is detrimental to society and, in particular, to women and children.

7.4 The Committee addressed articles 5 and 16 together in its general recommendations No. 19, No. 21 and No. 35; the Committee stressed that the provisions of general recommendations No. 19 and No. 35 concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men. It has indicated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The Committee emphasizes that the full implementation of the Convention requires States parties not only to take steps to eliminate direct and indirect discrimination and improve the de facto position of women, but also to modify and transform gender stereotypes, which constitute both a root cause and a consequence of discrimination against women.[12] Gender stereotypes are perpetuated through various means and institutions, including laws and legal systems, and can be perpetuated by State actors in all branches and at all levels of government and by private actors.[13]

7.5 The Committee notes that, under article 2 and article 5, the State party has an obligation to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women, whereas, under article 16 (1), the State party must take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. In that regard, the Committee stresses that stereotyping affects women's right to a fair trial and that the judiciary must be careful not to create inflexible standards on the basis of preconceived notions of what constitutes domestic

[11] General recommendation No. 35, para. 24 (2) (b).
[12] *Belousova v. Kazakhstan* (CEDAW/C/61/D/45/2012), para. 10.10.
[13] *R.K.B. v. Turkey* (CEDAW/C/51/D/28/2010), para. 8.8.

or gender-based violence, as noted in its general recommendation No. 33 (2015) on women's access to justice.[14]

7.6 In the present case, the compliance of the State party with its obligations to banish gender stereotypes under article 2 (a)–(c) and (e)–(g) and article 5 (a) of the Convention, read in conjunction with article 16 (1) (c), (g) and (h), must be assessed in the light of the level of gender sensitivity applied in the handling of the author's case by the authorities. Therefore, with regard to the submission of the author that the decisions of the authorities were based on gender stereotypes, the Committee reaffirms that the Convention places due diligence obligations on all State institutions and that States parties can be held responsible for judicial decisions that violate provisions of the Convention.[15]

7.7 The Committee notes that the State party has taken measures to provide protection against gender-based violence and domestic violence, including under the Protection against Domestic Violence Act. However, in order for the author to enjoy the practical realization of the principle of equality between women and men and of her human rights and fundamental freedoms, the political will that is expressed in such measures and legislation must be supported by all State actors, including the courts, which are bound by the obligations of the State party.

7.8 The Committee notes from the author's submission that the legislation in the State party does not provide effective legal protection against gender-based violence and domestic violence, which resulted in the violation of the State party's obligations under article 2 (a)–(c) and (e)–(g). The Committee recalls its views in *V.K. v. Bulgaria*, in which it requested the State party to amend article 10 (1) of the Protection against Domestic Violence Act, which stipulates that a request for a protection order must be submitted within one month of the date on which the act of domestic violence has occurred and has been interpreted as precluding courts from considering past incidents having occurred prior to the relevant one-month period.[16] The Committee finds that the rationale behind the one-month period within which, under the article, a victim must apply for a protection order, whereby the order is meant to provide for urgent court interventions rather than policing the cohabitation of partners, lacks gender sensitivity in that it reflects the preconceived notion that gender-based violence and domestic violence is, to a large extent, a private matter falling within the private sphere, which, in principle, should not be subject to State control.[17] In its concluding observations on the combined fourth to seventh period reports of Bulgaria (CEDAW/C/BGR/CO/4-7), the Committee reiterated its serious concern about the high prevalence of gender-based violence and domestic violence, the absence of specific provisions criminalizing gender-based violence, domestic violence and marital rape, the lack of criminal prosecution of violence within the family and the failure by the judiciary to follow the practice of shifting the burden of proof to favour victims, which is provided for in the Protection against Domestic Violence Act (ibid., para. 25). It recommended that the State party amend its Criminal Code and Criminal Procedure Code in order to specifically criminalize gender-based violence, domestic violence and marital rape and to introduce the possibility of ex officio prosecution for all three offences; amend article 10 (1) of the Act so as to remove the one-month time

[14] General recommendation No. 33, paras. 26 and 27; in para. 26, the Committee notes that judges often adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to those stereotypes, that stereotyping also affects the credibility given to women's voices, arguments and testimony as parties and witnesses and that such stereotyping can cause judges to misinterpret or misapply laws. See also *L.R. v. Republic of Moldova*, para. 13.6; and *J.I. v. Finland* (CEDAW/C/69/D/103/2016), para. 8.6.

[15] *V.K. v. Bulgaria*, para. 9.11; and *L.R. v. Republic of Moldova*, para. 13.6.

[16] *V.K. v. Bulgaria*, para. 9.9.

[17] *V.K. v. Bulgaria*, para. 9.12.

limit to file a petition for a protection order and to ensure the stringent application by the judiciary of article 13 (3) of the Act so as to ease the burden of proof in favour of the victim; ensure that sufficient State-funded shelters are available to women who are victims of gender-based violence and domestic violence and their children and provide support to non-governmental organizations offering shelter and other forms of support to victims of domestic violence; and provide mandatory training for judges, lawyers and law enforcement personnel on the application of the Act, including on the definition of gender-based violence and domestic violence and on gender stereotypes.

7.9 In the present case, the Committee recalls that the Plovdiv Regional Court and the Plovdiv District Court, in their application of aforementioned article 10 (1) of the Protection against Domestic Violence Act and their assessment, essentially based their decision to refuse a permanent protection order on the assumption that, during the relevant one-month period from the date of the application, there was "no proof of domestic violence" against the author or her children and that M's aggressive acts had likely been caused by the author's behaviour. The Courts had therefore concluded that both parents were responsible for the mental status of the children.

7.10 With regard to the court rulings, the Committee reiterates that it is not in a position to review the assessment of facts and evidence by domestic courts and authorities unless such assessment was, in itself, arbitrary or otherwise discriminatory.

7.11 The Committee also notes that the failure by the State party to amend article 10 (1) of the Protection against Domestic Violence Act directly affected the possibility for the author to claim justice and to have access to effective remedies and protection. The Committee notes in the present case that the failure by the State party to amend the article in question led to the courts not giving due consideration to M's previous record of gender-based violence and domestic violence and to their disregarding the author's vulnerable position and long-term suffering. The Committee also considers that the case displays a failure by the State party in its duty to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of the inferiority or superiority of either of the sexes, or on their traditional roles.

7.12 The Committee recognizes that the author of the communication has suffered severe physical, psychological and material damage and prejudice. Throughout all the proceedings of the case, the author did not get the legal protection required. Even if the Committee assumes that she was not directly subjected to physical gender-based violence and domestic violence following the final rejection of her claim, for which she had incurred costs, she nonetheless suffered great prejudice owing to the absence of legal and institutional protection and adequate responses to her and her children's application.

7.13 The Committee also notes that the State party, in its observations with regard to the present case, does not effectively challenge or contest the allegation made by the author.

7.14 Acting under article 7 (3) of the Optional Protocol and in the light of the above considerations, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the author's rights under article 2 (a)–(c) and (e)–(g), article 5 (a) and article 16 (1) (c), (g) and (h) of the Convention, read in conjunction with article 1 thereof and the Committee's general recommendations No. 19, No. 21 and No. 35.

7.15 The Committee makes the following recommendations to the State party:

(a) Concerning the author of the communication:

(i) Take immediate and effective measures to guarantee the physical and mental integrity of the author and her children;

(ii) Ensure that the author receives appropriate child support and legal assistance, as well as financial reparations proportionate to the physical, psychological and material damage suffered by her and her children and commensurate with the gravity of the violations of their rights;

(b) In general:

(i) Fulfil its obligations to respect, protect, promote and fulfil the human rights of women, in particular the right to be free from all forms of gender-based violence and domestic violence, including intimidation and threats of violence;

(ii) Promptly revise its legislation and, if necessary, its constitutional provisions, to bring them into full compliance with the Convention and international human rights standards, including general recommendations No. 19 and No. 35 and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention); ensure, in particular, that all acts of gender-based violence and domestic violence, including violence in the family sphere, are considered violations of the fundamental rights of women and thus criminalized and subject to sanctions; amend article 10 (1) of the Protection against Domestic Violence Act so as to remove the one-month time limit and thereby ensure that protection orders are available without placing undue administrative and legal burdens on applicants; and ensure that the provisions of the Act ease the burden of proof in favour of the victim;

(iii) Complete the process of ratifying the Istanbul Convention, as doing so will reinforce the State party's ability to combat gender-based violence and domestic violence;

(iv) Promptly, thoroughly, impartially and seriously investigate all allegations of gender-based violence against women, ensure that criminal proceedings are initiated in all such cases, bring the alleged perpetrators to trial in a fair, impartial, timely and expeditious manner and impose appropriate penalties;

(v) Provide victims of gender-based violence with safe and prompt access to justice, including free legal aid where necessary, in order to ensure that they have access to effective and sufficient remedies and rehabilitation, in line with the guidance provided in the Committee's general recommendation No. 33, and ensure that victims of domestic violence and their children are provided with prompt and adequate support, including shelter and psychological support;

(vi) Provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods;

(vii) Provide mandatory training for judges, lawyers and law enforcement personnel, including police and prosecutors, as well as social workers and psychologists, on the Convention, the Optional Protocol thereto and the Committee's jurisprudence and general recommendations, in particular general recommendations No. 19, No. 21, No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, No. 33 and No. 35, as well as the Istanbul Convention;

(viii) Develop and implement effective measures to prevent similar violations from being repeated, with the active participation of all relevant stakeholders, to address the stereotypes, prejudices, customs and practices that condone or promote gender-based violence and domestic violence;

(ix) Expeditiously implement the Committee's recommendations, in particular those regarding combating violence against women, contained in its concluding observations on the combined fourth to seventh periodic reports of Bulgaria (CEDAW/C/BGR/CO/4-7).

7.16 In accordance with article 7 (4) of the Optional Protocol, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee. The State party is requested to publish the Committee's views and recommendations and to have them widely disseminated in order to reach all sectors of society.

vii. J.I. v. Finland (Communication No. 103/2016)

United Nations — CEDAW/C/69/D/103/2016

Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women

Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 103/2016*,**

Communication submitted by:	J.I. (represented by counsel, Susan Hindström)
Alleged victims:	The author and her minor son, E.A.
State party:	Finland
Date of communication:	2 May 2016 (initial submission)
References:	Transmitted to the State party on 26 May 2016 (not issued in document form)
Date of adoption of views:	5 March 2018

* Adopted by the Committee at its sixty-ninth session (19 February–9 March 2018).

** The following members of the Committee participated in the examination of the present communication: Ayse Feride Acar, Gladys Acosta Vargas, Nicole Ameline, Magalys Arocha Domínguez, Gunnar Bergby, Marion Bethel, Louiza Chalal, Naéla Gabr, Hilary Gbedemah, Nahla Haidar, Ruth Halperin-Kaddari, Lilian Hofmeister, Ismat Jahan, Dalia Leinarte, Rosario Manalo, Lia Nadaraia, Aruna Devi Narain, Bandana Rana, Patricia Schulz, Wenyan Song, Aicha Vall Verges.

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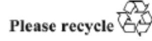

1.1 The author of the communication is J.I, a Finnish national born in 1972. She submits the communication on behalf of herself and her son, E.A., also a Finnish national, born in 2011. The Convention and the Optional Protocol entered into force for Finland in 1986 and 2000, respectively. The author is represented by counsel, Susan Hindström.

1.2 The communication was accompanied by a request for interim measures to ensure the safety of the author's child, who lives with his father. On 26 May 2016, the Committee requested the State party to take interim measures to ensure a prompt and exhaustive investigation of the author's allegations of violence against E.A. and to take all measures necessary to avoid the occurrence of irreparable harm to the child's health and well-being. On 17 January and 30 May 2017, the request was reiterated to the State party. Interim measures, however, have not been implemented.

Facts as submitted by the author

2.1 The author and J.A. initiated a relationship at the end of 2010. Soon thereafter, J.A. began to act violently towards the author. The violence included attempted suffocation, a bloody nose, being dragged by the hair, being thrown against a door and around the apartment and being humiliated. She later became pregnant. J.A. tried to force her to have an abortion but she refused. During the pregnancy, in 2011, she was subjected to pushing, slapping, name-calling, humiliation and threats. She remained in the relationship at that time as she wanted her child to have his father present in his life. Their son, E.A., was born on 14 August 2011.

2.2 After the birth, the violence escalated. The author did not inform the authorities because J.A. had threatened to kill her if she told anyone. On 22 December 2011, J.A. assaulted the author at their home, hitting her in the face, leaving a bruise around one eye and a wound on her cheek. She visited a doctor the following day. There was pain in her cheek for one to two weeks and a 1 cm scar is still visible near her eye.

2.3 In the service plan drawn up by the child welfare authorities in the wake of the assault, dated 18 January 2012, it is stated that there was a physical altercation between the parents at the end of 2011. J.A. stated that he became nervous whenever the author came too close to him and yelled, and admitted that he had hit the author. The author told the authorities that J.A. had hit her on the side and, during another disagreement, in the face. An outside party had noticed that the relationship between the parents was belligerent and was concerned about the author's situation.

2.4 Between 15 and 29 February 2012, J.A. struck the author under her left ribs. She heard a cracking sound and her left side became sore immediately. Owing to the pain, which lasted for a month, she could not lift her baby and it was difficult to move. J.A. attacked her a second time later in the same month.

2.5 On 22 February 2012, the Turku city authorities decided to make financial provision for J.A. to attend meetings of a group for violent men. He did not attend. In March 2012, J.A. attempted to have the author involuntarily committed to a mental institution. According to the author's medical record of 19 March 2012, the admitting doctor concluded that she was not psychotic, had had no previous mental illness and was potentially harmful neither to herself nor to anyone else, and that therefore the criteria for committal had not been met.

2.6 On the night of 15 April 2012, J.A. attacked the author, hitting her with a 30-cm-long drill bit that caused a wound on the back of her head. The author panicked and fled in her car, stopped 1.5 km away and called an ambulance. The ambulance took her to hospital, where the wound was stitched. As a result, on 16 April 2012, J.A. was detained by the police and their 8-month-old child was placed in the custody of the child welfare authorities, as his mother was still in hospital. The child remained

in their custody until 15 May 2012, despite the author's discharge from hospital on 17 April. That decision by the Turku city family and social services department was based on concerns about "the ability of the parents to provide for the safety and age-appropriate care of the child against the background of their continual disagreements". According to the child welfare report made by the paramedic on 16 April 2012, "the mother had been taken by ambulance to emergency care, since the father had hit her on her head with an iron pipe". J.A. later admitted, in testimony given on 14 October 2013 in the Varsinais-Suomi District Court during a subsequent custody dispute, that he had struck the author with a drill bit on the date in question.

2.7 On 16 October 2012, the author, upon the recommendation of a social worker and given the continual domestic violence and disagreements, left the family home with the child and moved to a women's shelter in Turku. The quarrels continued and the child was placed in an orphanage on 7 November 2012. As a result, the author became upset, as she felt that the shelter and child welfare authorities, rather than trying to help her and her child, had again separated them, as they had done on 16 April 2012, when she had been taken to hospital for emergency care owing to the violent behaviour of J.A.

2.8 At the beginning of December 2012, the author separated from J.A. permanently and moved to Mellilä to protect herself and her child from any further violence. By a decision dated 5 December 2012, E.A. was returned to live with his mother and J.A. was granted visitation rights. In line with the decision, a social worker had requested an assessment of the author by the acute psychiatry unit, but no such assessment was carried out with regard to J.A. According to the resulting medical report, the author was willing to discuss her situation. At no point was any concern raised about her psychiatric well-being or its possible effects on her child. It is further stated therein that both parents were capable of taking care of the child. Because the author had primarily looked after the child prior to his placement in the orphanage and was on childcare leave, her son had been returned to her care. There was no mention in the social worker's assessment of the continual violence by the father towards the author in the child's presence, nor was any question raised about his stability, although there were serious grounds for assessing him as violent and as a threat to the author and their child.

2.9 At the end of 2012, J.A. filed an application for sole custody of their son. On 28 January 2013, the Varsinais-Suomi District Court handed down an interim order, based on the agreement of the parents, that the son should live with his mother and that his father should have visitation rights of two weekends per month.

2.10 On 14 May 2012, both parties requested a report from social services because the father's visitation rights had not been carried out successfully. The report was obtained by the Varsinais-Suomi District Court on 11 September 2013 and sent to the parties. On 14 October 2013, the District Court granted the father sole custody of the child. In its reasoning for the decision, the Court referred briefly to violence between the parents but focused on the hostile attitude of the author towards J.A. and how that might affect their child in the future. Regarding the violence, the Court stated that both parties had accused each other of, and admitted using, violence, that there was no suggestion that any violence would be directed at E.A., although he had been present during violent episodes, and that no violence had occurred since the separation. Mention is made in the Court's decision of documentation confirming that the author had been shown not to have any mental illness but it is stated that her behaviour indicated instability, which had been corroborated by witnesses.

2.11 On 16 October 2013, the prosecutor filed an indictment against J.A. concerning three separate suspected violent assaults against the author in 2011 and 2012. On 30 October 2013, the child was removed from the author's home in Mellilä by two

social workers, two bailiffs and two police officers. That was very shocking for the author and her child.

2.12 On 19 February 2014, the Varsinais-Suomi District Court convicted J.A. of carrying out a violent assault on the author on 22 December 2011 in Turku by hitting her in the face, causing bruising around one eye and leaving a wound on her cheek.[1] J.A. was sentenced to pay a fine of €240 and to pay the author damages of €200 for the pain inflicted and €800 for cosmetic harm. J.A. has to date not paid the author the €1,000. The District Court dismissed charges relating to assaults on the author allegedly carried out between 15 and 29 February and on 15-16 April 2012. The Court ruled in those cases that no conclusions about what had happened could be drawn, given discrepancies in the accounts given of them by J.A. and the author and appearing in the medical records of the author, which the prosecutor had presented in court. J.A. had admitted striking the author with a drill bit on 15 April 2012 during custody hearings on 14 October 2013, but he denied it during the criminal proceedings. Thus, the author asserts, he should also have been convicted of that crime.

2.13 On 11 June 2014, the Turku Court of Appeal upheld the decision of the Varsinais-Suomi District Court granting sole custody of E.A. to J.A. The violence of J.A. and his general unsuitability to look after E.A. were raised in the appeal. The Court held that nothing changed the decision of the lower court. On 10 November 2014, the Supreme Court denied the author leave to appeal. No reasoning was given.

2.14 While E.A. has lived with J.A., he has repeatedly told the author that his father hurts him and has shaken him. He also constantly asks her permission to live with her again. She and the child welfare authorities have filed criminal reports with the police about suspected assaults by J.A. against E.A. in 2015 and 2016, but investigations have been slow and ineffective. Given that J.A. has been convicted of assault against the author and is violent, the situation is unbearable to the child and his safety and well-being are in serious danger. Furthermore, the child is not in day care, where his well-being could be monitored.

2.15 In July 2015, in connection with visitation, J.A. assaulted the author. She reported the assault to the police, but was told that no action would be taken. As a result, she dropped the charges. The author claims, therefore, that she is not protected effectively by the authorities from further violence.

Complaint

3.1 The author submits that the failure of the State party to prevent domestic violence affects women more than men, in violation of article 1 of the Convention. She claims that the State party does not consider domestic violence to be a real and serious threat. Its legislation and the practice of its public institutions, including the judicial system, do not recognize gender-based violence and its consequences. For example, the Act on Child Custody and Right of Access (No. 361/1983), according to the provisions of which the custody decision was taken, contains no special protective measures for mothers or children who are victims of domestic violence, even though the majority of victims of such violence are women and their children, while the perpetrators are generally men. The Act is not applied in practice in such a manner as to protect the victims of domestic violence effectively, as can be seen in the present case.

3.2 The author argues that the State party did not act with due diligence for the effective protection of her and her child against violence and its consequences. The State party has failed to adopt adequate legislative and policy measures to guarantee

[1] Case number R13/4430.

the rights of the author and her child and protect them against the risk of further violence by the perpetrator, as the violent father was granted sole custody of the child, who continues to live with the perpetrator. The author further submits that the decision by the courts to discontinue her custody of her child violates her human rights and discriminates against her severely as a woman and as a victim of domestic violence, given that J.A. had, on several occasions and in the presence of the child, used violence against her and was later also convicted of one of those assaults by a court in criminal proceedings. She asserts that she and her son are victims of gender-based discrimination, because the State party has failed to protect her equal rights in marriage and during its dissolution and as a parent with regard to her son's best interests (custody, residence and visitation rights). Those acts and omissions of the State party violate articles 1, 2 (a), (c), (d) and (f), 15 (1) and 16 (1) (d), (e) and (f) of the Convention.

3.3 The author further claims that the law and the practice of the authorities do not recognize many forms of violence against women, resulting in inequality with men and a lack of protection of motherhood, and that there is no effective support for victims of domestic violence in the State party. Victims often do not seek protection from the authorities, in part because of the stigma that may attach to them and the generally negative reaction of society. Often, when they do seek protection, the authorities do not offer adequate protection. The author also feared such a stigma and was ashamed of the assaults. When she finally sought help because of the violence, she was not protected, even though the violence had been known to the authorities for a long period, at least since the end of 2011. Instead, the violence was repeatedly deemed by the child welfare authorities to be a disagreement between (equal) partners. In addition to the consequences that the continual severe violence has had for the author's well-being (including her nervousness and hyperarousal), the authorities have also called her state of mental health into question. Although various doctors stated in 2012 and 2013 that she had no mental illness and that her state of mental health was normal, the accusations of J.A. regarding her "instability" have been at least partly believed by the authorities and the courts.

State party's observations on admissibility

4.1 On 26 July 2016, the State party requested the Committee to consider the admissibility separately from the merits of the communication. That request was not acceded to.

4.2 The State party submits that, after initial proceedings were dismissed in the Supreme Court, the author brought new proceedings on 13 May 2015 before the Varsinais-Suomi District Court requesting joint custody and residence or, alternatively, the extension of her visitation rights. On 9 June 2016, the District Court granted an extension to her visitation rights and rejected all other requests. On 8 July 2016, the author appealed to the Court of Appeal. Those proceedings are still pending and, at the time of the communication, had been in process for just over two years, which cannot be considered unreasonably prolonged. Furthermore, the allegations in the communication of gender-based violence were not raised before the national authorities.

4.3 The State party suggests that the author does not have standing to submit the communication on behalf of her son, who is in the custody of J.A., who in turn does not have knowledge of the proceedings before the Committee. It submits that the author has not provided sufficient reasoning, as required under article 2 of the Optional Protocol and rule 68 of the Committee's rules of procedure.

4.4 As to the material allegations, the State party asserts that they have been proved to be unfounded and that, therefore, the complaint should be found inadmissible

ratione materiae. It states that, according to available information, 51 child welfare notifications relating to E.A. have been filed, of which 29 by the author, 3 by the father and the rest by the authorities. It states, furthermore, that the authorities have reacted properly to all notifications, protecting the child's safety and well-being in various ways. It emphasizes that, according to the District Court judgment of 9 June 2016, the content and tone of the allegations in notifications by the author demonstrate her intention to change the substance of the earlier decision. The court noted that the majority of notifications by the author had been proved to be unfounded.

4.5 It further states that the substance of the present complaint is merely to challenge the legitimate assessment of the national courts regarding the custody of the child. The author therefore seeks to use the Committee as a fourth instance.

4.6 In relation to the emergency protection order issued for the author's child on 16 April 2014, the State party notes that the author did not lodge an appeal against it with the administrative authorities, which is provided for under the Child Welfare Act (No. 417/2007) and the Administrative Judicial Procedure Act (No. 586/1996).

4.7 The State party asserts that the best interests of E.A. have been taken into consideration at every stage of the proceedings in accordance with national legislation.[2] In that regard, it refers to the fact that equality between men and women is guaranteed under the Act on Equality between Women and Men (No. 609/1986), which was an essential part of the legislative framework fulfilling requirements under the Convention, and which has been further developed by relevant European Union legislation and the Criminal Code. The judgments of the national courts in the author's case make clear that they considered the acts of violence by the author and her partner when considering custody, residence and visitation rights.

4.8 The State party adds that legislation is being developed continually in order to ensure the effective protection of children, as reaffirmed in the Social Welfare Act (No. 1301/2014) and the new government action plan for gender equality covering the period 2016–2019, which was adopted in May 2016 and contains some 30 measures, including on violence against women and intimate partner violence as a priority area. The State party further notes that it ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, which entered into force on 1 August 2015. The State party has sought to ensure, through legislation and other measures, the practical realization of the policy on the best interests of the child. That principle remains paramount.

4.9 The State party maintains that the author's allegations regarding the lack of national legislation in place to protect her and her child are manifestly unfounded under article 4 (2) (c) of the Optional Protocol. It therefore asserts that, based on the foregoing, there has been no breach of article 1, 2 (a), (c), (d) and (f), 15 (1) or 16 (1) (d) and (f) of the Convention.

State party's observations on the merits

5.1 On 28 November 2016, the State party submitted its comments on the merits of the communication.

5.2 Reiterating its comments on admissibility and challenging all allegations made by the author, even where no specific observations have been submitted, the State party asserts specifically that, on 7 September 2016, leave to appeal to the Court of Appeal was granted and that the appeal is pending.

[2] The Act on Child Custody and Right of Access and the Child Welfare Act.

5.3 The State party refers to existing legislative provisions on equality in chapter 2 (6) of the Constitution and sections 1 and 4 of the Act on Equality between Men and Women, which include detailed provisions on the elimination of discrimination, the protection of fundamental rights and the positive obligation to promote equality systematically.

5.4 In specific reference to the author's allegations regarding discrimination, including the failure of the State party to protect her and her son from domestic violence, the lack of due diligence and timely investigations, the failure to adopt sufficient legislative measures and police procedures, the failure to recognize in law, and protect against, violence against women, the failure to provide training for law enforcement officials, the failure to prioritize the health of victims, and their de facto penalization, the State party asserts that they are vague, general in nature and unsubstantiated and do not relate to the specific circumstances of the author's case. The State party further asserts that the author has failed to demonstrate how her rights have been violated in accordance with article 2 of the Optional Protocol.

5.5 The State party submits that the author's complaint is based on her disagreement with the conclusion reached by the national authorities in her case and that she is merely using the Committee as a fourth instance to reassess the facts and evidence in her case.

5.6 As to the author's allegation regarding the failure of the police to investigate her complaints, the State party affirms that the author filed three criminal complaints against J.A. — on 3 March, 20 July and 18 November 2015 — and notes that, on 23 August 2016, the police ordered that he should be brought in for questioning.

5.7 Regarding the emergency protection order issued for the child on 16 April 2012, the State party submits that an emergency care worker notified the child welfare authorities that day of the situation and that the child was placed in emergency care as it was deemed that his safety had been greatly endangered owing to violence between his parents. The authorities informed the author of the decision at 10.30 p.m. on 16 April 2012 and, during that conversation, she threatened to kill J.A. On 2 May 2012, the placement was concluded as the grounds on which it had been ordered no longer obtained. The State party avers that the placement was made in the best interests of the child and was concluded as soon as circumstances allowed. Moreover, the author did not appeal against the decision of 16 April 2012.

5.8 In relation to the author's allegations regarding the lack of access to a women's shelter, the State party asserts that, according to the information available to it, she and her child were in fact taken in to a shelter upon her request. It avers that the policy of providing safe houses to those in need is taken seriously and has been in place and developed continually since the 1970s. It further notes that special programmes aimed at reducing violence against women have been in place since the mid-1990s, the most recent of them being an action plan to reduce violence against women, covering the period 2010–2015, which is aimed at extending a multidisciplinary risk assessment system to various municipalities. It also affirms that the Act on State Compensation to Producers of Shelter Services (No. 1354/2014), which entered into force on 1 January 2015, made the financing of shelters a State rather than local responsibility. The Act also provides for qualitative assessment of personnel and services, which include psychosocial support, counselling and guidance. All services are free of charge and available across regions and to men, women and children according to their needs.

5.9 With regard to the author's claims about her son's lack of access to day-care services since 30 October 2013, the State party notes that, pursuant to section 4 of the Act on Child Custody and Right of Access, the person who has custody of a child has the right to decide on the child's care, upbringing, place of residence and other

personal matters. The State party asserts that, according to information available to it, the author's child has been attending day care since 1 June 2016.

Author's comments on the State party's observations on admissibility and the merits

6.1 On 4 January 2017, the author provided her comments on the State party's submissions. She disagrees with the statement that she has not exhausted domestic remedies. The State party confirms that the first custody dispute ended on 10 November 2014, when the Supreme Court denied her leave to appeal and the decision of the Court of Appeal became final. Thus, she has exhausted all the remedies available at the national level to obtain protection for herself and her child in the custody dispute. The requirement for admissibility is not that she has tried to exhaust the national proceedings several times, since it is clear that the discriminatory and stereotyped attitudes of the national courts do not change by challenging the case again before the same court or courts. In addition, she has exhausted the remedies available to her in criminal law, under which J.A. was convicted of assaulting her on 19 February 2014. J.A. was sentenced to pay a fine of €240 and to pay her damages of €200 for the pain inflicted and €800 for cosmetic harm. That judgment, although final, did not offer any protection to her or her son, and J.A. has not paid her the compensation ordered.

6.2 The author repeats that she and her son, as victims of domestic violence, were discriminated against in the first custody dispute. She confirms that she initiated the second hearing in order to obtain protection for the child and that it is pending before the Court of Appeal. Aware of her child's continuous distress, she asserts that she is, as a parent, obliged by the law to try to obtain protection for him, regardless of the previous inaction and failure of the authorities to provide it. However, those latest proceedings are not the subject of the present communication.

6.3 The author disagrees with the assertion that she did not bring the matters in question before the national courts. She has informed them of the repeated and severe violence inflicted on her by J.A. in the presence of their child. In the proceedings before the Court of Appeal, the conviction on 19 February 2014 of J.A. for assaulting her was presented as written evidence in the custody dispute. It has been said that repeated violence targeting the other parent in the presence of the child proves that the offending parent is not suitable to act as a guardian of the child.

6.4 The author asserts that she has also stated before the national courts that the decisions in 2012 to place E.A. in emergency care, owing to the domestic violence inflicted on her by J.A., have to be taken into account as evidence of his poor parenting skills and detrimental behaviour when assessing the best interests of the child. His assaults of the author when they were still cohabiting have already severely affected E.A. given that, owing to his father's actions, E.A. was placed in emergency substitute care and separated from his parents at the early age of 8 months and again at the age of 15 months for several weeks. This underlines that J.A.'s actions are and have been severely detrimental to the child. In addition, she asserts, the child was returned from each emergency placement to her and not the father, which is evidence that J.A. is not a reliable parent who could provide a safe environment for the stable development of a child. Therefore, she should have custody of the child and J.A. should be granted visitation rights. Moreover, she asserts that she has always taken good care of E.A., as J.A. has admitted in court proceedings. She maintains that these facts and evidence have not, however, been taken into account in the decisions of the courts in a non-discriminatory way.

6.5 Noting the assertion by the State party that, according to the judgment of 9 June 2016 by the Varsinais-Suomi District Court, the contents and overtone of the

allegations in the child welfare notifications and emails of the author demonstrate her intention to change the substance of the (earlier) court decision, the author states that the same District Court, in its previous judgment, discriminated heavily against her and her son as victims of domestic violence and did not take the domestic violence inflicted by J.A. on her into account at all. The Court is prejudiced against her and it is clear that the courts are prone to defending their own earlier decisions. What the Court states about her motivation for initiating a second custody hearing is a matter of opinion, not fact. She initiated the proceedings and filed 29 child welfare reports in order to obtain protection for her son. Since the Court has previously taken a stand that custody of the child should be removed from the mother and that proven domestic violence is not a matter of concern, it is clear that such a court is of the view that the parent raising the matter of domestic violence against the child is the problem, rather than the violence itself.

6.6 With regard to the assertion attributed by the State party to the District Court that both she and the child's father have admitted having used violence against each other, the author maintains that she has neither used nor admitted to having used violence against J.A. Moreover, she has never been suspected of any such acts and J.A. has not presented any evidence in court with regard to alleged violence on her part. She recalls that, as a suspect in a criminal investigation, J.A. had no obligation to tell the truth in court or in the course of the criminal investigation and it would clearly have been in his interest to allege that she was also violent. J.A., however, has never reported any such acts by her to the police or presented any evidence in that regard. She states that the unproven allegations of J.A., repeated by the State party, are defamatory and that an allegation without evidence is not sufficient to prove that the violence was carried out by both parents.

6.7 The author states that the courts have not taken into account that the case includes a pattern of domestic violence that has had serious consequences for the victims: the mother and the son. The domestic violence occurred on several occasions over a long period, leading to the emergency placement of the child in substitute care twice in 2012, the hospitalization of the author on 16 April 2012 after a serious assault and the conviction of J.A. for assault in 2014. Most of the incidents of violence, however, went unpunished. The author refers to the incident in which she received a blow to the head from J.A. using a drill bit, after which their son was taken into care.

6.8 The author thus avers that the pattern of domestic violence was not taken duly into account when the decision on the custody, residence and visitation rights concerning E.A. was taken, and that the authorities did not investigate and remedy all the acts of violence effectively. As stated by the State party, she has filed 29 child welfare reports about her son. The State party also affirms that other parties, persons and authorities filed a total of 19 child welfare reports about him up until July 2016. The number of reports is a cause for great concern and proves that she is not the only party worried about the child's safety and well-being. The reports have not been investigated in detail and the police investigation was terminated without the child or witnesses having been heard or any physical or psychological examination of the child. This matter has been neglected by the State party, despite the request for interim measures issued by the Committee on 26 May 2016. This has led to a situation in which the child has reported being a victim of a severe assault by J.A. between 5 and 15 December 2016. The assault was reported by the mother and a psychiatric nurse of Loimaa City Health Care Centre to the child welfare authorities. No investigation was carried out. E.A. reports that further incidents of violence took place on 9 and 22 April 2017, in which he was grabbed by the neck and his hair was pulled. No investigation was carried out, despite expressions of concern by a doctor and the submission of child welfare criminal reports. E.A. remains without protection,

even despite the Committee's request for interim measures. The local authorities have denied any knowledge of that request.

6.9 The author states that she has filed the communication also on behalf of her son in order to obtain protection for him. She herself is currently safe in her own home, since she was able to separate from J.A. and thereby largely put an end to the assaults against her. According to the jurisprudence of human rights bodies, a natural mother has standing to represent her child, since the complaint is made for the purpose of its protection. In a case in which the parent with sole custody of the child has been convicted by a court of an assault on the other parent, that is, in the present case, the author, it is clear that it is in the best interests of the child that the non-violent parent, who has been deprived of custody, should be allowed to represent her child in an international investigation. The position of the State party in this matter, strongly opposing the rights of a natural mother who is a victim of domestic violence and trying to protect her son, clearly reflects the traditional attitudes in Finland that discriminate heavily against women, and whereby domestic violence is not recognized as a problem and the rights of domestic violence victims are not protected.

6.10 The author disagrees with the statement that she wishes to use the communications procedure as a fourth instance. She is resorting to the communications procedure available to her because she and her son have been discriminated against as victims of domestic violence before the national courts and by the authorities. They have not been protected effectively in national civil or criminal proceedings, as is required by national law and the Convention. The State party has ratified the Convention and its Optional Protocol and the provisions of the Convention should be applied in all domestic violence cases in the State party, whether civil or criminal. The Committee should examine the case because it is apparent that the decisions of the courts are arbitrary and amount to a denial of justice.

6.11 The author further asserts that, in its general recommendation No. 19 (1992) on violence against women, the Committee defines gender-based violence as a form of discrimination, within the meaning of article 1 of the Convention. States parties have a due diligence obligation to take all appropriate measures to prevent and investigate cases of gender-based violence perpetrated by non-State actors, punish the perpetrators and provide reparations to victims and survivors. According to the Committee, public officials must respect that obligation if women are to enjoy substantive equality and protection against violence in practice. That obligation includes investigating the existence of failures, negligence or omissions on the part of public authorities that may have deprived victims of protection against such violence.

6.12 In *González Carreño v. Spain*, the Committee affirmed that child custody and visitation decisions should be based on the best interests of the child, not on stereotypes, with domestic violence being a relevant consideration, and stressed that stereotypes affected the right of women to an impartial judicial process and that the judiciary should not apply inflexible standards based on preconceived notions about what constituted domestic violence.[3] In that case, the Committee concluded that the decision to grant the father unsupervised visits was based on stereotypes about domestic violence that minimized his abusive behaviour and prioritized his (male) interests over the safety of the mother and child, did not take into account the long-term pattern of domestic violence and did not specify necessary safeguards. Similarly, in the present case, the courts did not take into account the long-term pattern of domestic violence and did not specify necessary safeguards for the protection of the child after his parents' separation. This led to a situation in which E.A. has for three years, since October 2013, reported that his father hurts him. The latest more severe

[3] CEDAW/C/58/D/47/2012, para. 9.7.

assault of E.A. by J.A., as reported by E.A. to his mother, occurred between 5 and 15 December 2016. The State party has ignored even the request for interim measures made by the Committee on 26 May 2016 for the protection of E.A. No action has been taken to protect the child and the police ended their investigation without examining or hearing the child or witnesses.

6.13 The author highlights that, when there is evidence of systematic patterns of violence against women, or when the incidence of violence against women is inordinately high, as reflected in the high rate of domestic violence in Finland, it is clear that the State knows or should know of the risks faced by women who have complained of violence from their partners or former partners. Consequently, it is unacceptable for the State party to argue that the risk faced by the author or her son is small or that the case is manifestly ill-founded, given that J.A. has been convicted of assaulting the author. She maintains that it is not enough for the State to adopt legislation in order to discharge its duty of due diligence; the legislation must be applied. In Finland, State negligence in protecting women and minors from domestic violence persists, despite the adoption of legislative measures. The law is also deficient with regard to protecting minors who live in violent settings and who are therefore also victims of violence.

6.14 The author notes that, in *González Carreño v. Spain*, the Committee recalled "that in matters of child custody and visiting rights, the best interests of the child must be a central concern and that when national authorities adopt decisions in that regard they must take into account the existence of a context of domestic violence".[4] It further considered that "the authorities of the State party initially took actions to protect the child in a context of domestic violence. However, the decision to allow unsupervised visits was taken without the necessary safeguards and without taking into account that the pattern of domestic violence that had characterized family relations for years, unquestioned by the State party, was still present".[5] In the present case, the national courts did not even consider the possible need for supervised visits for J.A. Rather, they granted him sole custody of the child and excluded the mother, the victim of domestic violence, from custody. The courts should be ex officio responsible for assessing the need for supervised visits in domestic violence cases, since it might be unsafe for the victim to request them herself. Such a demand from the victim's side at trial could also jeopardize her health, or even life, by provoking the perpetrator into using violence again.

6.15 The Committee has recalled that, under article 2 (a) of the Convention, States parties have the obligation to ensure, through law or other appropriate means, the practical realization of the principle of equality of men and women, and that, under articles 2 (f) and 5 (a), States parties have the obligation to take all appropriate measures to modify or abolish not only existing laws and regulations but also customs and practices that constitute discrimination against women. States parties also have the obligation, in accordance with article 16 (1), to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relationships. In that regard, the Committee stresses that stereotyping affects the right of women to a fair trial and that the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence.[6]

6.16 The author concedes that the State party has taken some general measures to deal with domestic violence, including legislation and awareness-raising. The education of public, judicial and social services officials, however, has been

[4] Ibid., para. 9.4.
[5] Ibid., para. 9.5.
[6] See *V.K. v. Bulgaria* (CEDAW/C/49/D/20/2008), para. 9.11.

insufficient and they remain unaware of the concept of domestic violence, its effects on the power structures of a family or its consequences for the victims. Those officials are equally unaware of the international human rights conventions that the State party has ratified. Rather, they continue to apply harmful traditional attitudes reflecting male dominance and de facto approval of domestic violence by men. In order for a woman who is a victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will expressed in legislation must be supported by all State actors, who adhere to the State party's due diligence obligations.[7] The State party states in its response that J.A. claimed that both parents had used violence against each other. The evidence in the custody case and criminal trial, however, proves the contrary. The author is not even suspected of any assault targeted at J.A., whereas he has been convicted of assaulting her. Thus, the clear evidence presented by the author of one-sided domestic violence inflicted by J.A. on her in the presence of their child, E.A., has been ignored by the courts in the case concerning the custody, residence and visitation rights regarding their child. Her significant evidence has thus been accorded less respect and weight than that of J.A., which constitutes discrimination against her under article 15 of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 In accordance with rule 64 of its rules of procedure, the Committee is to decide whether the communication is admissible under the Optional Protocol. In accordance with rule 72 (4), it must do so before considering the merits of the communication.

7.2 In accordance with article 4 (2) (a) of the Optional Protocol, the Committee is satisfied that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's argument that the author has not exhausted domestic remedies, as it claims that the appeal against the decision of 9 June 2016 remains pending, that she did not raise allegations of gender-based violence before the national authorities and that she did not challenge the emergency protection order regarding her child. The Committee notes that custody of the author's child was granted to his father on 14 October 2013, that the author challenged that decision on 11 June 2014 before the Turku Court of Appeal, which upheld the decision, and that she was then denied leave to appeal before the Supreme Court on 10 November 2014. The author has submitted that, for the purposes of that first set of proceedings, the outcome of which she challenges before the Committee, she has brought the substantive matter, including domestic violence, before the national authorities up to the highest judicial instance. The author also informed the Committee by letter on 23 November 2017 that the second set of proceedings regarding the decision of 9 June 2016 had been discontinued owing to legal advice received by her about the futility of continuing to challenge the same issues previously dealt with before the same courts, having regard to inherent defects in the Court's approach to custody proceedings.

7.4 The Committee observes that the author has been consistently challenging the legal custody of her child for more than four years. Having regard to concerns about the first set of proceedings, including the upholding of the custody decision after J.A.'s conviction for a violent assault against the author, without any assessment of his suitability for assuming sole custody; the failure of the police to investigate or begin proceedings when new incidents of violence were reported after the separation;

[7] See *Goecke v. Austria* (CEDAW/C/39/D/5/2005), para. 12.1.2.

the fact that the second set of proceedings was launched after the communication was brought before the Committee; the fact that those proceedings were based on the same matters as in the first custody dispute; and the fact that the author had taken all matters that are before the Committee, including domestic violence, up to the Supreme Court and had felt it necessary to bring a second set of identical proceedings only in order to protect her son from harm in the face of the repeated failure of the State party to comply with the Committee's reiterated requests for interim measures, the Committee considers that the issues raised in the communication have been exhausted at the national level and therefore does not consider itself precluded by the requirements of article 4 (1) of the Optional Protocol from considering the merits. The Committee does not deem it necessary to consider whether there has been exhaustion as to the second set of proceedings.

7.5 The Committee notes the other arguments of the State party to the effect that the author does not have standing to make a claim on behalf of her child and failed to explain her reasons for making such a claim, that she is asking the Committee to act as a fourth instance and reassess facts and evidence in the case and that her claims are inadmissible ratione materiae, as most of them have been disproved. It also notes the author's position that, as his mother, she has the right to make a claim for the protection of her child, especially given that it is made in connection with violence by J.A. against herself and the child and that her claims have been vindicated by the conviction of J.A. for assault, and that she is asking the Committee to examine the case on the basis that the national authorities discriminated against her and denied her justice. The Committee finds that the author's claims are sufficiently substantiated for the purposes of admissibility and that they are within the competence of the Committee to decide, that she does have standing to act on behalf of her child where his safety is concerned and that she is requesting a review of the national processes on the basis of a denial of justice and discrimination based on sex rather than merely challenging the factual conclusion drawn by national decision makers. It therefore does not consider itself to be precluded from considering the matter on any other grounds of admissibility and proceeds with its consideration of the merits.

Consideration of the merits

8.1 The Committee has considered the present communication in the light of all the information placed at its disposal by the author and the State party, in accordance with the provisions of article 9 (1) of the Optional Protocol.

8.2 The question before the Committee is whether the State party fulfilled its duty of due diligence in connection with the protection of the author from, and investigation of, incidents of domestic violence by J.A. The Committee's task is to review, in the light of the Convention, decisions taken by the national authorities within their purview and to determine whether, in making those decisions, they took into account the obligations arising from the Convention. In the present case, the decisive factor is, therefore, whether those authorities applied principles of due diligence and took reasonable steps to ensure, without discrimination based on sex, the protection of the author and her son from possible risks in a situation of continuing domestic violence.

8.3 The Committee notes the State party's argument that it has robust and comprehensive legislation in place regarding the equality of men and women and the best interests of the child and that this was at the forefront of the decisions taken concerning the custody and visitation rights with regard to E.A. It also notes the State party's assertion that the author's claims are of a general nature. It further notes the author's concession that such legislation exists but that, de facto, national decision makers and law enforcement officials do not implement it properly, in that they allow gender stereotypes to affect the weight given to the evidence of victims and vulnerable

persons, often women and children, versus that of the perpetrator, and that the State party's authorities failed to protect her and her son owing to gender stereotypes in decision-making that minimized the importance of the father's violence. The Committee finds that the author's remarks on national laws and practice have been linked to her personal case.

8.4 The Committee notes with concern that the request for interim measures that it made, and reiterated, was never passed on to the local authorities and that no action was taken to protect E.A. from alleged violence by his father. The Committee recalls that interim measures, as provided for under article 5 of the Optional Protocol and rule 63 of its rules of procedure, are essential to its work on individual communications submitted under the Optional Protocol. Flouting of the rule, especially by measures such as, in the present case, failing to protect women and children at risk of serious harm, undermines the protection of Convention rights through the Optional Protocol.

8.5 The Committee observes that the Varsinais-Suomi District Court questioned the mental state of a victim of domestic violence and her hostility towards her alleged abuser without questioning the mental stability or carrying out an assessment of an accused abuser before giving him the sole custody of a child. It notes that, almost immediately after the custody decision, the prosecutor brought charges against J.A. for violent assault but that, two weeks later, E.A. was handed over to his father without further checks being carried out. The Committee also notes that the mother was subjected to a psychiatric assessment in relation to custody and visitation rights, which showed no cause for concern, but that the father was never subjected to such an assessment, despite his criminal conviction. It also notes that the final custody decision of 14 October 2013 contains very little or no reasoning for the change in custody from the mother to the father, that no reasoning in either the Court of Appeal decision or the decision on the application for leave to appeal to the Supreme Court explains why the violence was not given prominence in the decision-making process, even after the conviction of J.A. for violent assault against the author in the interim, that reports to the police were not investigated and that, in spite of the number of child welfare reports and the father's conviction, no investigation or assessment of his parental abilities has been carried out. The Committee is also persuaded that there has been a violation of the obligation of due diligence, as it took more than a year for J.A. to be brought in for questioning with respect to complaints of criminal conduct.[8]

8.6 In this regard, the Committee refers to paragraphs 26 and 27 of its general recommendation No. 33 (2015) on women's access to justice, where it is stated that:

> Often, judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to those stereotypes. Stereotyping also affects the credibility given to women's voices, arguments and testimony as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws. This has far-reaching consequences, for example, in criminal law, where it results in perpetrators not being held legally accountable for violations of women's rights, thereby upholding a culture of impunity. In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the re-victimization of complainants.

Judges, magistrates and adjudicators are not the only actors in the justice system who apply, reinforce and perpetuate stereotypes. Prosecutors, law enforcement officials and other actors often allow stereotypes to influence investigations and trials, especially in cases of gender-based violence, with stereotypes undermining the claims

[8] See paragraph 6.5 above.

of the victim/survivor and simultaneously supporting the defence advanced by the alleged perpetrator. Stereotyping can, therefore, permeate both the investigation and trial phases and shape the final judgment.

8.7 The Committee is of the view that the expression "paramount" in article 16 (1) (d) and (f) of the Convention means that the child's best interests may not be considered to be on the same level as all other considerations. The Committee is also of the view that, in order to demonstrate that the right of the child to have one's best interests assessed and taken as a primary or paramount consideration has been respected, any decision concerning a child must be reasoned, justified and explained. The Committee notes that the failure of the State party to respect its obligation of due diligence in the treatment of the claims of the author by the police and the various courts has led to the best interests of E.A. being harmed and to an infringement of his right to have his mother benefit from equal treatment regarding custody issues, in line with article 16 of the Convention.

8.8 The Committee recalls its general recommendations No. 19 and No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, according to which gender-based violence that impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions is discrimination within the meaning of article 1 of the Convention. Under the obligation of due diligence, States parties must adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors, including having laws, institutions and a system in place to address such violence and ensuring that they function effectively in practice and are supported by all State agents and bodies who diligently enforce the laws. The rights or claims of perpetrators or alleged perpetrators during and after judicial proceedings, including with respect to property, privacy, child custody, access, contact and visitation, should be determined in the light of the human rights of women and children to life and physical, sexual and psychological integrity, and guided by the principle of the best interests of the child.[9] The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, prosecute and punish perpetrators and provide reparations to victims and survivors of such acts, provides tacit permission or encouragement to perpetrate acts of gender-based violence against women. Such failures or omissions constitute human rights violations.[10]

8.9 The Committee recalls that: under article 2 (a) of the Convention, States parties have the obligation to ensure, through law and other appropriate means, the practical realization of the principle of equality of men and women; under article 2 (e), they can be held responsible for the acts of private persons, organizations or enterprises if they fail in their due diligence obligation; and under articles 2 (f) and 5 (a), they have the obligation to take all appropriate measures to modify or abolish not only existing laws and regulations but also customs and practices that constitute discrimination against women. States parties also have the obligation, under article 16 (1), to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relationships. In that regard, the Committee stresses that stereotypes affect the right of women to impartial judicial processes and that the judiciary should not apply inflexible standards based on preconceived notions about what constitutes domestic violence. In the present case, the Committee considers that the authorities, in deciding on the custody of E.A., applied stereotyped and therefore

[9] See *Yildirim v. Austria* (CEDAW/C/39/D/6/2005); *Goekce v. Austria* (CEDAW/C/39/D/5/2005); *González Carreño v. Spain* (CEDAW/C/58/D/47/2012); *M.W. v. Denmark* (CEDAW/C/63/D/46/2012) and *Jallow v. Bulgaria* (CEDAW/C/52/D/32/2011).

[10] See the Committee's general recommendation No. 35, para. 24 (2) (b).

discriminatory notions in a context of domestic violence by treating what appears to be a repetitive pattern of unilateral violence by J.A. as a disagreement between parents, affirming that both parents committed violence despite no evidence to support this apart from a statement made by the author the day after she had suffered a serious assault, dismissing the importance of J.A.'s criminal conviction, and according custody to a violent man. They have thus failed to provide due supervision in accordance with their obligations under articles 2 (a), (c), (d), (e) and (f), 15 (a) and 16 (1) (d) and (f) of the Convention.

8.10 The Committee notes with appreciation that the State party has adopted a broad model for dealing with domestic violence that includes legislation, awareness-raising, education and capacity-building. It recalls, however, concerns raised in its concluding observations on the State party's periodic report to the Committee in 2014, specifically regarding violence against women.[11] It observes that, in order for a woman who is a victim of domestic violence to see the practical realization of the principle of non-discrimination and substantive equality and enjoy her human rights and fundamental freedoms, the political will expressed by that model must have the support of public officials who respect the obligations of due diligence by the State party. They include the obligation to investigate the existence of failures, negligence or omissions on the part of public authorities that may have caused victims to be deprived of protection. The Committee considers that, in the present case, that obligation was not discharged with regard to complaints made by the author about J.A., her treatment in the courts and the Committee's request for interim measures.

9. In accordance with article 7 (3) of the Optional Protocol and taking into account the foregoing considerations, the Committee considers that the State party has infringed the rights of the author and her son under articles 2 (a), (c), (d) and (f), 15 (a) and 16 (1) (d) and (f) of the Convention, read jointly with article 1 of the Convention and the Committee's general recommendation No. 35.

10. The Committee makes the following recommendations to the State party:

(a) With regard to the author and her son:

(i) Promptly reopen judicial proceedings concerning the custody of E.A. and, within that framework, conduct a detailed assessment of J.A.'s violence in order to determine the best interests of the child, and accord her legal aid to proceed;

(ii) Grant the author appropriate reparation, including comprehensive compensation commensurate with the seriousness of the infringement of her rights;

(iii) Ensure payment to the author of sums due as part of the criminal judgment against J.A. dated 19 February 2014;

(b) In general:

(i) Adopt measures to ensure that domestic violence is given due consideration in child custody decisions;

(ii) Conduct an exhaustive and impartial investigation to determine whether there were structural failures in the State party's system and practices that may cause victims of domestic violence to be deprived of protection;

(iii) Strengthen the application of the legal framework to ensure that the competent authorities may respond with due diligence to situations of domestic violence;

[11] See CEDAW/C/FIN/CO/7, para. 18.

(iv) Provide mandatory training for judges and administrative personnel on the application of the legal framework with regard to combating domestic violence, including training on the definition of domestic violence and on gender stereotypes, as well as training with regard to the Convention, its Optional Protocol and the Committee's jurisprudence and general recommendations, in particular general recommendations Nos. 19, 28, 33 and 35. With regard to awareness-raising and capacity-building, in particular:

a. Address the issue of the credibility and weight given to women's voices, arguments and testimony, as parties and witnesses;

b. Address the standards used by judges and prosecutors in assessing what they consider to be appropriate behaviour for women;

(v) Develop and implement an effective institutional mechanism to coordinate, monitor and assess measures to prevent and address violence against women;[12] and implement monitoring mechanisms to ensure that evidentiary rules, investigations and other legal and quasi-judicial procedures are impartial and not influenced by gender stereotypes or prejudice.

11. In accordance with article 7 (4) of the Optional Protocol, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them widely disseminated in order to reach all relevant sectors of society.

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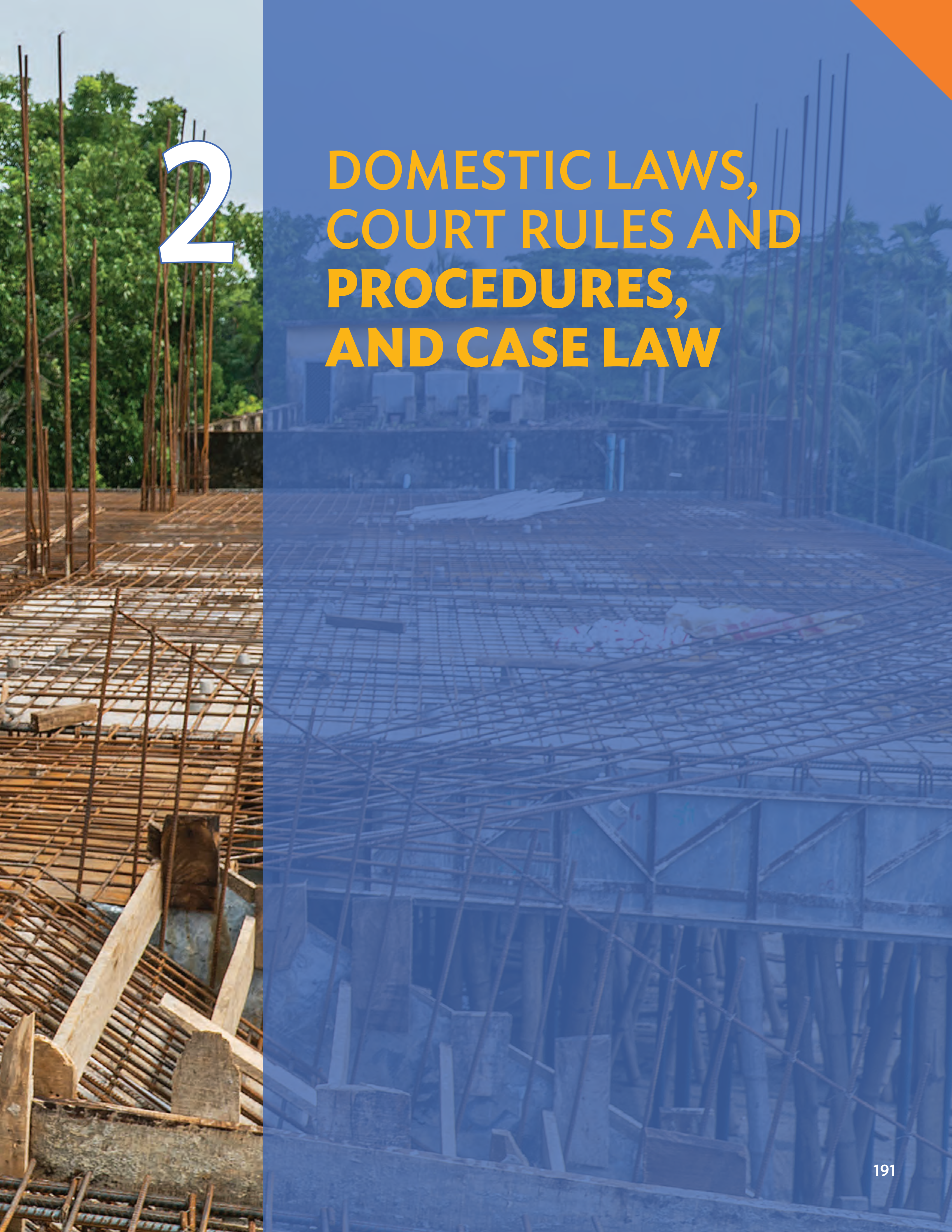
[12] See CEDAW/C/FIN/CO/7, para. 18 (b).

Ms. Rokeya Akter, site engineer, is responsible for the construction of a three-story multipurpose cyclone shelter to hold 2,000 people and 500 cattle, at a school in Galachipa, Patuakhali District, Bangladesh (photo by Gerhard Jörén/ADB).



2 DOMESTIC LAWS, COURT RULES AND **PROCEDURES, AND CASE LAW**

A. Australia

i. Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015

New South Wales

Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 No 46

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New South Wales

Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 No 46

Act No 46, 2015

An Act to amend the *Criminal Procedure Act 1986* in relation to a pilot scheme to make further provision with respect to the giving of evidence by children in criminal proceedings concerning prescribed sexual offences. [Assented to 5 November 2015]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*.

2 Commencement

This Act commences on the date of assent to this Act.

Schedule 1 Amendment of Criminal Procedure Act 1986 No 209

Schedule 2 Savings, transitional and other provisions

Insert after Part 28:

Part 29 Provisions relating to child sexual offence evidence pilot scheme

Division 1 Preliminary

81 Duration of pilot scheme

This Part operates from 31 March 2016 until 31 March 2019 (or such later date as is prescribed by the regulations).

82 Definitions

In this Part:

child means a child who is under 18 years of age.

children's champion or ***witness intermediary***—see clause 88.

Court means the District Court.

pre-recorded evidence hearing—see clause 84.

prescribed places means the following:

(a) Newcastle,

(b) Downing Centre, Sydney,

(c) such other places as may be prescribed by the regulations.

prescribed sexual offence—see section 3 (1).

recording means:

(a) an audio recording, or

(b) a video and audio recording.

witness, in relation to proceedings to which this Part applies, means a child who is a complainant in the proceedings.

83 Application of Part

(1) This Part applies to proceedings before the Court sitting at a prescribed place in relation to a prescribed sexual offence (whenever committed) commenced by a court attendance notice filed or indictment presented:

(a) on or after the commencement of this Part, or

(b) before the commencement of this Part but only if the matter has not been listed for trial before that commencement.

(2) This Part applies at any stage of such a proceeding, including an appeal or rehearing.

Division 2 Pre-recorded evidence hearings

84 Pre-recorded evidence hearing

(1) Subject to any contrary order of the Court, evidence of a witness in proceedings to which this Part applies who is less than 16 years of age when the evidence is given must be given at a hearing under clause 85 (a ***pre-recorded evidence hearing***) in accordance with that clause.

(2) The Court may, on its own motion or on the application of a party to proceedings to which this Part applies, order that evidence of a witness in the proceedings who is 16 or more years of age when the order is made, be given at a pre-recorded evidence hearing in accordance with clause 85.

(3) The evidence is to be subsequently dealt with in accordance with clause 85.

(4) The Court may make an order under subclause (1) or (2) only if it is satisfied that it is appropriate to do so in the interests of justice.

(5) The wishes and circumstances of the witness and the availability of court and other facilities necessary for a pre-recorded evidence hearing to take place are the primary factors to be considered by the Court in determining whether to make an order under subclause (1).

(6) Without limiting the other factors that the Court may take into account in determining whether to make an order under subclause (1), the Court may also take into consideration the following:

(a) sufficiency of preparation time for both parties,

(b) continuity and availability of counsel at both the pre-recorded evidence hearing and the trial,

(c) any other relevant matter.

(7) A witness who was a child when an order was made under this clause is entitled to continue to give evidence in accordance with the order even if the person becomes an adult before the conclusion of the proceeding concerned.

85 Provisions relating to timing and other aspects of pre-recorded evidence hearing

(1) A pre-recorded evidence hearing is to be held as soon as practicable after the date listed for the accused person's first appearance in the Court in the proceedings, but not before the prosecution has made the pre-trial disclosure required by section 141.

(2) At the pre-recorded evidence hearing, the witness is entitled to give, and may give:

(a) evidence in chief—as provided by section 306U, and

(b) any other evidence—by closed-circuit television facilities or by means of any other technology prescribed by the regulations for the purposes of this clause.

(3) The pre-recorded evidence hearing is to be held in the absence of the jury (if any).

(4) Evidence given at the pre-recorded evidence hearing is to be recorded and subsequently viewed or heard (or both) by the Court in the presence of the jury (if any).

(5) A witness who gives evidence at a pre-recorded evidence hearing must not, unless the witness otherwise chooses, be present in the Court, or be visible or

audible to the Court by closed-circuit television or other technology while it is viewing or hearing a recording made as provided by section 306U or made at the hearing.

(6) If evidence in chief is given under subclause (2) (a), section 306U (3) is to be read as if it required the witness to be available for cross-examination or re-examination under subclause (2) (b).

86 Access to recording and transcripts

(1) The accused person, and his or her Australian legal practitioner (if any), are not entitled to be given possession of a recording made under this Part or a copy of it (despite anything to the contrary in this Act or the *Evidence Act 1995*).

(2) However, the accused person and his or her Australian legal practitioner (if any) are to be given reasonable access to the recording to enable them to listen or view the recording, or both.

(3) This may require access to be given on more than one occasion.

(4) The regulations may make provision for the procedures to be followed in connection with the giving of access under this clause, and may provide for the giving of access to other persons assisting the accused person or his or her Australian legal practitioner.

(5) The Court may order that a transcript be supplied to the Court or jury (if any), or both, of all or part of a recording made under this Part if it appears to the Court that a transcript would be likely to aid its or the jury's comprehension of the evidence.

87 Witness may give further evidence only with leave

(1) A witness in proceedings to which this Part applies whose evidence is pre-recorded at a pre-recorded evidence hearing cannot give further evidence without the leave of the Court.

(2) An application for leave may be made by any party to the proceedings.

(3) The Court must not give leave under subclause (1) unless it is satisfied:

(a) that the witness or other party is seeking leave because of becoming aware of a matter of which the party could not reasonably have been aware at the time of the recording, or

(b) it is otherwise in the interests of justice to give leave.

(4) The further evidence is, so far as practicable, to be given by pre-recording at a hearing in the same way as the original pre-recorded evidence unless the Court otherwise directs.

(5) Subclause (1) applies despite anything to the contrary in this Act or the *Evidence Act 1995*.

Division 3 Children's champions

88 Role of children's champions

(1) A person appointed as a ***children's champion*** (who may also be called a ***witness intermediary***) for a witness is to communicate and explain:

(a) to the witness, questions put to the witness, and

(b) to any person asking such a question, the answers given by the witness in replying to them,

and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

(2) A children's champion for a witness is an officer of the Court and has a duty to impartially facilitate the communication of, and with, the witness so the witness can provide the witness's best evidence.

89 Appointment of children's champions

(1) Victims Services in the Department of Justice (or another agency nominated by the Attorney General) is to establish a panel of persons who are suitable persons to be appointed as children's champions.

(2) A person must not be included on a panel unless the person has a tertiary qualification in Psychology, Social Work, Speech Pathology or Occupational Therapy or such other qualifications, training, experience or skills as may be prescribed by the regulations (or both).

(3) For the purposes of proceedings to which this Part applies, the Court:

(a) must (except as provided by subclause (4)) appoint a children's champion for a witness who is less than 16 years of age, and

(b) may, on its own motion or the application of a party to the proceedings, appoint a children's champion for a witness who is 16 or more years of age if satisfied that the witness has difficulty communicating.

(4) The Court is not required to appoint a children's champion if it considers:

(a) there is no person on the panel established under this clause available to meet the needs of the witness, or

(b) it is otherwise not practical to appoint a children's champion, or

(c) it is unnecessary or inappropriate to appoint a children's champion, or

(d) it is not otherwise in the interests of justice to appoint a children's champion.

(5) A person must not be appointed as a children's champion for a witness if the person:

(a) is a relative, friend or acquaintance of the witness, or

(b) has assisted the witness in a professional capacity (otherwise than as a children's champion), or

(c) is a party or potential witness in the proceedings concerned.

(6) The children's champion appointed for a witness must, if requested by the Court, provide a written report, on the communication needs of the witness.

(7) A copy of any such report is to be provided to the parties to the proceedings concerned before the witness gives evidence in the proceedings.

90 Giving of evidence of witness in presence of children's champion

(1) Subject to the rules of court and any practice direction, in a proceeding to which this Part applies, the evidence of a witness for whom a children's champion has been appointed is to be given in the presence of the children's champion.

(2) The evidence is to be given in circumstances in which:

(a) the Court and any Australian legal practitioner acting in the proceedings are able to see and hear the giving of the evidence and are able to communicate with the children's champion, and

(b) except in the case of evidence given under Part 6 of Chapter 6 or this Part by a recording, the jury are able to see and hear the giving of the evidence.

(3) During any part of the proceedings to which this Part applies in which a children's champion for a witness is present, the children's champion is exempt from any requirement or direction under this Act that requires the proceedings or part of the proceedings to be heard in camera.

(4) The provisions of the *Evidence Act 1995* apply to and in respect of a person who acts as a children's champion for a witness in the same way as they apply to and in respect of an interpreter under that Act.

Note. Section 22 of the *Evidence Act 1995* requires an interpreter to take an oath, or make an affirmation, before acting as an interpreter.

(5) The regulations may prescribe the form of oath or affirmation to be taken by the children's champion for the purposes of subclause (4).

Division 4 General

91 Warnings

In any proceedings to which this Part applies, in which evidence of a witness is given by a pre-recording or a children's champion is used, the Court must:

(a) inform the jury that it is standard procedure to give evidence in that way or to use a children's champion in such proceedings, and

(b) warn the jury not to draw any inference adverse to the accused person or to give the evidence any greater or lesser weight because evidence was given in that way or a children's champion used.

92 Relationship to other provisions of this Act

(1) Except as provided by this Part, the regulations or rules of court, this Part does not affect the application of this Act to proceedings for offences to which this Part applies.

(2) In particular, and without limiting subclause (1), the provisions of this Part are in addition to, and do not affect the following:

(a) the entitlement of a witness to give, and the giving of, evidence under Parts 5 and 6 of Chapter 6,

(b) the rights of the accused person under those Parts,

(c) any powers of the Court under those Parts.

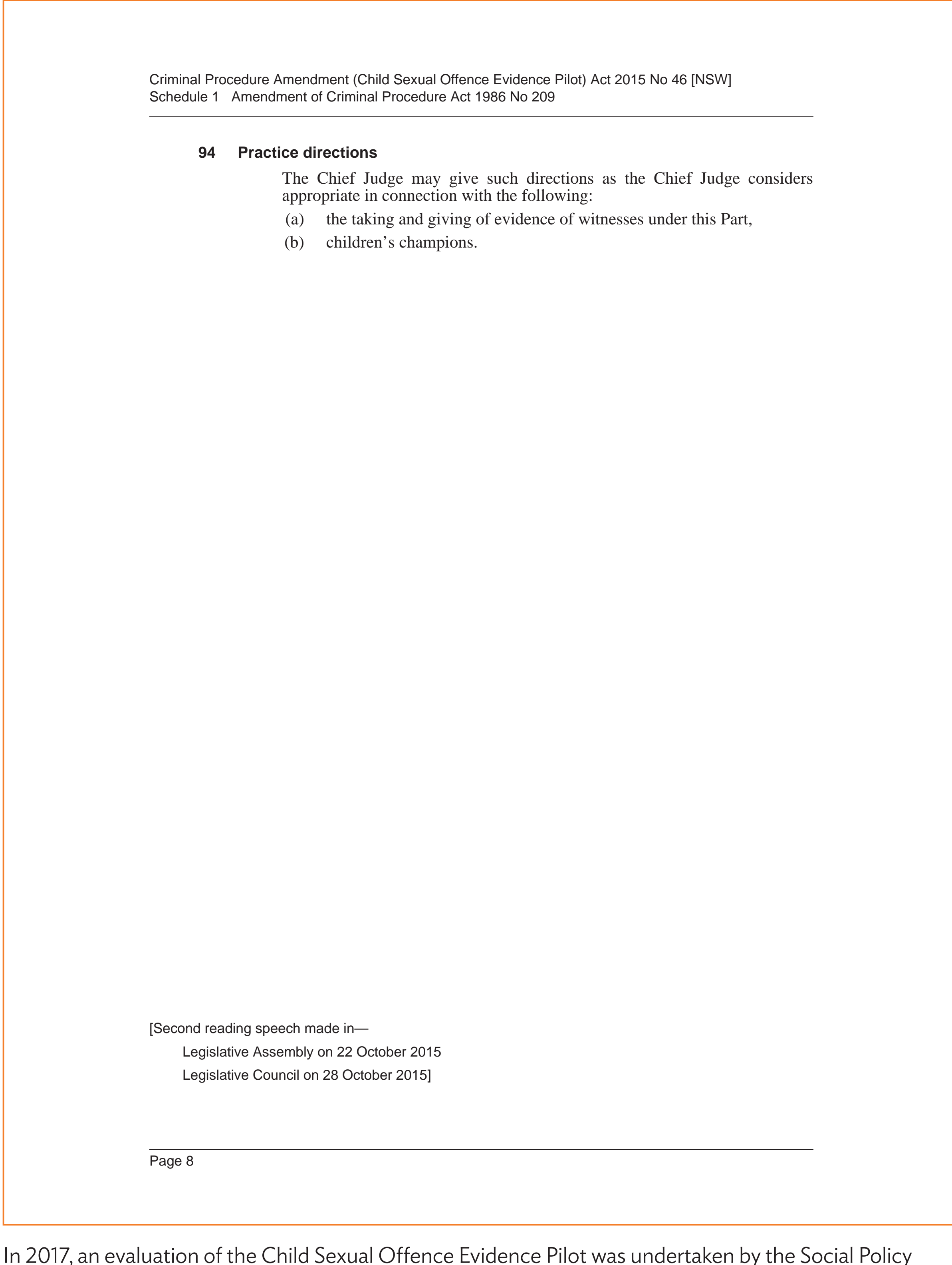
93 Regulations and rules of court

(1) The regulations may make provision for or with respect to the following:

(a) the giving, taking, recording and access to evidence of witnesses under this Part,

(b) children's champions.

(2) Rules of court may (subject to the regulations) be made for or with respect to any matter referred to in subclause (1).



Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 No 46 [NSW]
Schedule 1 Amendment of Criminal Procedure Act 1986 No 209

94 Practice directions

The Chief Judge may give such directions as the Chief Judge considers appropriate in connection with the following:

(a) the taking and giving of evidence of witnesses under this Part,

(b) children's champions.

[Second reading speech made in—

Legislative Assembly on 22 October 2015

Legislative Council on 28 October 2015]

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In 2017, an evaluation of the Child Sexual Offence Evidence Pilot was undertaken by the Social Policy Research Centre of the University of New South Wales Australia. Click here to read the Process Evaluation Report.

B. Fiji

i. Domestic Violence Act 2009 (Decree No. 33 of 2009)

EXTRAORDINARY 531

REPUBLIC OF FIJI ISLANDS GOVERNMENT GAZETTE

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DOMESTIC VIOLENCE DECREE 2009

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GOVERNMENT OF FIJI

DOMESTIC VIOLENCE DECREE 2009
(DECREE No. 33 OF 2009)

A DECREE TO PROVIDE GREATER PROTECTION FROM DOMESTIC VIOLENCE, TO CLARIFY THE DUTIES OF THE POLICE IN THAT REGARD, TO INTRODUCE DOMESTIC VIOLENCE RESTRAINING ORDERS AND OTHER MEASURES TO PROMOTE THE SAFETY AND WELLBEING OF VICTIMS OF DOMESTIC VIOLENCE AND TO PROMOTE REHABILITATION OF PERPETRATORS OF DOMESTIC VIOLENCE AND FOR RELATED MATTERS

IN exercise of the powers vested in me as Vice-President of the Republic of Fiji by virtue of the Office of the Vice-President and Succession Decree 2009 I hereby make the following Decree:

Part 1—PRELIMINARY

Short title and commencement

1.—(I) This Decree may be cited as the Domestic Violence Decree 2009.

(2) This Decree commences on a date or dates to be appointed by the Minister by notice in the Gazette.

(3) The Minister may appoint different dates for the commencement of different provisions of this Decree.

Interpretation

2. In this Act, unless the context otherwise requires—

"adult" means a person who has reached the age of 18 years;

"applicant" means a person who applies for an order under this Decree on their own behalf or for the benefit of another person or persons;

"child" means a person who is under the age of 18 years;

"Clerk of the Court" includes the Registrar of a Court;

"Commissioner of Police" means the office of Commissioner of Police established under section 21 of the State Services Decree 2009 (Decree No. 6);

"compensation order" means an order for compensation made under section 39;

"Court" means a court set out in section 8;

"de facto relationship" means the relationship between a man and a woman who live or lived with each other as spouses on a genuine domestic basis although not legally married to each other;

"domestic violence" has the meaning set out in section 3;

"domestic violence offence" means a domestic violence offence as defined in section 4 of the Penal Code;

"domestic violence restraining order" means—

(*a*) an order referred to in section 23 consisting of standard non-molestation conditions, referred to in sections 27 and 28, and any additional conditions that a Court applies, referred to in sections 29 to 38 inclusive; and

(*b*) includes an order that varies such an order;

"Family Law Act" means the Family Law Act 2003;

"family or domestic relationship" means the relationship of—

(*a*) spouse;

(*b*) other family member;

(*c*) person who normally or regularly resides in the household or residential facility;

(*d*) boyfriend or girlfriend;

(e) person who is wholly or partly dependent on ongoing paid or unpaid care or a person who provides such care;

"final order" in relation to an order made under this Decree means an order that deals with a substantive matter in issue in proceedings on a final basis;

"foreign domestic violence restraining order" means an order made by a Court in a prescribed foreign country, being—

(i) an order to protect a person from behaviour by the person against whom the order is made, where, if the behaviour occurred in Fiji it would be behaviour in respect of which a domestic violence restraining order could be made uuder this Decree; or

(ii) an order that varies, discharges, or is made in substitution for, such an order;

but does not include—

(i) an order made ex parte; or

(ii) an order of an interim nature; or

(iii) an order made by a Court in a prescribed foreign country that varies, discharges, or is made in substitution for, an order made by a Court in Fiji that is registered or is otherwise enforceable in that country;

"home" includes—

(a) any structure or vessel or part of a structure or vessel that can be used as a residence;

(b) any mobile home, caravan or other means of shelter placed upon any land that can be used as a residence;

"interim order" in relation to an order made under this Decree means an order that deals with a substantive matter in issue in proceedings on an interim basis pending further hearing of that particular matter;

"native land" has the meaning given to it by section 2 of the Native Lands Act (Cap. 133), and includes land administered or regulated under the Banaban Lands Act (Cap. 124) and the Rotuma Lands Act (Cap. 138);

"order" means an order by a Court that may be made or has been made under this Decree including an order—

(a) made in the absence of the respondent;

(b) made without notice to the respondent, and

(c) made on an interim or final basis;

"other family member" means any of the following—

(a) parent, grandparent, step-parent, father-in-law, mother-in-law;

(b) child, grandchild, step-child, son-in-law, daughter-in-law;

(c) sibling, half-brother, half-sister, brother-in-law, sister-in-law;

(d) uncle, aunt, uncle-in-law, aunt-in-law;

(e) nephew, niece, cousin;

(f) clan, kin or other person who in the particular circumstances should be regarded as a family member,

provided that, if a person was or is in a de facto relationship with another person the relationship of other family member includes a person who would be included if the persons in that de facto relationship were or had been married to each other;

"personal property" means clothing, furniture, household appliances, effects and other similar property in the possession or control of—

(a) the respondent; or

(b) a person who is or will be protected by the domestic violence restraining order;

"perpetrator" means a person who perpetrates domestic violence as defined in section 3;

"police officer" means any member of the Fiji Police Force;

"police station" includes a police post;

"prescribed foreign country" means a country within the Commonwealth or which is a member of the Pacific Islands Forum, or any other country prescribed by regulations for this purpose;

"presiding judicial officer" means a resident Magistrate or Judge presiding in proceedings under this Decree,

"proceedings under this Decree" includes proceedings where a Court exercises jurisdiction under this Decree in the course of other proceedings before the Court;

"property of the protected person" means property that a person protected by a domestic violence restraining order owns or does not own, but where the person does not own the property, the property was—

(*a*) used or enjoyed by the person;

(*b*) available for the person's use or enjoyment;

(*c*) in the person's care or custody; or

(*d*) at the person's home or place or residence;

"property of a victim" means property that a victim owns or does not own, but where the person does not own the property, was—

(*a*) used or enjoyed by the person;

(*b*) available for the person's use or enjoyment;

(*c*) in the person's care or custody; or

(*d*) at the person's home or place or residence;

"protected person" means a person who is protected by a domestic violence restraining order made under this Decree and includes a person protected by an interim order or a final order;

"registered foreign domestic violence restraining order" means a foreign domestic violence restraining order, that is registered in a Court pursuant to section 62;

"regulations" means regulations made under this Decree;

"respondent" means a person against whom an order is sought or made under this Decree;

"rules" means the rules made under this Decree unless the context otherwise requires;

"safety planning conference" means a conference referred to in section 58, conducted in accordance with that section, to attempt to resolve details about how the safety of a victim will be ensured and other matters relating to the objectives and principles in this Decree so far as the objectives and principles are relevant in a particular case.

"senior court officer" means a clerk of the Court or another senior administrative officer of the Court;

"sexual abuse" means any act of a sexual nature by one person towards another which is or was violence as defined in subsections 3(2)(*a*), (*d*), (*e*), (*f*) or (*g*);

"spouse" includes a person who is or has been in a de facto relationship with the other person;

"tenancy order" means an order made under section 36;

"urgent monetary relief" means payment of, or contribution towards, any of the following expenses of a protected person, by the respondent—

(*a*) medical expenses;

(*b*) living expenses (for example food, necessities);

(*c*) accommodation expenses (for example rent, mortgage, loans, electricity, fuel bills);

(*d*) relocation expenses (for example telephone calls, transport, establishing a child at a new school);

(*e*) purchase of household necessities; and

(*f*) any other expenses of an urgent nature that the Court considers reasonably necessary;

"victim" means a victim of domestic violence as defined in section 3, including a child as set out in that section;

"weapon" means any article —

(a) used or threatened to be used by a person to cause injury to a person;

(b) made or adapted for use to cause injury to a person; or

(c) intended to be used, or which may be used, by a person who has possession of it, or access to it, to cause injury to a person;

"weapons licence" means a licence of a kind issued under the Arms and Ammunition Act (Cap 188).

Definition of domestic violence

3.—(1) "Domestic violence" in relation to any person means violence against that person ('the victim') committed, directed or undertaken by a person ('the perpetrator') with whom the victim is, or has been, in a family or domestic relationship.

(2) In relation to subsection (1), "violence" means any of the following—

(a) physical injury or threatening physical injury;

(b) sexual abuse or threatening sexual abuse;

(c) damaging or threatening to damage property of a victim;

(d) threatening, intimidating or harassing;

(e) persistently behaving in an abusive, cruel, inhumane, degrading, provocative or offensive manner;

(f) causing the victim apprehension or fear by—

(i) following the victim; or

(ii) loitering outside a workplace or other place frequented by the victim, or

(iii) entering or interfering with a home or place occupied by the victim, or

(iv) interfering with property of the victim, or

(v) keeping the victim under surveillance;

(g) causing or allowing a child to see or hear any of the violence referred to in paragraphs *(a)* to *(f)* inclusive;

(h) causing another person to do any of the acts referred to in paragraphs *(a)* to *(g)* inclusive towards the victim.

(3) Subject to subsection (4), causing or allowing a child to see or hear violence, as specified in paragraph *(g)* of subsection (2), includes putting the child, or allowing the child to be put, at real risk of seeing or hearing that violence.

(4) A person who suffers the violence is not to be regarded, for the purposes of paragraph *(g)* of subsection (2) or of subsection (3), as having caused or allowed or put the child at real risk of seeing or hearing the violence.

(5) A single act may amount to violence for the purpose of subsection (1) and in addition a number of acts that form part of a pattern of behaviour may amount to violence even though some or all of those acts, when viewed in isolation, may appear minor or trivial.

Decree to bind State

4. This Decree binds the State.

Application of the Decree

5. This Decree applies to domestic violence committed in Fiji and overseas.

Objects

6. The objects of this Decree are –

(a) to eliminate, reduce and prevent domestic violence;

(*b*) to ensure the protection, safety and wellbeing of victims of domestic violence;

(*c*) to implement the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and related conventions; and

(*d*) to provide a legally workable framework for the achievement of (*a*), (*b*) and (*c*) above.

Principles

7.—(1) The following principles must be applied by a Court when exercising jurisdiction under this Decree and by any person who exercises a power, or performs a function, pursuant to this Decree—

(*a*) the need to promote the objects of this Decree;

(*b*) the need to ensure that proceedings under this Decree are as speedy, inexpensive and simple as possible;

(*c*) the need to ensure the safety and wellbeing of victims of domestic violence;

(*d*) the need to ensure that children are not exposed to domestic violence and to ensure the safety and wellbeing of children who have been, or are at risk of becoming, a direct or indirect victim of domestic violence;

(*e*) the need to ensure that victims of domestic violence can go about their life and usual routines free from the risk of domestic violence;

(*f*) the need to ensure as far as possible that victims of domestic violence are able to remain in their usual homes, and even if this does not or cannot occur, that their accommodation needs have highest priority;

(*g*) the need to address the adverse consequences of domestic violence for the victims and to rehabilitate the victims;

(*h*) the need to ensure that victims of domestic violence are not further victimised by the perpetrator or others, in the course of the proceedings or otherwise, because the victim sought protection or other redress in relation to the violence; and

(*i*) the need to ensure that the perpetrator—

(i) is aware of the terms and effect of an order made under this Decree which imposes obligations upon them;

(ii) is aware of services that may be able to assist them to address their violence;

(iii) is encouraged to accept responsibility for their violence; and

(iv) contributes, where possible, to the rehabilitation of the victim.

Jurisdiction of Courts

8.—(1) The following Courts have jurisdiction to make orders under this Decree—

(*a*) the Magistrates' Court when constituted by a resident magistrate;

(*b*) the Family Division of the Magistrates' Court;

(*c*) the Family Division of the High Court;

(*d*) a Juvenile Court; and

(*e*) the High Court.

(2) An application under this Decree may be commenced in any of the Courts specified in subsection (1) and in addition those Courts may make an order under this Decree when exercising jurisdiction in other proceedings before the Court, including proceedings relating to a criminal charge.

Transfer of proceedings

9.—(1) Subject to subsection (2) and (3), where—

(*a*) proceedings under this Decree are pending before a Court, and

(*b*) it appears to the Court that it is in the interests of justice or of convenience to the parties that the proceedings be dealt with in another Court that has jurisdiction under this Decree,

the Court may, before making an order, or after making an interim order but before making a final order, transfer the proceedings to another Court that has jurisdiction under this Decree.

(2) When a Court is considering whether to transfer the proceedings to another Court, the Court must make an interim order under this Decree to ensure the safety and wellbeing of each person proposed to be protected unless—

(a) suitable orders are already current; or

(b) the Court determines that the safety and wellbeing of each relevant person is not at risk.

(3) Where a Court intends to order that proceedings under this Decree be transferred to another Court, the Court may—

(a) request that the Court to which the proceedings are being transferred list the matter within a specified time, and

(b) make orders about procedural matters that will enable the case to proceed as quickly as possible before the Court to which the proceedings are being transferred.

Courts to act in aid of each other

10. Courts having jurisdiction under this Decree must severally act in aid of and be auxiliary to each other in all matters under this Decree.

Matters to be considered by the Court

11. Notwithstanding sections 28 and 29 of the Magistrates Court Act (Cap. 14), and any other law that would require a Court, when exercising jurisdiction under this Decree, to promote reconciliation between the parties, the Court must, in making any decisions or order under this Decree, regard the safety and wellbeing of the victim to be of the utmost and paramount importance in weighing factors that need to be taken into account.

PART 2—DUTIES

Police to prevent domestic violence, detect and bring to justice

12. Each police officer has a duty to prevent the commission of domestic violence offences, to detect and bring offenders to justice and to apprehend all persons who the police officer is legally authorised to apprehend and for whose apprehension sufficient grounds exist.

Police to render assistance to victims of domestic violence

13.—(1) Each police officer must when an incident of domestic violence is reported, respond in a timely way, investigate and render such assistance as is reasonable in the circumstances to the victim.

(2) Each police officer must at the scene of an incident of domestic violence or as soon after as is reasonably possible, or when an incident of domestic violence is reported —

(a) render such assistance to the victim as may be required in the circumstances, including—

(i) assisting the victim or another person to obtain medical treatment;

(ii) subject to subsection (iii), assisting to ensure as far as possible that the victim is able to remain in their usual home in accordance with the priority that is placed on the victim's accommodation needs by section 7 of this Decree;

(iii) assisting the victim to find other suitable accommodation if it is not possible for the victim to remain in their usual home or the victim does not wish to do so; and

(iv) assisting the perpetrator to find suitable accommodation;

(b) if it is reasonably possible to do so, hand written information listed in subsection (c) to the victim, in the language of the victim's choice and explain the contents to the victim;

(c) the written information to be handed to the victim referred to in subsection (b) is information in the prescribed form regarding—

(i) services that are available to assist the victim;

(ii) the rights that the victim may have to seek protection and other orders under this Decree;

(iii) the duty that police may have to apply for an order for the protection of the victim under this Decree;

(iv) the responsibilities police may have in relation to charging the perpetrator, and

(v) information about the complaints process that applies to police work in relation to domestic violence;

(d) if it is reasonably possible to do so, hand prescribed written iuformation listed in subsection *(c)* to the perpetrator in the language of the perpetrator's choice, and explain the contents to the perpetrator including—

(i) services that are available to assist the perpetrator; and

(ii) the matters in section 13(2)*(c)*, subparagraphs (ii) to (v), regarding the rights that the victim may have to seek protection and other orders under this Decree.

Police to apply for a domestic violence restraining order

14.—(1) Subject to subsection (2), a police officer must make an application for a domestic violence restraining order for the protection of a person who is, or may become, a victim of domestic violence in the following cases—

(a) where a person is charged with a domestic violence offence, or

(b) where the police officer suspects or believes that—

(i) a domestic violence offence has recently been committed, is being committed, is imminent, or is likely to be committed, and

(ii) the victim's safety or wellbeing is at risk.

(2) Where subsection (1) applies a police officer must make an application for a domestic violence restraining order against the relevant person or persons, being—

(a) the person charged with a domestic violence offence, or

(b) the person or persons who pose the risk.

(3) The obligation to apply for a domestic violence restraining order in subsection (1) and (2) does not apply if the police officer—

(a) is aware that an application for a domestic violence restraining order has already been commenced for the protection of the person against the person who would be bound if an order was sought by the police officer; or

(b) in the special circumstances of the case, having regard to the objects and principles in this Decree, a decision has been made by the officer in charge that that there are good reasons why an application should not be made.

(4) Where a decision not to apply is made under subsection (3), then subject to subsection (5), the officer in charge must make a written record of the decision and the reason for the decision and immediately provide a copy of this with the prescribed complaints notice attached to each person for whose protection a domestic violence restraining order would otherwise have been sought.

(5) Where a person for whose protection a domestic violence restraining order would otherwise have been sought is a person under 16 years or a person who lacks the mental capacity to understand the effect of a domestic violence restraining order, the written copy of the decision and reasons referred to in subsection (4) with the complaints notice attached must instead be immediately provided to a person above the age of 18 years who—

(a) is a parent or guardian of the person; or

(b) is providing care to the person; or

(c) is supporting or assisting the person and is considered appropriate by the senior police officer in the particular circumstances.

(6) The complaints notice referred to in subsection (4) and (5) is a notice in the form prescribed by the regulations that explains the rights of the victim to make a complaint about delay by a police officer in applying for a domestic violence restraining order for the protection of the person or a decision by a police officer not to apply for such an order.

Police to assist with collection of personal property

15.—(1) Where a Court makes a request under this Decree that the officer in charge of a police station arrange for a police officer to accompany a person to a specified place to assist with arrangements regarding the collection of specified personal property it is the duty of the officer in charge of a police station to whom the request is directed to arrange for a suitable police officer to accompany the person as specified in the order.

(2) Where a person who is protected by a domestic violence restraining order, requests a police officer to be present at a place to supervise the transfer of personal property between a person who is bound by the order and a person who is protected by the order, it is the duty of the officer to make all reasonable arrangements to assist where the office believes that a breach of the peace or a breach of the domestic violence restraining order may otherwise occur.

Legal practitioners to provide information about services

16.—(1) In the circumstances referred to in subsection (3) a legal practitioner who receives instructions to act for a person must provide the person at the earliest reasonable opportunity with information in the prescribed form which explains the services and programs that may be available to assist.

(2) Subsection (1) applies uuless the legal practitioner considers that providing the person with information in the prescribed form would not be useful or appropriate for the person in the circumstances.

(3) Subject to subsection (2), subsection (1) applies when a legal practitioner receives instructions from—

(a) a person who instructs that they have been a victim of domestic violence;

(b) a person who seeks to be, or is, protected by an order made under this Decree;

(c) a person who instructs that they have perpetrated domestic violence,

(d) a person who is the respondent to an application for an order under this Decree; and

(e) a person who has been charged with a domestic violence offence.

(4) Where subsection (3) applies but the legal practitioner is of the opinion that the person is unable to read or understand information in the prescribed form, the legal practitioner must take reasonable steps to explain the information to the person.

Court to provide information about services

17.—(1) Subject to this section a Court, when dealing with an application for an order under this Decree, must ensure that information in the prescribed form, which explains services and programs that may be available to provide assistance, is given as early as possible in the proceedings to—

(a) each person who would be protected by the order; and

(b) to the respondent.

(2) The requirement in subsection (1) is satisfied in relation to a person if the person confirms, or the Court has reason to believe, that the person has already received the information.

(3) Where a person who would be protected by an order is under 16 years or has a mental or other incapacity such that they are incapable of understanding the information required to be provided, the requirement in subsection (1) is satisfied—

(a) if the Court directs that the information be provided to the applicant or to another person who is caring for, or supporting, that protected person, or

(b) if the Court determines, in the special circumstances of the case, that it would not be useful or appropriate for the information to be provided to that protected person.

(4) Where a person to whom this section applies is not present before the Court, the Court may direct that the information be—

(a) posted to the person;

(b) served on the person; or

(c) provided to the person in another way specified by the Court.

(5) In criminal proceedings relating to a charge for a domestic violence offence, the Court must ensure that information in the prescribed form, which explains services and programs that may be available to provide assistance, is given to the defendant at the earliest possible opportunity during the proceedings.

(6) The requirement in subsection (5) is satisfied if the defendant advises that they have already received a copy of the information.

Court to explain the effect of orders

18.—(1) Subject to subsection (2), a Court that makes a domestic violence restraining order under this Decree must explain to—

(a) the person bound by the order; and

(b) the person protected by the order,

who are in Court when the order is made—

(c) the purpose, terms and effects of the order;

(d) the consequences that may follow if the person bound by the order breaches the order;

(e) the consequences that may follow if the persou protected by the order –

(i) encourages or invites the person who is bound by the order to breach the order; or

(ii) by their actions causes the person who is bound by the order to breach the order;

(f) that the order must be varied, suspended or discharged if the person who is bound by the order or the person protected by the order or both or all of them wish to do anything that would be contrary to, or in breach of, the order;

(g) how the order may be varied, suspended or discharged.

(2) If a person who would be protected by an order is under 16 years or has a mental or other incapacity such that they are incapable of understanding the information required to be provided, the requirement in subsection (1) is satisfied if the Court directs that the information be provided to the applicant or to another person who is caring for, or supporting, that person.

(3) If a person referred to in section 19(1)*(a)* or *(b)* is not present in Court when the order is made or it is not practical for the court to give the explanation at the time the restraining order is made, then the Court must direct the clerk ôf the court to cause a prescribed document containing the explanation—

(a) in the case of a person bound by the order, to be served on the person; and

(b) in the case of a person protected by the order, to be delivered to the person unless the Court directs that it should be delivered to another person on behalf of the protected person (for example, to their care giver).

(4) An order made under this Decree is not invalid merely because a person who should have been given the explanation referred to in subsection (1) was not given the explanation.

PART 3—DOMESTIC VIOLENCE RESTRAINING ORDERS

Who can apply

19.—(1) An application for an order under this Decree may be made in respect of—

(a) an adult, by—

(i) the person themselves; or

(ii) another person who normally cares for, or is currently caring for, the person;

(b) a child, by—

(i) a parent or guardian of the child;

(ii) an adult with whom the child resides (either usually or on a temporary basis);

(iii) a child themselves where the child has attained the age of 16 years and is a married person; and

(iv) a child themselves where the child has attained the age of 16 years and the court has granted leave to the child to make the application on their own behalf;

(c) an adult or a child, by—

(i) a police officer, where a person has been charged with a domestic violence offence or the police officer suspects or believes that a domestic violence offence has recently been committed, is being committed, is imminent, or is likely to be committed, and the victim's safety or wellbeing is at risk; or

(ii) the Director of Social Welfare or a welfare officer appointed under section 37(2) of the Juveniles Act (Cap. 56); or

(iii) the Public Trustee when undertaking management and care of the property of a person of unsound mind under section 17(1) of the Public Trustee Act (Cap. 64) or another person holding an appointment in respect of the affairs of a person of unsound mind under section 23 of that Act; or

(iv) the Public Trustee when holding an appointment under section 17(2) of the Public Trustee Act (Cap. 64) to undertake the management and care of the property of an incapable person; or

(v) any other person where it appears to the Court to be necessary for the safety or wellbeing of the victim.

(2) Where an application is made under section (1) for the protection of a person over 16 years and the applicant is not the person intended to be protected, the applicant must demonstrate to the satisfaction of the Court that—

(a) the applicant has the consent of the person to be protected to make the application; or

(b) the person to be protected lacks the capacity to understand the proceedings or the nature and extent of the risk and the proceedings are necessary for the victim's safety or wellbeing; or

(c) it is not reasonable in the circumstances for consent to be required.

Urgent proceedings without notice to the respondent

20.—(1) Where an application is filed seeking an order under this Decree and the applicant seeks to proceed urgently without notice to the respondent, section 42 applies in relation to listing the matter for urgent hearing by the court.

(2) A Court exercising jurisdiction under this Decree may make a domestic violence restraining order without notice to the respondent if the Court is satisfied that the delay that would be caused if notice to the respondent was required would or might entail—

(a) a risk of harm; or

(b) undue hardship

to a person who would be protected by the order.

(3) A domestic violence restraining order made without notice to the respondent is an interim order which continues until it is confirmed as a final order, or is earlier varied, suspended or discharged by a Court.

(4) At the time the order referred to in subsection (2) is made, the Court must—

(a) specify a further Court date when the respondent must be present at Court; and

(b) give directions about urgent service on the respondent of—

(i) a sealed copy of the order of the Court;

(ii) a sealed copy of any application and supporting material filed by the applicant; and

(iii) the information the Court is required to be provide to the respondent pursuant to sections 17 and 18.

Application with notice to the respondent

21. Where an application is filed seeking an order under this Decree and the applicant does not seek to proceed urgently without notice to the respondent, section 42 applies in relation to listing the matter before the court and service of the application on the respondent.

Interim and final orders

22. Except as provided by this Decree—
   (a) any order that a Court may make under this Decree may be made as an interim order or as a final order;
   (b) where a Court makes an interim domestic violence restraining order that order continues until confirmed by a Court as a final order or earlier varied, suspended or discharged by a Court;
   (c) where a Court makes a final domestic violence restraining order that order continues unless varied, suspended or discharged by a Court.

Grounds for making a domestic violence restraining order

23.—(1) A Court may make a domestic violence restraining order for the safety and wellbeing of a person if satisfied that the person is, or has been, in a family or domestic relationship with the respondent, and—
   (a) the respondent has committed, is committing, or is likely to commit domestic violence against that person or against another person relevant to the application, and
   (b) the making of the order is necessary for the safety and wellbeing of the person or another person relevant to the application, or both.

(2) In determining whether a domestic violence restraining order should be made for the safety and wellbeing of a person, the Court must consider—
   (a) whether there is reason for concern that the respondent's behaviour or other behaviour that would be domestic violence may be repeated by the respondent;
   (b) the perception of the applicant and of a person who would be protected by the order, about the nature and seriousness of the respondent's behaviour in respect of which the application is made; and
   (c) the effect of the respondent's behaviour on each person who would be protected by the order including the effect of the respondent's behaviour on their ability to go about their normal life and normal routines.

Circumstances where orders must be made

24.—(1) Subject to subsection (3) but notwithstanding any other provision in this Decree—
   (a) where a person stands charged before a Court with an offence which is a domestic violence offence, the Court must—
      (i) make an interim domestic violence restraining order under this Decree against the defendant for the safety and wellbeing of the person against whom the offence appears to have been committed; and
      (ii) make an order directing the defendant to appear at the further hearing of the matter on a date and at a location fixed by the Court;
   (b) where a person—
      (i) pleads guilty to, or is found guilty of, an offence which is a domestic violence offence; or
      (ii) the Court intends to stay or terminate the proceedings,

the Court must make a domestic violence restraining order under this Decree for the safety and wellbeing of the person against whom the offence or alleged offence was committed;

(2) Where paragraph *(a)* or *(b)* of subsection (1) applies and there is a domestic violence restraining order made under this Decree in effect against the defendant for the safety and wellbeing of the person against whom the offence is alleged to have been committed, or was committed, the Court may vary the order if this appears desirable to provide greater protection for the safety and wellbeing of a protected person.

(3) Where subsection (1) applies the Court need not make an order under this section if satisfied that, having regard to the safety and wellbeing of the person for whose protection the order would be made, the order is not required.

Application by police by telephone

25.—(1) A prescribed police officer may apply to a magistrate or judge of a Court that has jurisdiction under this Decree (referred to in this section as the "presiding judicial officer") by telephone for an interim domestic violence restraining order under this section.

(2) Before applying for an order under this section the police officer must—

(a) complete the application part of the prescribed form by indicating the grounds on which the order is sought;

(b) if possible to do so, without causing any unreasonable delay in making the application, transmit a copy of the completed application to the presiding judicial officer by facsimile transmission;

(c) if the respondent is present at the location from which the police officer is intending to apply for the order by telephone—

(i) invite the respondent to be present during the telephone application; or

(ii) if the respondent is in custody, unless there are good reasons not to do so, arrange for the respondent to be present;

(d) at the commencement of the application by telephone advise the presiding judicial officer whether the respondent is present with the police officer and if present whether the respondent is able to hear all of the telephone call.

(3) Where a presiding judicial officer to whom the application under subsection (1) is made is of the opinion that it is not practical in the circumstances of the case for the police officer to appear before the Court to make the application, the application may proceed by telephone.

(4) Where an application proceeds by telephone under this section the proceedings are deemed to be interim proceedings in Court before the presiding judicial officer, and—

(a) the provisions of this Decree apply, and

(b) any order made by the presiding judicial has the same effect as an order made in Court under this Decree.

(5) A judicial officer who makes an order under this section must—

(a) complete the application part of the prescribed application form unless the judicial officer has before the conclusion of the hearing by telephone received a copy of the application from the police officer by facsimile transmission;

(b) reduce to writing and include with the prescribed application form any additional information provided by the police officer during the hearing by telephone;

(c) complete and sign the order on the prescribed form;

(d) determine the time and place of the next Court date being a date—

(i) within 30 days of the date that the order is made if the Court will be sitting during that time at a location sufficiently convenient to the person protected by the order, the police officer and the respondent; or

(ii) if it is not possible to specify a date within 30 days then the first suitable hearing day after the end of that period;

(e) record on the order the reasons for making the order and the time and place of the next Court date;

(f) inform the member of the police force, by telephone, of the terms of the order, the reasons for making it and the time at and place of the next Court date;

(g) if the respondent is present with the police officer, speak to the respondent and inform the respondent of the matters set out in subsection (5)*(f)* and also explain the effect of the orders to the respondent as required by this Decree;

(h) if reasonably possible to do so, immediately send by facsimile transmission to the police officer, a copy of the application, the written notes of any additional information provided by the police officer during the hearing by telephone, and the order so made; and

(i) as soon as practical, cause the completed and signed prescribed form, to be forwarded to the Clerk of the Court for the Court file.

(6) A police officer who proceeds with an application under this section must—

(a) reduce to writing on the prescribed application completed by the police officer any additional information provided by the police officer to the presiding judicial officer during the hearing by telephone;

(b) on being informed under subsection (5) of the making and terms of the order, complete the relevant order parts of the prescribed form as directed by the presiding judicial officer; and

(c) place a copy of the application and order if received from the presiding judicial officer by facsimile transmission with the application.

(7) As soon as possible after an order under this section is made, the police officer must—

(a) cause a copy of the application and the order received by facsimile transmission from the presiding judicial officer, or if not available, then the application completed under subsection (6)*(a)* and the order completed under subsection (6)*(b)*, to be served on the defendant; and

(b) unless already explained to the respondent by the presiding judicial officer, cause the effect of the orders to be explained to the respondent having regard to section 18 of this Decree;

(c) cause a copy of the documents referred to in subsection 7*(a)* to handed as soon as possible to the person protected by the order;

(d) forward a copy of the order served to the clerk of the court, for the Court file.

(8) An order made under this section is deemed to be a summons to the respondent requiring the respondent to appear before the Court at the time and place shown on the order.

Orders by the Court's own motion

26.—(1) Notwithstanding any other provision in this Decree, where the Court that has jurisdiction under this Decree is dealing with proceedings, other than proceedings under this Decree, the Court may on its own motion make a domestic violence restraining order under this Decree if the Court considers—

(a) there are sufficient grounds to consider making an order under this Decree;

(b) that the order is required to ensure the safety and wellbeing of a victim of domestic violence;

(c) it is convenient and in the interests of justice that the order be made; and

(d) it is reasonable in all the circumstances that the order be made.

(2) An order made by the Court on its own motion under subsection (1) is an interim order and the Court must give directions in relation to—

(a) the date and place of the next hearing;

(b) who must be present at Court at the next hearing;

(c) service of the order;

(d) any documents that should be filed prior to the next hearing; and

(e) any other matter relating to the further hearing of the matter considered appropriate by the Court.

Standard non-molestation conditions

27.—(1) The standard non-molestation conditions that apply to every domestic violence restraining order are set out in subsection (2).

(2) The standard non-molestation conditions are that the respondent must not–

(a) physically assault or sexually abuse the protected person;

(*b*) threaten to physically assault or sexually abuse the protected person;

(*c*) damage or threaten to damage any property of the protected person;

(*d*) threaten, intimidate or harass the protected person;

(*e*) behave in an abusive, provocative or offensive manner towards the protected person;

(*f*) encourage any person to engage in behaviour against a protected person, where the behaviour if engaged in by the respondent would be prohibited by the order.

(3) In addition to the conditions set out in subsection (2), a Court may order other conditions having regard to sections 28 to 37.

Standard non-molestation conditions apply to a child

28.—(1) Where a Court makes, or intends to make, a domestic violence restraining order under this Decree for the safety and wellbeing of a person and the person has a child or children in their care—

(*a*) unless the Court orders otherwise, the standard non-molestation conditions also apply for the protection of that child or those children; and

(*b*) the Court may apply additional conditions under this Decree for the safety and wellbeing of the child or children.

(2) The powers in this section are in addition to the power of a Court, exercising jurisdiction under this Decree, to make a domestic violence restraining order for the protection of a child in the child's own right.

Additional conditions - contact

29.—(1) Where a Court makes, or intends to make, a domestic violence restraining order under this Decree for the safety and wellbeing of a person, the Court may include, either absolutely or on conditions specified by the Court, any of the non-contact conditions specified in subsection (2).

(2) The non-contact conditions referred to in subsection (1) are that the respondent must not—

(*a*) watch, loiter near, or prevent or hinder access to or from, the protected person's place of residence, business, employment, educational institution, or any other place that the protected person visits often; or

(*b*) follow the protected person about or stop or accost the protected person in any place; or

(*c*) enter or remain on any land or building occupied by the protected person; or

(*d*) enter any land or building or remain there when the protected person is also on the land or in the building;

(*e*) make any other contact with the protected person (whether by telephone, correspondence, or otherwise), except such contact—

(i) that is permitted in the domestic violence restraining order made by the Court; and

(ii) that is reasonably necessary in an emergency.

Additional conditions - spouse

30.—(1) Subject to subsection (2), where a Court makes, or intends to make, a domestic violence restraining order under this Decree for the safety and wellbeing of a person, the Court may direct that the order, or specified parts of the order, also apply for the benefit of a person, not being the respondent, who is the spouse of the protected person.

(2) The Court may make a direction under subsection (1) when satisfied that—

(*a*) the respondent is engaging in, or has engaged in, behaviour that, if the respondent and the person were or had been in a family or domestic relationship would amount to domestic violence against the person; and

(*b*) the respondent's behaviour towards the person is wholly or partly due to the person's relationship with a protected person; and

(c) the making of the direction is necessary for the safety of the person; and

(d) where practical in the circumstances, the court is satisfied that the person consents to the direction being made.

Additional conditions - children

31.—(1) This section applies where a Court makes, or intends to make, a domestic violence restraining order under this Decree for the safety and wellbeing of a child.

(2) In this section, "a specified order or agreement" means—

(a) an interim or final custody, guardianship or access order made by a court in Fiji;

(b) an order which is a residence order, a specific issues order or a contact order made under the Family Law Act; or

(c) a parenting plan registered under section 59 of the Family Law Act.

(3) Where subsection (1) applies—

(a) if there is no specified order or agreement in effect in relation to the child; and

(b) the Court considers that the safety and wellbeing of the child, or of another person, or of the child and another person requires that an order be made immediately in relation to –

(i) where the child should live;

(ii) who should care for the child;

(iii) a child being delivered to the person who should care for the child;

(iv) arrangements for contact in relation to the child; or

(v) other issues relating to the safety and wellbeing of the child,

then subject to subsection (4) and subsection (11), the Court may make an order in relation to a matter specified in subparagraphs (i) to (v) of paragraph *(b)* as a condition of a domestic violence restraining order.

(4) Before a Court makes an order of the kind specified in subsection (3) the Court—

(a) must consider whether each parent or guardian of the child has received notice of the application; and

(b) unless the Court considers that the safety and wellbeing of the child, or of a person protected by the domestic violence restraining order, or both, justifies the Court proceeding without notice, the Court must order that adequate notice be given to each parent or guardian of the child before making the order.

(5) When a Court makes an order under subsection (3) the order so made takes effect immediately and continues in effect unless and until it is varied, suspended or discharged by subsequent order under this Decree or by a Court exercising jurisdiction under the Family Law Act.

(6) Where subsection (1) applies and—

(a) a specified order or agreement is in effect in relation to that child; and

(b) the Court considers that one or more of the provisions of a specified order or agreement requires adjustment to ensure the safety and wellbeing of the child, or another person who is or will be protected by the domestic violence restraining order or both,

then subject to subsection (11), the Court may vary or suspend the specified order or agreement to the extent necessary to ensure the safety and wellbeing of the child or another person who is, or will be, protected by the domestic violence restraining order.

(7) The power in subsection (6) to vary or suspend a specified order or agreement applies notwithstanding the provisions of the Family Law Act.

(8) Before a Court makes an order to vary or suspend a specified order or agreement the Court—

(a) must consider whether each of the parties to the proceedings in which the existing orders were made have received notice of the application to vary or suspend; and

(b) unless the Court considers that the safety and wellbeing of the child or of a person protected by the domestic violence restraining order, or of both such child and person, warrants the Court proceeding without notice, the Court must order that adequate notice be given to the relevant party or to each of the relevant parties before proceeding to determine the matter.

(9) In determining, whether to vary or suspend a specified order or agreement, the Court must take the following matters into account—

(a) the nature and extent of the risk to the child and to any other person protected by the domestic violence restraining order that has been made or which the Court intends to make;

(b) whether the risk can be eliminated if the Court makes an order or varies an existing order—

(i) to provide that access or contact visits by the respondent in relation to the child may only take place if supervised by a suitable person specified by the Court; or

(ii) to provide that particular arrangements apply to ensure that the respondent does not come into contact with a specified person protected by this order when a child is being collected and returned in relation to access or contact visits; or

(iii) in some other way concerning how the coutact or access visits may take place.

(10) In addition to the matters specified in subsection (9), when determining whether to vary or suspend a specified order or agreement, the Court must take into account—

(a) whether the concerns raised in support of the application to vary or suspend the specified order or agreement, were considered by the Court that made the specified order or agreement; and

(b) whether proceedings in relation to the specified order or agreement are pending before another Court,

provided that neither of these matters may be treated as an impediment by the Court if the Court considers that the circumstances that now exist require variation or suspension of the specified order or agreement to ensure the safety and wellbeing of the child or another person who is, or will be, protected by the domestic violence restraining order.

(11) If the Court that is considering an application under subsection (3) or subsection (6) is a Court that also has jurisdiction under the Family Law Act and the Court considers that—

(a) it would be preferable to deal with the application under the Family Law Act rather than under this Decree; and

(b) there would be no disadvantage in relation to the need to ensure the safety and wellbeing of the child or another person who is, or will be, protected by the domestic violence restraining order,

the Court may decline to hear the application under this section and instead treat the application under this section as an application made under the Family Law Act to which the Family Law Act applies.

(12) When a Court makes an order under subsection (6) the order so made—

(a) takes effect immediately in substitution for the provisions of the specified order or agreement so varied or suspended; and

(b) continues in effect unless and until it is varied, suspended or discharged by subsequent order under this Decree or by a Court exercising jurisdiction under the Family Law Act.

(13) When a court makes an order under subsection (6) the Court must ensure that a sealed copy of the order is—

(a) forwarded as soon as possible to the Registrar of the Family Division of the Magistrates Court or the Family Division of the High Court, which ever may be appropriate; and

(b) served on each of the parties in the proceedings in which the specified order was made.

(14) A person specified in section 65 of the Family Law Act may apply to the Family Division of the Magistrates' Court or the Family Division of the High Court, as the case may be, to vary, suspend or discharge an order made under subsection (3) or subsection (6).

(15) If an application is made to the Family Division of the Magistrates' Court or the Family Division of the High Court, to vary, suspend or discharge an order made under subsection (3) or subsection (6) that Court is deemed to have power under the Family Law Act to vary or discharge the order made under subsection (3) or subsection (6) as if the order was an order made under the Family Law Act.

Additional conditions - possessions

32.—(1) Where a Court makes, or intends to make, a domestic violence restraining order under this Decree for the safety and wellbeing of a person, the Court may make any of the orders specified in subsection (2) concerning use of personal property.

(2) The orders referred to in subsection (1) are—

(a) that the respondent—

(i) must deliver specified personal property to the protected person or to another person or location specified in the order;

(ii) must allow the protected person, or another person on their behalf, to collect specified personal property from the respondent or from a specified location;

(iii) must allow the protected person, or another person on their behalf, access to premises for the purpose of collecting specified personal property;

(iv) must leave specified personal property in the home, or at another specified location, for use by the protected person;

(v) must not remove or attempt to remove specified personal property from the protected person;

(vi) must comply with directions by the court regarding arrangements for transfer of specified personal property.

(b) that a person protected by the order must—

(i) make specified personal property available for use by the respondent;

(ii) comply with directions made by the court regarding arrangements for transfer of specified personal property.

(3) When considering whether to make an order under this section the Court must—

(a) give highest priority to the safety and wellbeing of the protected person and any child in their care or ordinarily in their care; and

(b) have regard to the needs of the respondent and to any other person who would be affected by the order.

(4) When a Court makes an order under this section, the Court may request that the officer in charge of a particular police station arrange for a police officer to accompany a person to a specified place to assist with arrangements regarding the collection of specified personal property.

Additional conditions - weapons

33.—(1) Where a Court makes or intends to make a domestic violence restraining order for the safety and wellbeing of a person, the Court may make orders in relation to any of the matters in subsection (2) if satisfied that the condition is necessary for the safety and wellbeing of the protected person.

(2) Where subsection (1) applies, the additional orders that the Court may make in relation to weapons are—

(a) that the respondent must not have any weapons or particular weapons specified by the Court in their possession, custody or control;

(*b*) that the respondent must not seek to acquire any weapons or particular weapons specified by the Court;

(*c*) that the respondent must surrender all weapons and weapons licences or those specified by the Court, to the police within the time specified in the order;

(*d*) that the respondent must surrender all or any weapons and weapons licences at any time on demand by a police officer;

(*e*) that all weapons licences or those specified by the Court held by the respondent is suspended or cancelled; and

(*f*) that the respondent is disqualified from holding or seeking to hold any weapons licence or a particular weapons licence specified by the Court.

(3) Where the Court makes an order under subsection (2) the order applies unless and until the order is discharged by the Court.

(4) Where the Court makes an order under subsection (2) the Court may additionally order that—

(*a*) the Commissioner of Police be notified of the terms of these orders in relation to the Commissioner's functions under the Arms and Ammunition Act (Cap 188);

(*b*) police search locations specified by the Court for all or particular weapons or weapons licences, that the Court has reason to believe are in the respondent's possession, custody or control, to remove such weapons and retain them unless and until the Court directs that they be released to the respondent or be destroyed.

Additional conditions - urgent monetary relief

34.—(1) Where the Court makes or is intending to make a domestic violence restraining order under this Decree for the safety and wellbeing of a person, the Court may make an order that the respondent pay such urgent monetary relief to, or in respect of, a person protected by the order as the Court deems fair and reasonable.

(2) The following factors must be considered by the Court in determining an application for urgent monetary relief—

(*a*) the consequences of the domestic violence for the protected person;

(*b*) whether the protected person was wholly or partly financially reliant on the respondent;

(*c*) the financial circumstances of the protected person and whether there is a need for urgent monetary relief;

(*d*) whether the protected person would suffer hardship if an order for urgent monetary relief is not made;

(*e*) the financial circumstances of the respondent and whether the respondent has an ability to pay urgent monetary relief; and

(*f*) the desirability of ensuring wherever possible that the primary responsibility to provide urgent monetary relief is borne by the respondent rather than by the Department of Social Welfare.

(3) An order for urgent monetary relief may specify such lump sum, periodic or in-kind payments as the Court determines and in each case the Court must specify when and to whom the payment the payment must be made, but—

(*a*) where an order does not specify when a particular payment is to be made—

(i) if it is a lump sum or in-kind payment, the payment must be made by the respondent within 7 days of the date of the order; and

(ii) if it is a periodic payment, the first payment must be made within two days of the date of the order and on that same day in each subsequent week.

(*b*) where an order does not specify to whom a payment must be made—

(i) if it is a cash payment, it must be paid by the due date to the Clerk of the Court at the registry at which the order was made for payment out immediately to the protected person; and

(ii) if it is an in-kind payment, it must be paid by the due date to the victim by means that do not breach the terms of the domestic violence restraining order or any other order that binds the respondent.

(4) Subject to subsection (5) an order for urgent monetary relief may provide for payments that continue for such period specified by the Court up to a maximum of 3 months from the date that the order was made.

(5) Where, having regard to the matters referred to in subsection (2), the Court determines that there are exceptional circumstances, provided this determination is made —

(a) when making the order for urgent monetary relief ("the original order"); or

(b) within 3 months of that date,

the order for urgent monetary relief may provide for payments that continue for such period specified by the Court up to a maximum of 6 months from the date that the original order was made.

(6) Nothing in this section precludes a protected person from applying for a new order for urgent monetary relief if a further incident of domestic violence occurs.

(7) If a person who has been ordered to pay urgent monetary relief under this section fails to comply with the order, in addition to other powers that the Court may have in the circumstances, Part 6 applies in relation to enforcement of the order.

Additional conditions - occupying a home

35.—(1) Subject to this section—

(a) a Court that makes, or intends to make, a domestic violence restraining order, may order that a protected person has the right to occupy a home and that access by the respondent to the home be restricted (an "occupation order"); and

(b) a Court which is considering whether to make a domestic violence restraining order under this Decree, must consider whether an occupation order is required to promote the safety and wellbeing of the person who would be protected by the order and the safety and wellbeing of any child in their care or who is ordinarily in their care.

(2) An occupation order—

(a) may be made in relation to a home—

(i) which the protected person or the respondent, or the protected person and the respondent, own or in which either has a legal or equitable interest (including, but not limited to a tenancy);

(ii) whether or not the protected person and the respondent have ever lived in the same home, the home to which the order relates, or any other home; and

(iii) whether or not the protected person or the respondent is living in the home at the time that the order is made, provided that

(b) nothing in this section or this Decree allows a court to make an order alienating native land or any legal or equitable interest in it.

(3) Where an application is made for an occupation order, the Court may treat that application as an application for a tenancy order or an occupation order or both, and may, if it is satisfied that—

(a) it has jurisdiction to make a tenancy order;

(b) there are grounds to make a tenancy order; and

(c) the making of a tenancy order is appropriate,

make a tenancy order whether or not it makes an occupation order.

(4) Before an occupation order is made under this section—

(a) such notice as the Court directs must be given to any person having an interest in the home that would be affected by the order; and

(b) any person to whom notice is given pursuant to paragraph *(a)* of subsection is entitled to appear and to be heard in the matter as a party to the application.

(5) A Court that is considering whether to make an occupation order, must take the following into account—

(a) the principle in section 7(1)*(f)*;

(b) the effect on the safety and wellbeing of the protected person and on any child in their care, or who is ordinarily in their care, if an order under this section is made or is not made;

(c) any hardship that may be caused to the protected person and to any child in their care, or who is ordinarily in their care, if an order under this section is made or is not made; and

(d) the accommodation needs of the respondent, and any other relevant person, provided that unless there are exceptional circumstances, priority must still be given to the accommodation needs, safety and wellbeing of the protected person and any child in their care or who is ordinarily in their care.

(6) An occupation order may specify that a protected person has a right to occupy a specified home either from the time the order is made or from a time specified by the Court and that—

(a) the respondent is to vacate the home immediately or within a specified time; and

(b) the respondent may not enter the home, be in the home, or be within a specified distance of the home either from the time the order is made or from a time specified by the Court.

(7) An occupation order—

(a) applies for such period or periods specified by the Court in the order, or until the order is varied or discharged; and

(b) may be made on such terms and conditions relating to the occupation of the home as the court thinks fit.

Additional conditions - tenancy

36.—(1) If a Court makes, or is intending to make, a domestic violence restraining order for the safety and wellbeing or a person, an application may be made by, or for the benefit of, a person who is or will be protected by the order for an order that vests in the protected person the tenancy of any home of which, at the time the order is made, the respondent is—

(a) the sole tenant; or

(b) a tenant holding jointly, or in common, with the protected person.

(2) In this section "home" includes—

(a) any furniture or other household effects let with the home; and

(b) any land, outbuildings, or parts of buildings included in the tenancy.

(3) Before a tenancy order, or an order discharging a tenancy order, is made under this section—

(a) such notice as the Court directs must be given to any person having an interest in the property that would be affected by the order; and

(b) any person to whom notice is given pursuant to paragraph *(a)* is entitled to appear and to be heard in the matter as a party to the application.

(4) Where an application is made for a tenancy order, the Court may treat that application as an application for an occupation order or a tenancy order or both, and may, if it is satisfied that—

(a) it has jurisdiction to make an occupation order;

(b) there are grounds for making an occupation order; and

(c) the making of an occupation order is appropriate,

make an occupation order whether or not it makes a tenancy order.

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(5) Subject to this section, on hearing an application for a tenancy order, the Court may make an order vesting the tenancy of a specified home in a specified protected person despite any other law to the contrary, provided that nothing in this section or this Decree allows a court to make an order alienating native land or any legal or equitable interest in it.

(6) The Court may make an order under subsection (5) of this section if it is satisfied that the order—

(a) is necessary for the safety and wellbeing of the protected person; or

(b) is necessary for the safety and wellbeing of a child who is in the care of the protected person or is ordinarily in the care of the protected person.

(7) In determining whether to make a tenancy order under this section, the Court must take the matters specified in section 35(5) into account.

(8) Where a tenancy order takes effect, then, until the tenancy ends under the terms and conditions of the tenancy agreement—

(a) the protected person specified by the Court becomes the tenant of the home subject to the terms and conditions of the tenancy in force at the time the order is made; and

(b) the respondent ceases to be a tenant.

(9) Subject to subsection (3) and subsection (10), where a tenancy order has been made under this section the specified protected person who has become the tenant or the respondent may apply for an order (a "revesting order") to discharge the tenancy order.

(10) Where an application is made under subsection (9) to discharge a tenancy order, the Court may discharge the tenancy order and revest the tenancy accordingly if satisfied that the discharge and revesting will not result in risk to the safety and wellbeing of—

(a) the protected person; or

(b) a child who is in the care of the protected person or is ordinarily in the care of the protected person.

(11) Where a revesting order made under subsection (9) takes effect, then, unless the tenancy has ended under the terms and conditions of the tenancy agreement, the person in whose favour it is made becomes the tenant of the home subject to the terms and conditions of the tenancy in force at the time of the making of the revesting order.

Additional conditions – respondent to attend counselling or programme

37.—(1) Subject to subsection (2), when a Court makes, or is intending to make, a domestic violence restraining order against a respondent for the safety and wellbeing of a protected person, the Court may order the respondent to attend a prescribed counselling, education, rehabilitation or support programme specified by the Court.

(2) When considering whether to make an order that the respondent attend a prescribed counselling, education, rehabilitation or support programme the Court must take into account the availability of the counselling or other programmes being considered for the respondent having regard to—

(a) whether the respondent has been accepted for counselling or for the relevant programme by the intended provider;

(b) where and when the counselling or programme sessions would take place;

(c) the cost of the counselling or programme sessions;

(d) the desirability, in the circumstances, of the respondent attending to address their behaviour and to reduce the risk of repetition;

(e) any consequences for the respondent, or for the victim, if the respondent is ordered to attend (for example, loss of income, particularly if the respondent is contributing to the support of the victim and any other person protected by the domestic violence restraining order).

(3) If the Court makes an order under subsection (1) the Court must—

- *(a)* specify when the respondent must start the specified counselling or specified programme (for example, that the first attendance must be by a stated date);
- *(b)* specify the frequency of attendance or that the respondent must attend as frequently as recommended to the respondent by the counselling or programme provider;
- *(c)* specify when the attendance would cease (for example, after one session or upon completion of the programme);
- *(d)* issue a request to the person in charge of the specified counselling or specified programme that the Court be notified if the respondent fails to attend the specified counselling or specified programme in accordance with the order of the Court; and
- *(e)* direct that the Clerk of the Court provide a copy of the order to the person in charge of the specified counselling service or specified programme referred to in the order.

(4) If the Court makes an order under subsection (1) the Court may order that the respondent pay or contribute towards the cost of the counselling or programme specified by the Court, and the Court must take the following matters into account in making this decision—

- *(a)* the cost of the specified counselling or programme;
- *(b)* the respondent's financial position;
- *(c)* the respondent's obligations, if any, to support the victim, any children and any other person.

(5) Nothing in this section or this Decree gives a Court power to order or require that a provider of a prescribed counselling or of a prescribed education, rehabilitation or support programme must accept the respondent for counselling or for a programme.

(6) For the avoidance of doubt—

- *(a)* a Court exercising jurisdiction under this Decree may not make an order that a person, other than a person restrained by a domestic violence restraining order, attend counselling or an education, rehabilitation or support programme;
- *(b)* a Court may recommend, but cannot require, that a person protected by a domestic violence restraining order to attend counselling;
- *(c)* a Court may reqnest, but cannot require, that counselling be made available by a particular service or agency for a person protected by a domestic violence restraining order, including a child protected by an order;
- *(d)* if a person protected by an domestic violence restraining order wishes to attend counselling jointly with the person restrained the court may facilitate this, for example by adjourning the further hearing, if satisfied that the person protected—
  - (i) is not likely to be placed at risk; and
  - (ii) has freely given their consent.

(7) If a Court that has jurisdiction under this Decree becomes aware that the respondent has not complied with an order requiring the respondent to attend a counselling, education, rehabilitation or support programme the Court must inquire into the matter to determine if the respondent has, without reasonable excuse, failed to comply with the order.

(8) Where subsection (7) applies, the Court may, before proceeding to inquire into the matter—

- *(a)* allocate a date when the matter will be considered by the Court;
- *(b)* unless the relevant person was before the Court when the date was allocated, cause a notice to be served on the person who applied for the order and on the respondent advising of the court date; and
- *(c)* order the respondent to be present on the court date to explain the apparent failure to comply with the order.

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(9) Where upon completing the inquiry referred to in subsection (7), the Court determines that the respondent has without reasonable excuse failed to comply with the order, in addition to any other powers the Court may have in the circumstances under this Decree, the Court may—

(a) note the respondent's failure to comply with the order on the court file;

(b) admonish the respondent;

(c) make a further order that the respondent attend a specified counselling, education, rehabilitation or support program; or

(d) vary or discharge the order.

(10) If the respondent is not present before the Court on the date referred to in paragraph *(a)* of subsection (8), the Court may issue a warrant for the respondent to be brought before the Court.

Varying, suspending or discharging order

38.—(1) A person who—

(a) applied for a domestic violence restraining order;

(b) is protected by a domestic violence restraining order; or

(c) is bound by a domestic violence restraining order,

may, subject to this section, apply to a Court to vary, suspend or discharge the order.

(2) Subject to subsection (6), the Court must, before hearing an application to vary, suspend or discharge a domestic violence restraining order, consider whether each person who in the opinion of the Court has a direct interest in the outcome, has received notice of the application and had adequate opportunity to be heard.

(3) If an application to vary, suspend or discharge a domestic violence restraining order is made by or for a protected person, in considering the application the Court must have regard to—

(a) the wishes of the protected person;

(b) any current contact between the protected person and the person bound by the order;

(c) whether any pressure has been applied, or threat made, to the protected person by the person bound by the order or by someone else; and

(d) the objects and principles of this Decree.

(4) In relation to an application to which subsection (3) applies—

(a) the Court may vary, suspend or discharge an order only if satisfied that the safety of each person protected by the order would not be compromised;

(b) if the Court refuses to vary the order in the way sought or refuses to suspend or discharge the order, the Court may vary the order in a way that it considers does not compromise the safety of a protected person.

(5) An application to vary, suspend or discharge a domestic violence restraining order may be made by or on behalf of the person bound by the order—

(a) only with the leave of the Court; and

(b) leave may be granted only if the Court is satisfied there has been a substantial change in relevant circumstances since the order was made or last varied.

(6) Where an application is made for leave under subsection (5), the Court may determine the application for leave without notice to the applicant, or to a person protected by the order, if the Court considers that—

(a) the application is or may be an attempt to harass the applicant or a protected person; and

(b) that there will be no prejudice to the applicant or to a protected person if the Court considers the application for leave without prior notice.

(7) For the avoidance of doubt, when a Court is considering an application for leave under subsection (5) and (6) the Court may not vary, suspend or discharge the existing order.

(8) If a Court grants leave to a respondent under subsection (5) to proceed with an application to vary, suspend or discharge a domestic violence restraining order the Court must make directions about—

(a) the date and place of the hearing;

(b) service of a sealed copy of the respondent's application, any supporting material and the order granting leave on the applicant and each person specified by the Court who is protected by the order; and

(c) any other matters that will assist with the determination of the matter.

(9) Where an order is made under this section varying, suspending or discharging a condition of a domestic violence restraining order made under section 33 in relation to a weapon, the Court must direct that the Commissioner of Police immediately be notified of the variation, suspension or discharge of that condition or of those conditions.

PART 4—COMPENSATION

Compensation

39.—(1) Where a victim of domestic violence suffers personal injury or damage to property or financial loss as a result of the domestic violence, the Court hearing a claim for compensation under this Decree may—

(a) order that the respondent pays or provides such compensation in respect of the injury or damage or loss as it deems fair and reasonable;

(b) make orders about how, when and to whom the compensation payment or payments must be made; and

(c) make related orders, including orders for the establishment and operation of a trust fund for the victim.

(2) Where a victim of domestic violence is the parent of a child in their care and the child was affected as indicated in subsection (1), the claim may be made, or also be made, in respect of the injury or damage or loss to the child and for this purpose references in this section to "the victim" include a child victim where appropriate.

(3) In circumstances in addition to that dealt with in subsection (2) where compensation is sought by two or more people who were affected as indicated in subsection (1)—

(a) references in this section to "the victim" include each victim; and

(b) the Court may give directions about whether the claims may be made in one application or separately, and if separately, whether the claims should be heard together or separately.

(4) Subject to subsection (8) a claim for compensation may be made—

(a) where the domestic violence occurred before or after the commencement of this Decree;

(b) whether or not a domestic violence restraining order was sought or has been made under this Decree.

(5) The Court hearing a claim for compensation, referred to in subsection (1) must take the following into account—

(a) the pain and suffering of the victim, and the nature and extent of the physical or mental injuries suffered;

(b) the cost of medical treatment, including the cost associated with obtaining medical treatment, incurred by or on behalf of the victim;

(c) the cost associated with the victim obtaining crisis support or counselling incurred by, on behalf of, or for the benefit of the victim;

(d) any loss of earnings by the victim;

(*e*) the amount or value of the property taken or destroyed or damaged by the respondent; and

(*f*) necessary and reasonable expenses incurred by or on behalf of the victim as a result of the domestic violence, including the expenses referred to in the definition of urgent monetary relief.

(6) In considering whether to make an order for compensation and in considering the terms of an order, the Court must also take into account—

(*a*) the reasons for, and consequences of, the time that has elapsed between the domestic violence occurring and the hearing of the application for compensation;

(*b*) the financial position of the victim and the financial position of the respondent;

(*c*) the consequences for the victim and for the respondent if the order sought is made or not made;

(*d*) the appropriateness of an order being made in relation to the compensation sought, and each part of the compensation sought, under this Decree compared to other options for seeking compensation from the respondent that are reasonably available to the victim;

(*e*) any payments and other allowances made by or on behalf of the respondent to, or for the benefit of, the victim in relation to the consequences of the domestic violence for the victim including the terms of—

(i) any other order made under this Decree including any order that the respondent pay or provide urgent monetary relief to or for the victim;

(ii) an order made in criminal proceedings for compensation for the victim in relation to the domestic violence; and

(iii) any other order the Court considers relevant to the issues to be determined in relation to the application for compensation.

(7) A Court that is considering an application for compensation under this section may make an interim order if satisfied in the circumstances of the case that it is appropriate to do so prior to a final order being made.

(8) A Court that makes or declines to grant an application for compensation must specify whether that order is an interim or final order in respect of compensation for the person in relation to the matter, but where the Court does not so specify—

(*a*) the order is not invalid, and

(*b*) the order is deemed to be an interim order.

(9) An application for compensation under this Decree is deemed to be an action in tort to which section 4(1) of the Limitation Act (Cap 35) applies.

(10) If a person who has been ordered to pay compensation under this section fails to comply with the order, in addition to other powers that the Court may have in the circumstances, Part 6 applies in relation to enforcement of the order.

PART 5—PROCEDURE

Application of Part 5 and procedure generally

40.—(1) This Part applies to proceedings under this Decree excluding proceedings for a criminal charge brought under section 77.

(2) Except as provided in subsection (1)—

(*a*) proceedings under this Decree are governed by the procedure in this Decree and any rules and regulations made under this Decree; and

(*b*) in cases of difficulty or doubt the Court exercising jurisdiction in the proceedings may give directions about procedure.

Hearing in person or by telephone

41.—(1) Subject to this section, a Court may hear an application under this Decree in person or by telephone.

(2) This section does not affect the operation of section 25.

(3) An application, or part of an application, may be heard by telephone where this is technically possible, and—

(a) the presiding judicial officer gives a direction that a hearing by telephone may take place;

(b) during the hearing the presiding judicial officer is sitting in a court room or office in a court house;

(c) the telephone used by person appearing or giving evidence by telephone is in a court room or a court house.

(4) Where it is technically possible for an application or part of an application to be heard by telephone, the presiding judicial officer must take the following matters into account in determining whether to give a direction that a hearing by telephone may take place in a particular case—

(a) the urgency of the matter and the delay that would arise if the hearing does not take place by telephone;

(b) the consequences for the safety and wellbeing of a person for whose benefit the application is made if the hearing does not take place by telephone;

(c) the adequacy of a hearing by telephone having regard to justice and fairness in the matter if the hearing does or does not take place by telephone;

(d) any other matters considered relevant having regard to the objects and principles of this Decree.

(5) A presiding judicial officer who directs that a hearing or part of a hearing may take place by telephone may give directions concerning any details or protocols that will apply in relation to how the hearing by telephone will proceed.

Listing an application and service by police

42.—(1) Subject to subsection (2), each Court exercising jurisdiction under this Decree must make arrangements for applications under this Decree to be heard as soon as is reasonably possible after filing and in any event within 7 working days of the application being filed.

(2) Where an applicant is applying to proceed urgently the Clerk of the Court must—

(a) consider the urgency of the case having regard to the objects and principles of this Decree and the circumstances of the case, and

(b) where the urgency of the matter requires it the Clerk of the Court must allocate a time for an interim hearing that, if possible, is on the day that the application is filed and in any event is within 2 working days of the application being filed.

(3) Subject to subsection (4), as soon as possible after an application is filed under this Decree, the Clerk of the Court in the registry in which the application is filed must provide, or transmit by facsimile transmission, to the senior officer of the police station closest to where the respondent is likely to be personally served, a sealed copy of the application and any supporting documents.

(4) Subsection (3) does not apply if—

(a) the applicant is applying to proceed urgently without notice to the respondent; or

(b) the Clerk of the Court considers that, having regard to the safety and wellbeing of each person who would be protected if the orders sought were made and to the objects and principles of this Decree, that service on the respondent by police may not be necessary.

(5) Where paragraph *(a)* of subsection (4) applies the Clerk of the Court must—

(a) schedule the application for an urgent interim hearing in accordance subsection (2); and

(b) if necessary arrange for and schedule the hearing to take place from the court house by telephone.

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(6) Where paragraph *(b)* of subsection (4) applies—

(a) the Clerk of the Court must immediately put the matter before a judicial officer of the Court in chambers to determine if the police should be required to serve the application and any supporting material on the respondent;

(b) if the judicial officer does not consider that service by the police of the application and any supporting material is necessary having regard to the safety and wellbeing of the victim, and to the objects and principles of this Decree, the judicial officer may direct that the applicant arrange personal service on the respondent;

(c) where an applicant objects to a direction made pursuant to paragraph *(b)* and the applicant is entitled to be heard in relation to the matter in Court, the matter must be allocated a time for hearing before the judicial officer who made the direction, or if unavailable, then before another judicial officer of the Court—

(i) within one working day of the direction being made or on a later date if acceptable to the applicant; and

(ii) if necessary the hearing of the issue should be scheduled to take place from the court house by telephone.

(7) Upon receiving an application and any supporting documents referred to in subsection (3) the senior officer at the relevant police station must as soon as is reasonably possible—

(a) make an entry in a book or data base, maintained for this purpose at the police station, that the documents have been received and the time the documents were received;

(b) provide a copy of that entry to police headquarters in accordance with the police procedure established for this purpose;

(c) confirm receipt, the time of receipt and the name and contact details of the senior officer in writing to the Clerk of the Court who forwarded the documents;

(d) determine how the documents will be personally served on the respondent by police;

(e) if necessary, send, provide or transmit by facsimile transmission a copy of the documents to another police station closest to where the respondent is likely to be personally served;

(f) monitor police action to ensure that all reasonable steps are taken by the police to serve the respondent as soon as possible;

(g) where service is completed ensure that an affidavit of service—

(i) is completed by the police officer who served the respondent; and

(ii) the affidavit is promptly delivered, posted or transmitted by facsimile transmission to the registry of the Court in which the application was filed in time for the hearing of the matter;

(h) where service is not completed prior to the time for the hearing of the matter, ensure that an affidavit of attempted service detailing attempts to serve and any evidence from which the Court may conclude that the respondent is aware of the application, is evading service, or how the respondent may be served—

(i) is completed by the police officer who attempted service or where several police officers attempted service, then by the senior officer concerned; and

(ii) promptly deliver, post or transmit the affidavit by facsimile transmission to the registry of the Court in which the application was filed in time for the hearing of the matter;

(i) respond to inquiries by the Clerk of the Court, the applicant and a person over the age of 16 years who would be protected by the order sought in the application, about progress in serving the respondent.

Service of orders

43.—(1) When an interim order or a final order is made under this Decree, including an order varying, suspending or discharging a previous order, a sealed copy of the order must be provided—

(a) to the applicant and must be personally served on the respondent;

(b) by the Clerk of the Court in the registry where the order was made, on request to a person over the age of 16 years who is protected by the order; and

(c) by the Clerk of the Court in the registry where the order was made to the Commissioner of Police in accordance with section 45.

(2) In relation to paragraph (a) of subsection (1)—

(a) if the relevant person is present at Court when the order was made personal service must, if possible, be completed by the Clerk of the Court or a Court officer; and

(b) the Court may give directions about waiting arrangements, or arrangements for one of both of the parties to return to the court house to collect a copy of the order provided that in making such directions the primary consideration must be the safety and wellbeing of each person protected by the order;

(c) where an applicant –

(i) was present at Court when the order was made, but leaves the court house before being served with the order; or

(ii) the applicant was not present when the order was made,

a copy of the order may be provided to the person by the Clerk of the Court posting a sealed copy of the order to the applicant at the address shown on the application;

(d) where a respondent—

(i) was present at Court when the order was made, but leaves the court house before being served with the order; or

(ii) was not present at Court when the order was made,

section 44 applies in relation to service of the order on the respondent.

Service of order on the respondent by police

44.—(1) Where an order referred to in section 43(1) is made—

(a) in the absence of the respondent; or

(b) in the presence of the respondent but paragraph (d) of section 43(2) applies,

then, unless the Court makes an order for personal service of a sealed copy of the order on the respondent by different means, the Clerk of the Court in the registry where the order was made must as soon as possible provide, or transmit by facsimile transmission, a sealed copy of the order to the senior officer of the police station or police post closest to where the respondent is likely to be served.

(2) Upon receiving a sealed copy of an order made under this Decree from the Clerk of the Court in accordance with subsection (1), the senior officer at the relevant police station must as soon as is reasonably possible—

(a) make an entry in a book or data base maintained for this purpose at the police station that the order for service has been received and the time it was received;

(b) provide a copy of that entry to police headquarters in accordance with the police procedure established for this purpose;

(c) confirm receipt, the time of receipt and the name and contact details of the senior officer in writing to the Clerk of the Court who forwarded the order for service;

(d) determine how the order will be personally served on the respondent;

(e) if necessary, send or transmit by facsimile transmission a copy of the order to another police station or police post closest to where the respondent is likely to be served;

(f) monitor police action to ensure that all reasonable steps are taken by police to serve the respondent as soon as possible;

(g) where service is completed ensure that an affidavit of service –

(i) is completed by the police officer who served the respondent; and

(ii) the affidavit is promptly delivered, posted or transmitted by facsimile transmission to the registry of the Court where the order was made;

(h) where service is not completed within 1 month of the order being received for service by the police, ensure that an affidavit of attempted service detailing attempts to serve and any evidence from which the Court may conclude that the respondent is aware that the police are attempting to serve, is evading service and how the respondent may be served –

(i) is completed by the police officer who attempted service or where several police officers attempted service, then by the senior officer concerned; and

(ii) is delivered, posted or transmitted by facsimile transmission to the registry of the Court where the order was made;

(i) respond to inquiries by the Clerk of the Court, the applicant and a person over the age of 16 years who is protected by the order about progress in serving the respondent.

Clerk of the Court to forward a copy of the order to police

45.—(1) When an interim order or a final order is made under this Decree, including an order varying, suspending or discharging a previous order made under this Decree, the Clerk of the Court in which the order is made must ensure that a copy of the order is made available, without delay, to the Commissioner of Police for police records.

(2) Where a copy of an order is made available to the Commissioner of Police in accordance with subsection (1), the Commissioner must ensure that a copy of that order, is made available, without delay, to the officer in charge of the police station nearest to where the protected person or, each protected person, resides.

(3) For the purposes of this section, a copy of an order may be made available by the Commissioner of Police by—

(a) sending the copy by facsimile transmission;

(b) entering the copy on a database maintained in electronic form, where that database may be accessed by the person or persons to whom the copy is required to be made available; or

(c) making the copy available in such other manner as is appropriate in the circumstances.

Standard of proof

46.—(1) Subject to subsection (2), every question of fact arising in any proceedings under this Decree must be decided on the balance of probabilities.

(2) Subsection (1) does not apply to criminal proceedings for the offence under section 77 of breach of a domestic violence restraining order.

Competence and compellability

47.–(1) The parties to proceedings under this Decree are competent and compellable witnesses.

(2) In proceedings under this Decree the parties to a marriage are competent and compellable to disclose communications made between them during the marriage.

(3) Subsection (2) applies to communications made before, as well as to communications made after, the date of commencement of this Decree.

Rules of evidence

48.—(1) Subject to subsection (2), in any proceedings under this Decree the Court may receive any evidence that it thinks fit, whether or not it is otherwise admissible in a court of law.

(2) Subsection (1) does not apply to criminal proceedings for the offence under section 77 of breach of a domestic violence restraining order.

Evidence given orally or by affidavit

49. In proceedings under this Decree, subject to any directions by the Court in a particular case, evidence may be given orally or in an affidavit.

Proving injuries by evidence other than a medical report

50.—(1) Where the nature and extent of injuries suffered by a victim of domestic violence are relevant in proceedings, the Court may—

(*a*) receive evidence from that person and any other witness in relation to the nature and extent of the injuries;

(*b*) place such weight that the Court considers appropriate in the circumstances on this evidence,

and if the Court is satisfied that the nature and extent of the injuries are substantiated to the extent that is relevant in the proceedings, or to the extent that is relevant at that stage in the proceedings, the Court may proceed without requiring that a medical report be submitted in evidence.

(2) Nothing in subsection (1) prevents the Court from directing that a medical report in relation to the nature and extent of the injuries suffered by a victim of domestic violence is required by the Court in order to make a finding of the kind sought by the applicant.

Appearing and leave to appear

51.—(1) The following may appear in proceedings under this Decree in relation to a domestic violence restraining order or a compensation order—

(*a*) a legal practitioner representing a party, or other person, in the proceedings; or

(*b*) a party to the proceedings who is representing themselves in the proceedings, whether or not that party is also seeking orders for the benefit of another person; or

(*c*) a police officer, the Director of Social Welfare, a welfare officer or the Public Trustee when permitted by section 19 or section 25 to apply for an order.

(2) Where a Court receives a request from a person for the leave of the Court to appear in proceedings under this Decree, the Court must consider the following in determining the request—

(*a*) the objects and principles of this Decree;

(*b*) the interests of justice;

(*c*) whether the person who would be so represented—

(i) objects, and if so, the reasons for the objection;

(ii) wonld have difficulty representing themselves in the proceedings if leave is not granted;

(*d*) whether the person seeking leave to appear—

(i) has any interest that is contrary to the person they wish to assist;

(ii) is likely to focus on issues that are relevant and avoid unnecessarily lengthening, complicating or inflaming the proceedings;

(*e*) whether the other party, or other parties, object and if so the reasons for the objection; and

(*f*) any other matters considered relevant by the Court.

(3) If a Court grants leave to a person to appear for a person in the proceedings, the Court may—

(*a*) impose conditions or give directions that the person granted leave must comply with; and

(*b*) withdraw leave at any time during the proceedings.

Examination of witness by the respondent

52. The Court may, on its own accord or on the request of the applicant, if it is of the opinion that it is desirable to do so, order that in the examination of witnesses including the applicant, that a respondent who is not represented by a legal representative—

(*a*) is not entitled to cross-examine a particular witness directly; and

(*b*) must put any question to that witness by stating the question to the Court or to another person as directed by the Court,

on the basis that the Court or the person directed will repeat the question accurately to the person being questioned by the respondent.

Orders by consent

53.—(1) Subject to subsections (2), (3) and (4), in proceedings before a Court under this Decree where the parties are present before the Court, the Court may make an order under this Decree by consent of the parties.

(2) Where the applicant is consenting to an order for the benefit of another person, the consent of that other person is required unless—

(a) that other person is a child;

(b) that other person lacks the capacity to understand the proceedings; or

(c) the Court determines, having regard to the circumstances of the case and the objects and principles of this Decree, that the consent of that other person should not be required.

(3) Where an order sought to be made by consent is a domestic violence restraining order, the Court may make the order only if satisfied that—

(a) the person who would be bound by the order admits that there are grounds for the order;

(b) the order will not expose the victim or another person to risk of domestic violence; and

(c) the order is appropriate in all the circumstances of the case having regard to the objects and principles of this Decree.

(4) Where one or both parties are not present before the Court at the time that it is proposed that an order be made hy consent, the Court may—

(a) proceed to deal with the application, if satisfied that the attendance of the parties or the relevant party should not be required; or

(b) adjourn the application and direct that—

(i) notice of the next Court date be given to those specified in the order; and

(ii) a specified person or persons be present at Court at that time.

Warrant to secure the attendance of the respondent

54. Where a respondent has been served with a summons or order to attend at a certain time, place and date in relation to proceedings under this Decree and the respondent has failed to do so, the Court may issue a warrant for the arrest of the respondent if it appears to the Court that—

(a) the personal safety of a person who would be protected by the order will be put at risk unless the respondent is arrested for the purpose of being brought before the Court; or

(b) the step is necessary to secure the respondent's attendance before the Court to give evidence, for the Court to explain the seriousness of the orders the Court may make to the respondent, or for other similar reasons.

Costs

55.—(1) Subject to subsections (2) and (3), parties to proceedings under this Decree bear their own legal costs and expenses in relation to the proceedings.

(2) A Court hearing an application under this Decree may order that a particular party to the proceedings bear part or all of the legal costs and expenses of the other if satisfied that the party acted frivolously, vexatiously or unreasonably in relation to the proceedings.

(3) An order for payment of costs or expenses may not be made against a police officer or other official who made an application for the protection of a person in their official capacity unless the Court finds that the police officer or official put material before the Court in the application, or otherwise during the proceedings, that they knew to be false or misleading.

Closed Court and arrangements for support people

56.—(1) Proceedings in a Court when exercising jurisdiction under this Decree are to be heard in closed court except proceedings referred to in subsection (2).

(2) The proceedings which are excepted from the application of subsection (1) are the hearing of a criminal charge, where—

(a) an application for a domestic violence order is made during those proceedings; or

(b) the court of its own volition is considering making a domestic violence restraining order.

(3) Subsection (1) does not operate to exclude the following from the Court—

(a) officers of the Court;

(b) parties to the proceedings;

(c) a person bringing or defending the proceedings on behalf of another person;

(d) a lawyer representing any person in the proceedings;

(e) witnesses;

(f) a person or persons nominated by a person who would be protected by the order sought to provide support; and

(g) a person or persons nominated by the respondent to provide support.

(4) The Court may exclude a person from the whole or part of the proceedings or impose conditions upon attendance.

Restrictions on publication

57.—(1) A person who publishes in a newspaper or periodical publication or by radio broadcast or television, or otherwise disseminates to the public or to a section of the public by any means any account of any proceedings, or any part of any proceedings, under this Decree that identifies—

(a) a person for whose benefit an order has been made or has been sought under this Decree or a person bound by an order or who would be bound by an order if an application made under this Decree is granted;

(b) a person who is related to, or associated with a person specified in paragraph (a) or who is, or is alleged to be, in any other way concerned in the matter to which the application relates; and

(c) a witness in the proceedings,

commits an offence and is liable upon conviction to a fine of $10,000 and to a term of imprisonment not exceeding 12 months.

(2) Without limiting subsection (1), an account of proceedings, or of any part of proceedings, referred to in that subsection is taken to identify a person if—

(a) it contains any particulars of—

(i) the name, title, pseudonym or alias of the person;

(ii) the address of any premises at which the person resides or works, or the locality in which any such premises are situated;

(iii) the physical description or the style of dress of the person;

(iv) any employment or occupation engaged in, profession practised, or calling pursued by the person, or any official or honorary position held by the person;

(v) the relationship of the person to identified relatives of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person;

(vi) the recreational interests, or the political, philosophical or religious beliefs or interests, of the person;

(vii) any real or personal property in which the person has an interest or with which the person is otherwise associated,

being particulars that are sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case may be.

(b) in the case of a written or televised account, it is accompanied by a picture of the person; or

(c) in the case of a broadcast or televised account, it is spoken in whole or in part by the person and the person's voice is sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case may be.

(3) An offence against this section is an indictable offence.

(4) Proceedings for an offence against this section must not be commenced except by, or with the written consent of, the Director of Public Prosecutions.

(5) Notwithstanding the preceding provisions of this section, the following do not constitute an offence under subsection (1)—

(a) the communication, to persons concerned in the proceedings in any Court, of any order, any documents filed in the proceedings, transcript of evidence or other document for use in connection with those proceedings or other Court proceedings;

(b) the communication of any order, any documents filed in the proceedings, transcript of evidence or other document used in connection with the proceedings to—

(i) a person by a party to the proceedings or a person or persons for whose benefit an order has been sought or has been made;

(ii) a police officer in relation to the exercise of their functions;

(iii) the Legal Aid Commission for the purpose of facilitating the making of a decision about whether legal aid assistance should be granted, continued or provided in a particular case;

(iv) the Fiji Law Society or any other body or person responsible for dealing with complaints, disciplining members or particular members of the legal profession in Fiji for the purpose of performing such functions;

(c) the publishing of a notice, report or communication of information pursuant to the direction of a Court;

(d) the publishing of any publication bona fide intended primarily for use by members of any profession, being—

(i) a separate volume or part of a series of law reports; or

(ii) any other publication of a technical character; or

(e) the publication or other dissemination of an account of the proceedings or of any part of proceedings—

(i) to a person who is a member of a profession, in connection with the practice by that person of that profession or in the course of any form of professional training in which that person is involved; or

(ii) to a person who is a researcher or student, in connection with the research or studies of that person.

(6) Despite this section, a court exercising jurisdiction under this Decree may order that specified information concerning particular proceedings may be disseminated in accordance with directions made by the Court where the Court determines that this is—

(a) required in the public interest;

(b) will promote compliance with an order made under this Decree; or

(c) is necessary or desirable for the proper operation of this Decree.

Safety planning conference

58.—(1) Subject to subsection (2) the Court may direct that on the first substantial Court date when the parties to the proceedings are present, or on a later date ordered by the Court, that a safety planning conference be conducted at the court house where the proceedings are listed.

(2) The Court may direct that a safety planning conference be conducted if the Court is satisfied that—

(a) such a conference would not put the safety and wellbeing of a person who is, or who seeks to be, protected by a domestic violence restraining order at risk;

(b) each of those who would participate in the conference—

(i) are over the age of 18 years;

(ii) have been informed of the purpose of the conference and the conference procedure; and

(iii) have agreed to participate in the conference;

(c) there are suitable facilities at the court house, including an area where parties can remain separate, for the conference procedure specified in subsection (3) to apply;

(d) conference convenors, as required by the procedure specified in subsection (3), are available to conduct the conference; and

(e) in all the circumstances and having regard to the objects and principles of this Decree, that a safety planning conference should be conducted.

(3) A safety planning conference must be conducted as follows—

(a) the conference must be jointly convened and conducted by—

(i) a Clerk of the Court; and

(ii) a domestic violence counsellor;

("the conference convenors") each of whom has successfully completed prescribed training in relation to the conference procedure;

(b) a person who is, or seeks to be, protected by a domestic violence restraining order must have a separate support person of their choice present with them during the conference at all times;

(c) subject to paragraph *(d)*, the conference must be conducted by a shuttle discussion whereby the conference convenors move between the parties but the parties remain in separate locations and not in the presence of the other;

(d) a person who is, or who seeks to be, protected by a domestic violence restraining order must not be required to be in the presence of the respondent during the conference unless the person gives their free and informed consent and in the view of the conference convenors—

(i) the person is not likely to be at risk or be subjected to pressure by the respondent; and

(ii) the process is likely to be constructive having regard to the circumstances of the case, the matters to be resolved and the objects and principles of this Decree.

(4) An agreement reached by the parties as a result of a safety planning conference may be confirmed by order of the Court subject to the discretion of the Court to decline to make any order where the Court considers that the proposed order—

(a) does not accord with the objects and principles of this Decree as they apply in the particular case; or

(b) is contrary to another provision in this Decree including, but not limited to, considerations specified in section 53 regarding the making of orders by consent.

(5) Additional details, consistent with this section, concerning arrangements for safety planning conferences may be prescribed by regulations.

PART 6 – ENFORCEMENT OF CERTAIN ORDERS

Enforcement of order for urgent monetary relief or compensation

59.—(1) This Part applies to enforcement of—

(a) an order made under section 34 in relation to payment of urgent monetary relief; and

(b) an order made under section 39 in relation to compensation.

(2) Subject to this Part, and to regulations and rules made under this Decree, the orders to which this Part applies may be enforced by any Court having jurisdiction under this Decree.

(3) Except as prescribed, a Court must not entertain a proceeding under this Decree for the enforcement of an order made by another Court under this Decree unless the order is registered in the first-mentioned Court in accordance with the rules.

(4) If a person bound by an order to which this Part applies has died, the order may, by leave of—

(a) the Court which made the order; or

(b) any Court in which the order has been registered in accordance with the rules (whether the order was registered before or after the death of the person),

and on such terms and conditions as the Court considers appropriate, be enforced, in respect of liabilities that arose under the order before the death of that person, against the estate of that person.

Methods of enforcement

60. The rules may make provision for and in relation to the enforcement of orders to which this Part applies, including provision—

(a) for an officer of a Court exercising jurisdiction under this Decree; or

(b) an authority or person specified in the rules,

at the direction of the Court in its discretion, to take proceedings on behalf of the person entitled to moneys payable under that order for the purpose of enforcing payment of those moneys.

PART 7 – ENFORCEMENT OF ORDERS OVERSEAS AND FOREIGN ORDERS

Enforcement overseas of orders made in Fiji

61.—(1) Subject to subsections (2) and (3), the Attorney-General may request the appropriate Court or authority in a foreign country to make arrangements for the enforcement in that country of a domestic violence restraining order made under this Decree.

(2) Where a person wishes a request to be transmitted to a foreign country pursuant to subsection (1), the person must make a request in writing in the first instance to the Clerk of the Court in which the domestic violence restraining order was made.

(3) Where, on receiving a request made under subsection (2), the Clerk of the Court is satisfied that—

(a) the request is made by or on behalf of a protected person;

(b) the request relates to a domestic violence restraining order made under this Decree by a Court in Fiji;

(c) orders of that nature may be enforced in the foreign country to which the request relates; and

(d) there are reasonable grounds for believing that enforcement of the order in the foreign country is necessary for the protection of the protected person,

the Clerk of the Court must send the request to the Attorney-General for transmission to the foreign country in accordance with subsection (1).

(4) Where, pursuant to this section, a Clerk of the Court or the Attorney-General receives a request for the transmission of a domestic violence restraining order to a foreign country, the Clerk of the Court or, as the case requires, the Attorney-General, may require the person by or on whose behalf the request is made to supply such information or evidence as may be necessary—

(a) to enable a determination to be made whether or not the request satisfies the requirements of subsection (3); and

(b) to secure enforcement of the order in the foreign country.

(5) Where, in relation to a request made under subsection (2), a Clerk of the Court or the Attorney-General imposes a requirement pursuant to subsection (4), the Clerk of the Court or, as the case requires, the Attorney-General, may refuse to take any action, or further action, in relation to that request until that requirement is complied with.

(6) Nothing in this section prevents—

(a) a protected person from applying to a court or other appropriate authority in a foreign country for enforcement, in that country, of a domestic violence restraining order; or

(b) the variation or discharge, pursuant to this Decree, of a domestic violence restraining order that is enforced in a foreign country.

(7) In this section, the term "enforcement" includes registration and enforcement and "enforced" has a corresponding meaning.

Registration of foreign domestic violence restraining orders

62.—(1) A foreign domestic violence restraining order may be registered in a Court in accordance with this section.

(2) Where the Attorney-General receives—

(a) a certified copy of a foreign domestic violence restraining order;

(b) a certificate—

(i) that is signed by an officer of a court in the foreign country in which the order was made; and

(ii) that contains a statement that the order is, at the date of the certificate, enforceable in the foreign country; and

(c) written information tending to show that a person for whose protection the order was made—

(i) is present in Fiji; or

(ii) is proceeding to Fiji; or

(iii) is about to proceed to Fiji,

the Attorney-General must send the documents to a clerk of the Magistrates' Court for the purposes of registration.

(3) The clerk of the Magistrates' Court must register the foreign domestic violence restraining order by filing a certified copy of the order in the Court.

(4) Where the clerk of the Magistrates' Court receives the documents described in subsection (2) other than from the Attorney-General, the Registrar may register the order if satisfied that the nature of the documents is such that, if they had been transmitted to the Attorney-General, they would have been sent to the clerk of the Magistrates' Court by the Attorney-General.

Copy of registered foreign orders to be sent to police

63. Where a foreign domestic violence restraining order is registered pursuant to section 62, section 45 applies—

(a) in relation to that order; and

(b) in relation to any variation of that order pursuant to section 38,

as if the foreign domestic violence restraining order were a domestic violence restraining order made under this Decree.

Effect of registration

64. Subject to section 66, upon registration pursuant to section 62, a foreign domestic violence restraining order—

(a) has effect; and

(b) may be enforced; and

(c) the terms in which it has effect in Fiji, may be varied,

as if it were a domestic violence restraining order made under this Decree on the date of registration.

Variation of registered foreign domestic violence restraining order

65.—(1) Where, pursuant to paragraph *(c)* of section 64, a Court makes an order varying a foreign domestic violence restraining order, the Clerk of the Court—

(a) must, in the prescribed manner, notify the Court or the appropriate authority in the country in which the order was made of the variation; and

(b) must forward to the clerk of that court a copy of the order varying the foreign domestic violence restraining order.

(2) The Clerk of the Court in which the foreign domestic violence restraining order is registered, on receiving notice of the variation of that order, must note the Court records accordingly.

Registered foreign orders not to be enforced in certain circumstances

66.—(1) Where a Court is satisfied that a foreign domestic violence restraining order—

(a) was not, at the time of its registration in Fiji, enforceable in the country in which it was made; or

(b) has, since its registration in Fiji, ceased to be enforceable in the country in which it was made,

the Court must not enforce or vary the order under this Decree.

(2) Where the Clerk of the Court in which a foreign domestic violence restraining order is registered is satisfied—

(a) that a Court in Fiji has refused, pursuant to subsection (1), to enforce or vary the order under this Decree; or

(b) that the order is not enforceable in the country in which it was made; or

(c) that registration of the order in Fiji is no longer necessary,

the Clerk of the Court must cancel the registration of the order and must, in the prescribed manner, notify the court or the appropriate authority in the country in which the order was made of the cancellation.

(3) For the purposes of this section, a foreign domestic violence restraining order is not unenforceable in the country in which it was made solely by reason of the fact that the person to whom the order relates, or any other person affected by the order, is no longer in that country.

Evidence taken overseas

67. Where, pursuant to section 64 of this Decree, an application is heard in a Court, the evidence of any person outside Fiji may be taken in accordance with the rules of the High Court covering the examination of witnesses outside Fiji, and those rules, as far as they are applicable and with all necessary modifications, apply.

Proof of documents

68.—(1) For the purposes of this Part—

(a) any document purporting to be signed by any judge or officer of a court in any prescribed foreign country is, in the absence of evidence to the contrary, deemed to have been so signed without proof of the signature or judicial or official character of the person appearing to have signed it; and

(b) the officer of a court by whom a document purports to be signed is, in the absence of evidence to the contrary, deemed to have been the proper officer of the court to sign the document.

(2) Any document purporting to be signed, certified, or verified by any of the persons mentioned in subsection (1) is admissible in evidence in proceedings under this Part if it appears to be relevant to those proceedings.

Depositions to be evidence

69. Depositions taken for the purposes of this Part in a court in any prescribed foreign country may be received in evidence in any proceedings under this Part.

Prescribed foreign countries

70.—(1) A country outside Fiji may be declared by regulations to be a prescribed foreign country for the purposes of this Decree.

(2) Regulations made for the purpose of subsection (1) may specify the courts of the foreign country in relation to which the order is to have effect, or may otherwise modify the application of that order to that other country.

Evidence of orders made in foreign country

71. Nothing in this Part precludes a Court from receiving evidence of an order made in a foreign country (whether or not that country is a prescribed foreign country) with respect to the protection of any person from domestic violence.

PART 8 - APPEALS

Jurisdiction in relation to appeals

72.—(1) This section applies to an order of a Court in proceedings under this Decree, other than proceedings in relation to the criminal offence under section 77 of breach of a domestic violence restraining order, to—

(a) make or refuse to make an order; or

(b) dismiss the proceedings.

(2) Subject to section 73(3), an appeal from an order to which this section applies where it was made—

(a) by the Magistrates' Court, the Family Division of the Magistrates' Court or a Juvenile Court, lies of right to the Family Division of the High Court;

(b) as an original decision of a judge of the Family Division of the High Court or the High Court, lies to the Court of Appeal;

(c) by judges of the Family Division of the High Court sitting on appeal from orders of the Magistrates' Court, the Family Division of the Magistrates' Court or a Juvenile Court, lies to the Court of Appeal with leave of the Court of Appeal.

Commencing an appeal

73.—(1) Subject to this section, an appeal against an order to which section 72 applies, may be commenced by a person who was—

(a) an applicant in the proceedings; or

(b) a person for whose protection or benefit an order under this Decree was sought; or

(c) the respondent to the proceedings.

(2) An appeal must be commenced within 28 days of the date on which the order or decision which is the subject of the appeal was made.

(3) Where an order was made with the consent of the respondent no appeal by the respondent lies in relation to that order without the leave of the Court which would hear the appeal if leave is granted.

Appeal does not act as a stay of the order under appeal

74. Unless the Court that made the order appealed from otherwise directs—

(a) the operation of an order made under this Decree is not suspended as a result of an appeal being filed; and

(b) every order made under this Decree may be enforced in the same manner in all respects as if no appeal were pending.

Nature of appeal

75. An appeal from a decision—

(a) referred to in paragraph *(a)* of section 72(2) may be on a matter of fact as well as on a matter of law;

(b) referred to in paragraphs *(b)* and *(c)* of section 72(2) may only be on a matter of law.

Power on appeal

76. A court that hears an appeal against an order to which section 72 applies may affirm, vary or discharge an order nnder appeal and may make such other order or decision as the court thinks fit having regard to the provisions of this Decree.

PART 9—OFFENCE

Criminal offence to breach a domestic violence restraining order

77.—(1) Any person who, having notice of a domestic violence restraining order by which they were bound, without reasonable excuse contravenes the order or part of the order, is guilty of a criminal offence and is liable on conviction—

(a) subject to paragraph (b), to a fine of $1,000 and a term of imprisonment of 12 months;

(b) if the person has previously been convicted of an offence of breach of a domestic violence restraining order, to a fine of $2,000 and a term of imprisonment of 12 months.

(2) It is no defence to a charge under subsection (1) that when the contravention occurred—

(a) the person charged, or a person protected by the domestic violence restraining order, was in another country; or

(b) both were in another country or other countries.

(3) Subsection (1) does not apply to—

(a) a condition of a domestic violence restraining order made under section 34 or section 37;

(b) an order that a person pay compensation made under section 39; or

(c) a condition of a domestic violence restraining order directed to a person protected by an order made under paragraph (b) of section 32(2);

(4) For the purposes of subsection (1) a person will be taken to have had notice of a domestic violence restraining order if the person—

(a) was present before the Court at the time the order was made, or

(b) was present when the order was made by telephone and the presiding judicial officer spoke to the person by telephone and explained the terms of the order, or

(c) was told of the existence of the order and the terms of the order orally, or in writing, by a police officer, or

(d) was personally served with the order, or

(e) was served with a copy of the order in such other manner as the Court directed, or

(f) was aware of the terms of the order.

(5) In proceedings under this section the Court must inquire whether the person charged was subject to an order under section 37 requiring the person to attend a counselling, education, rehabilitation or support program.

(6) Where the Court becomes aware during proceedings under this section that the person charged has not complied with an order made under section 37 requiring the person to attend a counselling, education, rehabilitation or support program, the Court must proceed in relation to that matter in accordance with section 37(7).

Police may arrest without warrant

78.—(1) Where a domestic violence restraining order is in force, any police officer may arrest, without warrant, and charge any person whom the police officer has good cause to suspect is about to commit or has committed an offence under section 77.

(2) In considering whether or not to arrest a person pursuant to subsection (1) of this section, the police officer must take the following matters into account—

(a) the risk to the safety and wellbeing of a person protected by the domestic violence restraining order if the arrest is not made;

(b) the seriousness of the anticipated or alleged offence; and

(c) the imminence of the commission of the anticipated offence or the length of time since the alleged offence occurred.

(3) Nothing in this section limits or impinges upon any other power of arrest that the police officer may have in the circumstances.

PART 10—CONTEMPT

Contempt and referral for investigation or prosecution

79.—(1) Notwithstanding any other provision in this Decree a Court which has jurisdiction under this Decree may punish persons for—

(a) contempt in the face of the Court when exercising jurisdiction under this Decree;

(b) wilful disobedience of an order specified in paragraphs *(a)* and (b) of section 77(3).

(2) Rules may provide for the practice and procedure as to charging with contempt and the hearing of the charge.

(3) Where a natural person is in contempt the Court may punish the contempt by committal to imprisonment or a fine or both.

(4) Where a Court exercising jurisdiction under this Decree becomes aware, in the course of the proceedings, that a person who is bound by a domestic violence restraining order made under this Decree appears to have breached the order, the Court may direct that information in relation to the apparent breach be referred to the Commissioner of Police or the Director of Public Prosecutions or both.

PART 11 – MISCELLANEOUS

Power to make rules

80.—(1) The Chief Justice may from time to time make rules not inconsistent with this Decree providing for and in relation to practice and procedure to be followed by Courts exercising jurisdiction under this Decree and for and in relation to all matters and things incidental to any such practice and procedure, or necessary or convenient to be prescribed for the conduct of any business of those Courts under this Decree including providing for and in relation to—

(a) forms, and the use of forms, as necessary for the purposes of the Decree;

(b) service of documents, substituted service and dispensing with service;

(c) applications and hearings by telephone including but not limited to geographic location, permissible hours and equipment requirements (e.g. location of telephone, availability of facsimile machine);

(d) who may be joined in proceedings and how they may be joined;

(e) intervention;

(f) consolidation of applications or of proceedings;

(g) discontinuance and withdrawal of proceedings;

(h) striking out and staying proceedings;

(i) amendment of documents;

(j) representatives, including (without limitation)—

(i) providing for the appointment, retirement and removal of representatives, and

(ii) providing for the conduct of proceedings brought on a person's behalf by a representative;

(k) attendance of witnesses;

(l) production of documents and other material to be used in evidence;

(m) trial management;

(n) giving judgment;

(o) institution of appeals;

(p) costs of proceedings (including solicitor and client costs and party and party costs) and the assessment or taxation of those costs;

(q) the enforcement and execution of orders;

(r) the attendance by parties and others, in relation to proceedings under this Decree, at Court and at safety planning conferences;

(s) information about proceedings under this Decree to be transferred between Courts exercising jurisdiction under this Decree or otherwise in relation to this Decree;

(2) The power of the Chief Justice to make rules under subsection (1) includes power to apply, with or without modification, provisions of the Family Law Rules 2005, the High Court Rules, or the rules of procedure of another Court of Fiji.

(3) Before making rules under this section the Chief Justice must consult with the Chief Magistrate.

Power to make regulations

81. The Minister may make regulations, not inconsistent with this Decree, prescribing all matters that are required or permitted by this Decree to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Decree and, in particular—

(a) prescribing a country to be a prescribed foreign country in accordance with section 70;

(b) prescribing the information that the police must give to a victim of domestic violence and to a perpetrator of domestic violence as required by 13;

(c) prescribing the information that the police must give to a victim of domestic violence in a "complaints notice" about how a person may complain if a police officer does not apply for a domestic violence restraining order, as required by section 14;

(d) prescribing the information about services for victims of domestic violence and for perpetrators of domestic violence as required by sections 16 and 17;

(e) prescribing the information to be supplied for the purpose of Part 3 about the effect of domestic violence restraining orders;

(f) prescribing categories of police officers or individual officers for the purpose of section 25;

(g) prescribing counselling, education, rehabilitation and support programs, referred to in section 37, including the means by which potential providers may be approved for this purpose and other requirements that may apply for quality assurance purposes;

(h) in relation to safety planning conferences referred to in section 58—

(i) prescribing training to be undertaken by those who would act as a conference convenor; and

(ii) prescribing additional details, consistent with section 58 concerning arrangements for safety planning conferences.

(i) providing for the enforcement of overseas of orders made under this Decree; and

(j) providing for enforcement in Fiji of foreign domestic violence restraining orders.

Consequential amendments

82. The following enactments are amended as set out in the Schedule, as a consequence of this Decree.

SCHEDULE
(Section 82)

CONSEQUENTIAL AMENDMENTS

PART 1—AMENDMENTS TO THE MARRIAGE ACT

1. The Marriage Act (Cap 50) is amended—

(a) in section 2 by inserting in the appropriate alphabetical order the following definitions—

" "existing marriage officer" means a person who is registered as a marriage officer under section 4 or 5; "

" "new marriage officer" means a person who is registered as a marriage officer under section 4 or 5; "

" "prescribed information for marriage officers" means written information for marriage officers regarding the prevention of domestic violence, prescribed by regulations made under section 38;"

" "prescribed information for those intending to marry" means written information for those intending to marry regarding the prevention of domestic violence, prescribed by regulations made under section 38; "

(b) by adding after section 11 the following section—

"Provision of prescribed information to marriage officers

11A.—(1) The Registrar-General shall provide the prescribed information for marriage officers and an appropriate number of copies of the prescribed information for those intending to marry to—

(a) each existing marriage officer, within one month of coming into force of this section, and

(b) to each new marriage officer, within one month of the Registrar-General registering the person as a marriage officer under section 4 or 5.

(2) The Registrar General shall, when requested by a marriage officer, promptly provide an appropriate number of additional copies of the prescribed information for marriage officers and the prescribed information for those intending to marry.".

(c) by adding after section 19 the following section—

"Information to accompany certificate for marriage and licence

19A. The Registrar-General must ensure that—

(a) when a certificate for marriage is issued under section 17; or

(b) when a special licence to marry is issued under section 19,

the certificate or licence is accompanied by 2 copies of the prescribed information for those intending to marry."

(d) by adding after section 21 the following section—

"Marriage officer to provide information

21A. A marriage officer who is intending to solemnize a marriage shall before performing the ceremony referred to in section 22—

(a) ask each person who is a party to the intended marriage whether they have personally received a copy of the prescribed information for those intending to marry, and

(b) if a party has not personally received that information the marriage officer shall provide the prescribed information to that person,

provided that no marriage shall be void by reason only of non-compliance with this section by the marriage officer."

(e) in section 38 by inserting ", the information to be provided" after "adopted".

PART 2—AMENDMENTS TO THE BAIL ACT 2002

2. The Bail Act 2002 is amended—

(a) in section 2 by—

(i) inserting the following definition—

" "domestic violence offence" means a domestic violence offence as defined in section 4 of the Penal Code";

(ii) repealing the definition of "serious offence" and substituting the following definition—

" "serious offence" means –

(a) the offence of breach of a domestic violence restraining order; or

(b) any offence for which the maximum penalty includes imprisonment for 5 years or more;";

(b) in section 3(4) by—

(i) deleting "or" at the end of paragraph *(a)*;

(ii) deleting the full-stop at the end of paragraph *(b)* and substituting "; or"

(iii) adding the following paragraph—

"*(c)* the person has been charged with a domestic violence offence.";

(c) in section 3(5) by—

(i) deleting "or" at the end of paragraph *(b)*;

(ii) deleting the full-stop at the end of paragraph *(c)* and substituting "; or"

(iii) adding the following paragraph—

"*(d)* the person has been charged with a domestic violence offence."

(d) in section 8(2) by—

(i) deleting "or" at the end of paragraph *(b)*;

(ii) deleting the full-stop at the end of paragraph *(c)* and substituting "; or"

(iii) adding the following paragraph –

"*(d)* the offence is a domestic violence offence unless satisfied that the release of the person on conditions, that would or could be applied, would not pose a risk to the safety of a specially affected person.";

(e) by repealing subsections (3) and (4) of section 16 and substituting the following subsections—

"(3) Subject to subsections (5) and (6), where a person who is charged with a domestic violence offence is granted bail the person must reside at the residential address stipulated in the bail conditions until the hearing of the case.

(4) Subject to subsection (5) where a person who is charged with an offence other than a domestic violence offence is granted bail the person must reside at the address provided under subsection (1) until the hearing of the case.

(5) If the accused person wishes to reside elsewhere than at the address at which the person is required to reside in accordance with subsection (3) or (4), the person must, in writing or in person notify the police officer or the bail officer, as the case may be, and that officer must either make a decision or obtain a decision of the court, as the case may be, on whether the bail undertaking should be varied accordingly.

(6) Where a person is charged with a domestic violence offence a police officer or a court must have regard to the following in making a decision about where the person may reside while on bail—

(a) if the person's residential address is also the normal residential address of a specially affected person, unless it appears safe for each specially affected person and that person or those persons are agreeable, it must be a condition of bail that the accused reside at a residential address other than that residential address while on bail;

(*b*) where paragraph (*a*) applies, the accommodation needs of a specially affected person have priority over the accommodation needs of the accused person.";

(*f*) in section 19 by –

(i) deleting "or" at the end of paragraph (*b*);

(ii) deleting the full-stop at the end of paragraph (*c*) and substituting "; or"

(iii) adding the following paragraph—

"(*d*) the accused person is charged with a domestic violence offence and the safety of a specially affected person is likely to be put at risk if bail is granted taking into account the conditions that could be applied if bail were granted.";

(*g*) in section 19(2)(*c*) by deleting the full-stop at the end of sub-paragraph (iii) and substituting a semi-colon and by adding the following paragraph—

"(*d*) as regards the safety of a specially affected person when the accused is charged with a domestic violence offence—

(i) the nature and history of alleged domestic violence by the accused in respect of the person against whom the alleged offence has been committed and any other specially affected person;

(ii) the views of the person against whom the alleged offence has been committed and any other specially affected person about the risk, if any, that the accused may pose to the safety and well being of a specially affected person while on bail;

(iii) whether a domestic violence restraining order is in effect for the protection of a relevant specially affected person;

(iv) the likelihood of the accused person committing a further domestic violence offence while on bail.".

(*h*) in section 22 by—

(i) deleting "Bail" in subsection (1) and substituting "Subject to subsection (1A), bail";

(ii) inserting after subsection (1) the following subsection—

"(1A) Where an accused person is charged with a domestic violence offence—

(*a*) bail may not be granted unconditionally; and

(*b*) if bail is granted, bail must be subject to a condition that the accused person must not assault, threaten or harass the person or persons in respect of whom the alleged offence was committed.";

(*i*) in section 23 by—

(i) deleting "Bail" in subsection (1) and substituting "Subject to subsection (3), bail";

(ii) by inserting after subsection (2) the following subsection—

"(3) Where an accused person is charged with a domestic violence offence—

(*a*) bail may not be granted unconditionally, and

(*b*) if bail is granted, bail must be subject to a condition that the accused person must not assault, threaten or harass the person or persons in respect of whom the alleged offence was committed.";

(*j*) by adding after Part V the following Part—

"Part VA – NOTIFICATION OF DECISIONS IN DOMESTIC VIOLENCE CASES

Duty to notify persons at risk of domestic violence

24A. Where an accused person is charged with a domestic violence offence and bail is granted, refused, varied or discharged by a police officer or by the court, immediate steps must be taken by the police or by the court, as the case may be, to inform each specially affected person—

(*a*) of the decision; and

(*b*) where bail conditions apply, then of the precise terms and conditions of bail.".

PART 3 – AMENDMENTS TO THE CRIMINAL PROCEDURE CODE

3. The Criminal Procedure Code (Cap. 21) is amended—

(a) by adding after section 15 the following section—

"Entry and search in case of domestic violence offence

15A.–(1) Where a police officer reasonably suspects that a person is about to commit or is committing a domestic violence offence or that such an offence was committed before the officer's arrival, on any premises, the officer may without a warrant enter those premises and may remain in those premises for as long as the officer considers necessary—

(a) to ensure that, in the officer's opinion, there is no imminent danger of a person committing a domestic violence offence on the premises;

(b) to investigate whether or not a domestic violence offence has been committed; and

(c) to give or arrange for such assistance as is reasonable in the circumstances.

(2) If after entering premises, pursuant to the power conferred by subsection (1) or pursuant to a power conferred by any other law, a police officer reasonably suspects that a domestic violence offence is being or is about to be committed, or was committed before the officer's arrival, on the premises the officer without further authority may—

(a) search the premises to establish whether any person on the premises—

(i) is in need of assistance; or

(ii) is in possession of a weapon;

(b) search—

(i) in the premises for a weapon; and

(ii) any person on the premises whom the officer reasonably suspects is in possession of a weapon; and

(c) seize any weapon found on the premises, or on a person, that the officer reasonably suspects—

(i) was used to commit a domestic violence offence; or

(ii) may be used to commit a domestic violence offence.

(3) A police officer may use such force and such assistance as is necessary and reasonable in the circumstances in order to exercise the powers under this section.

(4) This section does not limit any other power a police officer may have under this Act, any other written law or at common law."

(b) by adding after section 163 the following section—

"Section 163 not to apply to domestic violence offence

163A. Section 163 does not apply to a charge, which in the circumstances of the case, is a charge for a domestic violence offence.".

(c) by adding to Schedule 1 the following offence—

"common assault that is a domestic violence offence".

PART 4 – AMENDMENTS TO THE PENAL CODE

4. The Penal Code (Cap. 17) is amended as follows—

(a) in section 4 by inserting in the appropriate alphabetical order the following definitions—

" "de facto relationship" means the relationship between a man and a woman who live or lived with each other as spouses on a genuine domestic basis although not legally married to each other;"

" "domestic violence offence" means—

(a) a personal violence offence committed by the offender against a person with whom the offender is or has been in a family or domestic relationship;

(b) a property damage offence committed by the offender against a person with whom the offender is or has been in a family or domestic relationship; or

(c) the offence of breach of domestic violence restraining order under section 77 of the Domestic Violence Decree 2009;"

" "family or domestic relationship" means the relationship of—

(a) spouse;

(b) other family member;

(c) person who normally or regularly resides in the household or residential facility;

(d) boyfriend or girlfriend;

(e) person who is wholly or partly dependent on ongoing paid or unpaid care or a person who provides such care;"

" "other family member" means any of the following—

(a) parent, grandparent, step-parent, father-in-law, mother-in-law;

(b) child, grandchild, step-child, son-in-law, daughter-in-law;

(c) sibling, half-brother, half-sister, brother-in-law, sister-in-law;

(d) uncle, aunt, uncle-in-law, aunt-in-law;

(e) nephew, niece, cousin;

(f) clan, kin or other person who in the particular circumstances should be regarded as a family member,

provided that if a person was or is in a de facto relationship with another person the relationship of other family member includes a person who would be included if the persons in that de facto relationship were or had been married to each other;"

" "personal violence offence" means an offence specified in Part 1 of Schedule 1A;"

" "property damage offence" means any an offence specified in Part 2 of Schedule 1A;"

" "spouse" includes a person who is or has been in a de facto relationship with the other person;"

(b) by adding after section 46 the following sections—

"Domestic violence offences – determining penalty

46A.—(1) Notwithstanding any other provision of this Act, where a person is charged with a domestic violence offence the matters listed in section 46A(3), so far as each is relevant in the particular case, must be taken into account by the court, in addition to any other relevant matters, in determining penalty.

(2) Where there was more than one victim of a particular domestic violence offence, references in this section to "the victim" means each of the victims.

(3) The matters referred to in section 46A(1) which must be taken into account are—

(a) whether the defendant has any previous convictions for a domestic violence offence;

(b) whether the defendant has previously been charged with a domestic violence offence where the charge was stayed or terminated under section 163 of the Criminal Procedure Code or otherwise;

(c) the extent of the damage, injuries or loss suffered by the victim as a result of the offence;

(d) any special considerations relating to the physical, psychological or other characteristics of the victim when the offence occurred including but not limited to—

(i) the age of the victim;

(ii) whether the victim was pregnant;

(iii) whether the victim was disabled;

(e) whether a child or children witnessed or heard the offence;

(f) the effect of the offence on the emotional, psychological and physical well being of the victim;

(g) the effect of the offence in terms of hardship, dislocation or other difficulties caused to the victim;

(h) the weight that can be accorded to any evidence, including a report by a person who has counselled, assisted or treated the victim since the offence, that deals with the victim's—

(i) attitude to the offence;

(ii) views in relation to any steps taken or proposed to be taken by the defendant to address his or her behaviour;

(iii) assessment of whether the defendant continues to pose a risk or threat to the victim and if so what measures would help ensure the victim's safety and well being;

(i) the conduct of the defendant towards the victim since the offence occurred so far as it relates to whether the defendant—

(i) accepts responsibility for the offence;

(ii) has taken reasonable steps available to the defendant to make amends to the victim including addressing or reducing the negative effects of the offence on the victim;

(iii) appears to pose any further threat to the victim;

(j) whether the defendant is willing to take steps, or further steps, to attempt to make amends to the victim;

(k) whether the defendant has sought and received personal counselling or other assistance since the offence or intends to do so;

(l) whether the defendant is willing to participate in personal counselling or in an educational or other programme if ordered by the Court;

(m) the weight that can be accorded to any report submitted by a person who has counselled, assisted or treated the defendant since the offence occurred that deals with whether—

(i) the defendant accepts responsibility for the offence;

(ii) the defendant appears to pose any further threat to the victim;

(iii) the defendant is likely to be assisted by further counselling or assistance or treatment.

Matters courts must consider

46B. Where section 46A applies, the court must:

(a) consider whether conditions should be imposed and whether a domestic violence restraining order should be made under the Domestic Violence Decree 2009 to ensure the safety and well being of the victim, or where more then one, then of each victim,

(b) consider making an order that the defendant undertake a course of counselling or suitable education or treatment programme that is likely to assist to ensure that the defendant does not re-offend;

(c) in a case where the court—

(i) has power to order that the defendant pay or provide compensation to or for the victim or victims; or

(ii) power to order payment of compensation for any loss or injury caused by the offence from a fine or money found on or in the possession of a convicted person pursuant to section 161 of the Criminal Procedure Code,

consider and make proper inquiry into whether an order for compensation, to or for the victim or victims, should be made.";

(c) by adding after Schedule 1 the following Schedule—

Schedule 1A

Domestic violence offences

Part 1 – Personal violence offence

Part 1 lists offences referred to by the definition of "personal violence offence" in section 4.

Item	Penal Code (Section)	Description
1	149	Definition of rape
2	151	Attempted rape
3	152	Abduction
4	153	Abduction of girl under 18 years of age with intent to have carnal knowledge
5	154	Indecent assaults on and indecently insulting or annoying females
6	155	Defilement of girl under 13 years of age
7	156	Defilement of girl between thirteen and 16 years of age. Defilement of idiots or imbeciles
8	157	Procuration
9	158	Procuring defilement of women by threats, fraud or drugs
10	159	Householder permitting defilement of girl under 13 years of age on his premises
11	160	Householder permitting, defilement of girl under 16 years of age on his premises
12	161	Detention of female in brothel or elsewhere
13	171	Conspiracy to defile
14	172	Attempts to procure abortion
15	175	Unnatural offeuces
16	176	Attempts to commit unnatural offences and indecent assaults
17	178	Incest by males
18	179	Incest by females
19	191	Inciting dogs to attack
20	197	Criminal trespass
21	198	Manslaughter
22	199	Murder
23	205	Infanticide
24	209	Responsibility of person who has charge of another
25	210	Duty of head of family
26	211	Duty of masters
27	214	Attempt to murder
28	215	Attempt to murder by convict
29	216	Accessory after the fact to murder
30	217	Conspiracy to murder

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31	219	Liability for complicity in another's suicide
32	221	Killing unborn child
33	222	Disabling in order to commit felony or misdemeanour
34	223	Stupefying in order to commit felony or misdemeanour
35	224	Acts intended to cause grievous harm or to prevent arrest
36	227	Grievous harm
37	228	Placing explosive with intent
38	229	Maliciously administering poison with intent to harm
39	230	Unlawful wounding
40	231	Unlawful poisoning
41	233	Failure to supply necessaries
42	237	Reckless or negligent acts
43	244	Common assault
44	245	Assault causing actual bodily harm
45	247*(a)*	Assault any person with intention to commit a felony
46	249	Punishment for kidnapping
47	250	Kidnapping or abducting in order to murder
48	251	Kidnapping or abducting with intent to confine person
49	252	Kidnapping or abducting with intent to harm
50	253	Wrongfully concealing kidnapped person
51	254	Child stealing
52	255	Abduction of girls under 16 years
53	256	Punishment for wrongful confinement
	Juveniles Act (Section)	
54	57	Cruelty to and neglect of juveniles

PART 2 – PROPERTY DAMAGE OFFENCE

Part 2 lists criminal offences referred to by the definition of "property damage offence" in section 4.

Item	**Penal Code** (Section)	Description
1	317	Arson
2	318	Attempts to commit arson
3	324	Other malicious injuries - general and special punishments
4	325	Attempts to destroy property by explosives
5	330	Criminal Intimidation

GIVEN UNDER my hand this 7th day of August 2009

EPELI NAILATIKAU
Vice-President
of the Republic of Fiji

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ii. Bench Book on Children: Part B—Child Complainants and Witnesses in Criminal Proceedings*

PART B:

CHILD COMPLAINANTS & WITNESSES IN CRIMINAL PROCEEDINGS

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The Bench Book may be read in full at this link: https://judiciary.gov.fj/wp-content/uploads/2021/03/Child-Bench-Book1.pdf.

1. IMPACT OF VICTIMISATION ON CHILDREN

Some of the most important criminal cases that judicial officers handle are those involving child complainants. Offences such as rape, sexual assault, defilement and grievous harm, when committed against children, are amongst the most abhorrent crimes. Magistrates and judges have an obligation under the *Constitution* to protect the best interest of children appearing before the court, and must ensure that child complainants are not further traumatised by giving evidence against an accused. This means taking steps to ensure that measures are put in place to protect and meet the special needs of the child. Understanding the impact of crime on children and their common reactions is important for countering common misperceptions about victim behaviour, and will assist judicial officers in deciding what the courts can do to ensure that children are able to give their best evidence, without affecting the rights of the accused to a fair trial.

Child complainants may suffer from both immediate and longer-term effects of the crime, particularly if it involved violence or sexual abuse. The impact of crime tends to be worse for children because of their young age, vulnerability, emotional immaturity, and dependency. In addition, more often than not the perpetrator is a family member or someone the child knows and trusts, which exacerbates feelings of shame, guilt and betrayal. Often, crimes against a child perpetrated by a family member leads to family breakdown or disputes and anger within the family. This increases the child's sense of guilt and self-blame, because the family is "torn apart" by their disclosure of what happened to them. Children's capacity to cope with a negative event varies depending on many factors such as age; their individual physical, social and emotional development; and the degree to which their family members and other significant adults are supportive, caring and nurturing. Depending on these factors, some children may have more difficulty than others in recovering from crime.

There are a number of common reactions that child victims of violence exhibit, particularly those who have experienced sexual abuse. Many of these reactions are contrary to what "common sense" tells us about how a victim would react:[7]

Secrecy: Children who have been victims of violence, sexual abuse and exploitation tend to keep the abuse a secret for a variety of reasons, including fear of the perpetrator; fear that they would not be believed; threats or bribery by the perpetrator; fear of being punished or getting themselves or others into trouble; or fear of rejection and anger from their parents, particularly if the perpetrator is someone in the family. Contrary to the general expectation that the victim would normally seek help, the majority of children don't tell anyone.

7 R.C. Summit (1983), The child sexual abuse accommodation syndrme. Child Abuse Neglect 7:177–93; K. London, M. Bruck, S. J. Ceci and D. W. Shuman, 'Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?' (2005) 11 Psychology, Public Policy, and Law 194.; J. A. Quas, W. C. Thompson, K. Alison and C. Stewart, 'Do Jurors "Know" What Isn't So About Child Witnesses?' (2005) 29 Law and Human Behavior 425, 426; A Cossins and J Goodman-Delahunty, 'Misconceptions or Expert Evidence in Child Sexual Assault Trials: Enhancing Justice and Jurors' "Common Sense" (2013) 22 Journal of Judicial Administration 171-190' Cossins. A. "Children and Sexual Abuse: What Laypeople Think They Know and What the Literature Tells Us" (2008) 15 Psychiatry, Psychology and Law 153.

Helplessness: Because of their small physical size, dependency, and emotional immaturity, children are inherently helplessness against adults. From a young age, children are taught to be obedient to adults, particularly family members or people in authority. Because of this feeling of helplessness, children are less likely to resist, to cry out, to ask for help, or to try to escape. The more common reaction is to try to hide or feign sleep. Children who experience repeated victimisation may feel incapable of escaping from their situation.

Accommodation: Because of this sense of helpless, children who experience repeated abuse tend to feel trapped in their situation, and learn to accept the situation to survive. There are a range of different ways that they cope and accommodate the abuse, ranging from "shutting down" emotionally or exhibiting no outward change to running away, self-harm, substance abuse and violence. This may include counter-intuitive behaviour such as maintaining contact with the perpetrator, not resisting spending time together, or having conflicted emotions about the abuser. The common assumption is that a victim would try to avoid a person who has abused them, but this is often not the case with children, particularly if the child is dependent on the perpetrator, is fearful of him/her, has an emotional attachment to that person, or has been groomed by the perpetrator to believe the abuse is normal, is a display of "love" or because they are "special." Some children begin to blame themselves for what has happened to them, which manifests in outward behaviours. For example, girls are likely to react by withdrawing, harming themselves, committing suicide, running away, or drug/ alcohol abuse. Boys are more likely to externalise their feelings of helplessness and anger through violence, aggression, delinquency, and drug/alcohol abuse.

Delayed and Partial Disclosure: Some children never disclose the crime at all, particularly in cases of sexual abuse. Those who do report sexual abuse generally do so after very long delays (on average 2 years). Adults generally assume that a normal, truthful child would immediately report abuse and seek help, however this is generally not the case. In addition, children often do not tell everything at once, and their first reports may be fragmented, scattered, and sound unconvincing.

Recanting or Changing Testimony: Many child complainants will change their testimony and deny that the crime happened, or refuse to participate in the criminal proceedings. Often, this is not because their initial report was untrue, but rather is due to threats or bribery from the perpetrator; pressure from family or community members; feelings of guilt, particularly if the perpetrator is a family member; parents do not believe the child; or parents or family members blaming

It is important for judicial officers to understand that these reactions are common amongst children, and that behaviour such as secrecy, delay in reporting, changes in their testimony, and maintaining a relationship with the perpetrator are not necessarily indicative of deceit on the part of the child. Understanding children's common reactions can help judicial officers to better assess the credibility of a child's evidence, and to determine what the courts can do to ensure that children are able to give their best evidence.[8]

8 For an example of the use of expert testimony to assist assessors in understanding common reactions of child sexual abuse victims, see the Victoria Court of Appeal decision in MA v The Queen [2013] VSCA 20; 40 VR 564

2. CASE MANAGEMENT AND PRE-TRIAL MATTERS

Cases involving child complainants and witnesses must be managed efficiently to ensure both a fair trial and to accommodate the special vulnerabilities of children. The court's obligation under the *Constitution* to ensure the best interest of the child (s.41(2)) and to make special arrangements for child witnesses (s.15(9)) means that judicial officers should be more hands-on in their approach to pre-trial management, particularly in cases involving sexual offences or other crimes of violence against children. Judicial officers should be pro-active in using their authority under ss.289 - 295 of the *Criminal Procedure Act 2009* to efficiently manage the trial process through pre-trial hearings and issuing appropriate orders/directions.

Constitution

s.41 (2) The best interests of a child are the primary consideration in every matter concerning the child.

s.15 (9) If a child is called as a witness in criminal proceedings, arrangements for the taking of the child's evidence must have due regard to the child's age.

2.2 Bail and Protection of Children's Safety

Starting from the accused's initial appearance and bail application, judicial officers should be mindful of their obligation to protect children's safety and to prevent further harm to the child. The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime emphasise that where the safety of a child complainant or witness may be at risk, judicial officers must take appropriate measures, from the earliest stages of the proceedings, to protect the child. This includes protecting the child from direct contact with the alleged perpetrator when appearing at court, using court-ordered restraining orders, ordering pre-trial detention of the accused, or setting special "no contact" bail conditions.

Pursuant to section 41(2) of the *Constitution*, the best interests and safety of a child is a primary consideration to take into account in any decision that affects a child, including when making decisions about bail where the complainant is a child. Under the *Bail Act 2002,* community safety, the protection of the community, and prevention of interference with the complainant and other witnesses are key considerations to take into account when deciding whether to grant or refuse bail (s.19(1)(c) and (2)(c)). Section 23(2)(a) and (b) of the *Bail Act* also allow the court to impose conditions on bail to protect the welfare of the community or to protect the welfare of any specially affected person.

Where the offence involves a family member, judicial officers are required under the *Domestic Violence Act 2009* to issue an interim Domestic Violence Restraining Order (DVRO) for the safety and wellbeing of the person against whom the offence appears to have been committed and related persons (s.24).

Good Practice Guidance for Protecting Children's Safety

- ✓ **Before making decisions about bail in cases involving violence or a sexual offence, ensure that you have sufficient information about the relationship between the parties and the potential risks to the complainant.**
- ✓ **Ask questions of counsel to clarify the age of the complainant, the relationship between the complainant and the perpetrator, and the complaint's views on bail, including any concerns the complainant may have about their safety.**
- ✓ **If bail is to be granted, consider whether it is necessary to add conditions:**
  - prohibiting the accused from having contact with the child complainant;
  - prohibiting the accused from having contact with other children in the family and/or the other parent / caregiver;
  - prohibiting the accused from having contact with children in general, including being at or near places that would put him/her into contact with children (e.g. schools, kindergartens, child care centres, playgrounds, etc.).
- ✓ **Remember that is it mandatory under the Domestic Violence Act 2009 to issue an interim DVRO whenever a case involves allegations of violence within the family, even if the accused is remanded into custody (s.24).**

2.1 Minimise Delays and Wait Time

Long delays and false starts can result in increased stress to a child witness and undermine his/her ability to give effective evidence due to memory loss. The longer the delay, the greater the impact on a child and the more likely that his/her parents will decide not to proceed. Whilst some delays are beyond the court's control, many can be prevented or minimised by better case management practices.

Good Practice Guidance for Minimizing Delays

- ✓ **Give priority in scheduling to cases involving a child complainant;**
- ✓ **Use colour-coded stickers to flag case files that involve a child complainant so that they can be more easily tracked and prioritised;**
- ✓ **Set clear timeframes for the progress of the case and give directions as appropriate to the needs of the case;**
- ✓ **Reduce the number of occasions the child is required to attend court;**
- ✓ **Trial dates should only be changed in exceptional circumstances.**

Weigh up any requests for adjournments against the adverse effect on the child's welfare, memory, and ability to give evidence;

- ✓ **Keep any adjournments granted to the minimum time period possible;**
- ✓ **Schedule a specific day and time for the child's testimony to minimise the length of time the child must wait at the courthouse. Long waits can result in increased stress and restlessness and adversely affect children's ability to give their best evidence, particularly if the courthouse lacks an appropriate child-friendly waiting area. It also increases the chances of the child coming into contact with the accused, or being influenced or intimidated by the accused's family or friends. Parties should agree to a specific time that the child will testify and stick to it.**
- ✓ **Where feasible, schedule the child's testimony so as not to interfere with his/her schooling (e.g. having the child testify during school holidays) or during important events such as exams, but balancing this against the need to keep delays to a minimum.**
- ✓ **It is generally best to schedule young children's evidence at the start of the day when they are most alert, but the needs of the individual child may vary. Consideration should also be given to minimising disruption of the child's schooling.**

2.2 Clarify Triable Issues

Deciding in advance on triable issues will help streamline the trial process by narrowing what evidence must be produced, minimising the need for motions and legal argument during the trial, allowing for a more accurate estimate of the amount of time needed for trial, and limiting the duration of a child's examination and cross-examination. For example, if the accused is known to the child and identity is not a live issue, then there should be no need for the child to go through the traumatic experience of confronting the accused in court for dock identification.

2.3 Decide on Appropriate Measures to Facilitate the Child's Evidence

The *Criminal Procedure Act* 2009 (s.296) outlines a number of measures that the courts can use to assist vulnerable witnesses to give evidence, including the use of video-taped statements, screens, closed-circuit television, and closed court proceedings (discussed in more detail in Chapter 4 below). The Act does not define "vulnerable witnesses", however the *Constitution* (s.15(9)) makes it clear that special arrangements should be used to assist child witnesses in criminal proceedings to give their best evidence. In addition, the courts have on numerous occasions noted that child complaints are particularly vulnerable and require special accommodation before the courts [*Kumar v The State* [2016] FJSC 44, CAV0024.2016 (27 October 2016);

Daas v. The State [2018] FJSC 28, CAV0014.2018 (2 November 2018); *Prakash v. The State* [2017] FJHC 263, HAA68.2016 (7 April 2017); *State v Cawi* [2018] FJHC 965, HAC124.2016 (19 September 2018)].

As such, it would be expected that one or more special measures would be used whenever a child under the age of 18 must give evidence in court, particularly in relation to sexual offences or other crimes of violence, and child witnesses can be considered as vulnerable witnesses without specific evidence being led that the child is likely to be unable to testify through fear, or would suffer emotional trauma from testifying in open court [*State v Cawi* [2018] FJHC 965, HAC124.2016 (19 September 2018)].

The issue of any special needs a child witness may have and what measures would be most appropriate to reduce stress and assist them in giving their best evidence should be discussed and decided at the pre-trial stage. Deciding well in advance of the trial date is important to ensure that appropriate arrangements are in place on the day of trial, and to avoid unnecessary delays and adjournments because the necessary equipment (e.g. screens or video) or people (e.g. sign language interpreter) are not available. Section 296 of the *Criminal Procedure Act 2009* outlines procedures for giving directions as to mode by which a vulnerable witness's evidence is to be given:

- Before the commencement of the trial, the prosecutor can apply to court for directions;
- The judge or magistrate is required to hear and determine the applications in chambers, giving each party an opportunity to be heard;
- Either party can also make an application during the course of the trial;
- Where necessary, the judge or magistrate may request input from an expert. In particular, getting advice from a psychologists, welfare officer, or other child development specialist may be advisable when making decisions about how to facilitate the testimony of very young children or children with disabilities.

Judicial officers can also use the pre-trial conference to set out some basic "**ground rules**" about appropriate questioning of the child, including guidance on:

- how frequently breaks will be taken;
- the duration of cross-examination;
- respecting the immaturity of the child witness and adapting the tone of questioning accordingly;
- adjusting the pace, language and style of questions to be more appropriate to the child's age and level of development [**see Part A for further guidance**].

Clear guidance on these matters in advance allows counsel to prepare appropriately, and also helps reduce objections at trial, which can be distressing to children and disrupt their train of thought.

R. v. J.P [2014] EWCA Crim 2064, Court of Appeal (Criminal Division)

"The court is required to take every reasonable step to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process. To that end, judges are taught, in accordance with the Criminal Practice Directions, that it is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a vulnerable witness. We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances. If there are any doubts on how to proceed, guidance should be sought from those who have the responsibility for looking after the witness and or an expert…

The ground rules hearing should cover, amongst other matters, the general care of the witness, if, when and where the witness is to be shown their video interview, when, where and how the parties (and the judge if identified) intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked. So as to avoid any unfortunate misunderstanding at trial, it would be an entirely reasonable step for a judge at the ground rules hearing to invite defence advocates to reduce their questions to writing in advance."

2.4 Give Directions about Pre-trial Familiarisation

Courts are a formidable and intimidating environment for most witnesses, particularly children, and most children and their parents will not be familiar with the process of giving evidence in court. Not understanding what is expected of them and being confronted with the unfamiliar and intimidating courtroom environment for the first time on the day of trial can add to children's fear and anxiety and undermine their ability to give evidence. It is therefore essential that child witnesses receive proper pre-trial preparation. This should include:

- Rapport-building meeting with the prosecutor with carriage of the case;
- Simple explanations of the role of the child at court, and of other people in the courtroom; and name suppression.
- A pre-trial visit to the courthouse to see an empty courtroom and/or the remote witness room; anc[9]
- Practice using any special measures that will be used at trial (e.g., screen, secure video-link, etc.).

Court clerks are responsible for liaising with counsel calling a child witness to help facilitate the courtroom visit.

Good Practice Guidance on Pre-Trial Familiarisation

- ✓ During the pre-trial conference, inquire whether appropriate arrangements have been made to familiarise the child with the court process, and give appropriate directions to the prosecutor and court clerk as needed.
- ✓ Ensure that the prosecutor has the contact name and number of the court registrar / court clerk to arrange the visit.
- ✓ Court visits should be arranged after hours when the courtroom is empty, and so as not to interfere with the child's schooling.
- ✓ If a screen, video-link or other special measures will be used, be sure that those are set up for the court familiarisation visit so the child can "practice" using these measures.

3. COMPETENCE AND RELIABILITY OF CHILD WITNESSES IN CRIMINAL PROCEEDINGS

Historically, common-law courts viewed the evidence of children with suspicion, and the assumption was that they were prone to fantasy, highly suggestable, and not reliable witnesses. However, there is now a substantial body of psychological research indicating that children, even from a very young age, are able to give reliable evidence:[9]

- From as young as three or four years of age, most children are able to give an accurate account of an event, particularly if it is something that they personally experienced (as compared to just observed) and that was traumatic or meaningful;
- Children can give clear, credible accounts in court as to what they have seen and heard and what has happened to them. A particular factor that tends to affect the reliability of children's evidence is how they are questioned;
- Children do not have a less accurate memory than adults. However, recall is more likely to decline with time for young children than for adults, and children are likely to recount an event in much less detail than adults;
- Children are no more prone to lying than an adult;
- Younger children tend to be more stringent than adults in their assessment of what constitutes a lie — for example, they may describe incorrect guesses and exaggeration as lies;
- Children do have the ability to distinguish fact and fantasy. There is no evidence that children are in the habit of fantasising about sexual incidents with adults;

9 See, for example: J. R. Spencer and R. H. Flin (eds.), The Evidence of Children: The Law and the Psychology (London: Blackstone Press, 1990), 297; S. J. Ceci and M. Bruck, 'Suggestibility of the Child Witness: A Historical Review and Synthesis' (1993) 113 Psychological Bulletin 403; Louise Sas (2001) The Interaction Between Children's Developmental Capabilities and the Courtroom Environment: The Impact on Testimonial Competency, Department of Justice Canada; L. Westcott, 'Child Witness Testimony: What Do We Know and Where Are We Going?' (2006) 18 Child and Family Law Quarterly 175, 188.

- Children are generally resistant to suggestion. Whilst younger children can be suggestible when questioned improperly, children of all ages are generally resistant to suggestions that they have been hurt when they have not.

Age should therefore not be a barrier to a child's ability to give evidence in criminal trials. As with adults, each child witness will have strengths and vulnerabilities that may potentially bear upon his or her ability to give evidence, which must be considered in the circumstances of each case.

3.1 Competence to Give Sworn and Unsworn Evidence

The *Criminal Procedure Act 2009* does not set an age limit on the capacity to testify as a witness, and there is no fixed rule at common law or by statute as to the age a child is competent to give evidence. The general rule is that a child is competent to testify if she/he has sufficient intelligence to understand the questions being asked, to give answers which can be understood, and to appreciate the duty to tell the truth.

Even if a child is competent to give evidence, a determination may need to be made as to whether the evidence given is sworn (under oath) or unsworn. Pursuant to the *Criminal Procedure Act 2009*, s. 117(2)(b) and the *Juveniles Act*, s. 10(1), if the child, due to immature age or tender years, is not able to understand the nature and solemnity of the oath, then the Court may allow the child to give unsworn testimony, provided the child understands the duty to tell the truth.

Criminal Procedure Act 2009

Evidence to be given on oath

117. (1) Every witness in any criminal cause or matter shall be examined upon oath or affirmation, and the court before which any witnesses shall appear shall have full power and authority to administer the usual oath or affirmation.

(2) The court may at any time, if it thinks it just and expedient, take without oath the evidence of any person-

(a)declaring that the taking of the oath whosoever is according to religious belief unlawful or impermissible; or

(b) who by reason of immature age or want of religious belief ought not, in the opinion of the court, to be admitted to give evidence on oath.

(3) The court shall record the fact that evidence has been taken in accordance with sub-section (2), and the reasons for allowing the evidence to be taken without oath.

Juveniles Act

Evidence of child of tender years

10.-(1) Where in any proceedings against any person for any offence or in any civil proceedings any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may proceed not on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth; and the evidence though not given on oath but otherwise taken and reduced into writing so as to comply with any law in force for the time being, shall be deemed to be a deposition within the meaning of any law so in force.

If a question arises about whether a child is competent to give evidence, then the court should conduct an inquiry, without the assessors present, into the child'competence to determine if s/he is capable of giving sworn evidence, and if not, if the child should give unsworn evidence. The inquiry should be conducted in a child-sensitive manner, using questions appropriate to the child's age and level of development.

Good Practice Guidance for Conducting a Competency Inquiry[10]

- ✓ Conduct the inquiry without the assessors present.
- ✓ Start by putting the child at ease with a series of questions concerning their age, schooling and favourite pastimes. This will also give the court a sense of the child's capacity to understand and give reasoned answers to questions.
- ✓ It is important to use open-ended questions that will enable the child to engage in a dialogue, rather than just giving a yes or no answer. This will build rapport and assist with assessing whether the child can give intelligible evidence.
- ✓ Use simple, direct questions. Questions should be asked in language appropriate to the child's level of development (**see Part A for further guidance**).
- ✓ Avoid hypothetical questions, questions involving abstract concepts, multi-faceted questions and legal jargon.
- ✓ Don't ask the child to explain the difference between the truth and a lie. Children find it difficult to respond to an abstract question about the conceptual difference between the truth and a lie.
- ✓ Phrase examples of truth or lie carefully, and avoid asking the child to say whether you, the judge/magistrate, are telling the truth or lying. Many children find it difficult to say that an adult, especially one in authority, is lying.

10 See: Cashmore, Problems and Solutions in Lawyer-Child Communication (1991) 15 Crim L J193-202; Australasian Institute of Judicial Adminstration, Bench Book for Children giving Evidence in Australian Courts, 2015.

- ✓ If a child does not appear to understand the difference between the truth and a lie, it may be necessary to ask a few extra questions to make sure that it is not because they are shy or have misunderstood your questions.
- ✓ For children with cognitive or learning disabilities, it may be advisable to get expert advice on the child's capacity to give evidence, and what assistance may be needed to help the child understand and communicate.
- ✓ If it is determined that that the child can give unsworn evidence, then the court should explain to the child, in **simple** language the duty to tell the truth. This should include an explanation that the child can say "I don't know" or "I don't remember", and getting the child to "practice" saying so.

Example of a Competency Inquiry[11]

- My name is Judge ...... and I am in charge here today.
- Are you comfortable on that seat?
- [Child's name], you have come to court today to tell what happened to you / tell what you know about [name of the accused]
- First I want to ask you a few questions. Then I want to talk to you about the rules here in court.
- How old are you? When is your birthday?
- Do you have any brothers or sisters? Tell me about them. How old are they?
- What year are you in at school?
- Do you have a favourite subject at school? Tell me about that.
- Tell me what you do at play time and lunchtime?
- Tell me what you like doing when you are not at school?
- What does the word "rules" mean? [Explain: rules are orders or instructions that help us to understand what we are allowed to do and what we are not allowed to do].
- Does your teacher have rules in your classroom? What are some of those rules?
- Now I want to talk to you about being in court.
- Do you remember that we just talked about some rules in the classroom? Well, in court there are some rules as well.
- A very important rule is that you tell the truth when you answer questions.
- Do you know what it is called if you do not tell the truth?
- Is telling the truth different to telling a lie? Explain that to me.
- Is telling a lie the right or wrong thing to do? Tell me why it is the right/ wrong thing to do?

11 Adapted from Australasian Institute of Judicial Adminstration, Bench Book for Children giving Evidence in Australian Courts, 2015.

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- Now I am going to tell you something that is true, and something that is a lie. I want you to tell me whether what I said is true or a lie.
- "There is a dog in this courtroom with us right now." Is that true or a lie? [Affirm the response if correct: 'Yes, it would be a lie to say that a dog is in the courtroom.')
- "[Name of support person] is sitting next to you." Is that true or a lie? [Affirm the response if correct: 'Yes, it is true to say that (support person) is sitting next to you]
- Do you think it is important to tell the truth here in court? [Affirm the response if correct: 'Yes, it's very important to tell the truth here.']
- Do you know what makes it important to tell the truth here? If yes, Can you tell me more about that?'
- What might happen to you if you told lies in court?
- It's always important to tell the truth. But it's even more important in court than anywhere else. Did you know that?
- So, do you understand that it is very important that you tell the truth here?
- Do you understand that it is very important that you do not tell lies here?
- Will you tell the truth here in court?
- Do you promise not to tell lies in court?

The Supreme Court has emphasised that there is no legal requirement to conduct a competency inquiry in every case before a child gives evidence, and the failure to do so is not *per se* fatal to a conviction: *Kumar v The State* [2016] FJSC 44, CAV0024.2016 (27 October 2016). In *Dass v. The State* [2018] FJSC 28, CAV0014.2018, the Court noted that not all children below 14 years of age necessarily fall within the ambit of section 10 of *Juveniles Act*, which applies only to children "of tender years." The legislation does not define "immature age" or "tender years" and has left this to the courts' discretion.

Dass v. The State [2018] FJSC 28, CAV0014.2018

"A 'child' is defined in the Act as 'a person who has not attained the age of fourteen years," and a "young person" as "a person who has attained the age of fourteen years, but who has not attained the age of seventeen years.' This twofold classification of juveniles in the Act is important in delineating the ambit of section 10 of the Act, which applies only to a 'child of tender years'. As Gamalath JA has observed in the above quoted passage from the judgment of the Court of Appeal, not all children below fourteen years of age fall within the ambit of section 10 of the Juveniles Act, and the question is whether DY, who according to the High Court Record was born on 3rd September 2001, was a child of tender years at the time she testified in court on 24th February 2014. At the time of testifying in Court, DY was a little more than 12 years and

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***Dass v. The State* [2018] FJSC 28, CAV0014.2018 cont.**

5 months in age. Her testimony in court, specially her answers to question put to her in cross- examination, shows without any semblance of doubt that she comprehended the questions put to her and responded to them as any adult would. In these circumstances, in my own opinion, there can be very little doubt that DY was not a 'child of tender years' for the purpose of the Juveniles Act."

However, where a competency inquiry is held, the questions asked to determine competency should be clearly reflected in the Court Record:

Dass v. The State [2018] FJCA 67, AAU59.2014 (1 June 2018)

"I find that it is important to state at this stage that the questions that are asked to determine the competency of the witness should have a clear reflection in the Court Record, so that anyone who has a legitimate interest in finding the nature of the test carried out by the learned trial judge could gain access to the relevant procedure. The requirement to carry out the test of competency and the need to administer the oath of a witness are intrinsically interconnected with the norms of the right to a fair trial. In a situation where having regard to all the attendant circumstances a court is of opinion that the need to administer the oath should be dispensed with, then the procedure that is carried out in arriving at such conclusion should have a reflection in the court record. In the same way the court record should bear the evidence of the nature of the competency test carried out in determining the ability and the level of intelligence of a witness to testify without administering an oath. Section 117 of the Criminal Procedure Act has made this requirement mandatory."

2.3 Children's Credibility and Corroboration

Children are presumed as reliable in giving evidence as any other witness, and the notion that children are more prone to lying or confuse fact with fantasy has now been discredited by research. As such, any issues of credibility should be based on an assessment of the individual witness, not their status as a child. There is no longer a legal requirement that children's evidence be viewed with suspicion, that their testimony be corroborated, or that assessors be warned on the danger of convicting on uncorroborated evidence of a child witness.

The *Criminal Procedure Act 2009*, section 129 states clearly that, in relation to sexual offences, no corroboration of the complainant's evidence is necessary for the accused to be convicted, and judges/magistrates are not required to give assessors a warning relating to the absence of corroboration.

In *Kumar v The State* [2016] FJSC 44, CAV0024.2016 (27 October 2016), the Supreme Court declared that the requirement in section 10(1) of the *Juveniles Act* for the unsworn evidence of a child to be corroborated is inconsistent with the *Constitution* and is therefore invalid.

Kumar v The State [2016] FJSC 44, CAV0024.2016 (27 October 2016)

The purpose of requiring corroboration of a child's evidence is to ensure that the defendant is not convicted on evidence which may be unreliable. Goundar JA thought that this was an illegitimate purpose because there was no basis for thinking that the evidence of a child was more likely to be unreliable than that of an adult, and that was where Calanchini P disagreed with him. But even if Calanchini P's view is to be preferred, the need for the evidence of a child to be corroborated is outweighed – in my view by a considerable margin – by the disadvantage of such a rule. That is that it may well result in many guilty people not being prosecuted or being acquitted if they are. As Goundar JA rightly said, independent evidence implicating a defendant in the sexual abuse of a child will very often not exist. It will invariably be the child's word against that of the defendant. So long as there is a rule requiring that a child's unsworn evidence be corroborated, children will be less protected from sexual abuse. The constitutional imperative in section 41(1) (d) of the Constitution will be thwarted, and the legislature will be treated as regarding the defendant's right to a fair trial as its "primary consideration", whereas its primary consideration, critically important though a defendant's right to a fair trial is, should be the best interests of the child. So although the rule requiring that the unsworn evidence of a child be corroborated serves a purpose which Calanchini P regards as legitimate, that purpose ceases to be legitimate when balanced against the need to protect children from sexual abuse. Accordingly, I would declare that the requirement in section 10(1) of the Juveniles Act for the unsworn evidence of a child to be corroborated is inconsistent with the Constitution and is therefore invalid.

The Supreme Court has further ruled that there is no longer a legal requirement on trial judges to give a warning of the danger of convicting a defendant on the uncorroborated evidence of a child, but they may do so if they think that it is appropriate in a particular case.

Kumar v The State [2016] FJSC 44, CAV0024.2016 (27 October 2016)

For the reasons given in [33] above, I believe that Fiji should follow the path taken in England many years ago, and treat that requirement as no longer representing part of our common law. Accordingly, the fact that the trial judge did not give the assessors that warning does not undermine Kumar's conviction. Having said that, there may be some cases in which the trial judge thinks that a warning of this kind is desirable. That may have something to do with the nature of the child's evidence, or the way it was given, or it may have something to do with the assessors themselves. The trial judge is in the best position to assess that. So although there should no longer be any requirement on trial judges to give a warning of this kind, they may do so if they think that it is appropriate in a particular case.

As has been emphasised by the English Court of Appeal (Criminal Division), a child's evidence should not be presumed less credible by reason of age alone.[12] Child witnesses start off on the basis of equality with every other witness, and as with adults, the reliability and credibility of their evidence must be assessed on a case-by-case basis.

R. v. B. **[2010] EWCA Crim 4**

"*We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence.*"

However, in assessing children's credibility, it is also important to remember that children's evidence must be assessed by reference to criteria appropriate to their age and level of understanding and development, and young children in particular cannot be held to the same exacting standards as an adult. For example,

12 *R. v. B.* [2010] EWCA Crim 4.

inconsistencies in a young child's testimony or inability to recall peripheral details would not have the same weight as similar flaws in the evidence of an adult.

R. v. B.(G.), *[1990] 2 S.C.R. 30 (Supreme Court of Canada)*

"... it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and ***not impose the same exacting standard on them as it does on adults****. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate.* ***While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it****. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but* ***the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children****. [emphasis added]*

R. v. W.(R.), *[1992] 2 S.C.R. 122 (Supreme Court of Canada)*

"The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. ***Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection…***

It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards -- to do so would be to create a new stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose ***credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate.*** *But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying."[emphasis added]*

KEY POINTS TO REMEMBER

- All children are competent witnesses unless the court determines that they are unable to understand questions and give rationale answers.
- If a child is mature enough to understand the nature of an oath, s/he can give sworn evidence.
- If a child, due to immature age, is not able to give evidence under oath, the court can take unsworn evidence, provided the child understands the duty to speak the truth.
- There is no fixed rule at common law or by statute as to the age a child will be presumed to be incompetent to give sworn evidence.
- Where a question arises as to a child's competence, it is good practice to conduct a competency inquiry. However, a competency inquiry is not required in every case where a child is called to give evidence, and the failure to do so is not *per se* fatal to a conviction.
- There is no longer a legal requirement for corroboration of a child witness' testimony (whether sworn or unsworn), or an obligation to give a warning of the danger of convicting an accused on the uncorroborated evidence of a child.
- Children cannot be expected to testify to the same standard as an adult, and their testimony must be assessed by reference to criteria appropriate to his/her mental development, understanding and ability to communicate. Minor inconsistencies and lack of detail are to be expected with children, and should not be as indicative of deceit on the part of the child.

4. SPECIAL ARRANGEMENTS FOR CHILD COMPLAINANTS/WITNESSES

Judicial officers are mandated by the *Constitution* (s.15(9)) to make special arrangements for child witnesses in criminal proceedings. This is in recognition of the fact that the adversarial, adult-oriented court system is challenging for children, and the court must therefore take steps to level the playing field and to minimise secondary victimisation. In *Kumar v The State* [2016] FJSC 44, CAV0024.2016 (27 October 2016), the Supreme Court emphasised that, as critically important as the defendant's right to a fair trial is, the *Constitution* mandates that the best interest of the child be a primary consideration. The court's duty to ensure a fair trial includes both the obligation to ensure the accused has an opportunity for full answer and defence, and also that witnesses have equal access to justice. In considering the latter, the court must consider the particular vulnerabilities of a child witness, and to make reasonable adjustments where necessary to assist the child to give his/her best evidence.

***State v. Cawi** [2018] FJHC 965, HAC124.2016 (19 September 2018)*

With the dramatic increase of child sexual abuse cases in Fiji, a greater number of children are being brought into contact with the criminal justice system. Accompanied by this trend are the legal and psychological dilemmas that such cases pose raising fears that child victims of sex offences will be further harmed by the courts. One of these dilemmas concerns how to prosecute an offender without causing additional trauma to children and without infringing the right to a fair trial of the accused.

There can be no doubt that childhood sexual abuse is often a traumatic experience. Courtrooms are ascetic, formal settings capable of intimidating adults, let alone children. It is common knowledge that testifying can be a traumatic experience even for adult witnesses [The Supreme Court in Kumar v State [2016] FJSC 44; CAV0024.2016 (27 October 2016)]; revisiting the abuse in courtroom testimony adds to that trauma.

The adversarial court system, established with adult defendants and witnesses in mind, does not easily accommodate children's special needs. It is common knowledge that children have particular difficulty with public speaking, especially when the audience is composed of strangers. This is exacerbated when they have to speak about intimate matters of a sexual nature. Children have very little knowledge and understanding of the court process and the knowledge which they do have is seriously flawed by misconceptions. (Cashmore & Bussey, 1990; Pierre-Puysegur, 1985; Saywitz, 1989; Warren-Leubecker et al., 1989)

The court has a duty to ensure that the accused has a fair trial, but also that the child victim has equal access to justice. In considering the latter, the court has a duty to consider the particular vulnerabilities of a child witness.

The *Criminal Procedure Act 2009* (s.296) outlines a number of measures that the court can use to assist a vulnerable witness, including a child, to give evidence. In addition, by virtue of s. 15(9) of the *Constitution*, the courts also have discretion to use other innovative measures to minimise the traumatic effects of the court appearance on the child and to maximise the child's ability to provide accurate testimony, having regard to the accused's right to a fair trial [*State v. Cawi [2018] FJHC 965, HAC124.2016 (19 September 2018)*].

The following are the most common measures used to assist child witnesses to give their best evidence in court:

4.1 Closed Court

Consistently, the factor child witnesses identify as most distressing about the courtroom experience is having to testify in open court. Removing members of the public helps reduce the child's anxiety and discomfort, protects his/her privacy, and also eliminates possible distractions while the child is giving evidence.

Both the *Constitution* (s.15(5)) and the *Criminal Procedure Act 2009* (s.44(2)) give judicial officers broad discretion to conduct closed court proceedings when the interests of justice so require. The *Constitution* specifically provides for exclusion of everyone other than the parties and their legal representatives where necessary for the welfare of children (s. 15(5)(b)).

4.2 Dispensing with Wigs and Robes

Dispensing with formal court attire is one of the simplest measures that can be used to make court proceedings more child-friendly. Wigs and robes can appear very foreign and intimidating, particularly for very young witnesses. Directions on appropriate attire should be given to counsel in advance, and may require a recess preceding the child's testimony so that the presiding officer and counsel can change.

Although not specifically provided for under *the Criminal Procedure Act 2009*, this measure falls within the general authority of the court to adopt procedures to be more child-sensitive pursuant to s. 15(9) of the *Constitution* [*State v. Cawi [2018] FJHC 965, HAC124.2016 (19 September 2018)*].

4.3 Modifications to the Courtroom Layout

Simple adjustments to the courtroom set-up can also help put the child witness at ease and improve the quality of his/her evidence. The witness box can be intimidating for children, and many have difficultly projecting their voices to be heard across the courtroom. The formality of the courtroom can be reduced without compromising the fairness of the trial by making adjustments to the placement of people in the courtroom while the child is giving evidence.

Good Practice Guidance for Modifying Courtroom Layout

- ✓ Have everyone sit at the same level - for example around the counsel table [*State v Nadruguca* [2005] FJHC 31, HAC0030D.2004S (21 February 2005)].
- ✓ Allow the child to sit, rather than stand, when giving evidence.
- ✓ Direct counsel to remain seated when asking questions.
- ✓ Ensure that the child is not sitting near the accused, and that the accused is blocked from the child's view.

4.4 Support Person

Another simple, low-cost strategy to reduce children's stress is to allow them to have a support person accompany them to court and while they testify. Children will generally feel more confident to speak if they have an adult support person sitting next to them when they are being questioned. The physical presence of a familiar adult is an easy and practical way to lessen a child's anxiety and help them focus. However, the support person should not be someone who may be

called as a witnesses, or someone who might influence the child's testimony or make the child feel reluctant or embarrassed to talk about sensitive issues. For these reasons, it is often advisable to use a neutral support person, such as a welfare officer or representative from a victim support NGO, rather than a parent or other family member. In *State v. Cawi [2018] FJHC 965, HAC124.2016 (19 September 2018)*, for example, the court ruled that a support person from the Fiji Women's Crisis Centre be allowed to be seated beside the child witness while she gave evidence.

Good Practice Guidance for Using Support Persons

- ✓ The child should be consulted about whom they would like to accompany them.
- ✓ The support person should not be someone who might influence the child's testimony or make the child feel reluctant or embarrassed to talk about sensitive issues.
- ✓ Consider whether it is preferable to have an independent support person, such as a welfare officer or representative from a victim support NGO rather than a family member.
- ✓ If the support person is not someone known to the child personally, that person should meet with the child privately before the trial to build rapport and make the child feel comfortable.
- ✓ The support person should be allowed to sit next to the child whilst s/he is giving evidence.
- ✓ If the child is testifying via CCTV, the support person should be visible to the court at all times.
- ✓ The support person should be clearly instructed not to speak to the child about his/her evidence, including during any breaks. They may be permitted to communicate with the child for the purposes of providing comfort, but cannot talk about the child's testimony.

4.5 Rapport Building

Judicial officers set the tone in court and can do much to reduce the inhospitable nature of the courtroom environment and to put the child at ease by being personable and introducing the child to the court process.

Where feasible and appropriate, it is good practice to arrange for the child to be brought to chambers so that you can briefly introduce yourself and put him/her at ease before the child proceeds to the courtroom. However, to avoid any perception of bias or impropriety, this must be done with both the prosecutor and defence counsel present. The interaction should be limited to a brief introduction, in no way touching on the child's evidence.

At the beginning of the child's testimony the judicial officer or prosecutor should:

- Start by putting the child at ease with a series of questions concerning their

age, schooling and favourite pastimes. Use open-ended questions that will enable the child to engage in a dialogue, rather than just giving a yes or no answer.

- Explain the importance of telling the truth
- Make it clear that the child can say "I don't know" or "I don't remember", and get the child to "practice" saying so.

Example of Rapport Building and Rules[13]

- My name is Judge ...... and I am in charge here today.
- Are you comfortable on that seat? Do you need some water?
- In the court room with us are some other people. You have probably met one of them before - Mr/Ms .... who is the prosecutor.
- There is another lawyer who will ask you questions later, Mr/Ms ....
- [Child's name], you have come to court today to tell what happened to you / tell what you know about [name of the accused]
- First I want to ask you a few questions. Then I want to talk to you about the rules here in court.
- How old are you? When is your birthday?
- Do you have any brothers or sisters? Tell me about them. How old are they?
- What year are you in at school?
- Do you have a favourite subject at school? Tell me about that.
- Tell me what you do at play time and lunchtime?
- Do you play any sport? Tell me about that.
- Tell me what you like doing when you are not at school?
- Do you have any pets? Tell me about them.
- Now I want to talk to you about being in court. A very important rule is that you tell the truth when you answer questions.
- So, do you understand that it is very important that you tell the truth here?
- Do you understand that it is very important that you do not tell lies here?
- Will you tell the truth here in court?
- Do you promise not to tell lies in court?

[Note: further questioning may be required if the child's competency is in question. **See Chapter 2 above**]

13 Adapted from Australasian Institute of Judicial Adminstration, Bench Book for Children giving Evidence in Australian Courts, 2015.

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Example of Rapport Building and Rules (Cont.)

- If you do not remember the answer, that is ok too. Just say 'I don't remember'.
- So what will you say if you don't remember the answer? [Affirm the response if correct, or provide the correct answer: Just say 'I don't remember'.]
- If you do not understand the question, that ok. Just say 'I don't understand / I don't know what that means.'
- So what will you say if you do not understand a question? [Affirm the response if correct, or provide the correct answer: Just say 'I don't understand / don't know what that means'.]
- Also, you might get tired, or need to go to the toilet. If you do, it's o.k. to say 'Can we stop for a while?' You can say that to me or to ......[support person] in the room with you.

- As we go along, I will try to help you to remember these rules.
- Will you do your best to answer the questions?
- Will you tell the truth in your answers?
- Is there anything you would like to ask me about the court rules?

4.6 Regular Breaks

Children's attention span varies with age but is generally much shorter than adults. Generally younger children (6 to 10 years) can stay focused for no more than 15 to 30 minutes, and older children for 30 to 60 minutes. More and increasingly frequent breaks are likely to be needed during cross-examination because it is more stressful.

It is a good idea to specifically tell children that they can ask for a break if they need one, however most children will not ask even if given permission to do so. Judicial officers should watch for signs that the child's attention is waning, such as squirming or fidgeting, or repeatedly answering "I don't know" or "I don't remember". In addition, judicial officers should also monitor the child's emotional state and take short breaks where necessary to prevent a child becoming overwrought.

4.7 Body Maps, Drawings and other Testimonial Aids

In some cases, the use of drawings, body maps or other testimonial aids may be helpful in assisting a child to give evidence. For example, it is generally not advisable to ask a child complainant to point to their own body when describing a sexual offence. Using a body map (outline drawing of a body) is a simple, low cost measure that will allow the child to indicate where s/he was touched but without the distress of pointing at their own intimate body parts in public.

Body maps are also a useful way to clarify what body part a child means if s/he uses slang terms or an indirect way of referring to intimate anatomy. Some families have their own names for body parts that may not be understood by others. Rather than drawing inferences about what the child means by a particular term, it is good practice to have the child use the body map to indicate what the word means. **See Annex 2.**

Good Practice Guidance for using Body Maps

- ✓ **Annex 2** has a series of body maps of boys and girls at different stages of development. Select the most appropriate body map depending on the child's gender and age. Use the adult body map if the child needs to indicate a part of the perpetrator's body.
- ✓ Discuss the use of the body maps with counsel at the pre-trial conference and ensure that both the prosecutor and defence counsel understand how they are to be used.
- ✓ Ensure that the child has seen the body maps before trial and that the same diagrams have been used by the prosecutor in their pre-trial meeting with the child.
- ✓ When there is a need to clarify a body part during the child's testimony, counsel should show the child the body map and ask him/her to point to the relevant part of the drawing.
    - Example: "You said Joseph touched your dudu. Please show me on this drawing where Joseph touched you."
- ✓ Counsel should indicate verbally, for the record, the body part the child pointed to on the body map. Example: "for the record, your Honour, the child pointed at the left breast".
- ✓ Have the court clerk mark where the child pointed with an "x" and enter the body map into evidence.

4.8 Video-Recorded Evidence

Section 296(1)(a) of the *Criminal Procedure Act 2009* allows the evidence of a vulnerable witness to be admitted in the form of a videotape where a videotape of the evidence was shown at the preliminary hearing. The use of video technology can be useful because it preserves the child's early account of the alleged event before his/her memory fades. This is particularly important where there is a long delay between the alleged offence and trial, and helps ensure that the child's evidence in chief is his/her "best evidence." Using video-recorded interviews as evidence of examination in chief also reduces the amount of time a child spends in the witness box, and the number of times they have to repeat, in detail, a traumatic event.

Good Practice Guidance for Video-Taped Evidence

- ✓ Prior to the video being admitted, it must be reviewed to exclude any content that is inadmissible in accordance with the rules of evidence.
- ✓ Check to ensure that the recording quality (audio and video) is sufficient for the child's evidence to be clearly heard and observed.
- ✓ Ensure that the court staff makes appropriate arrangements to have video equipment available on the day of trial, and that it is tested in advance to ensure both audio and video are working.
- ✓ If the video is admitted into evidence, then the prosecutor should be directed to limit examination-in-chief to some introductory questions and perhaps some follow-up questions after the video recorded interview has been viewed.
- ✓ The video only replaces the child's examination-in-chief, and the child must still be made available for cross-examination.
- ✓ Other measures should be considered to reduce stress during cross-examination, such as having a support person, conducting the cross-examination via CCTV, or using a screen.

4.9 Secure Audio-Visual Link

Section 296(1)(b) of the *Criminal Procedure Act 2009* gives the court discretion to allow a vulnerable witness to give evidence from outside the courtroom and to have it transmitted to the courtroom by means of a secure audio-visual electronic means. Where available, use of video-conferencing via Skype or some other secure video link can significantly reduce the stress of testifying in court and the risk of secondary victimisation. The child witness is "virtually present" in the courtroom; the presiding judge/magistrate, assessors, counsel and the accused can see and hear the child testify, however, the child is spared the trauma of testifying in an open courtroom and having to see the accused. The child could be as close as an adjacent room, or as far away as another country.

Good Practice Guidance for using Secure Audio- Video Link

- ✓ Ensure that court staff have checked the equipment in advance, including the internet connection, as equipment can be prone to glitches and technical problems. It is essential that the equipment is set up and tested in advance (both audio and video), and that a technical support person is present on the day to trouble shoot any problems.
- ✓ Ensure that the child is given a chance to see the remote room and practice using the audio-video equipment before the day of the trial, as part of the pre-trial visit to see the courtroom.
- ✓ The remote room where the child is sitting can be at the courthouse or in any other place, provided it is quiet, private and free from distractions.

Good Practice Guidance for using Secure Audio- Video Link

For example, this could be a vulnerable witness room within the courthouse, a hospital room or the child's home.

- ✓ If there are toys or games in the room to keep the child occupied while s/he waits, ensure that they are put away out of sight whilst the child testifies to avoid distractions (though a young child may be allowed to hold one "comfort" item such as a doll or stuffed animal).
- ✓ Test the camera angle and chair height to ensure that those in the courtroom can clearly see the child's head and shoulders.
- ✓ The child should be accompanied in the remote room by the court clerk. The judicial officer may also allow the child's support person to be present. Cameras should be positioned to ensure that the face of the court clerk and support person can be viewed on camera.
- ✓ Have a screen ready as a back-up, just in case the audio-video system malfunctions.

4.10 Screens or Partitions

The *Criminal Procedure Act 2009*, section 296(1)(c) gives the court discretion to allow a vulnerable witness to give evidence using a screen or one-way glass that blocks the witness' view of the accused. The screen must be positioned to block the child's view of the accused, but allow the child to be seen by the presiding judge or magistrate, assessors, and counsel.

For most child complainants, having to see the accused is one of the most traumatic aspects of giving evidence in court. Screens are a low-cost, flexible measure to reduce this hardship and should be routinely used whenever a child is giving evidence in a courtroom. Screens do not provide the same level of protection as testifying via CCTV, since the child must still testify in the courtroom and in the presence of the accused. However, it is a less costly option that does not require sophisticated equipment, and unlike CCTV equipment, screens are not prone to technical glitches and can be easily moved from one courtroom to another. If the court is not equipped with a purpose-made screen, something readily available such as a white-board can be used.

Good Practice Guidance for using Screens

- ✓ The screen can be positioned either in front of the accused, or in front of the child witness. If the screen is in front of the child, it must be positioned so that the child can be seen by the presiding judge or magistrate, assessors, and counsel.
- ✓ Instruct court staff to set up the screen ahead of time and test it out to ensure optimal placement. The pre-trial court familiarisation visit should be used to adjust the height of the screen or chair to match the size of the child.

Good Practice Guidance for using Screens

- ✓ To ensure that child will not see the accused when walking to the witness box, the child should be brought into the courtroom through the side door, or brought in and placed behind the screen before the accused and other court personnel. This may require the Court to recess and clear the court whilst the child is brought in.
- ✓ The child's support person should be seated next to the child, behind the screen. The presence of a support person reassures children who feel isolated behind a screen.
- ✓ If the child must identify the accused, this should be done at the end of his/her evidence.

4.11 Pre-Recorded Evidence

The *Criminal Procedure Act* s.296(1)(e) allows a child's evidence to be taken in a location outside the courtroom, with the judge or magistrate, the accused, counsel, and such other persons as the judicial officers thinks fit present, and the witnesses' evidence recorded and admitted at trial.

As with other types of commissioned evidence, this requires that arrangements be made for a separate hearing where the child's full evidence (examination, cross-examination and re-examination) is taken, with the judicial officer and parties present, and video-recorded. The video-taped evidence is then played at the trial, in the presence of the judicial officer, assessors and parties to the proceedings, without the child needing to be present.

The use of pre-recorded evidence requires a stronger case management approach and has additional workload implications because it requires all parties to attend an additional hearing at an early date. However, there are a number of advantages to using this approach: [14]

- The child is able to give evidence in a less intimidating environment than the formal courtroom, which reduces stress and increases the quality of the child's evidence;
- It allows the child's evidence to be captured closer to the event when their memory is freshest, and spares them added stress from lengthy delays.
- The child can be given a fixed day and time to give evidence, and is spared long wait-times at the courthouse
- There is a reduced chance of interference or intimidation by supporters of the accused

14 Baverstock, J. (2016) Process evaluation of pre-recorded cross-examination pilot (Section 28). UK Ministry of Justice Analytical Series; Ewin, robert (2018) Video recorded cross-examination or re-examination: a discussion on practice and research. Journal of Applied Psychology and Social Science, 4 (1). 22-38; hanna, K, et. al (2010) Child Witnessses in the New Zealand Criminal Courts: A review of practice and implications for policy; Australasian Institute of Judicial Adminstration, Bench Book for Children giving Evidence in Australian Courts, 2015.

- It can contribute to early resolution (through guilty plea or withdrawal of charges) since whether the child's evidence stands up to scrutiny will be clearer at a much earlier stage.
- It tends to shorten the ultimate trial, since the child's evidence is entered without interruptions or recesses, and the parties are generally better able to narrow down the issues in dispute.

Good Practice Guidance on Pre-Recorded Evidence

✓ Cases where pre-recording may be appropriate should be identified as soon as possible, and an early pre-trial conference scheduled to discuss and decide on appropriate arrangements with counsel, including date, time and location for pre-recording the child's evidence.

✓ The court should set a date for pre-recording the child's testimony as early as possible (ideally within 2-3 months of committal to trial), so that the child's testimony can be captured and recorded whilst his/her memory is at its best, bearing in mind the need to allow sufficient time for:

- the accused to hire a lawyer / secure legal aid;
- full disclosure to the defence; and
- preparation by both parties.

✓ As with commissioned evidence, the hearing to take the child's evidence can be presided over by any judicial officer, and it does not need to be the same judicial officer who conducts the trial.

✓ Since the child's pre-recorded evidence will be admitted and played at trial, there is no need for assessors to be present.

✓ It should be made clear that counsel for both the prosecution and defence appearing at the pre-recorded hearing are expected to continue as counsel in the ultimate trial, and that opportunities to recall the child at the later trial will be limited.

✓ The examination of the child should, where feasible, be done outside the courtroom, in a less formal setting.

✓ Steps should be taken to block the child from seeing the accused, for example by having the accused observe from outside the room using secure audio-video link, or by using a screen to block the child's view of the accused.

✓ Judicial officers conducting the hearing will not be expected to take contemporaneous notes on the proceedings since a video record is being made.

✓ The video record of the child's testimony must be properly labelled and stored securely by the court clerk until the trial date, and must be accessible to counsel for pre-trial preparation.

✓ A transcript of the child's testimony should be made available to the

Good Practice Guidance on Pre-Recorded Evidence

parties well in advance of the trial date. The accused and his or her legal representative are not entitled to a copy of the recording, but must be given reasonable opportunity to view it (more than once, if requested) before the trial date.

✓ In line with the general rules about recalling a witness, a child who has given pre-recorded evidence cannot be called to testify again at trial except with leave of the Court. Leave should only be granted where:

- The party wishing to examine the child further has become aware of a matter, since the recording was made, that they could not with reasonable diligence have known at that time; or
- It is otherwise in the interests of justice to give leave.

✓ Ensure that on the date of trial, arrangements have been made to have video equipment in place to view the recording of the child's testimony, and that it has been tested in advance to ensure both audio and video are working properly.

4.12 Controlling Improper Examination and Cross-Examination

Judicial officers have an obligation to ensure that a trial is fair, including a duty to control questioning and ensure that witness testimony is adduced as effectively and fairly as possible. This requires that the manner, tone, language and duration of questioning be appropriate to the child witness' developmental age and communication abilities. Judicial intervention to prevent inappropriate questioning is an important means by which the court can ensure that questioning is fair and understandable to child witnesses, particularly during cross-examination.

Cross-examination is generally seen by child witnesses as the hardest part of the court process as it is often conducted using complex language, leading questions and in a style which is confronting and intimidating. While it is important that a child's evidence is properly tested, it is also important that over-zealous cross-examination does not intimidate the witness into silence, lead to contradictions in their responses, or produce emotional distress. The contest between lawyer and child is an inherently unequal one, and the right to full answer and defence does not mean that counsel should be given unfettered license to confuse or intimidate a vulnerable young witness. Research has shown that, far from ensuring that the truth is revealed, cross-examination of children often results in inaccuracies in children's evidence through the use of language and questioning techniques that are designed to create inconsistencies and confusion.[15]

15 A Cossins, "Cross Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Oportunity to Confuse?", (2009) 33 Melbourne University Law Review, 68; M Brennan, " The Discourse of Denial: Cross Examining Child Victim Witnesses" (1995) 23 Journal of Pragmatics, 71: R Zajac, and H Hayne, I Don't Think That's What Really Happened: The Effect of Cross - Examination on the Accuracy of Children's Reports"(2003) 9 Journal of Experimental Psychology, 187: R Zajac, J Gross, J and H Hayne, "Asked and Answered: Questioning Children in the Courtroom", (2003) 10 Psychiatry, Psychology and Law, 199.

Being directly cross-examined by the accused can be particularly distressing for children. If an accused does not have a lawyer, judicial officers should insist that a duty solicitor be appointed to represent the accused for the purposes of the cross-examination. If this is not feasible, then the accused should ask questions through the judicial officer and not address the child directly. This is necessary both to protect the child from undue distress, but also to ensure that the accused receives a fair trial and is able to test the child's evidence.

Judicial officers must ensure that the cross-examination of a child is conducted in such a way that there is an appropriate balance between the right of the accused to test the evidence and the right of the child to be treated with respect and dignity. The English Court of Appeal (Criminal Division) has issued a number of decisions on the issue,[16] and has ruled that a trial judge is not only entitled, but also duty bound to control the cross-examination of child witnesses. Whilst the accused is entitled to challenge a child's evidence, the traditional means of cross-examination are not appropriate for children and defence counsel may have to forego many of the "contemporary" techniques that they generally employ. Cross-examination should be conducted through short, simple questions which put the essential elements of the defendant's case to the witness, without unnecessarily prolonging questioning or repeating issues already covered in chief.

R. v Dinc [2017] EWCA Crim 1206

There is nothing inherently unfair in restricting the scope, structure and nature of cross examination and or in requiring questions to be submitted in advance, in any case involving a child witness or a witness who suffers from a mental disability or disorder. The practice has been approved by this court on many occasions; it is the judge's duty to control questioning of any witness and to ensure it is fair both to the witness and the defendant.

Far from prejudicing the defence, it is the experience of many trial judges that the practice ensures that defence advocates ask focussed and often more effective questions of a vulnerable child witness.

R v Wills [2011] EWCA Crim 1938

The importance of the limitation on cross-examination in cases such as this is to protect the vulnerable witnesses and enable them to give the best evidence they can. We do not take the view that it follows that the type of cross-examination permitted means that the questions asked by counsel will be less effective in adducing the necessary evidence for the jury. Some of the most effective cross-examination is conducted without long and complicated questions being posed in a leading or "tagged" manner ... Whilst there was a limitation on the ability of [defence counsel] to put inconsistent statements to the witnesses, as set out in R v B there are ways in which this limitation can be overcome.

First, we consider that in cases where it is necessary and appropriate to have limitations on the way in which the advocate conducts cross-examination, there is a duty on the judge to ensure that those limitations are complied with. This is important to ensure that vulnerable witnesses are able to give the best evidence of which they are capable….

16 R.v. B. [2010] EWCA Crim 4; R v Wills [2011] EWCA Crim 1938; and R. v . J.P [2014] EWCA Crim 2064

Thirdly, this case highlights that, for vulnerable witnesses, the traditional style of cross-examination where comment is made on inconsistencies during cross-examination must be replaced by a system where those inconsistencies can be drawn to the jury at or about the time when the evidence is being given and not, in long or complex cases, for that comment to have to await the closing speeches at the end of the trial. One solution would be for important inconsistencies to be pointed out, after the vulnerable witness has finished giving evidence, either by the advocate or by the judge, after the necessary discussion with the advocates. This was, we think, envisaged by what the Lord Chief Justice said in R v B.

R. v. B. [2010] EWCA Crim 4

"When the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child's credibility. Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources. Notwithstanding some of the difficulties, when all is said and done, the witness whose cross-examination is in contemplation is a child, sometimes very young, and it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well-rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension, and therefore likely to be derived from another source. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence."

In summarising the law on the court's authority to restrict cross-examination of a child, the High Court in Narayan v State [2018] FJHC 790; HAA014.2018 (24 August 2018) emphasised that the practice of having a child witness repeat, in cross-examination, the account given in examination-in-chief to try to elicit inconsistencies is unfair to the witness and has little or no effect on credibility. Judicial officers are entitled to impose limits on cross-examination, and counsel who are properly prepared should be able to conduct a cross-examination that is focused and not unduly lengthy.

Narayan v State [2018] FJHC 790; HAA014.2018 (24 August 2018)

"From the above paragraphs the following key points can be deduced inter alia;

a. *A judge should do his utmost to restrain unnecessary cross-examination;*

b. *It is no part of a defence counsel's duty to embark on lengthy cross-examination on matters which are not really in issue;*

c. *Third parties should not be bandied about by defence counsel unless it is necessary;*

d. *Judges were entitled to impose time limits on cross-examination where it was repetitious and time was being wasted;*

e. *If the defendant (appearing in person) proved unable or unwilling to comply with the instructions, the judge should stop the questioning and take over; if the defendant sought by his dress, bearing, manner or questions to dominate, intimidate or humiliate the witness . . . the judge should order the erection of a screen as well as controlling the questioning. ...*

There is clear difference between questioning on a particular fact a witness alluded to in the examination in chief and requesting the witness to simply repeat his/her evidence*. On the face of it, I could see two reasons a defence counsel would ask a prosecution witness to simply repeat his/her evidence. First, based on the anticipation that the witness would come out with facts different to the previous account given by him/her and the secondly, due to lack of proper preparation to cross-examine the witness...*

All in all, ***as far as testing the credibility of a witness is concerned, getting that witness during cross-examination to repeat the account given by the witness during the examination in chief will have little or no effect on the credibility even if that witness fails to come out with the exact version the second time****....*

Employing this tactic would allow a counsel who had failed to properly prepare for cross-examination to take time with the witness and to simply pick points from what would come out from the witness' mouth. ***Needless to say, such practice is unfair by the relevant witness as well as the accused the counsel is representing, in addition to the wasting of time and the resources of the court. Experience has shown that a counsel who is properly prepared and focused would rarely engage in lengthy cross-examination****....*

Given the above, I find that the Learned Magistrate had not erred by not allowing the defence counsel to have the complainant simply repeat her evidence given during examination in chief and by deciding to regard the answer of the complainant referred to in ground (c) as a denial. The Learned Magistrate had clearly acted within his powers when he restrained the counsel for the appellant in that regard.[emphasis added]

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Good Practice Guidance for Appropriate Questioning of a Child

- ✓ Questions should be asked using simple language appropriate to the child's age and level of development.
- ✓ Questions should be framed using short, simple sentences that convey only one main idea at a time. Unduly long and complicated questions, or unnecessarily repetitious questions should be prohibited.
- ✓ Prohibit irrelevant questions that are designed to intimidate or upset the child.
- ✓ Questions framed in a negative (e.g. "That is not a lie?") should be avoided as these are more difficult for a child to understand. Even older children have difficulty with double and complex negatives (e.g. "It has been suggested to you that when you were raped you didn't say no?" or "I put it to you that he at no time told you not to say anything to anyone").
- ✓ Tag questions (e.g. "Vijay didn't touch you, did he?") are also linguistically too complex for children, and also risk that the child will agree because they find it difficult to disagree with an adult.
- ✓ Questioning should be conducted with minimal use of leading or closed questions. Younger children are vulnerable to suggestive questioning as they may be reluctant to contradict an adult.
- ✓ Questioning should be conducted patiently and without interruption, allowing the child time to consider the question and provide the response. Counsel should not be permitted to ask questions rapidly so as to confuse the child.
- ✓ Questioning should be conducted in a chronological sequence which will reduce the risk of the child becoming confused.
- ✓ All questions should be expressed in a pleasant, clear tone of voice. Prohibit aggressive and intimidating approaches to cross-examination or attempts to intimidate the child by tone of voice, speech rate, emphasis, eye contact, physical gesture and facial expressions (for example, no threatening hand or finger movements, no shouting or raised voice, no badgering, mocking, condescending or sarcastic comments).
- ✓ Cross-examination should be focused and not unduly lengthy, and should not consist of simply asking the child to repeat the account given during examination-in-chief.
- ✓ An unrepresented accused must not be permitted to cross-examine a child directly. Judicial officers should insist that a duty solicitor be appointed to represent the accused for the purposes of the cross-examination, or require that the accused ask questions through the judicial officer and not address the child directly.

KEY POINTS TO REMEMBER

- Judicial officers are mandated by the *Constitution* (s.15(9)) to make special arrangements for child witnesses in criminal proceedings. The court's duty to ensure a fair trial includes making reasonable adjustments where necessary to assist children to give their best evidence.
- Judicial officers should be pro-active in using the special measures available for vulnerable witnesses under section 296 of the *Criminal Procedure Act 2009*.
- Child witnesses can be considered as vulnerable witnesses without specific evidence being led that the child is likely to be unable to testify through fear, or would suffer emotional trauma from testifying in open court.
- Whilst some measures (such as testifying via secure video link or pre-recorded testimony) require special equipment, others can easily be used by all courts (e.g. dispensing with wigs and robes, closing the court to the public, allowing the child a support person, using a screen to block the child's view of the accused).
- Judicial officers should be pro-active in controlling the way children are questioned to ensure that all questions are framed in a way that is appropriate to the child's age and level of development, and in a neutral tone.
- In particular, Judicial officers are not only entitled, but also duty bound to control the cross-examination of child witnesses. Cross-examination should be conducted through short, simple questions which put the essential elements of the defendant's case to the witness, without unnecessarily prolonging questioning or repeating issues already covered in chief.

C. India

i. The Legal Services Authorities Act, 1987*

THE LEGAL SERVICES AUTHORITIES ACT, 1987

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* Source: National Legal Services Authority. The Legal Services Authorities Act, 1987.

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THE LEGAL SERVICES AUTHORITIES ACT, 1987

ACT NO. 39 OF 1987

[11*th October*, 1987.]

An Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity.

BE it enacted by the Parliament in the Thirty-eighth Year of the Republic of India as follows:**—**

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement.—This Act may be called the Legal Services Authorities Act, 1987.

(*2*) It extends to the whole of India, [1]***.

(*3*) It shall come into force on such date[2] as the Central Government may, by notification, appoint; and different dates may be appointed for different provisions of this Act and for different States, and any reference to commencement in any provision of this Act in relation to any State shall be construed as a reference to the commencement of that provision in that State.

2. Definitions.—In this Act, unless the context otherwise requires,**—**

[3][(*a*) "case" includes a suit or any proceeding before a court;

(*aa*) "Central Authority" means the National Legal Services Authority constituted under section3;

(*aaa*) "court" means a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions;]

(*b*) "District Authority" means a District Legal Services Authorityconstituted under section9;

[4][(*bb*) "High Court Legal Services Committee" means a High Court Legal Services Committee constituted under section8A;]

(*c*) "legal service" includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter;

(*d*)"Lok Adalat" means a Lok Adalat organised under Chapter VI;

(*e*) "notification" means a notification published in the Official Gazette;

(*f*) "prescribed" means prescribed by rules made under this Act;

[3][(*ff*) "regulations" means regulations made under this Act;]

(*g*) "scheme" means any scheme framed by the Central Authority, a State Authority or a District Authority for the purpose of giving effect to any of the provisions of this Act;

(*h*) "State Authority" means a State Legal Services Authority constituted under section6;

(*i*) "State Government" includes the administrator of a Union territory appointed by the President under article 239 of the Constitution;

1. The words "except the State of Jammu and Kashmir" omitted by Act 34 of 2019, s. 95 and the Fifth Schedule (w.e.f. 31-10-2019).
2. 9th November, 1995, *vide* notification No. S.O. 893(E), dated 9th November, 1995, *see* Gazette of India, Extraordinary, Part II, sec. 3(*ii*).
3. Subs. by Act 59 of 1994, s. 2, for clause (*a*) (w.e.f. 29-10-1994).
4. Ins. by s. 2, *ibid*. (w.e.f. 29-10-1994).

[1][(*j*) "Supreme Court Legal Services Committee" means the Supreme Court Legal Services Committee constituted under section3A;

(*k*) "Taluk Legal Services Committee" means a Taluk Legal Services Committee constituted under section11A.]

(*2*) Any reference in this Act to any other enactment or any provision thereof shall, in relation to an area in which such enactment or provision is not in force, be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area.

CHAPTER II

THE NATIONAL LEGAL SERVICES AUTHORITY

[2]**[3. Constitution of the National Legal Services Authority.—**(*1*) The Central Government shall constitute a body to be called the National Legal Services Authority to exercise the powers and perform the functions conferred on, or assigned to, the Central Authority under this Act.

(*2*) The Central Authority shall consist of**—**

(*a*) theChief Justice of India who shall be the Patron-in-Chief;

(*b*) a serving or retired Judge of the Supreme Court to be nominated by the President, in consultation with the Chief Justice of India, who shall be the Executive Chairman; and

(*c*) such number of other members, possessing such experience and qualifications, as may be prescribed by the Central Government, to be nominated by that Government in consultation with the Chief Justice of India.

(*3*) The Central Government shall, in consultation with the Chief Justice of India, appoint a person to be the Member-Secretary of the Central Authority, possessing such experience and qualifications as may be prescribed by that Government, to exercise such powers and perform such duties under the Executive Chairman of the Central Authority as may be prescribed by that Government or as may be assigned to him by the Executive Chairman of that Authority.

(*4*) The terms of office and other conditions relating thereto, of members and the Member-Secretary of the Central Authority shall be such as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(*5*) The Central Authority may appoint such number of officers and other employees as may be prescribed by the Central Government, in consultation with the Chief Justice of India, for the efficient discharge of its functions under this Act.

(*6*) The officers and other employees of the Central Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(*7*) The administrative expenses of the Central Authority, including the salaries, allowances and pensions payable to the Member-Secretary, officers and other employees of the Central Authority, shall be defrayed out of the Consolidated Fund of India.

(*8*) All orders and decisions of the Central Authority shall be authenticated by the Member-Secretary or any other officer of the Central Authority duly authorised by the Executive Chairman of that Authority.

(*9*) No act or proceeding of the Central Authority shall be invalid merely on the ground of the existence of any vacancy in, or any defect in the constitution of, the Central Authority.

3A. Supreme Court Legal Services Committee.—(*1*) The Central Authority shall constitute a committee to be called the Supreme Court Legal Services Committee for the purpose of exercising such

1. Ins. by Act 59 of 1994, s. 2 (w.e.f. 29-10-1994).
2. Subs. by s. 3, *ibid*., for section 3 (w.e.f. 29-10-1994).

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powers and performing such functions as may be determined by regulations made by the Central Authority.

(*2*) The Committee shall consist of**—**

(*a*) a sitting Judge of the Supreme Court who shall be the Chairman; and

(*b*) such number of other members possessing such experience and qualifications as may be prescribed by the Central Government,

to be nominated by the Chief Justice of India.

(*3*) The Chief Justice of India shall appoint a person to be the Secretary to the Committee, possessing such experience and qualifications as may be prescribed by the Central Government.

(*4*) The terms of office and other conditions relating thereto, of the members and Secretary of the Committee shall be such as may be determined by regulations made by the Central Authority.

(*5*) The Committee may appoint such number of officers and other employees as may be prescribed by the Central Government, in consultation with the Chief Justice of India, for the efficient discharge of its functions.

(*6*) The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the Central Government in consultation with the Chief Justice of India.]

4. Functions of the Central Authority.—The Central Authority shall [1]*** perform all or any of the following functions, namely:**—**

(*a*) lay down policies and principles for making legal services available under the provisions of this Act;

(*b*) frame the most effective and economical schemes for the purpose of making legal services available under the provisions of this Act;

(*c*) utilise the funds at its disposal and make appropriate allocations of funds to the State Authorities and District Authorities;

(*d*) take necessary steps by way of social justice litigation with regard to consumer protection, environmental protection or any other matter of special concern to the weaker sections of the society and for this purpose, give training to social workers in legal skills;

(*e*) organise legal aid camps, especially in rural areas, slums or labour colonies with the dual purpose of educating the weaker sections of the society as to their rights as well as encouraging the settlement of disputes through LokAdalats;

(*f*) encourage the settlement of disputes by way of negotiations, arbitration and conciliation;

(*g*) undertake and promote research in the field of legal services with special reference to the need for such services among the poor;

(*h*) to do all things necessary for the purpose of ensuring commitment to the fundamental duties of citizens under Part IVA of the Constitution;

(*i*) monitor and evaluate implementation of the legal aid programmes at periodic intervals and provide for independent evaluation of programmes and schemes implemented in whole or in part by funds provided under this Act;

1. The words ", subject to the general directions of the Central Government," omitted by Act of 59 of 1994, s. 4 (w.e.f. 29-10-1994).

[1][(*j*) provide grants-in-aid for specific schemes to various voluntary social service institutions and the State and District Authorities, from out of the amounts placed at its disposal for the implementation of the legal services schemes under the provisions of this Act;]

(*k*) develop, in consultation with the Bar Council of India, programmes for clinical legal education and promote guidance and supervise the establishment and working of legal services clinics in universities, law colleges and other institutions;

(*l*) take appropriate measures for spreading legal literacy and legal awareness amongst the people and, in particular, to educate weaker sections of the society about the rights, benefits and privileges guaranteed by social welfare legislations and other enactments as well as administrative programmes and measures;

(*m*) make special efforts to enlist the support of voluntary social welfare institutions working at the grass-root level, particularly among the Scheduled Castes and the Scheduled Tribes, women and rural and urban labour; and

(*n*) coordinate and monitor the functioning of [2][State Authorities, District Authorities, Supreme Court Legal Services Committee, High Court Legal Services Committees, Taluk Legal Services Committees and voluntary social service institutions] and other legal services organisations and give general directions for the proper implementation of the legal services programmes.

5. Central Authority to work in coordination with other agencies.—In the discharge of its functions under this Act, the Central Authority shall, wherever appropriate, act in coordination with other governmental and non-governmental agencies, universities and others engaged in the work of promoting the cause of legal services to the poor.

CHAPTER III

STATE LEGAL SERVICES AUTHORITY

[3]**[6. Constitution of State Legal Services Authority.—**(*1*) Every State Government shall constitute a body to be called the Legal Services Authority for the State to exercise the powers and perform the functions conferred on, or assigned to, a State Authority under this Act.

(*2*) A State Authority shall consist of**—**

(*a*) the Chief Justice of the High Court who shall be the Patron-in-Chief;

(*b*) a serving or retired Judge of the High Court, to be nominated by the Governor, in consultation with the Chief Justice of the High Court, who shall be the Executive Chairman; and

(*c*) such number of other members, possessing such experience and qualifications as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

(*3*) The State Government shall, in consultation with the Chief Justice of the High Court, appoint a person belonging to the State Higher Judicial Service, not lower in rank than that of a District Judge, as the Member-Secretary of the State Authority, to exercise such powers and perform such duties under the Executive Chairman of the State Authority as may be prescribed by that Government or as may be assigned to him by the Executive Chairman of that Authority.

Provided that a person functioning as Secretary of a State Legal Aid and Advice Board immediately before the date of constitution of the State Authority may be appointed as Member-Secretary of that Authority, even if he is not qualified to be appointed as such under this sub-section, for a period not exceeding five years.

1. Subs. by Act 59 of 1994, s. 4, for clause (*j*) (w.e.f. 29-10-1994).
2. Subs. by s. 4, *ibid*., for "State and District Authorities and other voluntary social welfare institutions" (w.e.f. 29-10-1994).
3. Subs. by s. 5,*ibid.,* for section 6 (w.e.f. 29-10-1994).

(*4*) The terms of office and other conditions relating thereto, of members and the Member-Secretary of the State Authority shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(*5*) The State Authority may appoint such number of officers and other employees as may be prescribed by the State Government, in consultation with the Chief Justice of the High Court, for the efficient discharge of its functions under thisAct.

(*6*) The officers and other employees of the State Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(*7*) The administrative expenses of the State Authority, including the salaries, allowances and pensions payable to the Member-Secretary, officers and other employees of the State Authorityshall be defrayed out of the Consolidated Fund of the State.

(*8*) All orders and decisions of the State Authority shall be authenticated by the Member-Secretary or any other officer of the State Authority duly authorised by the Executive Chairman of the State Authority.

(*9*) No act or proceeding of a State Authority shall be invalid merely on the ground of the existence of any vacancy in, or any defect in the constitution of, the State Authority.]

7. Functions of the State Authority.—(*1*) It shall be the duty of the State Authority to give to effect to the policy and directions of the Central Authority.

(*2*) Without prejudice to the generality of the functions referred to in sub-section(*1*), the State Authority shall perform all or any of the following functions, namely:**—**

(*a*) give legal service to persons who satisfy the criteria laid down under this Act;

(*b*) conduct[1][LokAdalats, including LokAdalats for High Court cases];

(*c*) undertake preventive and strategic legal aid programmes; and

(*d*) perform such other functions as the State Authority may, in consultation with the [2][Central Authority], fix by regulations.

[3]**[8. State Authority to act in coordination with other agencies., etc., and be subject to directions given by the Central Authority**.**—**In the discharge of its functions the State Authority shall appropriately act in coordination with other governmentalagencies, non-governmental voluntary social service institutions, universities and other bodies engaged in the work of promoting the cause of legal services to the poor and shall also be guided by such directions as the Central Authority may give to it in writing.

8A. High Court Legal Services Committee.—(*1*) The State Authority shall constitute a Committee to be called the High Court Legal Services Committee for every High Court, for the purpose of exercising such powers and performing such functions as may be determined by regulations made by the State Authority.

(*2*) The Committee shall consist of**—**

(*a*) a sitting Judge of the High Court who shall be the Chairman; and

(*b*) such number of other members possessing such experience and qualifications as may be determined by regulations made by the State Authority,

to be nominated by the Chief Justice of the High Court.

(*3*) The Chief Justice of the High Court shall appoint a Secretary to the Committee possessing such experience and qualifications as may be prescribed by the State Government.

1. Subs. by Act 59 of 1994, s. 6, for "LokAdalats" (w.e.f. 29-10-1994).
2. Subs. by s. 6, *ibid*., for "Central Government" (w.e.f. 29-10-1994).
3. Subs. by s. 7, *ibid*., for sections 8 and 9 (w.e.f. 29-10-1994).

(*4*) The terms of office and other conditions relating thereto, of the members and Secretary of the Committee shall be such as may be determined by regulations made by the State Authority.

(*5*) The Committee may appoint such number of officers and other employees as may be prescribed by the State Governmentin consultation with the Chief Justice of the High Court for the efficient discharge of its functions.

(*6*) The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of Service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

9. District Legal Services Authority.—(*1*) The State Government shall, in consultation with the Chief Justice of the High Court, constitute a body to be called the District Legal Services Authority for every District in the State to exercise the powers and perform the functions conferred on, or assigned to, the District Authority under this Act.

(*2*) A District Authority shall consist of—

(*a*) the District Judge who shall be its Chairman; and

(*b*) such number of other members, possessing such experience and qualifications, as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

(*3*) The State Authority shall, in consultation with the Chairman of the District Authority, appoint a person belonging to the State Judicial Service not lower in rank than that of a Subordinate Judge or Civil Judge posted at the seat of the DistrictJudiciary as Secretary of the District Authority to exercise such powers and perform such duties under the Chairman of that Committee as may be assigned to him by such Chairman.

(*4*) The terms of office and other conditions relating thereto, of members and Secretary of the District Authority shall be such as may be determined by regulations made by the State Authority in consultation with the Chief Justice of the High Court.

(*5*) The District Authority may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court for the efficient discharge of its functions.

(*6*) The officers and other employees of the District Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(*7*) The administrative expenses of every District Authority, including the salaries, allowances and pensions payable to the Secretary, officers and other employees of the District Authority, shall be defrayed out of the Consolidated Fund of the State.

(*8*) All orders and decisions of the District Authority shall be authenticated by the Secretary or by any other officer of the District Authority duly authorised by the Chairman of that Authority.

(*9*) No act or proceeding of the District Authority shall be invalid merely on the ground of the existence of any vacancy in, or any defect in the constitution of, the District Authority.]

10. Functions of the District Authority.—(*1*) It shall be the duty of every District Authority to perform such of the functions of the State Authority in the District as may be delegated to it from time to time by the State Authority.

(*2*) Without prejudice to the generality of the functions referred to in sub-section (*1*), the District Authority may perform all or any of the following functions, namely:—

[1][(*a*) coordinate the activities of the Taluk Legal Services Committee and other legal services in the District;]

1. Subs. by Act 59 of 1994, s. 8, for clause (*a*) (w.e.f. 29-10-1994).

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(*b*) organize Lok Adalats within the District; and

(*c*) perform such other functions as the State Authority may [1]*** fix by regulations.

11. District Authority to act in coordination with other agencies and be subject to directions given by the Central Authority, etc.—In the discharge of its functions under this Act, the District Authority shall, wherever appropriate, act in coordination with other governmental and non-governmental institutions, universities and others engaged in the work of promoting the cause of legal services to the poor and shall also be guided by such directions as the Central Authority or the State Authority may give to it in writing.

[2]**[11A. Taluk Legal Services Committee.—**(*1*) The State Authority may constitute a Committee, to be called the Taluk Legal Services Committee, for each taluk or mandal or for group of taluks or mandals.

(*2*) The Committee shall consist of**—**

(*a*) The [3][senior-most Judicial Officer] operating within the jurisdiction of the Committee who shall be the *ex officio* Chairman; and

(*b*) such number of other members, possessing such experience and qualifications, as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

(*3*) The Committee may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court for the efficient discharge of its functions.

(*4*) The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(*5*) The administrative expenses of the Committee shall be defrayed out of the District Legal Aid Fund by the District Authority.

11B. Functions of Taluk Legal Services Committee.—The Taluk Legal Services Committee may perform all or any of the following functions, namely:**—**

(*a*) co-ordinate the activities of legal services in the taluk;

(*b*) organize Lok Adalats within the taluk; and

(*c*) perform such other functions as the District Authority may assign to it.]

CHAPTER IV

ENTITLEMENT TO LEGAL SERVICES

12. Criteria for giving legal services.—Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is**—**

(*a*) a member of a Scheduled Caste or Scheduled Tribe;

(*b*) a victim of trafficking in human beings or *begar* as referred to in article 23 of the Constitution;

(*c*) a woman or a child;

[4][(*d*) a person with disability as defined in clause (*i*) of section2 of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);]

1. The words ", in consultation with the State Government," omitted by Act 59 of 1994, s. 8 (w.e.f. 29-10-1994).
2. Ins. by s. 9, *ibid.* (w.e.f. 29-10-1994).
3. Subs. by Act 37 of 2002, s. 2, for "senior Civil Judge" (w.e.f. 11-6-2002).
4. Subs. by Act 1 of 1996, s. 74, for clause (*d*) (w.e.f. 7-2-1996).

(*e*) a person under circumstances of underserved want such as being a victim of a mass disaster, ethnic, violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

(*f*) an industrial workman; or

(*g*) in custody, including custody in a protective home within the meaning of clause (*g*) of section2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956), or in a juvenile home within the meaning of clause (*j*) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986), or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (*g*) of section2 of the Mental Health Act, 1987 (14 of 1987); or

[1][(*h*) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.]

13. Entitlement of legal services.—(*1*) Persons who satisfy all or any of the criteria specified in section 12 shall be entitled to receive legal services provided that the concerned Authority is satisfied that such person has a*prima facie* case to prosecute or to defend.

(*2*) An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the entitlement of legal services under this Act unless the concerned Authority has reason to disbelieve such affidavit.

CHAPTER V

FINANCE, ACCOUNTS AND AUDIT

14. Grants by the Central Government.—The Central Government shall, after due appropriation made by Parliament by law in this behalf, pay to the Central Authority, by way of grants, such sums of money as the Central Government may think fit for being utilised for the purposes of this Act.

15. National Legal Aid Fund.—(*1*) The Central Authority shall establish a fund to be called the National Legal Aid Fund and there shall be credited thereto**—**

(*a*) all sums of money given as grants by the Central Government under section 14;

(*b*) any grants or donations that may be made to the Central Authority by any other person for the purposes of this Act;

(*c*) any amount received by the Central Authority under the orders of any court or from any other source.

(*2*) The National Legal Aid Fund shall be applied for meeting**—**

(*a*) the cost of legal services provided under this Act including grants made to State Authorities;

[2][(*b*) the cost of legal services provided by the Supreme Court Legal Services Committee;

(*c*) any other expenses which are required to be met by the Central Authority.]

16. State Legal Aid Fund.—(*1*) A State Authority shall establish a fund to be called the State Legal Aid Fund and there shall be credited thereto**—**

(*a*) all sums of money paid to it or any grants by the Central Authority for the purposes of this Act;

(*b*) any grants or donations that may be made to the State Authority by the State Government or by any person for the purposes of this Act;

(*c*) any other amount received by the State Authority under the orders of any court or from any other source.

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1. Subs. by Act 59 of 1994, s. 10, for clause (*h*) (w.e.f. 29-10-1994).
2. Subs. by s. 11, *ibid*., for clause (*b*) (w.e.f. 29-10-1994).

(2) A State Legal Aid Fund shall be applied for meeting—

(a) the cost of functions referred to in section 7;

[1][(b) the cost of legal services provided by the High Court Legal Services Committee;

(c) any other expenses which are required to be met by the State Authority.]

17. District Legal Aid Fund.—(1) Every District Authority shall establish a fund to be called the District Legal Aid Fund and there shall be credited thereto—

(a) all sums of money paid or any grants made by the State Authority to the District Authority for the purposes of this Act;

[2][(b) any grants or donations that may be made to the District Authority by any person, with the prior approval of the State Authority, for the purposes of this Act;]

(c) anyother amount received by the District Authority under the orders of any court or from any other source.

(2) A District Legal Aid Fund shall be applied for meeting—

(a) the cost of functions referred to in section 10 [3][and 11B];

(b) any other expenses which are required to be met by the District Authority.

18. Accounts and audit.—(1) The Central Authority, State Authority, or the District Authority (hereinafter referred to in this section as 'the authority'), as the case may be, shall maintain proper accounts and other relevant records and prepare an annual statement of accounts including the income and expenditure account and the balance-sheet in such form and in such manner as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the Authorities shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Authority concerned to the Comptroller and Auditor-General of India.

(3) The Comptroller and Auditor-General of India and any other person appointed by him in connection with the auditing of the accounts of an Authority under this Act shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General of India has in connection with the auditing of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Authorities under this Act.

(4) The accounts of the Authorities, as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon, shall be forwarded annually by the Authorities to the Central Government or the State Governments, as the case may be.

[4][(5) The Central Government shall cause the accounts and the audit report received by it under sub-section (4) to be laid, as soon as may be after they are received, before each House of Parliament.

(6) The State Government shall cause the accounts and the audit report received by it under sub-section (4) to be laid, as soon as may be after they are received, before the State Legislature.]

CHAPTER VI

LOK ADALATS

[5]**[19. Organisation of Lok Adalats.**—(1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be,

1. Subs. by Act 59 of 1994, s. 12, for clause (b) (w.e.f. 29-10-1994).
2. Subs. by s. 13, *ibid*., for clause (b) (w.e.f. 29-10-1994).
3. Ins. by s. 13, *ibid*. (w.e.f. 29-10-1994).
4. Ins. by s. 14, *ibid*. (w.e.f. 29-10-1994).
5. Subs. by s. 15, *ibid*., for sections 19 and 20 (w.e.f. 29-10-1994).

Taluk Legal Services Committee may organize Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.

(*2*) Every Lok Adalat organised for an area shall consist of such number of—

(*a*) serving or retired judicial officers; and

(*b*) other persons,

of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee, or as the case may be, the Taluk Legal Services Committee, organising such Lok Adalat.

(*3*) The experience and qualifications of other persons referred to in clause (*b*) of sub-section (*2*) for Lok Adalats organised by the Supreme Court Legal Services Committee shall be such as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(*4*) The experience and qualifications of other persons referred to in clause (*b*) of sub-section (*2*) for Lok Adalats other than referred to in sub-section (*3*) shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(*5*) A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of—

(*i*) any case pending before; or

(*ii*) any matter which is falling within the jurisdiction of, and is not brought before,

any Court for which the Lok Adalat is organised:

Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

20. Cognizance of cases by Lok Adalats.—(*1*) Where in any case referred to in clause (*i*) of sub-section (*5*) of section 19,—

(*i*)(*a*) the parties thereof agree; or

(*b*) one of the parties thereof makes an application to the Court,

for referring the case to the Lok Adalat for settlement and if such court is*prima facie* satisfied that there are chances of such settlement; or

(*ii*) thecourt is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat,

the Court shall refer the case to the Lok Adalat:

Provided that no case shall be referred to the Lok Adalat under sub-clause (*b*) of clause (*i*) or clause (*ii*) by such court except after giving a reasonable opportunity of being heard to the parties.

(*2*) Notwithstanding anything contained in any cither law for the time being in force, the Authority or Committee organising the Lok Adalat under sub-section (*1*) of section19 may, on receipt of an application from any one of the parties to any matter referred to in clause (*ii*) of sub-section (*5*) of section 19 that such matter needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat, for determination:

Provided that no matter shall be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.

(*3*) Where any case is referred to a Lok Adalat under sub-section (*1*) or where a reference has been made to it under sub-section (*2*), the Lok Adalat shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.

(*4*) Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles.

(*5*) Where no award is made by the Lok Adalat on the ground that no compromise or settlementcould be arrived at between the parties, the record of the case shall be returned by it to the court, from which the reference has been received under sub-section (*1*) for disposal in accordance with law.

(*6*) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, in a matter referred to in sub-section (*2*), that Lok Adalat shall advice the parties to seek remedy in a court.

(*7*) Where the record of the case if returned under sub-section (*5*) to the court, such court shall proceed to deal with such case from the stage which was reached before such reference under sub-section (*1*).]

21. Award of Lok Adalat.—[1][(*1*) Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section(*1*) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court-fees Act, 1870 (7 of 1870).]

(*2*) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.

22. Powers of [2][Lok Adalat or Permanent Lok Adalat.]—(*1*) The [2][Lok Adalat or Permanent Lok Adalat] shall, for the purposes of holding any determination under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely:**—**

(*a*) the summoning and enforcing the attendance of any witness and examining him on oath;

(*b*) the discovery and production of any document;

(*c*) the reception of evidence on affidavits;

(*d*) the requisitioning of any public record or document or copy of such record or document from any court or office; and

(*e*) such other matters as may be prescribed.

(*2*) Without prejudice to the generality of the powers contained in sub-section (*1*), every [2][Lok Adalat or Permanent Lok Adalat] shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it.

(*3*) All proceedings before a [2][Lok Adalat or Permanent Lok Adalat] shall be deemed to be judicial proceedings within the meaning of sections 193,219 and 228 of the Indian Penal Code (45 of 1860) and every [2][Lok Adalat or Permanent Lok Adalat] shall be deemed to be a Civil Court for the purpose of section195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

[3][CHAPTER VIA

PRE-LITIGATION CONCILIATION AND SETTLEMENT

22A. Definitions.—In this Chapter and for the purposes of sections 22 and 23, unless the context otherwise requires,**—**

(*a*) "Permanent Lok Adalat" means a Permanent Lok Adalat established under sub-section (*1*) of section22B;

1. Subs. by Act 59 of 1994, s. 16, for sub-section (*1*) (w.e.f. 29-10-1994),
2. Subs. by Act 37 of 2002, s. 3, for "Lok Adalat" (w.e.f. 11-6-2002).
3. Ins. by s. 4, *ibid*. (w.e.f. 11-6-2002).

(*b*) "public utility service" means any**—**

(*i*) transport service for the carriage of passengers or goods by air, road or water; or

(*ii*) postal, telegraph or telephone service; or

(*iii*) supply of power, light or water to the public by any establishment; or

(*iv*) system of public conservancy or sanitation; or

(*v*) service in hospital or dispensary; or

(*vi*)insurance service,

and includes any service which the Central Government or the State Government, as the case may be, in the public interest, by notification, declare to be a public utility service for the purposes of this Chapter.

22B. Establishment of Permanent Lok Adalats.—(*1*) Notwithstanding anything contained in section19, the Central Authority or, as the case may be, every State Authority shall, by notification, establish Permanent Lok Adalats at such places and for exercising such jurisdiction in respect of one or more public utility services and for such areas as may be specified in the notification.

(*2*) Every Permanent Lok Adalat established for an area notified under sub-section (*1*) shall consist of**—**

(*a*) a person who is, or has been, a district judge or additional district judge or has held judicial office higher in rank than that of a district judge, shall be the Chairman of the Permanent Lok Adalat; and

(*b*) two other persons having adequate experience in public utility service to be nominated by the Central Government or, as the case may be, the State Government on the recommendation of the Central Authority or, as the case may be, the State Authority,

appointed by the Central Authority or, as the case may be, the State Authority, establishing such Permanent Lok Adalat and the other terms and conditions of the appointment of the Chairman and other persons referred to in clause (*b*) shall be such as may be prescribed by the Central Government.

22C. Cognizance of cases by Permanent Lok Adalat.—(*1*) Any party to a dispute may, before the dispute is brought before any court, make an application to the Permanent Lok Adalat for the settlement of dispute:

Provided that the Permanent Lok Adalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law:

Provided further that the Permanent Lok Adalat shall also not have jurisdiction in the matter where the value of the property in dispute exceeds ten lakh rupees:

Provided also that the Central Government, may by notification, increase the limit often lakh rupees specified in the second proviso in consultation with the Central Authority.

(*2*) After an application is made under sub-section(*1*) to the Permanent Lok Adalat, no party to that application shall invoke jurisdiction of any court in the same dispute.

(*3*) Where an application is made to a Permanent Lok Adalat under sub-section(*1*), it**—**

(*a*) shall direct each party to the application to file before it a written statement, stating therein the facts and nature of dispute under the application, points or issues in such dispute and grounds relied in support of, or in opposition to, such points or issues, as the case may be, and such party may supplement such statement with any document and other evidence which such party deems appropriate in proof of such facts and grounds and shall send a copy of such statement together with a copy of such document and other evidence, if any, to each of the parties to the application;

(*b*) may require any party to the application to file additional statement before it at any stage of the conciliation proceedings;

(*c*) shall communicate any document or statement received by it from any party to the application to the other party, to enable such other party to present reply thereto.

(*4*) When statement, additional statement and reply, if any, have been filed under sub-section(*3*), to the satisfaction of the Permanent Lok Adalat, it shall conduct conciliation proceedings between the parties to the application in such manner as it thinks appropriate taking into account the circumstances of the dispute.

(*5*) The Permanent Lok Adalat shall, during conduct of conciliation proceedings under sub-section(*4*), assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.

(*6*) It shall be the duty of the every party to the application to cooperate in good faith with the Permanent Lok Adalat in conciliation of the dispute relating to the application and to comply with the direction of the Permanent Lok Adalat to produce evidence and other related documents before it.

(*7*) When a Permanent Lok Adalat, in the aforesaid conciliation proceedings, is of opinion that there exist elements of settlement in such proceedings which may be acceptable to the parties, it may formulate the terms of a possible settlement of the dispute and give to the parties concerned for their observations and in case the parties reach at an agreement on the settlement of the dispute, they shall sign the settlement agreement and the Permanent Lok Adalat shall pass an award in terms thereof and furnish a copy of the same to each of the parties concerned.

(*8*) Where the parties fail to reach at an agreement under sub-section (*7*), the Permanent Lok Adalat shall, if the dispute does not relate to any offence, decide the dispute.

22D. Procedure of Permanent Lok Adalat.**—**The Permanent Lok Adalat shall, while conducting conciliation proceedings or deciding a dispute on merit under this Act, be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice, and shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) and the Indian Evidence Act, 1872 (1 of 1872).

22E. Award of Permanent Lok Adalat to be final.—(*1*) Every award of the Permanent Lok Adalat under this Act made either on merit or in terms of a settlement agreement shall be final and binding on all the parties thereto and on persons claiming under them.

(*2*) Every award of the Permanent Lok Adalat under this Act shall be deemed to be a decree of a civil court.

(*3*) The award made by the Permanent Lok Adalat under this Act shall be by a majority of the persons constituting the Permanent Lok Adalat.

(*4*) Every award made by the Permanent Lok Adalat under this Act shall be final and shall not be called in question in any original suit, application or execution proceeding.

(*5*) The Permanent Lok Adalat may transmit any award made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.]

CHAPTER VII

MISCELLANEOUS

[1]**[23. Members and staff of Authorities, Committees and Lok Adalats to be public servants.—** The members including Member-Secretary or, as the case may be, Secretary of the Central Authority, the State Authority, the District Authorities, the Supreme Court Legal Services Committee, High Court Legal Services Committees, Taluk Legal Services Committees and officers and other employees of such Authorities, Committees and the [2][members of the Lok Adalats or the persons constituting Permanent Lok Adalats] shall be deemed to be public servants within the meaning of section21 of the Indian Penal Code (45 of 1860).

1. Subs. by Act 59 of 1994, s. 17, for sections 23 and 24 (w.e.f. 29-10-1994),
2. Subs. by Act 37 of 2002, s. 5, for "members of the LokAdalats" (w.e.f. 11-6-2002).

24. Protection of action taken in good faith.—No suit, prosecution or other legal proceeding shall lie against**—**

(*a*) the Central Government or State Government;

(*b*) the Patron-in-Chief, Executive Chairman, members of, Member-Secretary or officers or other employees of the Central Authority;

(*c*) Patron-in-Chief, Executive Chairman, member, Member-Secretary or officers or other employees of the State Authority;

(*d*) Chairman, Secretary, members or officers or other employees of the Supreme Court Legal Services Committee, High Court Legal Services Committees, Taluk Legal Services Committees or the District Authority; or

(*e*) any other person authorised by any of the Patron-in-Chief, Executive Chairman, Chairman, Member, Member-Secretary referred to in sub-clauses (*b*) to (*d*),

for anything which is in good faith done or intended to be done under the provisions of this Act or any rule or regulation made thereunder.]

25. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of law other than this Act.

26. Power to remove difficulties.—(*1*) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date on which this Act receives the assent of the President.

(*2*) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

[1]**[27. Power of Central Government to make rules.—**(*1*) The Central Government in consultation with the Chief Justice of India may, by notification, make rules to carry out the provisions of this Act.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) the number, experience and qualifications of other members of the Central Authority under clause (*c*) of sub-section(*2*) of section3;

(*b*) the experience and qualifications of the Member-Secretary of the Central Authority and his powers and functions under sub-section(*3*) of section3;

(*c*) the terms of office and other conditions relating thereto, of members and Member-Secretary of the Central Authority under sub-section(*4*) of section 3;

(*d*) the number of officers and other employees of the Central Authority under sub-section(*5*) of section3;

(*e*) the conditions of service and the salary and allowances of officers and other employees of the Central Authority under sub-section(*6*) of section3;

(*f*) the number, experience and qualifications of members of the Supreme Court Legal Services Committee under clause (*b*) of sub-section(*2*) of section 3A;

(*g*) the experience and qualifications of Secretary of the Supreme Court Legal Services Committee under sub-section(*3*) of section3A;

1. Subs. by Act 59 of 1994, s. 18, for sections 27, 28 and 29 (w.e.f. 29-10-1994).

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(*h*) the number of officers and other employees of the Supreme Court Legal Services Committee under sub-section(*5*) of section 3A and the conditions of service and the salary and allowances payable to them under sub-section(*6*) of that section;

(*i*) the upper limit of annual income of a person entitling him to legal services under clause (*h*) of section12, if the case is before the Supreme Court;

(*j*) the manner in which the accounts of the Central Authority, the State Authority or the District Authority shall be maintained under section18;

(*k*) the experience and qualifications of other persons of the LokAdalatsorganised by the Supreme Court Legal Services Committee specified in sub-section(*3*) of section19;

(*l*) other matters under clause (*e*) of sub-section(*1*) of section22;

[1][(*la*) the other terms and conditions of appointment of the Chairman and other persons under sub-section (*2*) of section 22B;]

(*m*) any other matter which is to be, or may be, prescribed.

28. Power of State Government to make rules.—(*1*)The State Government in consultation with the Chief Justice of the High Court may, by notification, make rules to carry out the provisions of this Act.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) the number, experience and qualifications of other members of the State Authority under clause (*c*) of sub-section(*2*) of section6;

(*b*) the powers and functions of the Member-Secretary of the State Authority under sub-section(*3*) of section6;

(*c*) the terms of office and other conditions relating thereto, of members and Member-Secretary of the State Authority under sub-section(*4*) of section6;

(*d*) the number of officers and other employees of the State Authority under sub-section(*5*) of section6;

(*e*) the conditions of service and the salary and allowances of officers and other employees of the State Authority under sub-section(*6*) of section6;

(*f*) the experience and qualifications of Secretary of the High Court Legal Services Committee under sub-section(*3*) of section 8A;

(*g*) the number of officers and other employees of the High Court Legal Services Committee under sub-section(*5*) of section 8A and the conditions of service and the salary and allowances payable to them under sub-section(*6*) of that section;

(*h*) the number, experience and qualifications of members of the District Authority under clause (*b*) of sub-section(*2*) of section9;

(*i*) the number of officers and other employees of the District Authority under sub-section(*5*) of section9;

(*j*) the conditions of service and the salary and allowances of the officers and other employees of the District Authority under sub-section(*6*) of section9;

(*k*) the number, experience and qualifications of members of the Taluk Legal Services Committee under clause (*b*) of sub-section(*2*) of section 11A;

(*l*) the number of officers and other employees of the Taluk Legal Services Committee under sub-section(*3*) of section 11A;

1. Ins. by Act 37 of 2002, s. 6 (w.e.f. 11-6-2002).

(*m*) the conditions of service and the salary and allowances of officers and other employees of the Taluk Legal Services Committee under sub-section(*4*) of section 11A;

(*n*) the upper limit of annual income of a person entitling him to legal services under clause (*h*) of section12, if the case is before a court, other than the Supreme Court;

(*o*) the experience and qualifications of other persons of the LokAdalats other than referred to in sub-section(*4*) of section19;

(*p*) any other matter which is to be, or may be, prescribed.

29. Power of Central Authority to make regulations.—(*1*) The Central Authority may, by notification, make regulations not inconsistent with the provisions of this Act and the rules made thereunder, to provide for all matters for which provisions is necessary or expedient for the purposes of giving effect to the provisions of this Act.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:**—**

(*a*) the powers and functions of the Supreme Court Legal Services Committee under sub-section(*1*) of section3A;

(*b*) the terms of office and other conditions relating thereto, of the members and Secretary of the Supreme Court Legal Services Committee under sub-section(*4*) of section3A.

29A. Power of State Authority to make regulations.—(*1*) The State Authority may, by notification, make regulations not inconsistent with the provisions of this Act and the rules made thereunder, to provide for all matters for which provision in necessary or expedient for the purposes of giving effect to the provisions of this Act.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:**—**

(*a*) the other functions to be performed by the State Authority under clause (*d*) of sub-section(*2*) of section7;

(*b*) the powers and functions of the High Court Legal Services Committee under sub-section(*1*) of section8A;

(*c*) the number, experience and qualifications of members of the High Court Legal Services Committee under clause (*b*) of sub-section(*2*) of section8A;

(*d*) the terms of office and other conditions relating thereto, of the members and Secretary of the High Court Legal Services Committee under sub-section(*4*) of section8A;

(*e*) the term of office and other conditions relating thereto, of the members and Secretary of the District Authority under sub-section(*4*) of section9;

(*f*) the number, experience and qualifications of members of the High Court Legal Services Committee under clause (*b*) of sub-section(*2*) of section 8A;

(*g*) other functions to be performed by the District Authority under clause (*c*) of sub-section(*2*) of section10;

(*h*) the term of office and other conditions relating thereto, of members and Secretary of the Taluk Legal Services Committee under sub-section(*3*) of section 11A.]

30. Laying of rules and regulations.—(*1*) Every rule made under this Act by the Central Government and every regulation made by the Central Authority thereunder shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation, or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of

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no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

(*2*) Every rule made under this Act by a State Government and every regulation made by a State Authority thereunder shall be laid, as soon as may be after it is made, before the State Legislature.

ii. Protection of Women from Domestic Violence Act, 2005

रजिस्ट्री सं० डी० एल०—(एन)04/0007/2003—05 REGISTERED NO. DL—(N)04/0007/2003—05

भारत का राजपत्र

The Gazette of India

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PART II — Section 1

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इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके।

Separate paging is given to this Part in order that it may be filed as a separate compilation.

MINISTRY OF LAW AND JUSTICE

(Legislative Department)

New Delhi, the 14*th September,* 2005/*Bhadra* 23, 1927 *(Saka)*

The following Act of Parliament received the assent of the President on the 13th September, 2005, and is hereby published for general information:—

THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

No. 43 OF 2005

[13*th September*, 2005.]

An Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Fifty-sixth Year of the Republic of India as follows:–

CHAPTER I

PRELIMINARY

Short title, extent and commencement.

1. (*1*) This Act may be called the Protection of Women from Domestic Violence Act, 2005.

(*2*) It extends to the whole of India except the State of Jammu and Kashmir.

(*3*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Definitions.

2. In this Act, unless the context otherwise requires,—

(*a*) "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

(*b*) "child" means any person below the age of eighteen years and includes any adopted, step or foster child;

(*c*) "compensation order" means an order granted in terms of section 22;

(*d*) "custody order" means an order granted in terms of section 21;

(*e*) "domestic incident report" means a report made in the prescribed form on receipt of a complaint of domestic violence from an aggrieved person;

(*f*) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

(*g*) "domestic violence" has the same meaning as assigned to it in section 3;

(*h*) "dowry" shall have the same meaning as assigned to it in section 2 of the Dowry Prohibition Act, 1961; 28 of 1961.

(*i*) "Magistrate" means the Judicial Magistrate of the first class, or as the case may be, the Metropolitan Magistrate, exercising jurisdiction under the Code of Criminal Procedure, 1973 in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place; 2 of 1974.

(*j*) "medical facility" means such facility as may be notified by the State Government to be a medical facility for the purposes of this Act;

(*k*) "monetary relief" means the compensation which the Magistrate may order the respondent to pay to the aggrieved person, at any stage during the hearing of an application seeking any relief under this Act, to meet the expenses incurred and the losses suffered by the aggrieved person as a result of the domestic violence;

(*l*) "notification" means a notification published in the Official Gazette and the expression "notified" shall be construed accordingly;

(*m*) "prescribed" means prescribed by rules made under this Act;

(*n*) "Protection Officer" means an officer appointed by the State Government under sub-section (*1*) of section 8;

(*o*) "protection order" means an order made in terms of section 18;

(*p*) "residence order" means an order granted in terms of sub-section (*1*) of section 19;

(*q*) "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:

Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner;

(*r*) "service provider" means an entity registered under sub-section (*1*) of section 10;

(*s*) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household;

(*t*) "shelter home" means any shelter home as may be notified by the State Government to be a shelter home for the purposes of this Act.

CHAPTER II

DOMESTIC VIOLENCE

Definition of domestic violence.

3. For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it —

(*a*) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(*b*) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(*c*) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (*a*) or clause (*b*); or

(*d*) otherwise injures or causes harm, whether physical or mental, to the aggrigved person.

Explanation I.—For the purposes of this section,—

(*i*) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(*ii*) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;

(*iii*) "verbal and emotional abuse" includes—

(*a*) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(*b*) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(*iv*) "economic abuse" includes—

(*a*) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved persón requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, *stridhan*, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(*b*) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her *stridhan* or any other property jointly or separately held by the aggrieved person; and

(*c*) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.—For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.

CHAPTER III

POWERS AND DUTIES OF PROTECTION OFFICERS, SERVICE PROVIDERS, ETC.

Information to Protection Officer and exclusion of liability of informant.

4. (*1*) Any person who has reason to believe that an act of domestic violence has been, or is being, or is likely to be committed, may give information about it to the concerned Protection Officer.

(*2*) No liability, civil or criminal, shall be incurred by any person for giving in good faith of information for the purpose of sub-section (*1*).

Duties of police officers, service providers and Magistrate.

5. A police officer, Protection Officer, service provider or Magistrate who has received a complaint of domestic violence or is otherwise present at the place of an incident of domestic violence or when the incident of domestic violence is reported to him, shall inform the aggrieved person—

(*a*) of her right to make an application for obtaining a relief by way of a protection order, an order for monetary relief, a custody order, a residence order, a compensation order or more than one such order under this Act;

(*b*) of the availability of services of service providers;

(*c*) of the availability of services of the Protection Officers;

(*d*) of her right to free legal services under the Legal Services Authorities Act, 1987; 39 of 1987.

(*e*) of her right to file a complaint under section 498A of the Indian Penal Code, wherever relevant: 45 of 1860.

Provided that nothing in this Act shall be construed in any manner as to relieve a police officer from his duty to proceed in accordance with law upon receipt of information as to the commission of a cognizable offence.

Duties of shelter homes.

6. If an aggrieved person or on her behalf a Protection Officer or a service provider requests the person in charge of a shelter home to provide shelter to her, such person in charge of the shelter home shall provide shelter to the aggrieved person in the shelter home.

Duties of medical facilities.

7. If an aggrieved person or, on her behalf a Protection Officer or a service provider requests the person in charge of a medical facility to provide any medical aid to her, such person in charge of the medical facility shall provide medical aid to the aggrieved person in the medical facility.

Appointment of Protection Officers.

8. (*1*) The State Government shall, by notification, appoint such number of Protection Officers in each district as it may consider necessary and shall also notify the area or areas within which a Protection Officer shall exercise the powers and perform the duties conferred on him by or under this Act.

(*2*) The Protection Officers shall as far as possible be women and shall possess such qualifications and experience as may be prescribed.

(*3*) The terms and conditions of service of the Protection Officer and the other officers subordinate to him shall be such as may be prescribed.

Duties and functions of Protection Officers.

9. (*1*) It shall be the duty of the Protection Officer—

(*a*) to assist the Magistrate in the discharge of his functions under this Act;

(*b*) to make a domestic incident report to the Magistrate, in such form and in such manner as may be prescribed, upon receipt of a complaint of domestic violence and forward copies thereof to the police officer in charge of the police station within the local limits of whose jurisdiction domestic violence is alleged to have been committed and to the service providers in that area;

(*c*) to make an application in such form and in such manner as may be prescribed to the Magistrate, if the aggrieved person so desires, claiming relief for issuance of a protection order;

(*d*) to ensure that the aggrieved person is provided legal aid under the Legal Services Authorities Act, 1987 and make available free of cost the prescribed form in which a complaint is to be made; 39 of 1987.

(*e*) to maintain a list of all service providers providing legal aid or counselling, shelter homes and medical facilities in a local area within the jurisdiction of the Magistrate;

(*f*) to make available a safe shelter home, if the aggrieved person so requires and forward a copy of his report of having lodged the aggrieved person in a shelter home to the police station and the Magistrate having jurisdiction in the area where the shelter home is situated;

(*g*) to get the aggrieved person medically examined, if she has sustained bodily injuries and forward a copy of the medical report to the police station and the Magistrate having jurisdiction in the area where the domestic violence is alleged to have been taken place;

(*h*) to ensure that the order for monetary relief under section 20 is complied with and executed, in accordance with the procedure prescribed under the Code of Criminal Procedure, 1973; 2 of 1974.

(*i*) to perform such other duties as may be prescribed.

(*2*) The Protection Officer shall be under the control and supervision of the Magistrate, and shall perform the duties imposed on him by the Magistrate and the Government by, or under, this Act.

Service providers.

10. (*1*) Subject to such rules as may be made in this behalf, any voluntary association registered under the Societies Registration Act, 1860 or a company registered under the Companies Act, 1956 or any other law for the time being in force with the objective of protecting the rights and interests of women by any lawful means including providing of legal aid, medical, financial or other assistance shall register itself with the State Government as a service provider for the purposes of this Act. 21 of 1860. 1 of 1956.

(*2*) A service provider registered under sub-section (*1*) shall have the power to—

(*a*) record the domestic incident report in the prescribed form if the aggrieved person so desires and forward a copy thereof to the Magistrate and the Protection Officer having jurisdiction in the area where the domestic violence took place;

(*b*) get the aggrieved person medically examined and forward a copy of the medical report to the Protection Officer and the police station within the local limits of which the domestic violence took place;

(*c*) ensure that the aggrieved person is provided shelter in a shelter home, if she so requires and forward a report of the lodging of the aggrieved person in the shelter home to the police station within the local limits of which the domestic violence took place.

(*3*) No suit, prosecution or other legal proceeding shall lie against any service provider or any member of the service provider who is, or who is deemed to be, acting or purporting to act under this Act, for anything which is in good faith done or intended to be done in the exercise of powers or discharge of functions under this Act towards the prevention of the commission of domestic violence.

Duties of Government.

11. The Central Government and every State Government, shall take all measures to ensure that—

(*a*) the provisions of this Act are given wide publicity through public media including the television, radio and the print media at regular intervals;

(*b*) the Central Government and State Government officers including the police officers and the members of the judicial services are given periodic sensitization and awareness training on the issues addressed by this Act;

(*c*) effective co-ordination between the services provided by concerned Ministries and Departments dealing with law, home affairs including law and order, health and human resources to address issues of domestic violence is established and periodical review of the same is conducted;

(*d*) protocols for the various Ministries concerned with the delivery of services to women under this Act including the courts are prepared and put in place.

CHAPTER IV

PROCEDURE FOR OBTAINING ORDERS OF RELIEFS

Application to Magistrate.

12. (*1*) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:

Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(*2*) The relief sought for under sub-section (*1*) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:

Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

5 of 1908.

(*3*) Every application under sub-section (*1*) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(*4*) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.

(*5*) The Magistrate shall endeavour to dispose of every application made under sub-section (*1*) within a period of sixty days from the date of its first hearing.

Service of notice.

13. (*1*) A notice of the date of hearing fixed under section 12 shall be given by the Magistrate to the Protection Officer, who shall get it served by such means as may be prescribed on the respondent, and on any other person, as directed by the Magistrate within a maximum period of two days or such further reasonable time as may be allowed by the Magistrate from the date of its receipt.

(*2*) A declaration of service of notice made by the Protection Officer in such form as may be prescribed shall be the proof that such notice was served upon the respondent and on any other person as directed by the Magistrate unless the contrary is proved.

Counselling.

14. (*1*) The Magistrate may, at any stage of the proceedings under this Act, direct the respondent or the aggrieved person, either singly or jointly, to undergo counselling with any member of a service provider who possess such qualifications and experience in counselling as may be prescribed.

(*2*) Where the Magistrate has issued any direction under sub-section (*1*), he shall fix the next date of hearing of the case within a period not exceeding two months.

Assistance of welfare expert.

15. In any proceeding under this Act, the Magistrate may secure the services of such person, preferably a woman, whether related to the aggrieved person or not, including a person engaged in promoting family welfare as he thinks fit, for the purpose of assisting him in discharging his functions.

Proceedings to be held *in camera*.

16. If the Magistrate considers that the circumstances of the case so warrant, and if either party to the proceedings so desires, he may conduct the proceedings under this Act *in camera*.

Right to reside in a shared household.

17. (*1*) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

(*2*) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

Protection orders.

18. The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being *prima facie* satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from—

(*a*) committing any act of domestic violence;

(*b*) aiding or abetting in the commission of acts of domestic violence;

(*c*) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;

(*d*) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;

(*e*) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her *stridhan* or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;

(*f*) causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence;

(*g*) committing any other act as specified in the protection order.

Residence orders.

19. (*1*) While disposing of an application under sub-section (*1*) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order —

(*a*) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(*b*) directing the respondent to remove himself from the shared household;

(*c*) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;

(*d*) restraining the respondent from alienating or disposing off the shared household or encumbering the same;

(*e*) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

(*f*) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (*b*) shall be passed against any person who is a woman.

(*2*) The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person.

(*3*) The Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence.

(*4*) An order under sub-section (*3*) shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 and shall be dealt with accordingly. 2 of 1974.

(*5*) While passing an order under sub-section (*1*), sub-section (*2*) or sub-section (*3*), the court may also pass an order directing the officer in charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order.

(*6*) While making an order under sub-section (*1*), the Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties.

(*7*) The Magistrate may direct the officer in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order.

(*8*) The Magistrate may direct the respondent to return to the possession of the aggrieved person her *stridhan* or any other property or valuable security to which she is entitled to.

Monetary reliefs.

20. (*1*) While disposing of an application under sub-section (*1*) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but not limited to,—

(*a*) the loss of earnings;

(*b*) the medical expenses;

(*c*) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(*d*) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 or any other law for the time being in force. 2 of 1974.

(*2*) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(*3*) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

(*4*) The Magistrate shall send a copy of the order for monetary relief made under sub-section (*1*) to the parties to the application and to the in charge of the police station within the local limits of whose jurisdiction the respondent resides.

(*5*) The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (*1*).

(*6*) Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (*1*), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

Custody orders.

21. Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent:

Provided that if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.

Compensation orders.

22. In addition to other reliefs as may be granted under this Act, the Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.

Power to grant interim and *ex parte* orders.

23. (*1*) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

(*2*) If the Magistrate is satisfied that an application *prima facie* discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an *ex parte* order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.

Court to give copies of order free of cost.

24. The Magistrate shall, in all cases where he has passed any order under this Act, order that a copy of such order, shall be given free of cost, to the parties to the application, the police officer in-charge of the police station in the jurisdiction of which the Magistrate has been approached, and any service provider located within the local limits of the jurisdiction of the court and if any service provider has registered a domestic incident report, to that service provider.

Duration and alteration of orders.

25. (*1*) A protection order made under section 18 shall be in force till the aggrieved person applies for discharge.

(*2*) If the Magistrate, on receipt of an application from the aggrieved person or the respondent, is satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order made under this Act, he may, for reasons to be recorded in writing pass such order, as he may deem appropriate.

Relief in other suits and legal proceedings.

26. (*1*) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(*2*) Any relief referred to in sub-section (*1*) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(*3*) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

Jurisdiction.

27. (*1*) The court of Judicial Magistrate of the first class or the Metropolitan Magistrate, as the case may be, within the local limits of which—

(*a*) the person aggrieved permanently or temporarily resides or carries on business or is employed; or

(*b*) the respondent resides or carries on business or is employed; or

(*c*) the cause of action has arisen,

shall be the competent court to grant a protection order and other orders under this Act and to try offences under this Act.

(*2*) Any order made under this Act shall be enforceable throughout India.

Procedure.

28. (*1*) Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973. 2 of 1974.

(*2*) Nothing in sub-section (*1*) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (*2*) of section 23.

Appeal.

29. There shall lie an appeal to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later.

CHAPTER V

MISCELLANEOUS

Protection Officers and members of service providers to be public servants.

30. The Protection Officers and members of service providers, while acting or purporting to act in pursuance of any of the provisions of this Act or any rules or orders made thereunder shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code. 45 of 1860.

Penalty for breach of protection order by respondent.

31. (*1*) A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

(*2*) The offence under sub-section (*1*) shall as far as practicable be tried by the Magistrate who had passed the order, the breach of which has been alleged to have been caused by the accused.

(*3*) While framing charges under sub-section (*1*), the Magistrate may also frame charges under section 498A of the Indian Penal Code or any other provision of that Code or the Dowry Prohibition Act, 1961, as the case may be, if the facts disclose the commission of an offence under those provisions. 45 of 1860. 28 of 1961.

Cognizance and proof.

32. (*1*) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offence under sub-section (*1*) of section 31 shall be cognizable and non-bailable. 2 of 1974.

(*2*) Upon the sole testimony of the aggrieved person, the court may conclude that an offence under sub-section (*1*) of section 31 has been committed by the accused.

33. If any Protection Officer fails or refuses to discharge his duties as directed by the Magistrate in the protection order without any sufficient cause, he shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

Penalty for not discharging duty by Protection Officer.

34. No prosecution or other legal proceeding shall lie against the Protection Officer unless a complaint is filed with the previous sanction of the State Government or an officer authorised by it in this behalf.

Cognizance of offence committed by Protection Officer.

35. No suit, prosecution or other legal proceeding shall lie against the Protection Officer for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act or any rule or order made thereunder.

Protection of action taken in good faith.

36. The provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force.

Act not in derogation of any other law.

37. (*1*) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

Power of Central Government to make rules.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) the qualifications and experience which a Protection Officer shall possess under sub-section (*2*) of section 8;

(*b*) the terms and conditions of service of the Protection Officers and the other officers subordinate to him, under sub-section (*3*) of section 8;

(*c*) the form and manner in which a domestic incident report may be made under clause (*b*) of sub-section (*1*) of section 9;

(*d*) the form and the manner in which an application for protection order may be made to the Magistrate under clause (*c*) of sub-section (*1*) of section 9;

(*e*) the form in which a complaint is to be filed under clause (*d*) of sub-section (*1*) of section 9;

(*f*) the other duties to be performed by the Protection Officer under clause (*i*) of sub-section (*1*) of section 9;

(*g*) the rules regulating registration of service providers under sub-section (*1*) of section 10;

(*h*) the form in which an application under sub-section (*1*) of section 12 seeking reliefs under this Act may be made and the particulars which such application shall contain under sub-section (*3*) of that section;

(*i*) the means of serving notices under sub-section (*1*) of section 13;

(*j*) the form of declaration of service of notice to be made by the Protection Officer under sub-section (*2*) of section 13;

(*k*) the qualifications and experience in counselling which a member of the service provider shall possess under sub-section (*1*) of section 14;

(*l*) the form in which an affidavit may be filed by the aggrieved person under sub-section (*2*) of section 23;

(*m*) any other matter which has to be, or may be, prescribed.

(*3*) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

BRAHM AVTAR AGRAWAL,
Addl. Secretary to the Govt. of India.

D. Indonesia

i. Anti-Sexual Violence Law, 2022

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LAW OF THE REPUBLIC OF INDONESIA

NUMBER 12 OF 2022

REGARDING

SEXUAL VIOLENCE

BY THE GRACE OF GOD THE ALMIGHTY

PRESIDENT OF THE REPUBLIC OF INDONESIA,

Noting :

a. that every person has the right to receive protection from violence and to be free from abuse or degrading treatment as guaranteed under the 1945 Constitution of the Republic of Indonesia;

b. that sexual violence is a violation of the values set forth by God and a violation of humanity, and disrupts peace and public security;

c. that legislations that relate to sexual violence has not been effective in terms of rendering prevention, protection, access to justice, and restitution, and do work towards providing the needs of the victim of sexual violence, and is not comprehensive in setting forth procedural rules;

d. based upon the considerations referred to in Point a, Point b, and Point c, a Law on Sexual Violence needs to be enacted;

Recalling : Article 20, Article 21, and Article 28G paragraph (2) of the 1945 Constitution of the Republic of Indonesia;

Upon the joint approval of the

HOUSE OF REPRESENTATIVES OF THE REPUBLIC OF INDONESIA

and

THE PRESIDENT OF THE REPUBLIC OF INDONESIA

IT IS HEREBY DETERMINED:

Affirmation of : LAW ON SEXUAL VIOLENCE

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CHAPTER I

GENERAL PROVISIONS

Article 1

In this Law:

1. Crime of Sexual Violence is any act that meet the elements of the crime as provided under the present Law and any other act of sexual violence that is provided under the law, insofar that it is determined as such under this Law.
2. Person is any individual person or corporation.
3. Corporate Entity is a group of organized persons and/or assets, whether or not incorporated as a legal entity.
4. Victim is any person incurring physical or mental suffering, economic loss, and/or adverse social situation caused by Sexual Violence.
5. Child is any person not having reached the age of 18 (eighteen) years, including a child still in the womb.
6. Witness is a person able to provide their statement for the purpose of an investigation, prosecution, and trial regarding a Crime of Sexual Violence that such person directly heard, saw, and experience, including any person who is able to provide a statement relating to a case of Sexual Violence despite not having personally heard, seen and experienced provided that the person's statement relates to the Crime of Sexual Violence.
7. Family [consists of] persons having consanguineous relationship line either vertically or horizontally up to the third degree, persons related through marriage, or persons who the dependents of the Witness and/or Victim.
8. Person With Disability is any person who has physical, intellectual, mental, and/or sensory impairment for a prolonged duration, and experiences impediments in interacting with their surroundings and difficulties in [interacting] fully and effectively with other members of society on an equal rights basis.
9. Society [comprises] individual persons, families, social organization, and/or civil society organizations, including community-led institutional service providers.
10. Witness and Victim Protection Agency, hereinafter referred to as LPSK, is an agency having the task of providing, and the authority to provide, protection and other rights to Witnesses and/or Victims as mandated by the law on witness and victim protection.

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11. Regional Technical Implementing Unit for the Protection of Women and Children, hereinafter referred to as UPTD PPA (Unit Pelaksana Teknis Daerah Perlindungan Perempuan dan Anak), is a technical operational implementing unit which administrates governmental affairs in the empowerment of women and protection of children, having the function of providing integrated services to women and children experiencing violence, discrimination and other issues.
12. Community-Led Institutional Service Provider is a community institution with the status of legal entity providing service to Victims, Family of Victims, and/or Witnesses of Sexual Violence.
13. Integrated Service is a service delivered in an integrated, multi-dimensional, cross-functional and cross-sectoral manner to Victims, Family of Victims, and/or Witnesses of Sexual Violence.
14. Support Person is a trusted person having the necessary competence to accompany the Victim in accessing their rights to care, protection and recovery.
15. Prevention is any measure or endeavor undertaken to eliminate various factors that may cause the occurrence of Sexual Violence and the repeated commission of such crime.
16. Rights of the Victim are the rights to care, protection, and recovery that are received, used and enjoyed by the Victim.
17. Care is measure undertaken to provide complaint service, healthcare service, social rehabilitation, law enforcement, repatriation, and social reintegration.
18. Protection is any measures fulfill rights and provide assistance in order to bring sense of safety to the Witnesses and/or Victims that must be undertaken by the LPSK or other agencies in accordance with the requirements of the law.
19. Recovery is any measure to restore the physical, mental, spiritual, and social condition of the Victim.
20. Restitution is the payment of damages imposed on the offender or a third party by virtue of a court order or judgement having permanent legal force, as compensation of the tangible and/or intangible harm suffered by the Victim or their inheritors.
21. Victim Assistance Fund is a state managed compensation funds paid to Victims of Sexual Violence.

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22. Rehabilitation is measures directed towards the Victim and offender for the purpose of recovery from physical, mental and social impairments in order to regain normal ability to play their role, as an individual, member of their Family or within Society.
23. National Government is the President of the Republic of Indonesia holding governmental powers of the Republic of Indonesia, assisted by the Vice President and ministers, as mandated by the 1945 Constitution of the Republic of Indonesia.
24. Subnational Government is the head of regional government as the implementer of regional governance, heading the administration of government affairs that fall within the authority of the autonomous regions.
25. Minister is the minister administrating government affairs in the empowerment of women and duty of the government to provide child protection.

Article 2

Provisions regarding the crime of sexual violence is based upon the principles of:

a. respect of human dignity and honor;
b. non-discrimination;
c. best interest of the victim;
d. justice;
e. benefit; and
f. legal certainty.

Article 3

Subject matter of the provisions of the Law on the Crime of Sexual Violence are intended towards:

a. preventing all forms of sexual violence;
b. provide care, protection and recovery to Victims;
c. facilitating enforcement of the law and rehabilitation of the offender;
d. creating an environment free of sexual violence; and
e. ensuring that sexual violence is not repeated.

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CHAPTER II

CRIME OF SEXUAL VIOLENCE

Article 4

(1) Crime of Sexual Violence takes the form of:

a. non-physical sexual violence;
b. physical sexual violence;
c. forced use of contraceptives;
d. forced sterilization;
e. forced marriage;
f. sexual abuse;
g. sexual exploitation;
h. sexual slavery; and
i. electronic based sexual violence.

(2) In addition to the acts of Sexual Violence as referred to in paragraph (1), Crime of Sexual Violence also covers:

a. rape;
b. acts of indecency;
c. sexual intercourse with a Child, indecent act committed against a Child, and/or sexual exploitation of a Child;
d. violation of moralistic values against the will of the Victim;
e. pornography involving a Child or pornography that contains explicit violence and sexual exploitation;
f. forced prostitution;
g. trafficking in persons for the purpose of sexual exploitation;
h. sexual violence within the household;
i. money laundering with the predicate crime being a crime of Sexual Violence; and
j. other crimes expressly defined as Sexual Violence in the legislations.

Article 5

Any person committing a non-physical sexual [harassment] directed towards the body, sexual [orientation], and/or reproductive organ with the intention of degrading and humiliating a person based on their sexuality and/or moral values may be convicted of non-physical sexual

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[harassment] and sentenced to serve a minimum prison term of 9 (nine) years and/or pay a fine in the maximum amount of IDR 10,000,000 (ten million rupiah).

Article 6

Subject to punishment on charge of physical sexual abuse are:

a. any person committing physical sexual abuse directed towards the body, sexual desire, and/or reproductive organs with the intention of degrading and humiliating a person based on their sexuality and/or moral values that are not covered by other criminal provisions imposing a more severe sentence, by maximum prison term of 4 (four) years and/or a maximum fine of IDR 50,000,000 (fifty million rupiah).
b. any person committing physical sexual abuse directed towards the body, sexual desire, and/or reproductive organs with the intention of unlawfully causing another person to be under their control, whether in or outside a marriage, by maximum prison term of 12 (twelve) years and/or a maximum fine of IDR 300,000,000 (three hundred million rupiah);
c. any person abusing their position, authority, trust, or charisma through fraud or relationship arising from a given circumstances or the taking advantage of a position of vulnerability, inequality or a person's dependence, forcing or through fraud causing another person to commit or allow the commission of sexual intercourse or indecent acts with that or another person, by maximum prison term of 12 (twelve) years and/or a maximum fine of IDR 300,000,000 (three hundred million rupiah).

Article 7

(1) Non-physical sexual violence as referred to in Article 5 and physical sexual violence as referred to in Article 6 point a constitute complaint-based offense.
(2) The provisions set forth in paragraph (1) do not apply to victims who are Persons With Disability or Children.

Article 8

Any person enforcing the application of contraceptives on another person by use or threat of violence, abuse of power, fraud, deceit, causing or taking advantage of incapacitation that may result in the temporary loss of their reproductive functions, may be convicted of enforced use of contraceptive and sentenced to a maximum prison term of 5 (five) years and/or a maximum fine of IDR 50,000,000.00 (fifty million rupiah).

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Article 9

Any person enforcing the application of contraceptives on another person by use or threat of violence, abuse of power, fraud, deceit, causing or taking advantage of incapacitation that may result in the permanent loss of their reproductive functions, may be convicted of enforced sterilization and sentenced to a maximum prison term of 9 (nine) years and/or a maximum fine of IDR 200,000,000.00 (two hundred million rupiah).

Article 10

(1) Any person unlawfully enforcing or placing a person under their control or the control of another person, or abusing their power to conduct or allow the conduct of marriage with themselves or with another person, may be convicted of forced marriage and sentenced to a maximum prison term of 9 (nine) years and/or a maximum fine of IDR 200,000,000.00 (two hundred million rupiah).

(2) The definition of forced marriage as provided under paragraph (1) includes:

a. child marriage;

b. forced marriage in the name of cultural practice; or

c. forced marriage of a rape Victim with their rapist.

Article 11

Any [public] official or person acting in their capacity as a [government] official, or any person acting under the instruction or with the knowledge of a public official, committing sexual violence against a person with the purpose of:

a. intimidation to obtain information or admission from such person or a third party;

b. persecution or imposition of punishment for a suspected or committed act; and/or

c. humiliation or degradation on the basis of discrimination and/or sexual reasons in all their forms,

may be sentenced to a maximum prison term of 12 (twelve) years and/or a maximum fine of IDR 300,000,000.00 (three hundred million rupiah).

Article12

Any person by use or threat of violence or abuse of position, power, trust, charisma fraud or relationship arising from a given circumstances or the taking advantage of a [person's] situation of vulnerability, inequality, powerlessness, dependence, debt bondage, or by the giving of

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payment or benefit for the purpose of gaining profit, or exploiting sexual or other body organs of such person, with the purpose of sexual gratification with such person or other person, may be imposed with a minimum prison sentence of 15 (fifteen) years and/or a fine in the maximum amount of IDR 1,000,000,000.00 (one billion rupiah).

Article 13

Any Person who unlawfully places a person under their control or the control of another person and cause such person to become powerless with the purpose of exploiting them sexually, may be convicted of sexual slavery and sentenced to a maximum prison term of 15 (fifteen) years and/or a maximum fine of IDR 1,000,000,000.00 (one billion rupiah).

Article 14

(1) Any Person who unrightfully:
  a. make a recording and/or capture an image or screenshot of a sexual content againt the will or without the consent of the person who is the object of the recording or image or screenshot;
  b. transmit electronic information and/or document of a sexual content against the will of the recipient for the purpose of obtaining sexual gratification; and/or
  c. using an electronic system stalk and/or track a person who is the object of the electronic information/ document for sexual purposes,

  may be convicted of electronic sexual violence and sentenced to a maximum prison term of 4 (four) years and/or a maximum fine of IDR 200,000,000.00 (two hundred million rupiah).

(2) If the act as described in paragraph (1) is committed with the intention of :
  a. extorting or threatening or coercing; or
  b. misleading or deceiving,

  a person for the purpose of [causing] such person to commit, allow the commission of, or omit to undertake an act, [such offense] is punishable by a minimum prison term of 6 (six) years and/or a maximum fine of IDR 300,000,000.00 (three hundred million rupiah).

(3) Electronic sexual violence as referred to in paragraph (1) constitute complaint-based offense (delik aduan), except where the Victim is a Child or a Person With Disability.

(4) In the event the act as described in paragraph (1) point a and point b is committed in the name of public interest or in defense of such person against sexual violence, then such act shall not be punishable.

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(5) In the event the Victim of the electronic sexual violence provided under paragraph (1) point a and point b is a Child or Person With Disability, willingness or consent of the Victim does not preclude criminal charges.

Article 15

(1) The sentences as described in Article 5, Article 6, Article 8 to Article 14 are added by 1/3 (one-third) if [the offense]:
   a. is committed within the Family;
   b. is committed by a healthcare personnel, medical personel, educator, education worker, or other professionals mandated with the task of providing care, protection, and recovery;
   c. is committed by a staff member, manager or officer to whom a person has been entrusted or placed for safeguarding;
   d. is committed by a public official, employer, supervisor, or manager against a person working with or for them;
   e. is committed on more than 1 (one) occasion or against more than 1 (one) person;
   f. is committed by 2 (two) or more persons acting in complicity;
   g. is committed against a Child;
   h. is committed against a Person With Disability;
   i. is committed against a pregnant woman;
   j. is committed against an unconscious or powerless person;
   k. is committed a person during a situation of emergency, danger, conflict, disaster, or war;
   l. is committed using electronic means;
   m. causes the Victim to sustain severe injuries, suffer severe psychological harm, or contract a transmittable disease;
   n. causes failure of and/or damage to reproductive functions; and/or
   o. results in the death of the victim.

(2) The adding of 1/3 (one-third) to the sentence as provided under paragraph (1) point 1 does not apply to Article 14.

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Article 16

(1) In addition to the prison term, fine, or other form of sentence prescribed by law, the Court must determine Restitution in cases where the charge of Sexual Violence carry a prison term of 4 (four) years or higher.

(2) With regard to the provision of paragraph (1), the court may impose the additional sentence of:

a. revocation of custody right or guardianship;

b. announcement of the offender's identity; and/or

c. seizure of profit and/or assets required from the commission of the Sexual Violence offense.

(3) Provisions on the imposition of additional sentence as provided under article (2) do not apply to capital punishment and life sentence.

(4) Additional sentences as described in paragraph (2) are to be stated in the text of the court judgement.

Article 17

(1) In addition to criminal sentence, a Sexual Violence offender may be ordered to undergo Rehabilitation.

(2) Rehabilitation as referred to in paragraph (1) includes:

a. medical rehabilitation; and

b. social rehabilitation.

(3) Rehabilitation as referred to in paragraph (2) is performed under the coordination of the public prosecutor and the periodic supervision of the minister in charge of government affairs in social affairs sector and the minister in charge of government affairs in the health sector.

Article 18

(1) A Corporate Entity committing a crime of Sexual Violence as defined in this Law shall be sentenced to pay a fine in the minimum amount of IDR5,000,000,000.00 (five billion rupiah) and a maximum amount of IDR15,000,000,000.00 (fifteen billion rupiah).

(2) Where a crime of Sexual Violence is committed by a Corporate Entity, criminal sentence may be imposed on the board members, instructing person, controlling person, beneficiaries of the Corporate Entity, and/or the Corporate Entity.

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(3) In addition to a fine, the court shall also determine the amount of Restitution [to be paid by] the corporate offender.

(4) A Corporate Entity may also be imposed with the following supplemental sentences:

a. seizure of profit and/or assets gained from a Sexual Violence offense;

b. revocation of certain licenses;

c. announcement of the court judgement;

d. perpetual ban from undertaking certain acts;

e. ceasing of all or parts of the Corporation Entity's operations;

f. dissolution of the Corporate Entity.

CHAPTER III

OTHER CRIMINAL OFFENSES RELATING TO THE CRIME OF SEXUAL VIOLENCE

Article 19

Any person knowingly preventing, obstructing, or undermining an investigation, prosecution, and/or examination at a trial of a suspect, defendant, or Witness in a Sexual Violence case shall be sentenced to maximum prison term of 5 (five) years.

CHAPTER IV

INVESTIGATION, PROSECUTION AND COURT EXAMINATION

Part One

General

Article 20

Investigation, prosecution, and trial of Sexual Violence cases are conducted pursuant to the law governing criminal procedure, including that which applies specifically to the prosecution of Sexual Violence cases, except as otherwise provided under the present Law.

Article 21

(1) Investigators, prosecutors and judges assigned to Sexual Violence cases must meet the following requirements:

a. possesses integrity and competency to handle cases that feature a human rights perspective and which are Victim [oriented];

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b. has undergone training on the handling of Sexual Violence cases.

(2) If no investigator, prosecutor or judge are able to meet the requirements set forth in paragraph (1), the Sexual Violence case is to be handled by investigators, prosecutors or judges having experience in handling Sexual Violence cases, to be determined based on decision affirmed by the relevant authorized officials.

(3) The decision as referred to in paragraph (2) is affirmed pursuant to the following conditions:

a. investigators [are assigned] by the Chief of the Indonesia National Police or another official [delegated with such authority];

b. prosecutors [are assigned] by the Attorney General or another official [delegated with such authority];

c. judges [are assigned] by the Chief Justice of the Supreme Court or another official [delegated with such authority].

Article 22

In examining the Witness / Victim / suspect / defendant, the investigator, prosecutor and judge shall respect the human rights, honor, and dignity of the Victim and shall not justify the wrongdoing, shall not victimize with regard to the lifestyle and moral values [of the victim] including their sexual history, by asking leading questions or questions that cause trauma for the Victim or which is irrelevant to the Sexual Violence offense.

Article 23

Sexual Violence offenses cannot be resolved outside a court proceeding, except where it involves a Child offender pursuant to the applicable laws.

Part Two
Evidence

Article 24

(1) Valid evidence that can be presented to substantiate charges in Sexual Violence cases consist of:

a. evidence as described in the criminal procedural code;

b. other evidence in the form of electronic information and/or documents as determined under the prevailing legislations; and

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c. [items] used in the perpetration of the offense or resulting from the Sexual Violence offense and/or objects or articles relating to such offense.

(2) Included as admissible Witness testimony are the result of examination performed on the Witness and/or Victim during the investigation collected through electronic recording.

(3) Included as evidentiary documents are:

a. certificate issued by a clinical psychologist and/or psychiatrist/mental specialist;

b. medical records;

c. result of forensic examination; and/or

d. result of analysis of bank statements.

Article 25

(1) Witness and/or Victim statement is sufficient to prove that the defendant is guilty if accompanied by another valid evidence and the judge is convinced of the perpetration of a criminal offense and that the defendant is the person who committed the offense.

(2) The family of the defendant may give testimony as Witnesses under oath, without requiring the consent of the defendant.

(3) In the case where witness testimony can only be obtained from the Victim, witness testimony not obtained under oath, or obtained from another [indirect] person, the evidentiary powers of such testimony may be supported by statement given by:

a. a person able to provide a statement relating to the Sexual Violence case, despite not having personally heard, seen or experienced, insofar as such statement relates to the criminal offense;

b. a witness whose statements can be considered by itself but is related [with the other statements] such that it can substantiate an occurrence or condition and such statement can be used as valid evidence whether as a witness statement or a lead; and/or

c. an expert issuing evidentiary document and/or expert corroborating the criminal allegations.

(4) Statement from a Witness and/or Victim with disability shall have evidentiary strength equal to a statement from a Witness and/or victim who do not have disability.

(5) Witness and/or Victim statement as described in paragraph (4) must be corroborated by a personal assessment as required by the applicable regulatory instrument regarding adequate accommodation for Persons With Disability during court proceedings.

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Part Three

Support Person of Victim and Witness

Article 26

(1) Victim may be accompanied by a Support Person at every stage of the examination during the court proceedings.

(2) Support Person of the Victim may be:

a. LPSK staff;

b. UPTD PPA staff;

c. healthcare personnel;

d. psychologist;

e. social worker;

f. social welfare worker;

g. psychiatrist;

h. legal counsel, including lawyers and paralegals;

i. staff member from a community-led institutional service provider; and

j. other support persons

(3) A Support Person must meet the following qualifications:

a. possesses competency to provide care to Victims with a human rights perspective and in a gender-sensitive manner; and

b. has undergone training on handling cases of Sexual Violence.

(4) Support Person shall be as far as possible be of the same sex as the Victim.

Article 27

(1) A Witness and/or Victim with disability may be accompanied by the parent or guardian as designated by a court order, and/or a Support Person.

(2) The provision of the above paragraph (1) does not apply in the event the parent and/or guardian of the Victim or Witness has been named suspect or defendant in the case being examined.

Article 28

A Support Person is entitled to legal protection while during their support to the Victim and Witness at every level of the examination.

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Article 29

A Support Person as referred to in Article 26 in providing Care to the Victim cannot be held liable under criminal or civil law with regard to the support or service provided, except where such support or service are provided in bad faith.

Part Four

Restitution

Article 30

(1) A Victim of Sexual Violence is entitled to Restitution and Recovery services.

(2) Restitution as referred to in paragraph (1) may be in the form of:

a. compensation for loss of property or income;

b. compensation for suffering directly caused by the Sexual Violence;

c. reimbursement of cost of medical and/or psychological care; and/or

d. compensation for other losses suffered by the Victim as a result of the Sexual Violence.

Article 31

(1) The investigator, prosecutor and judges are obligated to inform the Victim and LPSK [staff] regarding the right to restitution.

(2) Restitution may be deposited in advance with the registrar's office of the district court at which the case is being examined.

(3) The investigator may seize the assets of a Sexual Violence offender as guarantee for Restitution based upon the consent of the relevant district court.

(4) Seizure of asset as referred to in paragraph (3) shall be executed with due consideration of the right of third parties acting in good faith.

Article 32

Restitution as referred to in Article 31 paragraph (2) is returned to the offender in the event:

a. the case ceases to be prosecuted due to lack of evidence or is found to not [involve] a criminal offense; and/or

b. based upon a court judgment having acquired permanent legal force, the defendant is declared free or released from any criminal charges.

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Article 33

(1) Restitution is disbursed within no later than 30 (thirty) days from the copy of the judgement or determination of the court being received.

(2) The Prosecutor delivers a copy of the court judgment stipulating the order of Restitution as referred to in paragraph (1) to the convicted offender, Victim, and LPSK [staff] within a period of 7 (seven) days from the receipt of the copy of court judgment.

(3) In the event Restitution is not paid to the Victim by the lapse of period as prescribed in paragraph (1), the Victim or their inheritors shall inform the court of such condition.

(4) The court as referred to in paragraph (3) issues a written notice to the Restitution payer to immediately pay Restitution to the Victim or their inheritors.

(5) The judge makes an order in the court judgement for the prosecutor to auction off the Restitution guarantee insofar as no payment Restitution has been made by the lapse of a 30 (thirty) day period following the court order acquiring permanent legal force.

(6) In the event the Restitution deposited in advance as provided in Article 31 paragraph (2) and the assets of the convicted offender being auctioned as provided under paragraph (5) exceeds the Restitution amount ordered or determined by the court, the prosecutor must return the excess amount to the offender.

(7) In the event the asset of the offender that has been seized pursuant to paragraph (5) is not sufficient to cover the Restitution amount, the convicted offender shall be sentenced to serve substituting jail time that shall not exceed the principal sentence as prescribed by the law.

(8) If the convicted offender as referred to in paragraph (7) is a Corporate Entity, closure of its place of business or business operation shall be effected for a maximum period of 1 (one) year.

(9) Service of a substituting prison sentence as provided under paragraph (7) and paragraph (8) shall be carried out by taking into account the amount of Restitution paid in a proportionate manner.

Article 34

The Prosecutor prepares a report on payment of Restitution and deliver the same to:

a. the Victim and family of the Victim;

b. the investigator; and

c. the court.

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Article 35

(1) In the event the seized assets of the convicted offender is not sufficient to cover the Restitution obligation as referred to in Article 33 paragraph (7), the State shall cover the shortfall in Restitution and pay the same to the Victim based upon a court order.

(2) Compensation as referred to in paragraph (1) is paid through the Victim Assistance Fund.

(3) The Victim Assistance Fund as referred to in paragraph (2) may be sourced from philanthropy, contribution from the community and individuals, corporate social and environmental responsibility, and other legitimate and non-binding sources as well as the State Budget in accordance with the prevailing legislations.

(4) The source, purpose and use of the Victim Assistance Fund as referred to in paragraph (2) are to be provided under a Government Regulation.

Article 36

(1) With regard to a case being halted in the name of public interest or halted by operation of the law, if the Restitution seized or deposited is in the form of goods, a ruling shall be requested from the Chairperson of the District Court for the same to be auctioned.

(2) In the event the case is halted in the name of public interest, the request for a court ruling as provided under paragraph (1) is to be filed by the Attorney General.

(3) In the event the case is halted by operation of the law during the investigation phase, the request for a ruling as referred to in paragraph (1) is to be filed by the prosecutor.

(4) In the event the case is halted by operation of the law during the prosecution phase, the request for ruling as referred to in paragraph (1) is to be filed by the prosecutor.

(5) The auction as provided under paragraph (1) is executed by the officer relevant to the current stage of the case proceeding.

(6) Where an auction has been performed by the official as referred to in paragraph (5), proceeds from the auction is to be used to pay Restitution with due consideration of the assessment performed by the LPSK.

Article 37

Where the offender is Child, Restitution is provided by the parent or guardian.

Article 38

Provisions regarding the procedure to claim for Restitution are set forth in the applicable legislations.

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Part Five

Reporting

Article 39

(1) The Victim or person having knowledge of, seen, and/or witnessed the event constituting Sexual Violence files a report to the UPTD PPA, the technical implementing unit and the subnational technical implementing unit in charge of social affairs, a Community-Led Institutional Service Provider, and/or the police, at the location of the Victim or at the location where offense occurred.

(2) A medical or healthcare personnel must notify the UPTD PPA, the technical implementing unit and the subnational technical implementing unit in charge of social affairs, a Community-Led Institutional Service Provider, and/or the police upon finding indications of Sexual Violence.

Article 40

The UPTD PPA, technical implementing unit and the subnational technical implementing unit in charge of social affairs, and/or Community-Led Institutional Service Provider receiving a report as referred to in Article 39 paragraph (1) must provide support and Integrated Services needed by the Victim.

Article 41

(1) The UPTD PPA, technical implementing unit and subnational technical implementing unit in charge of social affairs, and/or Community-Led Institutional Service Provider must:

 a. receive the report in a special room that guarantees the security and privacy of the Victim; and

 b. provide psychological support to the Victim,

 if the Victim makes the report and/or provides the information through a UPTD PPA, a technical implementing unit and subnational technical implementing unit in charge of social affairs, and/or a Community-Led Institutional Service Provider.

(2) The UPTD PPA, technical implementing unit and subnational technical implementing unit in charge of social affairs, and/or Community-Led Institutional Service Provider must file a report with the police regarding the report and/or information conveyed by

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the Victim, medical personnel, healthcare personnel, psychiatrist, psychologist or social worker.

(3) The UPTD PPA, technical implementing unit and subnational technical implementing unit in charge of social affairs, and/or Community-Led Institutional Service Provider must file the report as referred to in paragraph (2) by no later than 3 x 24 (three times twenty-four) hours since the report from the Victim.

(4) In the event the Victim files a report directly with the police, the police must receive the report in a special room that guarantees the security and privacy of the Victim.

(5) The report as referred to in paragraph (2) is to be received by an officer or investigator providing special service to the Victim.

Part Six
Victim Protection

Article 42

(1) Within a period of no longer than 1 x 24 (one times twenty-four) hours upon receiving the report on Sexual Violence, the police may provide temporary protection to the Victim.

(2) The temporary protection as referred to in paragraph (1) is provided based upon a temporary protection order for a period of 14 (fourteen) days upon support being given to the Victim.

(3) For the purpose of the temporary protection as referred to in paragraph (1), the police has the authority to restrict the movements of the offender, whether for the purpose of maintaining a certain distance between the perpetrator and the Victim over a specific period of time, or removing certain rights of the perpetrator.

(4) The temporary restriction as referred to in paragraph (2) is effected through a temporary protection order.

Article 43

(5) Within a period no longer than 1 x 24 (one times twenty-four) hours from the rendering of temporary protection as referred to in Article 42 paragraph (1), the police must submit a request for protection with the LPSK.

(6) Protection as referred to in paragraph (1) is delivered in accordance with the applicable legislations.

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Article 44

In providing temporary protection and protection as referred to in Article 42 paragraph (1) and Article 42 paragraph (1), the police and the LPSK may work together with the UPTD PPA.

Article 45

(1) Where the suspect or defendant is not remanded and there is concern that the suspect or defendant will commit sexual violence, make intimidation, make threats and/or commit violence against the Victim, and based upon a request from the Victim, Family, investigator, prosecutor, or Support Person, the judge may issue an order restricting the movement of the offender, whether for the purpose of maintaining a certain distance between the offender and the Victim over a specific period or to remove certain rights of the offender.

(2) Movement restriction order as referred to in paragraph (1) is issued by no later than 6 (six) months and may be extended for 1 (one) instance by a maximum period of 6 (six) months.

(3) The request for extension of movement restriction order as referred to in paragraph (2) is issued by no later than 7 (seven) days prior to the expiry of the restriction period.

(4) Restriction of movement of the offender as referred to in paragraph (2) is enforced by the police.

(5) Where a violation of the movement restriction order is committed, the suspect or defended shall be remanded in accordance with the applicable legislations.

Article 46

(1) The National Government has the authority to remove and/or sever access to electronic information and/or document containing Sexual Violence.

(2) Further provisions regarding the removal and/or severance of access to electronic information and/or document containing Sexual Violence as referred to in paragraph (1) is established through a Government Regulation.

Article 47

In the name of public interest, the prosecutor may file a request with the court to order the minister administrative government affairs in the area of communication and information to remove electronic information and/or document containing Sexual Violence.

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Part Seven

Examination of Witness

Article 48

(1) If a Witness and/or Victim due to health, security, safety and/or other legitimate reasons is unable to be examined in court, examination may be performed by way of:

a. reading out of the minutes of examination setting forth the statement taken under oath;

b. electronic recording; and/or

c. live remote examination using audio visual communication device.

(2) A statement from a Witness and/or Victim taken pursuant to paragraph (1) has the same evidentiary value as that given in a court session.

Article 49

(1) The investigator may conduct examination of the Witness and/or Victim while being recorded electronically in the presence of the prosecutor, who may attend directly or remotely using electronic means.

(2) Electronic recording as referred to in paragraph (1) is used based upon an order of the chairperson of the district court.

(3) The chairperson of the district court issues order as referred to in paragraph (2) by no later than 3 (three) days upon receiving the request for such order from the investigator.

(4) If within the period of 3 (three) days the chairperson of the district court fails to issue the order, the investigator, upon their discretion, may examine the Witness and/or Victim while being electronically recorded as referred to in paragraph (1).

(5) The order as referred to in paragraph (2) is issued with due consideration of :

a. the health, security, safety of the Witness and/or Victim, and/or other legitimate reasons supported by a letter issued by the authorized or competent official;

b. decision of the LPSK tasked with providing protection to the Witness and/or Victim;

c. number Witnesses and/or Victims; and/or

d. the domicile or home of the Witness and/or Victim.

(6) Where examination is conducted on a Witness and/or Victim domiciling overseas, [such examination is to be] electronically recorded, attended by an officer of the Indonesian diplomatic mission overseas.

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Article 50

(1) With respect to the electronic recording as referred to in Article 49 paragraph (1), the following documents are prepared:

a. minutes of examination of Witness;

b. minutes of electronic recording; and

c. statement of oath to be read out by the Witness whose oath can be taken.

(2) The minutes as referred to in paragraph (1) may be signed electronically.

Article 51

(1) The judge may order the prosecutor to conduct live remote examination using audio visual communication device of a Witness and/or Victim.

(2) The order as referred to in (1) takes into consideration:

a. the health, security, safety of the Witness and/or Victim, and/or other legitimate reasons supported by a letter issued by the authorized or competent official;

b. decision of the LPSK tasked with providing protection to the Witness and/or Victim;

c. number Witnesses and/or Victims; and/or

d. the domicile or home of the Witness and/or Victim.

(3) Perintah sebagaimana dimaksud pada ayat (1) mempertimbangkan:

(4) Live remote examination using audio visual device may be conducted at the courthouse where the case is being examined or at any other location upon consideration of the health, security and/or safety of the Witness and/or Victim.

(5) In the event the examination is conducted on a Witness and/or Victim who is living or domiciled overseas, the live remote examination using audio visual device may be conducted in the presence of an officer of the Indonesian diplomatic mission overseas.

Part Eight

Investigation

Article 52

In the event the Witness and/or Victim of Sexual Violence is a Child, the investigator may make an electronic recording of the statement or conduct live remote examination using audio visual communication device, with or without the consent of the parents or guardian, and upon due consideration of the best interest of the Child.

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Article 53

(1) Examination during the investigation process is conducted at the special service room at the police office.

(2) In certain circumstances the examination as referred to in paragraph (1) may be conducted at the office of the UPTD PPA or any other location.

Article 54

(1) Prior to conducting an examination of the Victim, the investigator must [discuss] with the Support Person on the readiness and needs of the Victim based on their condition.

(2) Result of the discussion with the Support Person as referred to in paragraph (1) may be taken by the investigator as basis to conduct an examination of the Victim.

(3) If the Victim is suffering severe trauma, the investigator may convey the question through the Support Person.

Article 55

(1) The investigator is authorized to make data and/or an electronic system relating to a Sexual Violence case inaccessible other than for the purpose of the judicial process.

(2) Exercise of the authority as provided under paragraph (1) is conducted upon determination by the Chairperson of the local District Attorney's Office.

Part Nine

Prosecution

Article 56

(1) If deemed necessary, the Prosecutor may conduct a preliminary meeting with the Witness and/or Victim upon receiving submission or resubmission of the complete investigation documents from the investigators.

(2) The preliminary meeting as referred to in paragraph (1) is conducted following delivery of the suspect and evidence.

(3) For the purpose of a preliminary meeting, the Prosecutor may summon the Victim and/or Witness by stating the time and place and reason of the summon.

(4) The preliminary meeting as referred to in paragraph (1) may be conducted through electronic means upon due consideration of the health, security and/or safety of the Witness and/or Victim.

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(5) During the preliminary meeting the Victim and/or Witness may be accompanied by a Support Person and/or family member, and the investigator may be present at such meeting.

(6) At the preliminary meeting, the prosecutor may convey information on or explain about:

a. the judicial process;

b. the right of the Witness and/or Victim, including their right to claim for restitution, and/or compensation and the procedure by which such claim can be filed;

c. consequences of the Victim and/or Witness' decision to appear or not to appear in court in order to ensure that they understand the situation; and

d. [the possibility for] examination to be conducted outside the court through electronic recording and/or live remote audio visual examination if a Victim and/or Witness is not able to appear in court due to health, security, safety, and/or other legitimate reasons.

Article 57

(1) In the presentation of facts and acts that are sexual in nature, the Prosecutor should, as far as possible, refrain from providing description that is overly detailed, vulgar, [or] excessive in the case file while providing a detailed, clear and complete description.

(2) Avoidance of overly detailed, vulgar [or] excessive as required under paragraph 1 is meant to respect the human rights, dignity and privacy of Women and Children in Contact with the Law and to prevent the revictimization of Victims.

(3) Elaboration of facts and acts that are overly detailed and vulgar as referred to in paragraph (1) is may be presented insofar as necessary to support the substantiation of the elements of the offense set forth in the articles [under which the charges are brought] and/or the charged offense or wrongdoing of the offender.

(4) In the case where the Victim has been subjected to exploitation and sexual violence through electronic media or relating sexuality, the prosecutor shall avoid the insertion or copying and pasting of images, illustrations, and/or photographs of the Victim or details of the Victim or which depict reproductive organs, sexual activities and/or sexual objects in the indictment.

(5) Avoidance of inserting or copying and pasting materials described in paragraph 4 above is intended as a measure to protect and ensure safety and to respect the dignity and privacy of the Victim.

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Part Ten

Court Examination

Article 58

Examination of a case relating to Sexual Violence shall be held in a closed court.

Article 59

(1) The Panel of Judges reads the judgments on the case relating to Sexual Violence in a courtroom made open to the public.

(2) In reading out the judgement as referred to in paragraph (1), the panel of judges is obliged to keep the identity of the Witness and/or Victim confidential.

(3) The court must keep the information containing the identity of the Witness and/or Victim in the court judgment or court determination confidential.

(4) Courts at every level are obliged to provide copies of judgments to defendants, legal counsels, investigators, and public prosecutors within a period of no later than 14 (fourteen) working days from the date the judgment is pronounced.

(5) Excerpts of the judgment must be provided to the defendant, legal counsel, and public prosecutor within 1 (one) working day after the judgment is pronounced.

Article 60

(1) The examination of a Witness and/or Victim should at all times observe the human rights, honor and dignity [of the Witness and/or Victim] without intimidation, without justifying wrongdoing, lifestyle, and moral values, including sexual history, through the use of leading questions or questions that are not related to crimes of Sexual Violence as [a form of] extenuating circumstances for the defendant.

(2) In examination of a victim, the Judge and Public Prosecutor should explore and consider the special circumstances that underlie the crime of sexual violence and/or impact upon the victim.

(3) Questions and/or statements that are demeaning, condemning, intimidating, and using sexual experience and/or background shall be prohibited from being inquired, either to the Witness, Victim, or the Defendant.

Article 61

The Court shall seek to provide the facilities and protection needed in order for the Witness or Victim to give their testimony.

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Article 62

The Panel of judges may order the institution providing assistance to replace the Victim's Support Person at the behest of the Victim, the Victim's Family, or the Victim's guardian.

Article 63

The Panel of judges is obliged to consider [to include] the Recovery of the Victim in the judgment as regulated in the Law.

Part Eleven

Enforcement of Judgment

Article 64

(1) In the event the court imposes a fine, the convicted offender is given a period of 30 (thirty) days from the date the Judgment has obtained permanent legal force to pay the fine.

(2) In the event that there are strong grounds, the period as referred to in paragraph (1) may be extended for a maximum of 1 (one) month.

(3) In the event the convicted offender does not pay the fine within the term set by the sentence as referred to in paragraph (1) or paragraph (2), the asset or income of the convicted offender may be confiscated and auctioned by the prosecutor to settle the fine by virtue of the court judgment.

(4) In the event the confiscation and auction of the asset and income as referred to in paragraph (3) [constitutes to the amount that is deemed] insufficient or [the execution is] unfeasible to enforce, the unpaid fine shall be substituted with a term of imprisonment for a maximum of not exceeding the primary punishment.

(5) For corporate convicted offenders, the substituting sentence as referred to in paragraph (4) shall be freezing of all or part of the corporate business activities for a maximum period of 1 (one) year.

(6) The term of the substituting sentence as referred to in paragraph (4) and paragraph (5) shall be determined in the court's judgment.

(7) The substituting punishment as referred to in paragraphs (4) and (5) is enforced by taking into account the fines that have been paid proportionally.

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CHAPTER V

RIGHTS OF THE VICTIMS, FAMILY OF VICTIMS AND WITNESSES

Part One

General

Article 65

(1) Provisions concerning the Rights of the Victims, the Family of Victims, and Witnesses as regulated in laws and regulations remain in effect, unless otherwise stipulated by this Law.

(2) The implementation of Witness and Victim Protection is carried out in accordance with the Law that regulates the Witness and Victim protection, unless otherwise stipulated by this Law.

Part Two

Rights of the Victims

Article 66

(1) Victims are entitled to [receive] Care, Protection, and Recovery since the occurrence of the Crime of Sexual Violence.

(2) Victims with Disabilities are entitled to adequate accessibility and accommodation in order to fulfill their rights in accordance with the provisions of laws and regulations, unless otherwise stipulated in this Law.

(3) Further provisions regarding the procedures for [receiving] Care, Protection, and Recovery as referred to in paragraph (1) shall be regulated by a Government Regulation.

Article 67

(1) Rights of Victims include:
    a. Right to [receive] care;
    b. Right to protection; and
    c. Right to recovery.

(2) Fulfillment of the Victim's Rights is a state obligation and is carried out in accordance with the conditions and needs of the Victim.

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Article 68

The right of a victim in receiving care as referred to in Article 67 paragraph (1) point a include:

a. right to information on the entire process and outcome pertaining to the Care, Protection and Recovery of the victim;
b. right to obtain documents pertaining to the care of the victim;
c. right to legal services;
d. right to build psychological [strength];
e. right to health services including examination, treatment, and medical care;
f. right to services and facilities in accordance with the special requirements of the victim; and
g. right to remove content that contain sexual images/descriptions for cases involving sexual violence through electronic media.

Article 69

The rights of a victim to Protection as referred to in Article 67 paragraph (1) point b include:

a. provision of information regarding protection rights and facilities;
b. provision of access to information on the enforcement of Protection;
c. protection from threats or violence from criminal offenders and other parties as well as protection from repeated commission of such violence;
d. protection of confidentiality of identity;
e. protection from the conduct and behavior of law enforcement officers who demean the victim;
f. protection from loss of employment, job transfer, loss of education, or political access; and
g. protection of Victims and/or Complainants from criminal charges or being named in a civil claim based on reported sexual violence.

Article 70

(1) The right of a victim to Recovery as referred to in Article 67 paragraph (1) point c include:
    a. Medical rehabilitation;
    b. Mental and social rehabilitation;
    c. Social empowerment;

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d. Restitution and/or compensation; and

e. Social reintegration.

(2) Recovery prior to and after judicial process include:

a. delivery of health service for physical recovery;

b. psychological strengthening;

c. providing information on Victims' Rights and the judicial process;

d. providing information on Recovery services for Victims;

e. legal assistance;

f. providing adequate accessibility and accommodation for Victims with Disabilities;

g. provision of assistance for transportation, consumption, temporary living expenses, and proper and safe temporary residence;

h. provision of mental and spiritual guidance;

i. providing educational facilities for Victims;

j. provision of documents pertaining to civil registry and other supporting documents required by the Victim;

k. the right to information in the event that the prisoner has finished serving his/her sentence; and

l. the right to remove content that contain sexual images/descriptions for cases involving sexual violence through electronic media.

(3) Recovery after judicial process include:

a. monitoring, examination, as well as physical and psychological health services for Victims on a regular and ongoing basis;

b. strengthening community support for Victim Recovery;

c. assistance in the use of Restitution and/or compensation;

d. provision of documents pertaining to civil registry and other supporting documents required by the Victim;

e. provision of social security services in the form of health insurance and other social assistance in accordance with needs based on an integrated team assessment;

f. economic empowerment; and

g. provision of other needs based on the identification results of the Regional Technical Implementing Unit for the Protection of Women and Children (UPTD PPA) and/or Community-Led Institutional Service Providers.

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(4) Further provisions regarding the integrated team as referred to in paragraph (3) point e shall be regulated by a Presidential Regulation.

Part Three

Rights of the Family of the Victim

Article 71

(1) Rights of the Family of Victims include:
   a. right to information about the rights of the victim, the rights of the victim's family, and the criminal justice process from the start of reporting to the completion of the term of sentence served by the convicted offender;
   b. right to confidentiality of identity;
   c. right to personal security and freedom from threats regarding the testimony that will be, is being, or has been given;
   d. right to not be criminally charged [or] being named in a civil claim based on a reported sexual violence;
   e. custody rights to children who become Victims, unless their rights are revoked through a court judgment;
   f. right to receive psychological reinforcement;
   g. right to economic empowerment; and
   h. right to obtain documents pertaining to civil registry and other supporting documents needed by the Victim's Family.

(2) In addition to the rights as referred to in paragraph (1), children or other family members who depend for their livelihood on the victim or parents who are not criminal offenders are entitled to:
   a. Education facilities;
   b. Health services and insurance; and
   c. Social security.

(3) Fulfillment of the rights of the victim's family is a state obligation and is carried out in accordance with the conditions and needs of the victim.

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CHAPTER VI

IMPLEMENTATION OF INTEGRATED SERVICES FOR THE PROTECTION OF WOMEN AND CHILDREN AT THE NATIONAL AND SUBNATIONAL LEVEL

Article 72

The National and Subnational Governments provide Integrated Services in Administering Care, Protection, and Recovery.

Article 73

(1) Implementation of Integrated Services at the national level is coordinated by the Minister.

(2) The implementation of Integrated Services as referred to in paragraph (1) involves:

a. the ministry that administrates government affairs pertaining to the health sector;
b. the ministry that administrates government affairs pertaining to social sector;
c. the ministry that administrates government affairs pertaining to law and human rights;
d. the ministry that administrates foreign affairs;
e. the ministry that administrates for domestic affairs;
f. the ministry that administrates government affairs pertaining to education sector;
g. the ministry that administrates for religious affairs;
h. police;
i. LPSK;
j. Indonesian Migrant Workers Protection Agency; and
k. other institutions.

Article 74

The Minister administrates Integrated Services which include:

a. providing services for Victims that require coordination at national, cross-provincial and international levels; and
b. the provision of services for children who require special protection that requires coordination at national and international levels.

Article 75

Further provisions regarding the implementation of Integrated Services at the national level are regulated by a Presidential Regulation.

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Article 76

(1) The implementation of Integrated Services as referred to in Article 72 at the subnational level is carried out by a technical operational implementing unit that administrates government affairs in the empowerment of women and child protection.

(2) Provincial and district/city governments are obliged to establish UPTD PPA which administers the Care, Protection, and Recovery of Victims, Family of Victims, and/or Witnesses.

(3) In administering the provision of Care, Protection, and Recovery of Victims, UPTD PPA is tasked to:

a. receive reports or outreach from Victims;
b. provide information on the Rights of a Victim;
c. facilitate the delivery of health services;
d. facilitate the provision of psychological strengthening services;
e. facilitating the provision of psychosocial services, social rehabilitation, social empowerment, and social reintegration;
f. provide legal services;
g. identify the need for economic empowerment;
h. identify the need for temporary shelter for Victims and Family of Victim that must be met immediately;
i. facilitate the needs of Victims with Disabilities;
j. coordinate and cooperate on the fulfillment of Victims' Rights with other institutions; and
k. monitor the fulfillment of the Rights of the Victims by law enforcement officers during the court proceedings.

Article 77

UPTD PPA in carrying out its duties and functions can work closely with:

a. community health centers, hospitals, and other health care facilities;
b. technical implementing unit that is responsible for administering social affairs;
c. detention houses, correctional institutions, and correctional centers;
d. police;
e. public prosecutor's office;

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f. courts;

g. the technical implementing unit of the agency that organizes the protection of migrant workers;

h. regional office of the ministry that administers religious affairs of the government;

i. regional offices and technical implementing units of ministries that administer government affairs in the area of law and human rights;

j. LPSK representatives in the regions;

k. Social Service Institution;

l. Community-Led Institutional Service Provider; and

m. other institutions.

Article 78

Further provisions regarding UPTD PPA are regulated by a Presidential Regulation.

CHAPTER VII

PREVENTION, COORDINATION, AND MONITORING

Article 79

(1) The National Government and Subnational Governments are obliged to implement the Prevention of Criminal Acts of Sexual Violence in a fast, integrated, and unified manner.

(2) The implementation of the Prevention of Sexual Violence as referred to in paragraph (1) is carried out through the following means:

  a. education;

  b. public facilities and infrastructure;

  c. administration and institutional governance;

  d. economy and employment;

  e. social welfare;

  f. culture;

  g. information technology;

  h. religion; and

  i. Family.

(3) The implementation of the Prevention of Sexual Violence is carried out by taking into consideration:

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a. Conflict situations;
b. Disaster;
c. geographical location of the area; and
d. other special situations.

(4) The Prevention of Sexual Violence Crimes is carried out on:
a. Social service center;
b. education institutions; and
c. other places with the potential for sexual violence crimes to occur.

Article 80

Further provisions regarding the implementation of the Prevention of Sexual Violence are regulated by a Government Regulation.

Article 81

(1) The National Government and Subnational Governments are required to provide education and training for law enforcement officers, government service personnel, and service personnel at Community-Led Institutional Service Providers.

(2) Education and training are conducted to increase understanding related to the Prevention and Handling of Sexual Violence.

(3) The implementation of education and training as referred to in paragraph (1) is coordinated by the Minister and cooperates with the minister who administers government affairs in the fields of law and human rights.

(4) Further provisions regarding the implementation of education and training shall be regulated by a Presidential Regulation.

Article 82

The National Government and Subnational Governments are required to coordinate regularly and continuously to ensure the effective Prevention and Handling of Victims.

Article 83

(1) In the context of the effectiveness of the Prevention and Handling of Victims of Sexual Violence, the Minister conducts cross-sectoral coordination and monitoring with relevant ministries/agencies.

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(2) Governors and regents/mayors coordinate and monitor the Prevention and Handling of Victims in the regions.

(3) Coordination as referred to in paragraph (1) and paragraph (2) is carried out through planning, service, evaluation, and reporting.

(4) Monitoring as referred to in paragraph (1) is carried out by the Minister, the commission that addresses violence against women, human rights, child protection, and disability and also carried out by the community.

(5) Further provisions on coordination and monitoring as referred to in paragraph (1) shall be regulated by a Government Regulation.

Article 84

(6) In the context of preventing and coordinating the crime of sexual violence, a national policy on the eradication of the crime of sexual violence is drawn up.

(7) Further provisions regarding the national policy on the eradication of sexual acts as referred to in paragraph (1) shall be regulated by a Presidential Regulation.

CHAPTER VIII
COMMUNITY AND FAMILY PARTICIPATION

Part One
Community Participation

Article 85

(1) The community can participate in the prevention, assistance, recovery, and monitoring of sexual violence crimes.

(2) Community Participation in Prevention as referred to in paragraph (1) is realized through:

a. cultivate literacy on the Crime of Sexual Violence to all age groups of society to prevent the occurrence of criminal acts of sexual violence and to avoid becoming a victim or offender;

b. disseminate the laws and regulations governing the Crime of Sexual Violence; and

c. create environmental conditions that can prevent the occurrence of criminal acts of sexual violence.

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(3) Community Participation in the Recovery of Victims as referred to in paragraph (1) is realized through:
  a. provide information on the occurrence of Sexual Violence Crimes to law enforcement officers, government agencies, and non-governmental organizations;
  b. monitor the implementation of Prevention [of Sexual Violence Crimes] and Recovery of Victims;
  c. provide support for the implementation of Victim Recovery;
  d. provide emergency assistance to Victims;
  e. assist in the submission of applications for the determination of Protection; and
  f. play an active role in the implementation of Victim Recovery.

Part Two
Family Participation

Article 86

Family Participation in the Prevention of Sexual Violence Crimes is realized through:
a. strengthen education in the family, in terms of moral, ethical, religious, and cultural aspects;
b. build quality communication between Family members;
c. build emotional bonds among Family members;
d. strengthen the role of father, mother, and all family members so that a protective character is built;
e. protect and prevent Family members from being influenced by pornography and [prevent] access to information containing pornographic elements; and
f. protect family members from negative environmental influences and promiscuity.

CHAPTER IX
FUNDING

Article 87

(1) Funding for the implementation of this Law derives from:
  a. state revenue and expenditure budget;
  b. regional revenue and expenditure budget; and
  c. other sources that are legal and not binding in accordance with the provisions of the legislation.

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(2) Funding as referred to in paragraph (1) includes being used for medico-legal examinations (visum) and health services needed by the Victim.

CHAPTER X

INTERNATIONAL COOPERATION

Article 88

(1) To make the implementation of the Prevention and Handling of Sexual Violence Crimes effective, the Government can establish international cooperation, both bilateral, regional and multilateral.

(2) Cooperation as referred to in paragraph (1) is carried out in accordance with the provisions of the legislation.

CHAPTER XI

TRANSITIONAL PROVISIONS

Article 89

Upon this Law coming into force, cases of Sexual Violence Crimes that are still in progress at the level of investigation, prosecution, or court examination will continue to be examined based on the laws currently in force.

Article 90

(1) The UPTD PPA which was established before this Law was promulgated will continue to carry out its duties and functions related to the Crime of Sexual Violence and must comply with this Law no later than 2 (two) years from the promulgation of this Law.

(2) In the event that UPTD PPA has not been formed, the establishment of the UPTD PPA shall be carried out no later than 3 (three) years from the promulgation of this Law.

(3) In the event that the UPTD PPA has not been established as referred to in paragraph (2), the implementation of Integrated Services in the regions is carried out by a technical operational implementing unit which administrates governmental affairs in the empowerment of women and protection of children.

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CHAPTER XII

CONCLUDING PROVISIONS

Article 91

(1) Implementing regulations of this Law must be enacted no later than 2 (two) years from the promulgation of this Law.

(2) the National government must report the implementation of the present Law to the People's House of Representatives of the Republic of Indonesia through the state organ in charge of legislative affairs no later than 3 (three) years from the promulgation of this Law.

Article 92

Provisions regarding the Crime of Sexual Violence regulated in other laws are declared to remain in effect as long as they do not conflict with this Law.

Article 93

This Law shall come into force on the date of its promulgation.

For public cognizance, the promulgation of this Law shall be announced by publishing it in the State Gazette of the Republic of Indonesia.

Enacted in Jakarta
on May 9, 2022
PRESIDENT OF THE REPUBLIC OF INDONESIA,

Signed.
JOKO WIDODO

Promulgated in Jakarta
on May 9, 2022

MINISTER OF LAW AND HUMAN RIGHTS
OF THE REPUBLIC OF INDONESIA,

signed.
YASONNA H. LAOLY

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LEMBARAN NEGARA REPUBLIK INDONESIA TAHUN 2022 NOMOR 120

Certified true copy
MINISTRY OF STATE SECRETARIAT
OF THE REPUBLIC OF INDONESIA

Deputy for Legislative Affairs
and Legal Administration ,

[stamp & signature]
Lydia Silvanna Djaman

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ELUCIDATION
OF LAW OF THE REPUBLIC OF INDONESIA
NUMBER 12 OF 2022
REGARDING
SEXUAL VIOLENCE

I. GENERAL

The right of every citizen to receive protection from violence and be free from torture or demeaning or degrading treatment is a constitutional right guaranteed by the 1945 Constitution of the Republic of Indonesia. Sexual violence is a form of violence and degrading act in contravention with the social and humanistic values and disrupts the security and peace of society.

Indonesia is committed to eradicate all forms of violence and degrading acts as well as discrimination against women, children and people with disability as reflected in the ratification of a number of international conventions, among others the International Convention on the Elimination of All Forms of Discrimination against Women; International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Elimination of All Forms of Racial Discrimination; International Convention Concerning the Rights of Persons with Disabilities; Optional Protocol and International Convention on the Rights of the Child; and the International Convention Concerning the Sale of Children, Child Prostitution and Child Pornography.

It is also Indonesia's commitment to uphold civil and political, economic, social and cultural rights as confirmed in Law Number 11 of 2005 on the ratification of the International Covenant on Economic, Social, and Cultural Rights and Law Number 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights.

Sexual violence is a violation of human rights, a crime against human dignity, and a form of discrimination that needs to be eliminated. Sexual violence is becoming more prevalent in society, causing severe impact on the victim. Such impact may take the form of physical and mental suffering, health, economic, social and political harm. The effect of sexual violence also greatly affects the life of the victim, which becomes more severe when the victim is part of a economically, social, or political marginalized group, or if they have special needs, such as children and people with disability.

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Thus far there have been laws and regulations that governs several forms of sexual violence, but their forms and scope are very limited. The available laws and regulations have not been fully able to respond to the facts of sexual violence that occurs and develops in the community. Investigations, prosecutions, and examinations in court of cases of sexual violence also do not pay attention to the rights of the victim and tend to blame the victim. In addition, prevention efforts and community involvement are still needed to create an environment free from sexual violence. Therefore, we need a special law on the crime of sexual violence that is able to provide a material and formal legal basis at the same time so that it can guarantee legal certainty and meet the legal needs of the community.

As a nation founded upon the belief in the One True God, the present Law is not intended to condone unhampered sexual behavior and deviant sex, as they are not in line with the state ideology of Pancasila, religious norms, and the traditional values of the nation. The Law on the Crime of Sexual Violence is a law reform measure aimed at overcome these issues. Such law reform has the following objectives:

1. prevent all forms of sexual violence;
2. provide care, protect and administer recovery for;
3. carry out law enforcement and rehabilitate offenders;
4. create an environment without sexual violence; and
5. ensure the non-recurrence of sexual violence.

This Law regulates the Prevention of all forms of Sexual Violence; Care, Protecting, and Recovery of Victims' Rights; coordination between the National Government and Subnational Governments; including international cooperation to allow the effective implementation of Prevention and Handling of Victims of Sexual Violence. In addition, community involvement in the Prevention and Recovery of Victims is also regulated in order to create environmental conditions that are free from sexual violence.

Several breakthroughs in the Law on the Crime of Sexual Violence include:

1. In addition to characterizing the types of Sexual Violence Crimes as regulated in this Law, there are also other criminal acts that are expressly stated as Sexual Violence Crimes as regulated in other laws and regulations;
2. there is a comprehensive procedural law arrangement starting from the stage of investigation, prosecution, and examination in court proceedings while at all times observing and upholding human rights, honor and without intimidation;

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3. The Victim's Right to [receive] Care, Protection, and Recovery since the occurrence of the Crime of Sexual Violence which is the obligation of the state and is carried out in accordance with the conditions and needs of the Victim. Furthermore, great attention to the suffering of the victim is also seen in the form of restitution. Restitution is rendered by the offender of the crime of sexual violence as compensation for the victim. In the event the assets of the convicted offender that are confiscated are deemed insufficient to cover the cost of restitution, the state will compensate the victim in accordance to the court's judgment; and
4. Cases of Sexual Violence cannot be resolved outside the judicial process, except for child offenders.

II. ARTICLE BY ARTICLE

Article 1

Sufficiently clear.

Article 2

Point a

"respect of human dignity and honor" is an acknowledgment of the dignity of the victim that must be protected, respected and enforced.

Point b

"non-discrimination" is to respect equality without discrimination of both parties, on the basis of religion, race, ethnicity, nationality, skin color, social status, affiliation, and ideology.

Point c

"best interest of the victim" is that all actions concerning victims undertaken by the executive, legislative, judicial bodies including the community must be the main consideration.

Point d

"justice" is the substantive content related to the Crime of Sexual Violence must reflect fair and proportionate treatment for every citizen.

Point e

"benefit" is the substantive content related to the Crime of Sexual Violence should be capable of providing broad benefits for the interests of the community, nation and state.

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Point f

"legal certainty" is the implementation of the regulation of the Crime of Sexual Violence must be carried out within the framework of a state of law that prioritizes the basis of legislation, propriety, and justice.

Article 3

Sufficiently clear.

Article 4

Sufficiently clear.

Article 5

"non-physical sexual [harassment]" is a statement, gesture, or activity that is inappropriate and leads to sexuality with the aim of degrading or humiliating.

Article 6

Sufficiently clear.

Article 8

Sufficiently clear.

Article 9

Sufficiently clear.

Article 10

Sufficiently clear.

Article 11

Sufficiently clear.

Article 12

Sufficiently clear.

Article 13

Sufficiently clear.

Article 14

Sufficiently clear.

Article 15

Paragraph (1)

Point a

Note: As this is an unofficial translation, the English text is not authoritative and provided only for reference purposes.

Unofficial translation by the Law and Policy Reform Program, Asian Development Bank
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Sufficiently clear.

Point b

Sufficiently clear.

Point c

Safeguarding is carried out, among others, at educational units, government institutions, non-governmental organizations, international institutions domiciled in Indonesia, homes, hospitals, social service centers, or social rehabilitation centers.

Point d

Sufficiently clear.

Point e

Sufficiently clear.

Point f

Sufficiently clear.

Point g

Sufficiently clear.

Point h

Sufficiently clear.

Point i

Sufficiently clear.

Point j

Sufficiently clear.

Point k

Sufficiently clear.

Point l

Sufficiently clear.

Point m

Sufficiently clear.

Point n

Sufficiently clear.

Point o

Sufficiently clear.

Paragraph (2)

Sufficiently clear.

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Article 16

Sufficiently clear.

Article 17

Paragraph (1)

Sufficiently clear.

Paragraph (2)

Point a

"Medical rehabilitation" include Psychiatric Rehabilitation.

Point b

Sufficiently clear.

Paragraph (3)

Sufficiently clear.

Article 18

Sufficiently clear.

Article 19

Sufficiently clear.

Article 20

Sufficiently clear.

Article 21

Sufficiently clear.

Article 22

Sufficiently clear.

Article 23

Sufficiently clear.

Article 24

Paragraph (1)

Sufficiently clear.

Paragraph (2)

Sufficiently clear.

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Paragraph (3)

Point a

Sufficiently clear.

Point b

"Medical records" include:

a. Microbiology laboratory results;

b. Urology;

c. Toxicology; or

d. Deoxyribo Nucleic Acid (DNA)

Point c

Sufficiently clear.

Point d

Sufficiently clear.

Article 25

Paragraph (1)

Sufficiently clear.

Paragraph (2)

Sufficiently clear.

Paragraph (3)

Sufficiently clear.

Paragraph (4)

Sufficiently clear.

Paragraph (5)

"personal assessment" is an effort undertaken to assess the different types of disability, level, barriers, and needs of Persons with Disabilities, both medically and psychologically to determine appropriate accommodation.

Article 27

Sufficiently clear.

Article 28

Sufficiently clear.

Note: As this is an unofficial translation, the English text is not authoritative and provided only for reference purposes.

Article 29

Sufficiently clear.

Article 30

Paragraph (1)

Sufficiently clear.

Paragraph (2)

Point a

Sufficiently clear.

Point b

Sufficiently clear.

Point c

Sufficiently clear.

Point d

"Other losses" include:

a. basic transportation costs;
b. attorney's fees or other costs associated with legal proceedings;
c. loss of income promised by the offender; and/or
d. loss of income due to the Crime of Sexual Violence.

Article 31

Paragraph (1)

Sufficiently clear.

Paragraph (2)

Sufficiently clear.

Paragraph (3)

Sufficiently clear.

Paragraph (4)

"the right of third parties" is the right of the husband, wife, and/or children.

Article 32

Sufficiently clear.

Article 33

Sufficiently clear.

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Article 34

Sufficiently clear.

Article 35

Sufficiently clear.

Article 36

Sufficiently clear.

Article 37

In the event the parents or guardians of the Sexual Violence offender does not have sufficient assets, Restitution for the Victim shall be executed in accordance with this Law.

Article 38

Sufficiently clear.

Article 39

Paragraph (1)

"Technical implementing unit" is a technical implementing unit under the ministry that is in charge of social affairs.

"Technical implementing unit in charge of social affairs" is a regional technical implementing unit that is responsible for social affairs under the Regional Government.

Paragraph (2)

Sufficiently clear.

Article 40

Sufficiently clear.

Article 41

Sufficiently clear.

Article 42

Paragraph (1)

Sufficiently clear.

Paragraph (2)

Sufficiently clear.

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Paragraph (3)

"Certain rights" among others is the right of the perpetrator to meet with the child of the perpetrator and the victim, in the event that the crime of sexual violence is occurred within the scope of the household.

Paragraph (4)

Sufficiently clear.

Article 43

Sufficiently clear.

Article 44

Sufficiently clear.

Article 46

Sufficiently clear.

Article 47

"Remove" including the obliteration and announcing the prohibition of posting aimed at disseminating electronic information and/or electronic documents containing sexual violence crimes.

Article 48

Sufficiently clear.

Article 49

Paragraph (1)

Recording can be done with audio and/or audiovisual recording devices.

Paragraph (2)

Sufficiently clear.

Paragraph (3)

Sufficiently clear.

Paragraph (4)

Sufficiently clear.

Paragraph (5)

Point a

Sufficiently clear.

Point b

Sufficiently clear.

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Point c

Sufficiently clear.

Point d

"The place of residence or domicile of the Witness and/or Victim" includes place of residence or domiciled abroad or outside the province.

Paragraph (6)

Sufficiently clear.

Article 50

Sufficiently clear.

Article 51

Paragraph (1)

Sufficiently clear.

Paragraph (2)

Sufficiently clear.

Paragraph (3)

Sufficiently clear.

Paragraph (4)

The provisions of examination, including those conducted in the territory of the representative of the Republic of Indonesia or in other places attended by representatives of the Republic of Indonesia.

Article 52

Sufficiently clear.

Article 53

Paragraph (1)

Sufficiently clear.

Paragraph (2)

"Certain circumstances" is by considering the health, security, and/or safety of the Witness and/or Victim.

"Any other location" for example is a hospital or safe house.

Article 55

Sufficiently clear.

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Article 56

Paragraph (1)

Sufficiently clear.

Paragraph (2)

Sufficiently clear.

Paragraph (3)

"place" is the local state prosecutor's office, or in the event that there is a condition where the Witness and/or Victim for a valid reason is unable to attend the local state prosecutor's office, the preliminary meeting can be held in another place by considering the health, security and/or safety of the Witness and/or or Victim.

Paragraph (4)

Sufficiently clear.

Paragraph (5)

Sufficiently clear.

Paragraph (6)

Sufficiently clear.

Article 57

Sufficiently clear.

Article 58

Sufficiently clear.

Article 59

Sufficiently clear.

Article 60

Sufficiently clear.

Article 61

"Needed" among others are physical and psychological health services for Victims as a result of the Crime of Sexual Violence suffered [by the Victim].

Article 62

Sufficiently clear.

Article 63

Sufficiently clear.

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Article 64

Sufficiently clear.

Article 65

Sufficiently clear.

Article 66

Paragraph (1)

Care, Protection, and Recovery of Victims is obtained when reporting [of a Sexual Violence Crime] is submitted by the Victim, Victim's Family, Victim's guardian, or the Community to law enforcement officers, government agencies, or non-governmental institutions that handle Sexual Violence Crimes.

Paragraph (2)

Sufficiently clear.

Paragraph (3)

Sufficiently clear.

Article 67

Sufficiently clear.

Article 68

Point a

Sufficiently clear.

Point b

Sufficiently clear.

Point c

“Legal services” among others are legal assistance, legal consultation, and legal support.

Point d

Sufficiently clear.

Point e

Sufficiently clear.

Point f

Sufficiently clear.

Point g

Sufficiently clear.

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Article 69

Sufficiently clear.

Article 70

Paragraph (1)

Point a

Sufficiently clear.

Point b

"Mental and social rehabilitation" including physical, psychological, psychosocial, and mental-spiritual rehabilitation.

Point c

Sufficiently clear.

Point d

Sufficiently clear.

Point e

Sufficiently clear.

Paragraph (2)

Point a

Sufficiently clear.

Point b

Sufficiently clear.

Point c

Sufficiently clear.

Point d

Sufficiently clear.

Point e

Sufficiently clear.

Point f

Sufficiently clear.

Point g

Sufficiently clear.

Point h

Sufficiently clear.

53

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Point i

"Educational facilities" are facilities for Victims who are still in the study period.

Point j

Sufficiently clear.

Point k

Sufficiently clear.

Point l

Sufficiently clear.

Paragraph (3)

Point a

Sufficiently clear.

Point b

Sufficiently clear.

Point c

Sufficiently clear.

Point d

Sufficiently clear.

Point e

"Integrated team" is a team consisting of a ministry that administrates government affairs in the empowerment of women and protection of children, a ministry that is in charge of social affairs and a ministry that administrates government affairs in the health sector.

Point f

Sufficiently clear.

Point g

Sufficiently clear.

Paragraph (4)

Sufficiently clear.

Article 71

Paragraph (1)

Sufficiently clear.

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Paragraph (2)

Point a

"Education facilities" include educational assistance and scholarships.

Point b

Sufficiently clear.

Point c

Sufficiently clear.

Paragraph (3)

Fulfillment of the rights of the Family of Victims is implemented collectively, which among others involve UPTD PPA, the agency that administrates government affairs in the social sector, and LPSK in accordance with the provisions of the legislation.

Article 72

Sufficiently clear.

Article 73

Paragraph (1)

Sufficiently clear.

Paragraph (2)

Point a

Sufficiently clear.

Point b

Sufficiently clear.

Point c

Sufficiently clear.

Point d

Sufficiently clear.

Point e

Sufficiently clear.

Point f

Sufficiently clear.

Point g

Sufficiently clear.

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Point h

Sufficiently clear.

Point i

Sufficiently clear.

Point j

Sufficiently clear.

Point k

“Other institutions” among others are organizations of Persons with Disabilities, indigenous people organizations, and religious organizations.

Article 74

Sufficiently clear.

Article 75

Sufficiently clear.

Article 76

Paragraph (1)

Sufficiently clear.

Paragraph (2)

Sufficiently clear.

Paragraph (3)

Point a

Sufficiently clear.

Point b

Sufficiently clear.

Point c

Sufficiently clear.

Point d

Sufficiently clear.

Point e

“Social rehabilitation” includes vocational training and entrepreneurship coaching.

Point f

Sufficiently clear.

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Point g

Sufficiently clear.

Point h

Sufficiently clear.

Point i

Sufficiently clear.

Point j

Sufficiently clear.

Point k

Sufficiently clear.

Article 77

Point a

Sufficiently clear.

Point b

Sufficiently clear.

Point c

Sufficiently clear.

Point d

Sufficiently clear.

Point e

Sufficiently clear.

Point f

Sufficiently clear.

Point g

Sufficiently clear.

Point h

Sufficiently clear.

Point i

"Technical implementing units" is an institution in charge of special child development.

Point j

Sufficiently clear.

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Point k

Sufficiently clear.

Point l

Sufficiently clear.

Point m

Sufficiently clear.

Article 78

Sufficiently clear.

Article 79

Paragraph (1)

Sufficiently clear.

Paragraph (2)

Point a

"Education" includes materials containing reproductive health.

Point b

Sufficiently clear.

Point c

Sufficiently clear.

Point d

Sufficiently clear.

Point e

Sufficiently clear.

Point f

Sufficiently clear.

Point g

Sufficiently clear.

Point h

Sufficiently clear.

Point i

"Family" which includes the surrogate family.

Paragraph (3)

Point a

Sufficiently clear.

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Point b

Sufficiently clear.

Point c

Sufficiently clear.

Point d

"Other special situations" include quarantine or extraordinary circumstances.

Paragraph (4)

Point a

"Social service center" includes social service center for people with disabilities.

Point b

"Education institution" include boarding schools.

Point c

"Other places" are among other things a place of refuge, a place to shelter for workers, or any other place that has the potential for the occurrence of criminal acts of sexual violence.

Article 80

Sufficiently clear.

Article 81

Sufficiently clear.

Article 82

Sufficiently clear.

Article 83

Paragraph (1)

"Relevant ministries/agencies" among others are the ministries that are in charge of education sector.

Paragraph (2)

Sufficiently clear.

Paragraph (3)

Sufficiently clear.

Note: As this is an unofficial translation, the English text is not authoritative and provided only for reference purposes.

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Paragraph (4)

Sufficiently clear.

Paragraph (5)

Sufficiently clear.

Article 84

Sufficiently clear.

Article 85

Sufficiently clear.

Article 86

Sufficiently clear.

Article 87

Paragraph (1)

Sufficiently clear.

Paragraph (2)

"Visum" among others is ***visum et repertum*** and ***visum et repertum psychiatricum.***

Article 88

Sufficiently clear.

Article 89

Sufficiently clear.

Article 90

Sufficiently clear.

Article 91

Sufficiently clear.

Article 92

Sufficiently clear.

Article 93

Sufficiently clear.

SUPPLEMENTAL STATUTE BOOK OF THE REPUBLIC OF INDONESIA NUMBER 6792

Note: As this is an unofficial translation, the English text is not authoritative and provided only for reference purposes.

ii. Establishing Safe Environments Free from Sexual Harassment in Workplaces and Higher Education Institutions: An Indonesian Policy Perspective (Indonesia Law Digest, Issue No. 744, by Hukumonline)*

Rabu, November 24, 2021 | Issue Number : 744

Establishing Safe Environments Free from Sexual Harassment in Workplaces and Higher Education Institutions: An Indonesian Policy Perspective

Overview

The most recent report published by the National Commission on Violence Against Women (*Komisi Nasional Anti Kekerasan Terhadap Perempuan* – "**Komnas Perempuan**") revealed that during 2021, a total of 1,731 cases of sexual harassment have occurred at the community level to date. Moreover, some 962 of these cases involved violence. Furthermore, while the report reveals an overall decrease in the number of reported cases in comparison with 2019, this does not necessarily reflect any decrease in occurrences of sexual harassment. Indeed, the decrease in the number of reported cases may potentially also serve as a red flag in terms of Indonesia's poor reporting and resolution mechanisms as regards these issues and may demonstrate the fact that victims and witnesses do not feel either safe or confident enough to report incidences of sexual harassment.[1]

Certainly, it should not be surprising that the reporting rate for sexual harassment has decreased of late, given that several recent high-profile cases involving alleged sexual harassment have resulted in poor outcomes or even in the tables being turned upon victims or witnesses. For example, the recent case of sexual harassment involving Baiq Nuril ultimately led to her becoming criminally liable after she distributed a recording of a phone call that constituted evidence. In another recent case, alleged sexual harassment was experienced by Agni at her higher education institution and resulted in a media storm.[2]

However, sexual harassment does not only occur within higher education institutions but also within the workplace. Recently, a sexual harassment case that involved the Indonesian Broadcasting Commission (*Komisi Penyiaran Indonesia/KPI*) attracted plenty of public attention due to prolonged attempts to resolve the case and the fact that the victim had been pressured to fulfill certain work responsibilities, in spite of their being absent from work due to the ongoing case and various health issues.[3]

Alas, it has become all too clear that many cases of sexual harassment within the workplace or higher education institutions are likely to be dismissed or resolved unjustly due to the asymmetrical power relationships that often exist between victims and perpetrators.

In order to prevent any reoccurrence of these past cases, it is important for all members of communities to gain an awareness of and take an active role in the prevention and mitigation of sexual harassment. Awareness of applicable policies is critical to determining the success of attempts to prevent and mitigate acts of sexual harassment at all levels. Indeed, in the wake of the recent promulgation of Regulation of the Minister of Education, Culture, Research, and Technology No. 30 of 2021 on the Prevention and Mitigation of Sexual Violence at Higher Education Institutions ("**Regulation 30/2021**"), students at higher education institutions have been actively reviving a number of unresolved and buried cases of sexual harassment that they allege occurred within their places of study.[4] This proves that the awareness and active participation of all members of the community will be critical during efforts to resolve sexual harassment cases in a just way.

This edition of Indonesian Law Digest ("**ILD**") offers a basic analysis of the guidelines and regulations that are applicable as regards the prevention and mitigation of sexual harassment, specifically within the workplace and higher education institutions, and that are based upon the following Indonesian legal frameworks:

1. Regulation 30/2021;
2. Circular of the Minister of Manpower and Transmigration No. SE.03/MEN/IV/2011 on Guidelines for the Prevention of Sexual Harassment Within the Workplace ("**Circular 03/2011**"); and
3. Circular of the Governor of the Special Capital Region of Jakarta No. 7/SE/2021 on the Prevention and Mitigation of Sexual Harassment Within the Working Area of the Provincial Government of the Special Capital Region of Jakarta ("**Circular 7/2021**");
4. Convention of the International Labor Organization ("**ILO**") No. 190 of 2019 on Violence and Harassment ("**ILO Convention**").[5] It is worth highlighting the fact that Indonesia has yet to ratify the ILO Convention. However, in spite of this, it is crucial that Indonesia takes look at the various provisions that are set out under this convention in

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order to further enhance the implementation of laws and regulations across various sectors as part of attempts aimed at preventing violence and harassment within the workplace.[6]

Furthermore, in addition to the above regulations, this analysis will also cover various related provisions, as provided under the latest version of the Draft Bill on the Criminal Acts of Sexual Violence ("**2021 Draft Bill**"), which was published in November 2021. Previously, the title phrase, "Criminal Acts of Sexual Violence," was first introduced under the Draft Bill published in August 2021. This draft bill previously went under the title of the "Draft Bill on the Eradication of Sexual Violence" back in 2017 ("**2017 Draft Bill**").

In order to offer a comprehensive analysis of the above-listed regulatory frameworks and the draft bills, our discussion breaks down into the following sections:

I. **Sexual Harassment: Understanding the Basics**

A. Forms of Sexual Harassment;
B. Punishable Acts of Sexual Harassment;
C. Expressed Consent;
D. Identification of Victims and Perpetrators;
E. Rights of Victims and Witnesses.

II. **Prevention of Sexual Harassment: Forms and Actions**

A. Preventive Measures;
B. Policy Statements;
C. Monitoring and Evaluation.

III. **Resolving Cases of Sexual Harassment:**

A. Grievance Procedures under Circular 03/2011;
B. DKI Jakarta Governmental Institutions and the Framework of Circular 7/2021;
C. Sexual Harassment at Higher Education Institutions: Mandatory Establishment of Task Forces for the Prevention and Mitigation of Sexual Harassment ("**Task Forces**");
D. Criminal Proceedings: The 2021 Draft Bill's Perspective.

I. **Sexual Harassment: Understanding the Basics**

In order to provide a broad overview in this edition of ILD, this first section offers an elaboration of the various forms of sexual harassment that are outlined under the frameworks of Circular 03/2011, Regulation 30/2021, as well as those addressed under the 2021 Draft Bill and the 2017 Draft Bill. Moreover, our discussion will also address applicable sanctions, including some sanctions which are still under deliberation, as set out under both draft bills. Finally, a brief analysis of the phrases, "expressed consent," and, "identification of victims and perpetrators," as well as the rights of victims and witnesses, will also come under this section.

A. *Forms of Sexual Harassment*

Before we discuss the guidelines for the prevention and mitigation of sexual harassment in any depth, it is important to first define the scope of acts that can be categorized as sexual harassment. Under Circular 03/2011, the definition and scope of sexual harassment are defined as any unwanted conduct of a sexual nature, requests for sexual favors or other behavior which may leave victims feeling humiliated, offended and/or intimidated. Moreover, sexual harassment can take various forms, both direct and indirect.[7]

Broadly speaking, the applicable guidelines and regulations that apply within Indonesia recognize six specific forms of sexual harassment, which break down as follows: [8]

Form	Remarks

Physical harassment	Any unwelcomed touching in a sexual manner, which may manifest as kissing, patting, pinching and glancing, or staring in a lustful manner. Broader and more detailed acts of physical harassment have also been included under Regulation 30/2021, specifically: 1. The exposure of genitals without the victim's consent; 2. Peeking or intentionally invading a victim's personal activities and/or personal space; 3. Imposing sanctions in a sexual manner; 4. Removing items of a victim's clothing without their consent; and 5. Attempted rape and actual rape, with or without penetration.
Verbal harassment	All types of unwelcome comments about a person's private life, body parts or physical appearance, as well as sexual remarks and sexually suggestive jokes and comments. Regulation 30/2021 elaborates upon several types of this kind of harassment, including: 1. Discrimination relating to bodily/physical appearance; 2. Seductive speech/catcalling.
Gestural harassment	Making or displaying various types of sexually suggestive body language and/or gestures, for example: repeated winking, the making of gestures with fingers, licking of lips, etc. Furthermore, Regulation 30/2021 also includes staring at victims in a sexual way and/or in ways that make them feel uncomfortable under this type of harassment.
Written or graphic harassment	This form of harassment is most likely to occur via digital means through displays of pornographic materials and sexually explicit content, as well as harassment that is undertaken through emails, text messages and other modes of electronic communication. Regulation 30/2021 also includes the following acts under this type of harassment: 1. Delivering messages, jokes, pictures, audio materials and/or videos that include sexual themes and which have been prohibited by the victims; 2. Capturing, recording and/or distributing visual, audio and/or audiovisual information of a sexual nature that relates to victims without their consent; and 3. Uploading pictures of victims' bodies and/or information of a sexual nature that relates to victims without their consent.
Psychological/emotional harassment	This form of harassment comprises persistent proposals, unwelcome requests, manipulation, coercion, threats, taunts or innuendo of a sexual nature. As specifically regulated under Regulation 30/2021, this form of harassment may include: 1. Propositions, promises, offers and/or threats to carry out sexual transactions and/or sexual acts; 2. Threatening or manipulating victims so that they become impregnated and/or undergo abortions; and 3. Forcing victims to perform sexual transactions/activities.
Other forms of harassment	Any other acts that result in victims feeling unsafe, offended, scared, frightened, intimidated or humiliated may also qualify as other forms of sexual harassment. Moreover, the following acts may also qualify as other forms of sexual harassment: 1. Entrenched company, student community and/or educational culture which leads to sexual harassment; and 2. Intentionally enabling the act of sexual harassment (*bystanders*).

In addition to the abovementioned acts, which have already been legally recognized within Indonesia, the two draft bills offer different scopes of definition in relation to sexual harassment, as elaborated upon in the following table:

2017 Draft Bill[9]	2021 Draft Bill[10]
1. Sexual assault; 2. Sexual exploitation; 3. Forced contraception; 4. Forced abortion; 5. Rape; 6. Forced marriage; 7. Forced prostitution; 8. Sexual slavery; and/or 9. Sexual torture.	1. Non-physical sexual harassment; 2. Forced contraception; 3. Forced sterilization; 4. Forced sexual intercourse; 5. Sexual exploitation; 6. Committing of one or more criminal acts of sexual violence, as set out under the 2021 Draft Bill ("**Other Forms of Sexual Violence**").

The two draft bills offer different classifications of sexual harassment. Essentially though, the various forms of sexual harassment that are recognized under the two draft bills are substantially similar in nature to the broad definition and scope of sexual harassment previously elaborated upon. However, it should be noted that a number of changes have been made to the initial 2017 Draft Bill and that the overall scope of sexual harassment covered under the 2021 Draft Bill has become noticeably narrower.

Despite this narrowing of scope, the 2021 Draft Bill provides a clearer articulation of the elements of each type of conduct, along with the applicable criminal charges and range of punishment that may be imposed in relation to said conduct. Further discussion of these matters are set out in the following subsection.

B. *Punishable Acts of Sexual Harassment*

Sexual harassment is a crime of formal complaint or charge (*delik aduan*), as specifically addressed under the Criminal Code of Indonesia (*Kitab Undang-Undang Hukum Pidana* – "**KUHP**"). Accordingly, complaints or reports should be made by victims or by any persons that become aware of such harassment. However, the forms of sexual harassment set out under the KUHP are limited to the following:[11]

1. Violence or threats of violence in order to engage in sexual intercourse; and
2. Unpleasant conduct that violates norms of decency, such as molestation, kissing, groping of genitals or the breast area.

In deciding whether or not certain acts can be categorized as sexual harassment offenses, the norms of decency described under the KUHP are based on morality that is in line with the values of the community.[12]

In addition to provisions that address punishable acts of sexual harassment, as stipulated under the KUHP, the provisions set out under the newly promulgated Regulation 30/2021, as well as the provisions set out under the 2021 Draft Bill, address a range of punishments that may be imposed upon offenders who have committed acts of sexual harassment, dependent on the acts in question. The applicable sanctions and punishments set out under each regulation are broken down in the following sub-sections:

a. Regulation 30/2021

Under Regulation 30/2021, the administrative sanctions that can be handed down to sexual harassment offenders can be categorized as follows:[13]

Category of Administrative Sanctions	Remarks
Mild	1. Written reprimands; or 2. Written public apologies that should be published through mass or internal campus media.

Moderate	1. Temporary suspension from an offender's position without the right to secure any other position; or 2. Limitation of rights as students, if offenders are students.
Severe	1. Permanent expulsion of students; or 2. Permanent termination from any positions that are occupied within the campus in accordance with the applicable regulations.

Furthermore, it is important to note that the imposition of the abovementioned administrative sanctions in relation to sexual harassment cases at the higher education level does not rule out the imposition of other forms of administrative or penal sanctions, which may be applicable in accordance with other laws and regulations.[14]

Finally, administrative sanctions in the following forms may also be also imposed in the event that higher education institutions fail to take preventive measures and implement mitigating procedures in relation to sexual harassment:[15]

1. Termination of assistance in the form of financing, facilities and/or infrastructure; and/or
2. Lowering of the accreditation rate of higher education institutions.

b. 2021 Draft Bill

In contrast with Regulation 30/2021, which sets out the various administrative sanctions that may be handed down to sexual harassment offenders, the 2021 Draft Bill sets out various applicable penal sanctions that are based upon the types of sexual harassment committed by offenders. The sanctions set out under Regulation 30/2021 break down as follows:

Type of Sexual Harassment	Sanctions
Non-physical harassment[16]	Any non-physical harassment in the form of gestures, writing and/or remarks that relate to body parts and sexual desire will result in the perpetrator being subject to a maximum term of imprisonment of nine months and/or a maximum fine of Rp. 10 million fines.
Forced contraception[17]	Any forced contraception which results in a victim suffering any temporary reproductive dysfunction will result in the perpetrator being subject to a maximum term of imprisonment of five years and/or a maximum fine of Rp. 50 million.
Forced sterilization[18]	Any forced contraception which results in a victim suffering any permanent reproductive dysfunction will result in the perpetrator being subject to a maximum term of imprisonment of nine years and/or a maximum fine of Rp. 200 million.
Forced sexual intercourse[19]	Any forced act of sexual intercourse will result in the perpetrator being subject to a maximum term of imprisonment of 12 years and/or a maximum fine of Rp. 500 million.
Sexual exploitation[20]	A perpetrator will be subject to a minimum term of imprisonment of five years and a maximum term of imprisonment of 15 years and/or a fine ranging from a minimum of Rp. 100 million up to a maximum of Rp. 1 billion.

Other Forms of Sexual Violence[21]	

In addition to the imposition of criminal penalties, offenders may also have rehabilitative measures imposed upon them, which may include:[22]

1. Medical rehabilitation;
2. Psychological rehabilitation;
3. Psychiatric rehabilitation; and
4. Social rehabilitation.

The 2021 Draft Bill also addresses sexual harassment offenders that are employed by corporations. As such, the relevant managements of such corporations may be subject to the imposition of sanctions in the form of fines that range from Rp. 200 million to Rp. 2 billion. In addition, corporations may also be subject to the imposition of additional criminal sanctions in the following forms:[23]

1. Restitution payments;
2. Financing of work training;
3. Confiscation of profits obtained by offenders;
4. Revocation of certain permits;
5. Partial or total termination of business activities and/or corporate activities; and/or
6. Dissolution of corporations.

C. *Expressed Consent*

Expressed consent is a critical element of any discussion of sexual harassment. The most essential element that has to be considered when deciding whether or not an act constitutes sexual harassment is its unwelcome or non-consensual nature.[24] However, controversy and debate have long raged regarding expressions of consent as one of the deciding elements concerning allegations of sexual harassment. Indeed, the concept of expressed consent, specifically sexual consent, is seen as contradicting Indonesia's religious and cultural norms. Specifically, the adoption of the concept of sexual consent as a deciding element in sexual harassment cases is often seen as a loophole that will enable the emergence of a culture of sex before marriage, which would run contrary to the country's religious and cultural values. In essence, the locating of the nonconsensual nature of a given act as central as regards definitions of sexual harassment would mean that, conversely, consensual sex is to be considered unpunishable, a notion that is in direct contradiction with many of Indonesia's prevailing religious and cultural norms.[25] Indeed, this debate is one of the main reasons behind the promulgation of the 2021 Draft Bill being put on hold.

However, despite this ongoing debate, it cannot be denied that expressed consent is a crucial element when deciding whether a given act constitutes sexual harassment. Indeed, omitting the element of expressed consent from any framework that is ultimately passed will result in a far narrower scope of sexual harassment. This narrowing would be inevitable given that, when drawing a commonality across all guidelines and regulations, the constant element that characterizes most acts of sexual harassment, as previously elaborated upon, is the non-consensual and unwelcome nature of said acts.[26] Ultimately expressed consent is an integral and inseparable element of any discussion of sexual harassment.

In fact, in this regard, it should be noted that the concept of expressed consent was also previously adopted under the decade-old guidelines set out under Circular 03/2011, as well as the newly promulgated Regulation 30/2021. Under Regulation 30/2021, the definition of certain acts as comprising sexual harassment (or not) is heavily reliant on the consent of victims. For example, the capturing, recording and/or distribution of audio, visual and/or audiovisual materials can constitute an act of sexual harassment if it is carried out without the consent of the victims.[27] However, this does not necessarily mean that if a party offers their consent in relation to a given act then said act is legal, as there are also other applicable laws and regulations to consider which prohibit the distribution of sexually explicit content.[28]

It should also be noted that there are various limitations to consider in terms of expressed consent, which are set out under Regulation 30/2021. Consent is considered to be invalid if the relevant victims meet any of the following conditions:[29]

1. Are legally underage;
2. Are subject to threats, coercion and/or abuses of power by perpetrators;

3. Are under the influence of drugs, alcohol and/or narcotics;
4. Are sick, unconscious or asleep;
5. Are in a vulnerable physical and/or psychological condition;
6. Are in a condition of chronic immobility; and/or
7. Are in shock.

D. *Identification of Victims and Perpetrators*

Guidelines and regulations that are applicable in Indonesia do not limit sexual harassment victims to being women and girls. Indeed, Circular 03/2011 explicitly states that sexual harassment can be experienced by both men and women. Even though most recorded cases involve girls and women as the victims of sexual harassment, this does not mean that the regulations and guidelines only apply to victims that are female in gender. Both men and women can become victims of sexual harassment, as well as perpetrators of sexual harassment or any other form of behavior considered sexually impolite, offensive or humiliating.[30]

Furthermore, acts of sexual harassment may take place within a vertical relationship (e.g. between a superior and a subordinate) or a horizontal relationship (e.g. between employees). Having identified that in certain relationships, there may be an asymmetrical power relationship between perpetrators and victims, it should be noted that the prohibition on sexual harassment is applicable regardless of position and/or power. Put simply, there is no limitation as regards the identification of perpetrators and/or victims of sexual harassment, who can be legally defined regardless of their gender, employment position, religion, social status, etc.[31]

Moreover, the 2021 Draft Bill now states that disabled persons should fall under the general definition set out within the regulation, which has made an effort to accommodate and defend the rights of all victims of sexual harassment who are disabled, whether physically, intellectually, mentally and/or in terms of their senses.[32]

E. *Rights of Victims and Witnesses*

In order to protect the victims of sexual harassment and related witnesses, various rights have to be fulfilled. The rights of victims are elaborated upon in the following table:

Rights of Victims	Forms of Fulfillment
Confidentiality[33]	The confidentiality of victims should be guaranteed.
Information[34]	Victims have the right to be informed of the overall process as regards the resolution of sexual harassment cases.
Protection and safety[35]	Victims have the right to be protected and to have their safety guaranteed from all forms of retaliation from other parties. Requests for protection, security and/or chaperoning that are made by victims should be met. Furthermore, in certain cases, safe shelters may also be provided to victims.
Remedies[36]	Medical services, psychological services and/or counseling may be provided to victims.

In addition to the abovementioned rights, the 2021 Draft Bill sets out a broader scope of victims' rights than those addressed under the abovementioned regulations. The table below describes the rights of victims, as set out under the 2021 Draft Bill:

Rights of Victims	Forms of Fulfillment

Mitigation[37]	In addition to the right to information, under the 2021 Draft Bill, victims also have the right to obtain documents that address the results of any mitigation processes, the right to receive legal aid, as well as the right to enjoy various other facilities, depending on the special needs of victims.
Protection[38]	In addition to the abovementioned right to enjoy protection and confidentiality, the 2021 Draft Bill also states that victims also have the right to be protected from the loss of their employment, demotion, expulsion from an educational institution and/or restriction of access to political forums. Victims also have the right to not become subject to lawsuits in relation to any sexual harassment case that they are involved in.
Remedies[39]	The 2021 Draft Bill sets remedies for victims that relate to the following aspects: 1. Physical; 2. Psychological; 3. Economic; 4. Social and cultural; and 5. Compensation.

It is also worth noting that under the 2021 Draft Bill, these rights are guaranteed not only to victims but also to their family members.[40]

In terms of the rights of witnesses, under the current regime, witnesses may be entitled to enjoy similar rights to victims and may also be entitled to enjoy the rights of complainants or reporters of cases.[41] Broadly speaking, witnesses should be extended the right to confidentiality, as well as the right to protection and safety. Witnesses should also be extended guarantees that their information and identities will be kept confidential.

Furthermore, Regulation 30/2021 explicitly states that witnesses also have the right to request chaperoning, protection and/or remedies.[42]

Meanwhile, under the 2021 Draft Bill, witnesses are also entitled to enjoy certain rights which are similar to those outlined above, with several additional rights also being extended, as follows: 1) The right to be summoned appropriately, including assistance relating to transportation, accommodation, food and drink; 2) The right to not be sued; 3) The right to enjoy certain facilities and special assistance in accordance with certain needs and conditions of witnesses.[43]

II. **Prevention of Sexual Harassment: Forms and Actions**

A. *Preventive Measures*

Broadly speaking, the most effective way of addressing and preventing sexual harassment within the workplace and higher education institutions is through the implementation of the following preventive measures:[44]

Measure	Remarks
Communication	Communication can be implemented in the form of the promotion of the relevant guidelines and regulations through a cooperation forum or other types of media, both digital and printed.

Education	Education can be implemented through direct provision, orientation, culture building and/or staff induction programs.
Training	Training can be implemented through the provision of specialized training courses to supervisors, managers, educators, educational staff and/or sexual harassment response teams in order to identify red flags relating to sexual harassment and to develop preventive strategies.
Commitment building	Commitment building can be set out under certain company policies, company regulations, regulations of higher educational institutions, internal guidelines or any types of written commitments that provide guarantees relating to the safety of victims through the inclusion of sanctions and/or disciplinary action that will be imposed upon perpetrators.

To be a little more specific, all actors present within workplaces and higher educational institutions have an important role to play in preventing instances of sexual harassment from taking place around them. Said actors are subject to different obligations, as addressed in the following table:

Actor	Obligations
Higher education institutions[45]	Higher education institutions are obliged to implement efforts to prevent sexual violence through: 1. Learning processes, by obliging various parties to study a module that addresses the prevention and mitigation of sexual violence, as set by the Minister; 2. Strengthening of governance through the formation of a Task Force, issuance of relevant policies and a guidebook, provision of relevant training and reporting services, etc; 3. Strengthening of culture within the community of students, educators and educational staff through orientation activities and student organizations, etc.
Educators, educational staff and students[46]	1. Limiting of one-on-one meetings between students and educators that take place outside of campus areas, outside of campus' operational hours and/or for non-learning purposes without the approval of the head of the relevant study program or head of department (*jurusan*); and 2. Playing an active role in the prevention of sexual violence.
Employees[47]	1. Promotion of company policies on sexual harassment among their peers; and 2. Pursuing effective remedial measures.
Employers and managers[48]	1. Development, endorsement and promotion of policies on sexual harassment within working environments; 2. Dissemination of said policies among all employees during their recruitment and induction; 3. Regulation of standards aimed at the elimination of all forms of unwanted harassment leading to sexual harassment; 4. Ensuring that all third parties dealing with a given business, for example, customers, job applicants or suppliers, are not subjected to any sexual harassment by either employers or employees and vice versa; and 5. Establishment of in-house mechanisms aimed at the prevention and mitigation of sexual harassment.

In addition to the actors outlined above, according to Circular 7/2021, all government officials working within DKI Jakarta areas have now been mandated to prevent sexual harassment through the following preventive measures: 1) Internal commitment building regarding the prevention of sexual harassment; 2) Mandatory culture building in order to create workplaces that are safe from sexual harassment; and 3) Internalization and promotion of awareness and efforts to prevent sexual harassment.[49]

It should be emphasized that the abovementioned preventive measures, especially at the level of the workplace, are in line with the procedures set out under the ILO Convention.[50] Therefore, in spite of the fact that Indonesia has yet to ratify this convention, the laws and regulations that are applicable at the national level are already in line with those that apply internationally. The ILO Convention itself addresses core principles that relate to the mitigation and eradication of violence and harassment within the workplace, specifically:[51]

1. Prohibiting violence and harassment;
2. Ensuring relevant policies for the handling of acts of violence and harassment;
3. Adopting a comprehensive strategy;
4. Developing and strengthening enforcement and monitoring mechanisms;
5. Ensuring access to remedies for victims;
6. Imposition of sanctions;
7. Developing guidelines, training, education and increasing awareness; and
8. Ensuring that inspections and investigations are carried out in an effective manner in relation to violence and harassment cases.

B. *Policy Statements*

A strong commitment from all levels within a given enterprise or organization is critical in determining the successful prevention and mitigation of sexual harassment. Accordingly, it is important for all upper management, ranging from executives and managers to the supervisors, to come up with a concrete form of commitment in the form of a policy statement that ensures that a policy is accepted, observed and executed by all employees, supervisors and managers throughout the workplace. Any such policy statement should address the following areas at the least:[52]

1. The assertion that all parties working for a company, as well as any third parties associated with said company, reserve the right to be treated with dignity and without discrimination;
2. A comprehensive explanation of the forms of conduct that constitute sexual harassment;
3. Prohibition on the committing of any acts of sexual harassment;
4. Guaranteeing the right of victims to raise grievances and to receive an appropriate resolution from the relevant company in relation to any case;
5. Walkthrough of the procedures that should be undertaken in response to any allegations of committed sexual harassment;
6. An affirmation that any sexual harassment-related conduct represents a breach of company policy and will be subject to disciplinary actions;
7. A directive stating that supervisors and managers have a duty to engage in the positive implementation of policy and to demonstrate leadership by example.

Moreover, in order to ensure that sexual harassment policies can be implemented in an effective manner, they should be included in company regulations or collective labor agreements as requirements that must be fulfilled and that will be subject to the imposition of sanctions in the form of disciplinary action if they are not implemented.

C. *Monitoring and Evaluation*

In order to ensure their success and effectiveness, preventive measures relating to acts of sexual harassment within the workplace and higher education institutions will be subject to the following monitoring and evaluation mechanisms:

Place	Monitoring and Evaluation Mechanism

Workplaces	The following monitoring and evaluation mechanisms should be applied within the workplace:[53] 1. A business should instruct its supervisors and managers to take all complaints of sexual harassment seriously, regardless of their conformity with existing company complaints procedures; 2. Managers and supervisors will be monitored by the relevant company as regards their compliance with policies on sexual harassment; 3. Annual reports should be drawn up and submitted to employers/management that address the numbers and types of complaints that have been raised; and 4. Regular evaluations should be conducted by the enterprise in order to analyze the effectiveness of any mechanism for the prevention and mitigation of sexual harassment.
Higher education institutions	Even though the guidelines outlined under Circular 03/2011 and Regulation 30/2021 set out specific measures that should be implemented by the heads of higher education institutions in relation to preventive measures and mitigation carried out by Task Forces. Reports on monitoring and evaluation results should also be submitted to the Minister of Education, Culture, Research and Technology on a six-monthly basis. Said reports should contain the following information:[54] 1. Preventive measures taken; 2. Results of sexual harassment surveys conducted by the relevant Task Force; 3. Data on reports of sexual harassment; 4. Mitigation activities; and 5. Measures taken to prevent any repeated sexual harassment. Any failure to comply with the abovementioned procedure may result in the imposition of administrative sanctions in the form of written reprimands or the heads of higher education institutions being removed from their posts.[55] It should be noted that the Minister of Education, Culture, Research and Technology may conduct the direct monitoring and evaluation of the relevant higher education institutions in relation to sexual harassment cases that meet any of the following conditions:[56] 1. Are extraordinary in their scale (*skala berat*); 2. Victims are in a critical condition; 3. Victims are located overseas or beyond the relevant jurisdiction; and/or 4. Perpetrators have certain duties and responsibilities as regards the prevention and mitigation of sexual harassment within institutions.

III. **Resolving Cases of Sexual Harassment**

In essence, procedures for the resolution of sexual harassment cases are briefly outlined under Circular 03/2021. However, the new framework of both Regulation 30/2021 and Circular 7/2021 have now introduced a number of specific procedures that should be applied in order to resolve sexual harassment cases, as discussed in the following section. Moreover, the following section will also discuss provisions for the settlement of sexual harassment cases if said cases are to be settled through criminal proceedings, as specifically addressed under the 2021 Draft Bill.

A. *Grievance Procedures under Circular 03/2011*

As mentioned previously in an earlier section, employers and managers are obliged to establish in-house grievance mechanisms in order to provide effective and accessible complaints or reporting procedures for the victims of sexual harassment. Said procedures may differ between workplaces depending on the resources at their disposal and their working conditions.

In general, an in-house mechanism is expected to satisfy the following thresholds in order to achieve the desired level of effectiveness:[57]

1. Ensuring that any complaints are resolved in a consistent manner through a step-by-step procedure that involves the reporting and processing of reports within a specified timeframe;
2. Provision of investigative and appeals procedures for higher authorities in cases where the results of investigations are unsatisfactory;
3. Identification of patterns of unacceptable conduct in order to formulate future prevention strategies within particular areas;
4. The offering of various choices to victims as regards the filing of complaints of sexual harassment (i.e. victims can choose options that best suit their conditions when submitting any complaints or reports).

Grievance procedures that are initiated through in-house mechanisms may be implemented in one of the following forms:

Form of Procedure	Remarks
Informal complaints procedure[58]	This procedure emphasizes the forward-looking settlement of conflicts through deliberations (*kekeluargaan*) that must be settled within 30 business days and which include the following actions: 1. Explaining to offenders that their conduct is unacceptable; 2. Allowing victims to seek confidential advice on possible solutions from colleagues or supervisors who have been trained in related issues; 3. Victims may request that their bosses speak privately to offenders on their behalf; 4. Provision of telephone information services that address concerns or complaints relating to sexual harassment; or 5. Mediating with co-workers in order to find solutions to sexual harassment complaints.
Formal complaints procedure[59]	Formal complaints may be made directly at the request of victims without the need to exhaust the above-listed informal procedures. Said procedures should be guided by the principles of procedural fairness and should include the following steps: 1. Private interview with the relevant complainant; 2. Conveying the relevant allegation to the offender; 3. Provision of an opportunity for the offender to respond and defend themselves against the allegations; 4. Investigation of claims through the collection of further evidence in cases where the relevant facts are disputed; 5. Making of findings; 6. Submission of a report that documents the overall process to the management; and 7. Issuance of recommendations by the management in order to settle on a course of action.

Furthermore, in an effort to prevent repeat cases of harassment through a deterrent effect, disciplinary action and sanctions must be imposed upon sexual harassment offenders. The forms of disciplinary actions or sanctions that will be imposed should depend on the severity/frequency of the harassment, any requests made by the relevant victims, the level of contrition expressed by the offender, expressions of awareness by the offender that their behavior is unacceptable or unwanted and/or any prior incidents or warnings. The range of disciplinary actions and sanctions break down as follows:[60]

1. Written warnings or reprimands;
2. Transfers or reassignments of duties;
3. Termination of management authority or duties;
4. Reduction in wages;
5. Suspension or termination of employment in serious cases; and/or
6. Training or counseling for offenders in relation to their conduct.

It should also be noted that the abovementioned disciplinary actions or sanctions may also be imposed upon any employees who have engaged in any acts of retaliation or victimization of complainants/witnesses, as well as any employees who make any false or malicious accusations.[61] Furthermore, in order to protect victims, witnesses and complainants in cases of sexual harassment, protective and remedial actions must also be initiated by the relevant company or institution. Regular check-ups must also be made in relation to complainants by the relevant officials responsible for the overseeing of sexual harassment cases. Moreover, in cases where victims have sustained losses as a result of any sexual harassment, then it is appropriate to restore the victim to the position that they would have been in had the harassment not taken place. Additional forms of remedial measures may also be taken through the:[62]

1. Restoration of any sick leave or annual leave taken as a result of harassment;
2. Granting of additional sick leave in cases where victims require trauma counseling through the provision of medical advice;
3. Provision of compensation for losses such as medical expenses;
4. Deletion of any negative evaluations which have arisen as a result of harassment, etc.

B. *DKI Jakarta Governmental Institutions and the Framework of Circular 7/2021*

As stipulated under Circular 7/2021, victims will be subject to the following complaints procedure in terms of any sexual harassment cases that take place within government offices in Jakarta:[63]

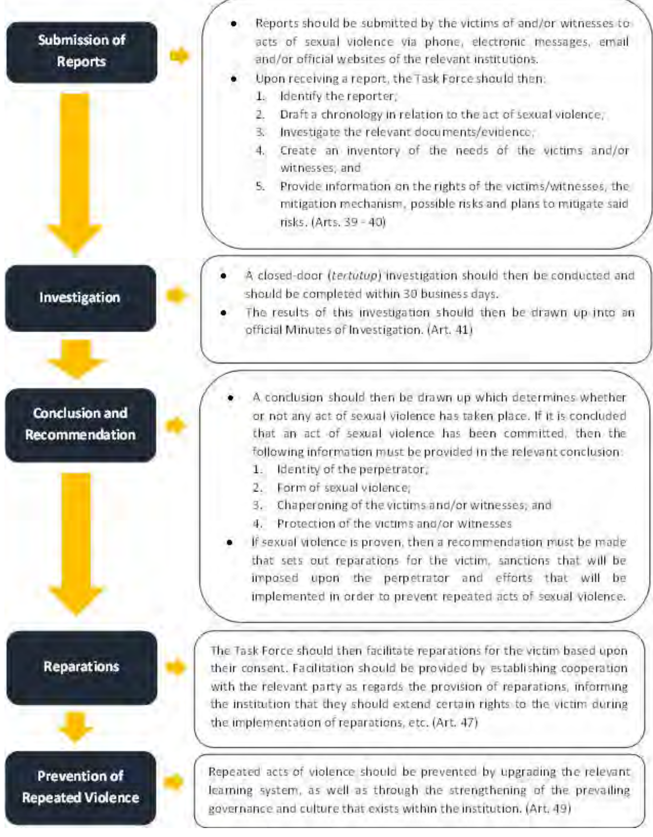
1. Complaints may be submitted in written form through the following official website: https://bkddki.jakarta.go.id/pengaduan;
2. The Office of Empowerment, Child Protection and Population Control, in conjunction with the Technical Implementation Unit of the Integrated Service Center for the Empowerment of Women and Children, will provide a preliminary assessment of any report, as well as offer protection and chaperoning to complainants/victims; and
3. Investigations of offenders will be carried out by the Regional Civil Service Agency (*Badan Kepegawaian Daerah*).

C. *Sexual Harassment at Higher Education Institutions: Mandatory Establishment of Task Forces*

Regulation 30/2021 has now mandated that the mitigation of sexual harassment cases within higher education institutions is to be carried out by Task Forces, which should be formed by the heads of higher education institutions.[64] Task Forces should be based around the following organizational structures:[65]

1. Chairman (who will act concurrently as a member), who should be drawn from the relevant institution's educators;
2. Secretary (who will act concurrently as a member), who should be drawn from the relevant institution's students or educational staff; and
3. Membership, at least 50% of which should comprise students.

The Task Force is responsible for resolving any reported cases of sexual violence in accordance with the following mechanism:[66]



D. *Criminal Proceedings: The 2021 Draft Bill's Perspective*

Under the current regime, if a sexual harassment case is resolved through criminal proceedings, then it should adopt the mechanism set out under the country's Criminal Procedural Law.

However, if the 2021 Draft Bill is ultimately promulgated, then certain special conditions will be applicable as regards any attempts to resolve sexual harassment cases through criminal proceedings. Under both draft bills, investigators, prosecutors any and judges that process sexual harassment cases must possess adequate knowledge and expertise as regards the handling of victims in ways that observe their human rights and gender perspectives, and must have been trained in the handling of sexual harassment cases.[67]

In terms of evidence, the requirements for evidence set out under Indonesia's Criminal Procedural Law will remain applicable, with a number of additions, as set out under the two draft bills, which allow for the use of the following forms of evidence:

Other Forms of Evidence	2017 Draft Bill[68]	2021 Draft Bill[69]
Affidavits from psychologists and/or psychiatrists	√	√
Medical records and/or the results of forensic examinations	√	√
Recordings of investigations	√	

Information that was articulated, sent, received or saved electronically through optical devices or similar	√	√
Documents	√	
Bank statements	√	√

It is important to note that under both draft bills, victim statements are considered sufficient to prove an offender guilty provided that they are corroborated by one other piece of evidence. Furthermore, the following statements should also be considered as valid evidence:[70]

1. Witness statements from the victims' blood relatives or relatives by marriage until the third degree;
2. Victim or witness statements from minors; and
3. Victim or witness statements from disabled persons.

It should be noted that the 2021 Draft Bill does not address the validity of the types of statements described under points (1) and (2) above.

Conclusion

Vertical and asymmetrical power relationships between offenders and victims within the context of sexual harassment should not serve as any impediment to the ultimate serving of justice to victims, particularly within workplaces and higher educational institutions. As a result, in order to successfully eradicate sexual harassment within the workplace and higher educational institutions and to effectively address this crucial issue, it is critical for all members of communities to take an active role and ensure that they are aware of the various preventive measures that are available, as well as of the various mitigation mechanisms that should be followed in order to eradicate sexual harassment.

Improvement in this area begins with the awareness that certain types of conduct may constitute sexual harassment and with the building of commitment through the issuance of policy statements and the establishment of proper mitigating mechanisms. With the participation of individuals across all levels of organizations, not only may existing cases of sexual harassment be brought to a just conclusion but also potential repeat harassment may be prevented.

Ultimately, it is hoped that the issuance of Regulation 30/2021 will lead to the fair settlement of any sexual harassment and violence cases that occur within higher education institutions within Indonesia. Moreover, in a bid to provide greater legal certainty as regards the handling of sexual harassment cases, it is also expected that the Indonesian Government will immediately pass the 2021 Draft Bill and ratify the ILO Convention so that the country has a chance of eliminating and eradicating all forms of sexual harassment and violence. Finally, if the 2021 Draft Bill passes, then offenders will also have the right to be rehabilitated, which will hopefully have a positive effect as regards breaking the chain of sexual harassment and violence. (AR)

[1] Komnasperempuan.go.id, *"CATAHU 2021: Catatan Tahunan Kekerasan Terhadap Perempuan Tahun 2020"* as accessed through: https://komnasperempuan.go.id/uploadedFiles/1466.1614933645.pdf on 17 November 2021.

[2] Cnnindonesia.com, *"Kronologi Kasus Baiq Nuril, Bermula dari Percakapan Telepon"* as accessed through: https://www.cnnindonesia.com/nasional/20181114133306-12-346485/kronologi-kasus-baiq-nuril-bermula-dari-percakapan-telepon on 17 November 2021; and bbc.com, *"Kasus dugaan kekerasan seksual di UGM berakhir damai"* as accessed through: https://www.bbc.com/indonesia/trensosial-47116889 on 17 November 2021.

[3] Grafis.tempo.com, *"Kronologi Dugaan Pelecehan Seksual dan Perundungan Terhadap Pegawai KPI"* as accessed through: https://grafis.tempo.co/read/2794/kronologi-dugaan-pelecehan-seksual-dan-perundungan-terhadap-pegawai-kpi on 22 November 2021; and cnnindonesia.com, *"Dinonaktifkan, Kini Korban Pelecehan di KPI Diberi Surat Penertiban"*, as accessed through: https://www.cnnindonesia.com/nasional/20211102194214-12-715753/dinonaktifkan-kini-korban-pelecehan-di-kpi-diberi-surat-penertiban on 22 November 2021.

[4] Radarbali.jawapos.com, *"Ungkap Kasus Seksual di Unud, Pelakunya Mahasiswa, Buruh Hingga Doktor"* as accessed through: https://radarbali.jawapos.com/hukum-kriminal/20/11/2021/ungkap-kasus-seksual-di-unud-pelakunya-mahasiswa-buruh-hingga-doktor on 22 November 2021; and nasional.kompas.com, *"Ada Puluhan Laporan Kekerasan Seksual di UI: Pelecehan Fisik, Verbal hingga Virtual"* as accessed through: https://nasional.kompas.com/read/2021/11/13/16265881/ada-puluhan-laporan-kekerasan-seksual-di-ui-pelecehan-fisik-verbal-hingga?page=all on 22 November 2021.

[5] The ILO Convention can be accessed through the following link: https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/legaldocument/wcms_740454.pdf.

[6] Ksbsi.org, *'KSBSI Desak Pemerintah Segera Meratifikasi Konvensi ILO 190/2019'* as accessed through https://www.ksbsi.org/home/read/1648/KSBSI-Desak-Pemerintah-Segera-Meratifikasi-Konvensi-ILO-190-2019 on 22 November 2021.

[7] Chapter I.D.3.a, Circular 03/2011.

[8] Chapter II, Circular 03/2011; Point 1, Circular 7/2021; Art. 5 (2), Regulation 30/2021.

[9] Art. 11, 2017 Draft Bill.

[10] Art. 4-9, 2021 Draft Bill.

[11] Art. 285, KUHP.

[12] Chapter II.C, Circular 03/2011.

[13] Art. 14, Regulation 30/2021.

[14] Art. 18, Regulation 30/2021.

[15] Art. 19, Regulation 30/2021.

[16] Art. 4, 2021 Draft Bill.

[17] Art. 5, 2021 Draft Bill.

[18] Art. 6, 2021 Draft Bill.

[19] Art. 7, 2021 Draft Bill.

[20] Art. 8, 2021 Draft Bill.

[21] Art. 9, 2021 Draft Bill.

[22] Art. 12, 2021 Draft Bill.

[23] Art. 13, 2021 Draft Bill.

[24] Chapter 2.B, Circular 03/2011.

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[26] Art. 5, Regulation 30/2021.

[27] Art. 5 (2)(f), Regulation 30/2021.

[28] Art. 4 (1), Law No. 44 of 2008 on Pornography.

[29] Art. 5 (3), Regulation 30/2021.

[30] Chapter I.E, Circular 03/2011.

[31] *Ibid.*

[32] Art. 1(9), 2021 Draft Bill.

[33] Art. 53 (1)(a), Regulation 30/2021; Chapter IV, Circular 03/2011; Point 3 (d)(2), Circular 7/2021.

[34] Art. 53 (1)(c), Regulation 30/2021; Chapter IV, Circular 03/2011; Point 3 (d)(1), Circular 7/2021.

[35] Art. 53 (1)(b), Regulation 30/2021; Chapter IV, Circular 03/2011; Point 3 (d)(2) and (4), Circular 7/2021.

[36] Art. 20, Regulation 30/2021; Chapter IV, Circular 03/2011; Point 3 (d)(3), Circular 7/2021.

[37] Art. 23, 2021 Draft Bill.

[38] Art. 24, 2021 Draft Bill.

[39] Art. 26, 2021 Draft Bill.

[40] Arts. 32 - 33, 2021 Draft Bill.

[41] Point 3(e), Circular 7/2021; Chapter IV, Circular 03/2011.

[42] Art. 53(2), Regulation 30/2021.

[43] Art. 57, 2021 Draft Bill.

[44] Chapter III.C, Circular 03/2011.

[45] Art. 6, Regulation 30/2021.

[46] Arts. 7 - 8, Regulation 30/2021.

[47] Chapter III.A.1, Circular 03/2011.

[48] Chapter III.A.2, Circular 03/2011.

[49] Point 2, Circular 7/2021.

[50] Art. 4, ILO Convention.

[51] Ibid.

[52] Chapter III.B, Circular 03/2011.

[53] Chapter IV.B, Circular 03/2011.

[54] Art. 54, Regulation 30/2021.

[55] Art. 55, Regulation 30/2021.

[56] Art. 56, Regulation 30/2021.

[57] Chapter IV.A.1, Circular 03/2011.

[58] Chapter IV.2.a, Circular 03/2011.

[59] Chapter IV.2.b, Circular 03/2011.

[60] Chapter IV.2.c, Circular 03/2011.

[61] *Ibid.*

[62] Chapter IV.2.d, Circular 03/2011.

[63] Point 3, Circular 7/2021.

[64] Art. 23 (1), Regulation 30/2021.

[65] Arts. 27 (1 - 2) and 28 Regulation 30/2021.

[66] Art. 38, Regulation 30/2021.

[67] Art. 43, 2017 Draft Bill; Art. 17, 2021 Draft Bill.

[68] Art. 44, 2017 Draft Bill.

[69] Art. 19, 2021 Draft Bill.

[70] Art. 45, 2017 Draft Bill.

iii. Guide to Trying Cases of Women Before the Law
(Regulation No. 3/2017, Supreme Court of Indonesia, 4 August 2017)

Unofficial translation by the Law and Policy Reform Program, Asian Development Bank
website: lpr.adb.org

REGULATION OF THE SUPREME COURT OF THE REPUBLIC OF INDONESIA
NUMBER 3/2017
REGARDING
GUIDE TO TRYING CASES OF WOMEN BEFORE THE LAW

BY THE GRACE OF GOD ALMIGHTY

THE CHAIRPERSON OF THE SUPREME COURT OF THE REPUBLIC OF INDONESIA,

Considering:

a. that the protection of citizens against all acts of discrimination constitutes the implementation of constitutional rights as set out in 1945 Constitution of the Republic of Indonesia;

b. that Indonesia has ratified the International Covenant on Civil and Political Right (ICCPR) with Law No. 12/2005 on the Ratification of the International Covenant on Civil and Political Rights which states that all people are the same before the law and legislation prohibits discrimination and guarantees equal protection for all persons against discrimination based on any reason, including sex or gender;

c. that Indonesia as a State-party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) recognises the obligations of the State to ensure that women have access to justice and must be free from discrimination in the justice system;

d. that based on the considerations mentioned in a, b and c, it is necessary to establish a Regulation of the Supreme Court on a Guide to trying Cases of Women before the Law.

Recalling:

1. Law No. 7/1984 on the Ratification of the Convention on The Elimination of All Forms of Discrimination Against Women) (State Gazette of the Republic of Indonesia No. 29/1984, Supplement to the State Gazette of the Republic of Indonesia No. 3277);

2. Law No. 14/1985 on the Supreme Court (State Gazette of the Republic of Indonesia No. 73/1985, Supplement to the State Gazette of the Republic of Indonesia No. 3316) as amended several times, most recently with Law No. 3/2009 on the Second Amendment to Law No. 14/1985 on the Supreme Court (State Gazette of the Republic of Indonesia No. 3/2009, Supplement to the State Gazette of the Republic of Indonesia No. 4958);

3. Law No. 12/2005 on the Ratification of the International Covenant on Civil and Political Rights (State Gazette of the Republic of Indonesia No. 119/2005, Supplement to the State Gazette of the Republic of Indonesia No. 4558);

4. Law No. 13/2006 on Witness and Victim Protection (State Gazette of the Republic 0f Indonesia No. 64/2006, Supplement to the State Gazette of the Republic of Indonesia No. 4635) as amended by Law No. 31/2014 amending Law No. 13/2006 on Witness and Victim Protection (State Gazette of the Republic of Indonesia No. 293/2014, Supplement to the State

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Gazette of the Republic of Indonesia No. 5602);

5. Law No. 48/2009 on Judicial Authority (Official Gazette of the Republic of Indonesia No. 157/2009, Supplement to the Official Gazette of the Republic of Indonesia No. 5076);

HEREBY DECIDES:

TO STIPULATE:

REGULATION OF THE SUPREME COURT ON A GUIDE TO TRYING CASES OF WOMEN BEFORE THE LAW

CHAPTER I

GENERAL PROVISIONS

Article 1

In this Regulation of the Supreme Court what is meant by:

1. Women Before the Law is women who are in conflict with the law, female victims, female witnesses or female parties.

2. Sex is the physical, physiological and biological status of a man and a woman.

3. Gender is the concept that refers to the role, function and responsibilities of men and women that exist as the consequence of and can be altered by the social and cultural circumstances in society.

4. Gender equality is the sameness and equality of conditions between men and women to obtain opportunities and their rights as human beings so they are capable of performing roles and participating in a range of fields.

5. Gender Analysis is the process that has been systematically developed to identify and understand the division of labour or the role of men and women, access and control of development resources, participation in the development process and benefits that they enjoy, patterns of relationships between men and women that are unequal, that in their implementation consider other factors such as social class, race and ethnicity.

6. Gender Justice is a process to ensure fairness for men and women.

7. Gender Stereotypes are general views or impressions about the attributes or characteristics that should be possessed and performed by women or men.

8. Discrimination Against Women includes any differentiation, ostracism or limitation on the basis of sex that has an impact or goal of reducing or removing the recognition, enjoyment or exercise of human rights and core freedoms of women in the fields of law, politics, economics, social matters, culture, civil matters or other fields, independent of their marital status on the basis of equality between men and women.

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9. Power Relations are relations that are characterised as hierarchical, unequal and/or dependent on social status, culture, knowledge/education and/or economics that give rise to one party having power over another party in the context of gender relations to disadvantage one party that has a lower position.

10. A support person is a person or group or organisation that is trusted and/or has skills and knowledge to support Women Facing the Law with the aim of making women feel safe and comfortable in testifying during the trial process.

Chapter II

PRINCIPLE AND AIM

Article 2

Judges try cases of Women Before the Law based on the principles of:

a. respect for human nobility and dignity;

b. non-discrimination;

c. Gender Equality;

d. equality before the law;

e. justice;

f. advantageousness; and

g. legal certainty.

Article 3

The guide to trying cases of Women Before the Law aims for judges to:

a. understand and apply the principles as mentioned in Article 2;

b. identify situations of unequal treatment that cause Discrimination Against Women; and

c. guarantee the rights of women to equal access in obtaining justice.

CHAPTER III

EXAMINING CASES

Article 4

In the examination of cases, judges should consider Gender Equality and non-discrimination, by identifying the facts in a trial:

a. unequal social status between the parties involved in a case;

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b. unequal legal protection that impacts on access to justice;

b. discrimination;

d. the psychological impact experienced by the victim;

e. the physical and psychological powerlessness of the victim;

f. Power Relations that cause the victim/witness to be powerless; and

g. the history of violence by the perpetrator against the victim/witness.

Article 5

When examining Women Before the Law, judges must not:

a. display an attitude or issue statements that belittle, blame and/or intimidate Women Before the Law;

b. justify the occurrence of Discrimination Against Women by using culture, customary regulations, and other traditional practices as well as using expert interpretation that is gender biased;

c. question and/or consider the sexual experience or background of the victim as a basis to acquit the perpetrator or mitigate the punishment against the perpetrator; dan

d. issue statements or views that contain Gender Stereotypes.

Article 6

Judges when trying cases of Women Before the Law should:

a. consider Gender Equality and Gender Stereotypes in the legislation and unwritten law;

b. interpret legislation and/or unwritten law that can guarantee Gender Equality;

c. draw on legal values, local wisdom and the sense of justice that exists in the community in order to guarantee Gender Equality, equal protection and non-discrimination; and

d. consider the application of international conventions and treaties linked to Gender Equality that have been ratified.

Article 7

When conducting examinations during trials, judges should prevent and/or admonish the parties, legal advisors, public prosecutors and/or legal representatives for attitudes or making statements that belittle, blame, intimidate and/or use the sexual experience or background of Women Before the Law.

Article 8

(1) Judges should ask female victims about losses, the impact of the case and the need for redress.

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(2) Judges should inform victims about their right to combine cases in accordance with Article 98 of the Criminal Procedure Code and/or ordinary claims or requests for restitution as set out in the provisions of legislation.

(3) In terms of redressing the victim or injured party, judges should:

a. be consistent with human rights principles and standards;

b. not convey Gender Stereotypes; and

c. consider the circumstances and interests of the victim from disproportional damages resulting from Gender inequality.

Article 9

When Women Before the Law experience physical and psychological obstacles and therefore require support then:

a. Judges can suggest for Women Before the Law to summon a Support Person; and
b. Judges can grant a request made by Women Before the Law to summon a Support Person.

Article 10

Judges at their own initiative and/or at the request of the parties, public prosecutor, legal advisor and/or victim can order Women Before the Law to have their testimony examined by the means of remote audio visual communication in the local court or other location, when:

a. the mental condition/mental health of Women Before the Law is not in a good state due to fear/psychological trauma based on the evaluation of a doctor or psychologist;

b. based on the assessment of the judge, the safety of Women Before the Law cannot be guaranteed when they are in a public and open place; or

c. based on a decision from the Witness and Victim Protection Agency (LPSK), Women Before the Law are in a witness and/or victim protection program and according to the assessment of the LPSK they cannot be present in court to testify both for reasons of safety as well as physical or psychological obstacles.

CHAPTER IV

JUDICIAL REVIEW

Article 11

When the Supreme Court conducts a judicial review linked to Women Before the Law, it should consider:

a. human rights principles;

b. the best interests and redress of Women Before the Law;

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d. international conventions and/or treaties linked to Gender Equality that have been ratified;

d. Power Relations as well as every Gender Stereotype that exists in legislation; and

e. Comprehensive Gender Analysis.

CHAPTER V

CONCLUDING PROVISIONS

Article 12

This Regulation of the Supreme Court will enter into force on the date of its enactment.

To ensure that all people are aware of this regulation, the promulgation of this Regulation of the Supreme Court is ordered, by placing it in the Official Gazette of the Republic of Indonesia.

Stipulated in Jakarta,

On 11 July 2017

CHAIRPERSON OF THE SUPREME COURT OF THE REPUBLIC OF INDONESIA,
[Signed]
MUHAMMAD HATTA ALI

Promulgated in Jakarta,
On 4 August 2017

DIRECTOR GENERAL OF LEGISLATION OF THE MINISTRY OF LAW AND HUMAN RIGHTS OF THE REPUBLIC OF INDONESIA,
[Signed]
WIDODO EKATJAHJANA

OFFICIAL GAZETTE OF THE REPUBLIC OF INDONESIA No. 1084/2017

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iv. Guideline on Access to Justice for Women and Children in the Management of Criminal Cases (Guideline No. 1 of 2021, Attorney General's Office, 21 January 2021)

Unofficial translation by the Law and Policy Reform Program, Asian Development Bank
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Guideline Number 1 of 2021
on Access to Justice for Women and Children
in the Management of Criminal Cases

ATTORNEY GENERAL'S OFFICE
OF THE REPUBLIC OF INDONESIA

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ATTORNEY GENERAL
OF THE REPUBLIC OF INDONESIA

GUIDELINE
NUMBER 1 OF 2021 ON
ACCESS TO JUSTICE FOR WOMEN AND CHILDREN
IN THE MANAGEMENT OF CRIMINAL CASES

CHAPTER I
FOREWORD

A. Background

Delivery of access to justice for women and children in the criminal cases has become a legal necessity within society for the purpose of protecting the interests and rights of women and children who are in contact with the law. In an integrated criminal justice system, prosecutors play a key role in monitoring and ensuring women and children's access to justice.

Providing access to justice to women and children in the management of criminal cases must be done in a proportionate manner with due consideration of the their role and status in such cases, the principle of non-discrimination, the principle of protection, developments in crime and criminal procedural law, including the misuse or utilization of information technology, international conventions, as well as other aspects of the law in accordance with the applicable laws and regulations specifically relating to protection of witnesses and victims, as well as other influencing factors that would affect the outcome of the handling of such criminal case to ensure justice, legal certainty and benefit.

B. Purpose and Objective

1. Purpose

   The present Guideline is intended to serve as reference for prosecutors in delivering access to justice for women and children in contact with the law in the course of prosecuting criminal cases.

2. Objective

   The present Guideline aims to optimize the delivery of justice for women and children

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in contact with the law in the management of criminal cases.

C. Scope

The scope of the present Guideline covers the management of criminal cases involving women and children in contact with the law during the phases of pre-investigation, investigation, pre-prosecution, prosecution, trial, and enforcement of court judgments that have gained permanent legal force.

D. Basis

1. Law Number 16 of 2004 on the Attorney General's Office of the Republic of Indonesia (Statute Registry of the Republic of Indonesia Year 2004 Number 67, Supplemental Statute Registry of the Republic of Indonesia Number 4401);
2. Presidential Regulation Number 38 of 2010 on the Organization and Working Procedure of the Attorney General's Office of the Republic of Indonesia as amended by Presidential Regulation Number 29 of 2016 on Amendment to Presidential Regulation Number 38 of 2010 on the Organization and Working Procedure of the Attorney General's Office of the Republic of Indonesia (Statute Registry of the Republic of Indonesia Year 206 Number 65);
3. Regulation of the Attorney General Number PER-006/A/JA/07/2017 tentang Organisasi dan Tata Kerja Kejaksaan Republik Indonesia (Berita Negara Republik Indonesia Tahun 2017 Nomor 1069) sebagaimana telah diubah dengan Peraturan Kejaksaan Nomor 6 Tahun 2019 tentang Perubahan atas Peraturan Jaksa Agung Nomor PER- 006/A/JA/07/2017 tentang Organisasi dan Tata Kerja Kejaksaan Republik Indonesia (Berita Negara Republik Indonesia Tahun 2019 Nomor 1094).

E. Definitions

The terms used in the present Guideline are ascribed the following definitions:

1. Woman in Contact with the Law is any female criminal offender, female victim, [or] female witness.
2. Female Criminal Offender is any female person having reached 18 (eighteen) years of age who is suspected of having committed a crime and has been charged with such offense.
3. Female Victim is any female person having reached 18 (eighteen) years of age and is

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experiencing physical or mental suffering and/or economic loss as a result of a crime.

4. Female Witness is any female person who has reached 18 (eighteen) years of age who is able to provide a statement on matters with regard to a crime that such person has personally heard, seen and/or experienced for the purpose of an investigation, prosecution, or trial.
5. Child in Contact with the Law is any child in conflict with the law, child victim, [or] child witness.
6. Child in Conflict with the Law, hereinafter referred to as Child, is any child having reached 12 (twelve) years of age, but under 18 (eighteen) years of age, suspected of having committed a criminal offense.
7. Child Victim is any child having reached 18 (eighteen) years of age who has experienced physical or mental suffering and/or economic loss as a result of a crime.
8. Child Witness is any child not having reached 18 (eighteen) years of age who is able to provide a statement on matters with regard to a crime that such person has personally heard, seen and/or experienced for the purpose of an investigation, prosecution, or trial.
9. Victim refers to a Female Victim and/or Child Victim.
10. Witness refers to a Female Witness and/or Child Witness.
11. Violence is any unlawful act committed physical or mentally [against a person] with or without a means causing danger to the life, body, psychological condition, or removal of the freedom of such person.

CHAPTER II
GENERAL

1. Prosecution of criminal cases involving a woman or children should be in accordance with the applicable laws and regulations with due regard of the guiding provisions on the prosecution of criminal offenses, operational standards for criminal prosecution, and the present Guideline.
2. Prosecution of criminal cases involving women or children should be conducted by adopting a perspective of delivering access to justice for women and children.
3. The publicizing of a criminal case involving a woman [or] child who is in contact with the law should always protect the human rights, dignity, privacy [of the woman or child] and in

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accordance with the requirements of the laws and regulations.

CHAPTER III

PRE-INVESTIGATION AND INVESTIGATION

A. Taking of Statement and Examination

1. The taking of statement and/or examination of a Victim, Witness, Female Offender, [or] Child should at all times observe the human rights, dignity, and honor [of the Victim, Witness, Female Offender, or Child], without intimidation and without [judging] such person's wrongdoing, lifestyle, [or] moral values including their sexual history through the use of leading questions or questions that has are not related to the criminal offense.
2. In the taking of statement and/or examination of a Victim, Witness, Female Offender or Child, a Public Prosecutor (acting as investigator) shall not:
   a. ask questions that are sexist and/or discriminative from a gender or sexual perspective that are not relevant to the case; and/or
   b. build irrelevant assumptions relating to the socio-economic background or specific condition of such person that [judge], degrade [or] is prejudicial against their existence as a human being. When providing their statement and/or during an examination, a Victim and/or Witness may be accompanied by social worker, [an officer of] the Witness and Victim Protection Agency (hereinafter referred to as LPSK), family member, legal counsel and/or other support provider.
3. In performing examination of a Female Offender [or] Child, a State Prosecutor, in the capacity of investigator, should inform the rights afforded to them by the legislations.
4. In performing examination of a Victim [or] Witness, a State Prosecutor in the capacity of investigator should first inform them of:
   a. the judicial process; and
   b. the rights of Victims and/or Witnesses, including the right to claim for damages, restitution, and/or compensation, as well as the procedure by which such claim can be initiated.
5. Should there be sufficient grounds to believe that a Child Victim and/or Child Witness is unable to be present at a court session due to health, security, safety and/or other

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reasons, examination of such person may be conducted through electronic recording, subject to the satisfaction of the following procedural requirements:

a) certificate from a physician or psychologist;

b) notification to the parents/guardian and/or support provider of the Child Victim and/or Child Witness regarding the electronically recorded examination; and/or

c) request for authorization of the Chairperson of the District Court for the examination by way of electronic recording.

6. Examination by electronic means as provided under paragraph 6 must be recorded in a minutes of examination.

7. If authorization is not issued by the Chairperson of the District Court as required under paragraph 6 item c), electronic recording may be performed at the discretion of the investigator.

8. A Child Victim and/or Child Witness who has reached 15 (fifteen) years of age who, due to health, security, safety, and/or other reasons, is believed to be unable to be present at a court session, may have their statements heard under oath and a transcript of their oath shall be prepared.

9. A Female Victim and/or Female Witness who, due to health, security, safety, and/or other reasons, is believed to be unable to be present at a court session, may have provide their statements under oath and their oath shall be recorded in writing.

B. Arrest and Detention

1. Arrest of a Female Offender [or] Child should as far as possible be performed by a female State Prosecutor acting in the capacity of investigator.

2. A Child who is placed under arrest is to be placed in a Temporary Children Placement Institution (Lembaga Penempatan Anak Sementara) facility. If such facility is unavailable, the Child may be placed with the Social Service Institution (Lembaga Penyelenggaraan Kesejahteraan Sosial).

C. Search and Seizure

1. Body search of a female person [or] child to the furthest extent possible should be performed by a female Prosecutor in the capacity of investigator.

2. Collection of evidence to be examined at a forensic laboratory should [preserve] integrity and authenticity in order to maintain its evidentiary value.

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D. Compilation of Case File

1. In the presentation of facts and acts that are sexual in nature, the Prosecutor should, as far as possible, refrain from providing description that is overly detailed, vulgar, [or] excessive in the case file.
2. Avoidance of overly detailed, vulgar [or] excessive as required under paragraph 1 is meant to respect the human rights, dignity and privacy of Women and Children in Contact with the Law and to prevent the revictimization of Victims.
3. Elaboration of facts and acts that are overly detailed and vulgar as referred to in paragraph 1 is may be presented insofar as necessary to support the substantiation of the elements set forth in the articles [under which the charges are brought] and/or the charged offense or wrongdoing of the offender.
4. For the purpose of protecting information and/or documents [that contain sexual images/description], Prosecutor in the capacity of investigator shall separate documents that contain images, illustrations and/or photographs that depict sexual organs, activities and/or objects from the case file.
5. Protective [measures] as prescribed in paragraph 4 includes maintaining the confidentiality of identities, information, and/or documents as required by the applicable laws and regulations.
6. The documents referred to in paragraph 4 constitute an integral part of the case file.

CHAPTER IV

PRE-PROSECUTION

A. Tracking Progress of Investigation

1. For the purpose of tracking the progress of the investigation, Prosecutor shall direct and/or proactively coordinate with the investigators, including ensuring that investigators have informed the victim of their rights to damages, restitution or compensation, as well as the procedure to initiate such claims, as well as [ascertaining] that the Victim and/or Witness will be able to give their testimony in court with due consideration of their health, security, safety and/or other legitimate factors.
2. If the Prosecutor views that the result of the investigation is inadequate, they may

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return the case file to the investigators together with instructions on how to address the gaps.

B. Examination of Case File

In examining the case file pertaining to a crime involving Women and Children in Contact with the Law, the Prosecutor should pay due attention to the substantive and procedural requirements:

1. Procedural Requirements

   a. Where a criminal offense committed against the body and life of a person, including the removal of the freedom of a person, rape, acts of indecency, adultery, domestic violence, trafficking in persons, sexual exploitation, pornographic acts, crimes in the area of electronic information and transactions that violates moral values or contain pornography, terrorism [or] gross violation of human rights, the following elements can be included [in the case file]:

      1) Forensic medical examination report (*Visum et Repertum*) or a medical certificate issued for the victim. If deemed necessary to provide evidentiary support, forensic examination can also be performed on the offender.

      2) Forensic laboratory test result, among others test conducted on bodily fluid, hair, and/or cells of the offender as well as the victim that can prove the occurrence of penetration (penis) and/or ejaculation into the vagina or anus and/or which was committed orally, and others.

      3) Forensic psychological examination (*Visum et Repertum Psikiatrikum*) result or a medical certificate issued by a psychiatrist:

         a) with respect to the victim, to determine the psychological impact of the crime or their mental capacity to undergo the judicial process; and

         b) with respect to the offender, to determine their ability to be held accountable, mental capacity to undergo the judicial process, and/or psychological response or specific external provocation such as history of being subject to abuse that can potentially create psychological conflict or proclivity to commit a violent crime.

   b. In the event the prosecutor will be demanding additional punishment for an offender who have committed domestic abuse in the form of:

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1) counseling, additional procedural requirements that must be provided are result of forensic medical examination, observation, and/or a certificate issued by a psychiatrist, certificate issued by a psychologist and/or result of a social assessment of the victim;
2) restriction of movement of the offender, additional procedural requirements that must be provided are result of forensic medical examination, observation, and/or support for the victim by a psychiatrist, psychologist or a person who is certified or having a specific competence.

c. In the event the Prosecutor will be demanding additional punishment for an offender who have committed sexual abuse against a minor in the form of announcement of the offender's identity, additional procedural requirements that must be provided are the result of forensic medical examination, observation, and/or a certificate issued by a psychiatrist, certificate issued by a psychologist and/or result of a social assessment of the victim.

d. [Original text is a repetition of the immediately preceding point above—(1)(c).]

e. In the event the Prosecutor will be demanding additional punishment for an offender committing sexual intercourse with a child in the form of:
1) chemical castration, additional procedural requirements that must be provided are result of clinical assessment, consisting of clinical and psychiatric interview, physical examination and supporting examinations;
2) attachment of electronic detention device, additional procedural requirements that must be provided are result of forensic medical examination, observation, and/or a certificate issued by a psychiatrist, certificate issued by a psychologist and/or result of a social assessment of the offender;
3) rehabilitation, additional procedural requirements that must be provided are result of forensic medical examination, observation, and/or a certificate issued by a psychiatrist, certificate issued by a psychologist and/or result of a social assessment of the offender.

f. In the event the Prosecutor will be demanding certain actions to be taken against an offender who has committed indecent act against a child in the form of:

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1) wearing of an electronic detection device, additional procedural requirements that must be provided are result of forensic medical examination, observation, and/or a certificate issued by a psychiatrist, certificate issued by a psychologist and/or result of a social assessment of the offender;
2) rehabilitation, additional procedural requirements that must be provided are result of forensic medical examination, observation, and/or a certificate issued by a psychiatrist, certificate issued by a psychologist and/or result of a social assessment of the offender.

g. If there exists sufficient health, security, safety and/or other legitimate reasons to believe that a Child Victim and/or Child Witness is not able to appear in court and thus prompting Investigators to conduct examination through electronic recording, additional requirements that must be satisfied are:
   1) certificate issued by a doctor or psychologist; notification to the parents/ guardian and/or support provider of the Child Victim and/or Child Witness regarding examination by way of electronic recording;
   2) letter seeking approval from the Chairperson of the District Court of the examination by way of electronic recording; and/or
   3) minutes of the examination of Child Victim and/or Child Witness.

h. Where a child victim and/or child witness who has reached the age of 15 (fifteen) years due to health, security, safety and/or other legitimate reasons is believed to be unable to appear in court, their statement will be given under oath and the case file will contain a transcript of such oath.

i. In the event a Child Victim files a claim for restitution, additional procedural requirements that must submitted are:
   1) a letter requesting restitution from the Child Victim or an institution; and
   2) documents to support the request for restitution.

j. For the filing of a request for restitution and compensation for the benefit of a Female Victim, submission of the request and procurement of the relevant requirements are to be facilitated by the LPSK.

2. Substantive Requirements
   a. Where testimony can only be obtained from the Victim, from a witness not under

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oath, or through hearsay (*testimonium de auditu*), the Prosecutor shall direct the investigators to make the most use of evidence obtained from:

1) a person who is able to provide a statement relating to a criminal case despite not having directly heard, seen or experienced the facts, provided that such testimony relates to the crime;
2) witnesses whose statements are provided separately but are interlinked such that they can collectively establish the occurrence of an event or condition and such testimonies can be used as valid evidence (chain of evidence/*ketting bewijs*), whether to be taken as witness testimony or a lead;
3) experts issuing evidentiary documents, such as forensic medical reports, forensic psychological reports, or forensic laboratory reports, or witnesses who corroborate the substantiation of charges or elements of a criminal offense, based on their respective field of knowledge; and/or
4) information and/or documents in electronic form relating to the offense.

b. In the event a Child Victim and/or Child Witness who has reached the age of 15 (fifteen) years, due to health, security, safety and/or other legitimate reasons, is believed to be unable to appear in court, their statement will be given under oath.

c. If there exist sufficient health, security, safety, and/or other legitimate reasons to believe that a Child Victim and/or Child Witness cannot appear in court, the Prosecutor shall direct the investigator to electronically record the conduct of the examination subject to the approval of the Chairperson of the District Court or, if the Chairperson declines to give such approval, based upon the discretion of the investigator.

d. If during the course of the investigation examination of a Child Victim and/or Child Witness is electronically recorded, substantive requirement for the trial shall include the recorded audio or visual testimony.

C. Protection of Witnesses and Victims

1. Where the condition of the Victim and/or Witness qualifies them to request protection by the LPSK, the Prosecutor shall direct the investigators to coordinate with such agency.
2. For the purpose of protecting information and/or documents [that contain sexual

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images/description], Prosecutor in the capacity of investigator shall separate documents that contain images, illustrations and/or photographs that depict sexual organs, activities and/or objects from the case file.

3. Documents that are described in paragraph 2 above constitute an integral part of the case file.
4. Protective [measures] as prescribed in paragraph 2 includes maintaining the confidentiality of identities, information, and/or documents as required by the applicable laws and regulations.

CHAPTER V

PROSECUTION

A. Preliminary Meeting

1. For the purpose of obtaining successful prosecution and to determine whether the case file has met the requirements to be submitted with the court, and if deemed necessary by the prosecutor with the approval of the Head of the District Prosecutor's Office (Kejaksaan Negeri) or Head of the District Prosecutor's Branch Office, a preliminary meeting may be conducted with the Victim and/or Witness.
2. The preliminary meeting as referred to in paragraph 1 is conducted following delivery of the suspect and evidence (phase two).
3. For the purpose of the preliminary meeting, the Prosecutor may summon the Victim and/or Witness by stating the time and place and reason of the summon.
4. The preliminary meeting shall be conducted at the Prosecutor's Office or, if for any legitimate reason the Victim and/or Witness cannot be present, at another location or through an online platform based on considerations of their health, security, and/or safety.
5. During the preliminary meeting the Victim and/or Witness may be accompanied by a social worker, an LPSK staff, family member, attorney and/or other support provider, and the investigator may be present at such meeting.
6. At the preliminary meeting, the prosecutor may convey information on or explain about:
   a. the judicial process;

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b. the right of the Witness and/or Victim, including their right to claim damages, restitution, and/or compensation and the procedure by which such claim can be filed;

c. consequences arising from the Victim and/or Witness' decision to appear or not to appear in court in order to ensure that they understand the situation;

d. [the possibility for] live remote audio visual examination to be conducted by order of the court if a Female Victim and/or Female Witness is not able to appear in court due to health, security, safety, and/or other legitimate reasons; and

e. [the possibility for] live remote audio visual examination to be conducted based on court order, if a Child Victim and/or Child Witness is not able to appear in court due to health, security, safety, and/or other legitimate reasons; and

f. [the possibility for] out-of-court examination to be conducted through electronic recording and/or live remote examination by order of the court if a Child Victim and/or Child Witness cannot appear in court due to health, security, safety and/or other legitimate reasons.

7. The preliminary meeting shall be recorded in a minutes of meeting signed by the prosecutor, Victim and/or Witness, and/or 2 (two) persons accompanying [the Victim and/or Witness] or who are present at the meeting and the supervisor of the Prosecutor.

8. If based upon the outcome of the preliminary meeting it is found or can be presumed that the Victim and/or Witness cannot appear in court, the Prosecutor shall consider the strength and quantity of the evidence in order to determine the court strategy to be adopted with due consideration of the condition of the Victim and/or Witness.

B. Drafting of the Indictment

1. In the presentation of facts and acts that are sexual in nature, the Prosecutor should, as far as possible, refrain from providing description that is overly detailed, vulgar, [or] excessive in the case file, while maintaining accurate, clear and complete description of the case.

2. Avoidance of overly detailed, vulgar [or] excessive as required under paragraph 1 is meant to respect the human rights, dignity and privacy of Women and Children in Contact with the Law and to prevent the revictimization of Victims.

3. Elaboration of facts and acts that are overly detailed and vulgar as referred to in

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paragraph 1 is may be presented insofar as necessary to support the substantiation of the elements set forth in the articles [under which the charges are brought] and/or the charged offense or wrongdoing of the offender.

4. In cases of online child and women sexual exploitation and abuse or which involve sexual elements, the prosecutor shall avoid inserting or copying and pasting picture, illustration, and/or photograph of the Victim, or which depict sexual organs, sexual activities and/or objects in the indictment document.
5. Avoidance of inserting or copying and pasting materials described in paragraph 4 above is intended as a measure to protect and ensure safety and to respect the dignity and privacy of the Victim.
6. Where a child has committed an [offense] without intent, through negligence or without culpability due to the child being in a situation they were unaware of, misled, forced or subjected to violence perpetrated by a person using such child as a means, then the construction of the law as adopted in the indictment shall stipulate that the person manipulating the child has ordered such child to commit the offense.
7. In the legal construction where the offender has instructed the child to commit an offense as referred to in paragraph 5, the suspect is positioned as the *manus domina* and the child as *manus ministra.*
8. A construction of the law that is similar to paragraph 6 may be applied to women if it can be established that she only served as a means by which a crime is committed, or as *manus ministra.*
9. In the position of *manus ministra,* a woman or child as referred to in paragraph 6 and paragraph 7 is qualified as Victim and is are not subject of prosecution.
10. Where a woman and/or child as *manus ministra* is deemed to be a Victim as referred to in paragraph 8, statement made by such woman and/or child will have evidentiary strength equal to that of a statement made by a Witness.
11. In cases where claim for restitution/compensation is made before the filing of the case file [with the court], the Prosecutor shall state filing of such claim in the indictment.
12. [Original text is a repetition of the immediately preceding point above—(B)(11).]

C. Protection of Identity

1. If a request is made to the Prosecutor by the defendant or their legal counsel for a copy

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of the minutes of examination for the purpose of mounting their defense, in order to protect information and/or documents containing items of a sexual nature, the Prosecutor shall inform [the defendant or their legal counsel] of the obligation of the Prosecutor to withhold such minutes.

2. Protection of information and/or documents as referred to in paragraph 1 above includes maintaining the confidentiality of identity, information, and/or documents as required under the applicable laws and regulations.

CHAPTER VI
EXAMINATION DURING COURT SESSION

A. Examination During Court Session

1. Examination in a court session is conducted with the Victims and/or Witness attending such session.
2. If a Victim and/or Witness who is over 15 (fifteen) years of age cannot be examined in court due to health, security, safety, and/or other legitimate reasons, the Prosecutor shall seek the court's approval to read out the minutes of examination that has been conducted under oath.
3. If a Child Victim and/or Child Witness cannot be present in court for examination due to health, security, safety, and/or other legitimate reasons, the Prosecutor shall request the court to order the examination:
   a. to be conducted outside the court by using electronic recording; and/or
   b. to be conducted remotely by [using] audio/visual [device].
4. The method described in paragraph 3 point b shall also be applied to Female Victims and/or Female Witnesses.
5. In the event examination of a Child Victim and/or Child Witness is performed outside the court using electronic recording device or remotely using audio/visual communication device, the examining officer and/or person present at the examination session shall remove their court uniform or official attributes.
6. Prosecutor shall request to the court that the result of the examination conducted outside the court using electronic recording device or remotely using audio/visual device be recorded in a minutes of court examination.

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7. In addition to reading out the minutes of examination conducted under oath, the examination conducted outside the court using electronic recording device, and/or live remote examination using audio/visual device, for the purpose of further substantiating the charges, 2 (two) legitimate evidentiary instruments and reinforcement of the judge's conviction can be acquired by:
   a. examining a Witness whose testimony incriminates the defendant and/or an expert not named in the case file, as requested by the Prosecutor during the course of the legal proceeding or before the passing of judgment; and/or
   b. having the witnesses meet to ascertain the correctness of their testimonies and/or examine the witnesses orally, as needed.
8. Examination of a Victim and/or Witness shall be undertaken while respecting the victim or witness' fundamental rights, dignity, and honor, without intimidation and without judgment of the omissions, lifestyle and moral values, including sexual history of the Victim and/or Witness by asking leading questions or questions that are not related to the crime, as extenuating circumstances for the defendant.
9. If deemed necessary and with due consideration of the condition of the Victim and/or Witness, during the examination process the Victim and/or Witness may be accompanied by a psychologist, psychiatrist, doctor, and/or spiritual counselor.

B. Examination Outside the Court by Using Electronic Recording Device
1. Prosecutor shall seek the approval of the Judge to review the result of examination conducted by using electronic recording device at the investigation phase.
2. If the judge approves the request as referred to in paragraph 1, the Prosecutor shall present the result of examination conducted using electronic device for examination in court.
3. If the judge denies the request made pursuant to paragraph 1, the prosecutor may ask the court to order the examination of the Child Victim and/or Child Witness to be conducted outside the court using electronic recording device.
4. Upon obtaining the approval as referred to in paragraph 3, the Prosecutor shall prepare and deliver:
   a. letter requesting for assistance in performing examination outside the court to the Correctional Facility (Balai Pemasyarakatan); and

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b. letter of summons to examination outside the court by using electronic recording device to the Child Victim and/or Child Witness and the parent/guardian, social worker, and/or other support provider,

by stating the time and place of the examination and the reason for such examination.

5. Examination outside the court by using electronic recording [device] shall be performed by the Prosecutor, attended by a Social Worker and parent/guardian (if the examination is performed on a child victim and/or child witness), investigator, and legal counsel or other legal aid provider.
6. In the event the Child Victim and/or Child Witness is domiciled or living outside the geographical jurisdiction of the court having judicial competence to hear the case, with due consideration of the principle of expedient, simple, and low-cost judicial proceeding. Examination as described in paragraph 5 may be performed by the Prosecutor with the local District Prosecutor's Office or the original investigating officer under the coordination of the Prosecutor trying the case.
7. In the course of the examination referred to in paragraph 6, the prosecutor trying the case may participate in the examination through online means.
8. Examination conducted outside the court through the use of electronic recording device shall be recorded in a report, which at least contains:
   a. time and location of the examination;
   b. officer recording the examination;
   c. officer performing the examination;
   d. identity of the Child Victim and/or Child Witness being examined;
   e. the parties present during the examination;
   f. type of electronic recording device and the audio/video file format;
   g. duration of examination;
   h. the questions asked by the examining officer and/or advocate and the response given by the Child Victim and/or Child Witness; and
   i. signature of the parties present at the examination.

C. Live Remote Examination using Audio Visual Communication Device

1. Upon receiving approval from the judge to perform live remote examination, the Prosecutor shall prepare and deliver summons to:

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a. the Victim and/or Witness;

b. the support provider, who may be a social worker, an LPSK officer, family member, attorney of the Victim and/or Witness; and/or

c. other support provider,

by stating the time and location of the examination, and the reason for such summon.

2. In the case of Child Victim and/or Child Witness, summons shall also be delivered to the parents/guardian/person trusted by the Child Victim and/or Child Witness or social worker.

3. Location of the examination as stated in the summon letter as referred to in paragraph 1 shall be determined based on the location of the Victim and/or Witness providing the statement.

4. Live remote examination using audio visual communication device can be conducted from the courthouse where the case is being heard or at another location with due regard of the health, security, and/or safety of the Victim and/or Witness.

D. Substantiation of Case

1. Substantiation of Criminal Case in General

a. In taking the statement from and/or conducting an examination on a Victim, Witness, Female Offender, [or] Child, the Prosecutor shall not:

1) ask questions that are sexist and/or discriminative from a gender or sexual perspective that are not relevant to the case; and/or

2) build irrelevant assumptions relating to the socio-economic background or specific condition of such person that [judge], degrade [or] is prejudicial against their existence as a human being.

b. Special conditions that constitute a contributing factor of the offense or the impact of the offense on Women and Children in Contact with the Law, such as depression, reoccurrence of an event that happened in the past, trauma, sense of shame, fear, low esteem or defensive mindset, should be supported by evidentiary statement and/or expert report.

c. Where a Female Offender and/or Child committing a criminal offense experiences the following situation:

1) violence experienced during the commission or occurrence of the offense,

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2) psychological condition prevailing during the commission or as a result of the crime,
3) gender stereotyping causing the person to be trapped in a certain position or condition within the family and/or community,
4) dominating relationship placing such person as a subordinate, and/or
5) other conditions that cause a person to commit or react to a crime,

the Prosecutor shall establish causality between the conditions described in points 1) through 5) supported by statements, expert reports, statement from a social worker and/or social report, and the relevant evidence that are appropriate to the identified legal facts linked with the crime.

d. If causality as referred to in item c can be established, the crime committed by the Female Offender and/or Child can serve as justification of or grounds to disregard culpability.

e. If causality as referred to in item c cannot be established, but no justifying factor or ground exists that can nullify culpability, then the Prosecutor shall consider such situation as an extenuating circumstance.

f. With a Victim of a crime, the Prosecutor shall examine factors such as:
1) psychological condition that prevails during the commission of or as a result of the offense;
2) gender stereotyping causing the person to be trapped in a certain position or condition within the family and/or community,
3) dominating relationship placing such person as a subordinate, and/or
4) power relationship between the offender and the Victim; and/or
5) psychological response or specific syndromes which indicate deviant relationship or misconstruction of relationship, thus causing tolerance of the acts of the offender due to situation, circumstances or past experience.

g. The situation, impact, or reaction of the victim as referred in paragraph f points 1) through 5) must be established by the Prosecutor through legal analysis and can be taken into account as an aggravating circumstance with due regard of the legal facts uncovered during trial in a proportionate manner.

h. For the purpose of proving a criminal offense related to marriage, marriage

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registration document or copy thereof does not constitute the sole valid evidence to prove marriage.

2. Substantiating Cases of Rape or Sexual Violence

a. In establishing acts relating to sexual violence, the Prosecutor should take into account provisions of various laws that contain elements of sexual intercourse, sexual violence, or rape, as set forth in the following table:

<table>
<tr><th>No</th><th>Act</th><th>Criminal Code</th><th>Child Protection Law</th><th>Domestic Abuse Law</th></tr>
<tr><td>1.</td><td colspan="4">Forced sexual intercourse using violence or threat of violence.</td></tr>
<tr><td></td><td>a. adult female victim and committed outside a marriage</td><td>✓
(Article 285)</td><td>-</td><td>✓
(Article 8 point a jo. Article 46)
If the victim is living within the household</td></tr>
<tr><td></td><td>b. in a marriage</td><td>-</td><td>-</td><td>✓
(Article 8 point a jo. Article 46)
If the victim is the spouse</td></tr>
<tr><td>2.</td><td colspan="4">Having sexual intercourse with a woman outside a marriage</td></tr>
<tr><td rowspan="2"></td><td rowspan="2">a. while it is known that the woman is unconscious or powerless
Note: such act is equated to “committing violence”</td><td>✓
(Article 286)
If the victim is an adult female</td><td>✓
[Article 76D jo. Article 81 paragraph (1)] If the victim is a Child Victim</td><td>✓
(Article 8 point a jo. Article 46) If victim is living within the household</td></tr>
<tr><td colspan="3">Supreme Court Decree Number 377/Pid.B/2011/ including for victims having intelektual disability</td></tr>
<tr><td></td><td>b. while it is known or ought to be known that the person’s age is below fifteen years or has not reached the right age for marriage</td><td>✓
(Article 287)</td><td>✓
[Article 81 paragraph (2)]
If the victim is a Child Victim</td><td>✓
(Article 8 point a jo. Article 46)
If the victim is living in the household and sexual violence occurs</td></tr>
<tr><td>3.</td><td colspan="4">Having sexual intercourse with a woman in a marriage</td></tr>
<tr><td></td><td>a. who is known or</td><td>✓</td><td>✓</td><td>✓</td></tr>
</table>

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	ought to be known that the person has not reached the right age for marriage	(Article 288) If resulting in injury	[Article 81 paragraph (2)] If achieved through seduction and/or deception	(Article 8 point a jo. Article 46) If sexual violence occurs
4.	Forced Sexual Intercourse			
	Forced Sexual Intercourse for commercial or specific purposes with another person	✓ [Article 296]	✓ (Article 761 jo. Article 88) If the victim is a Child Victim	✓ (Article 8 point b jo. Article 47) If the victim is part of the household

b. In establishing acts relating to sexual violence, the Prosecutor should take into account provisions of various laws that contain elements of indecency, sexual violence, or sexual harassment as set forth in the following table:

No.	Act	Criminal Code	Child Protection Law	Domestic Abuse Law
1.	Forcing to commit or allow the commission of indecency through violence/threat of violence			
	a. against an adult	✓ (Article 289)	-	✓ (Article 8 item a jo. Article 46) If victim is part of the household
	b. against a child		✓ (Article 76E jo. Article 82)	
2.	Committing indecency against a person			
	a. who is unconscious or in a powerless state	[Article 290 ayat (1)]	✓ (Article 76E jo. Article 82) If the victim is a Child Victim	✓ (Article 8 item a jo. Article 46) If victim is part of the household
	b. against a child	✓ [Article 290 paragraph (2)] If the victim has not reached 15 years of age or is not ready to be married	✓ (Article 76E jo. Article 82) If committed with the use of violence, threat of violence, deception, a series	✓ (Article 8 item a jo. Article 46) If victim is part of the household and element of sexual violence is present

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No.	Act	Criminal Code	Child Protection Law	Domestic Abuse Law
		✓ [Article 290 paragraph (3)] If through deception, a series of lies or persuasion (Article 293) If by providing gift or promise of money/goods	of lies, or persuasion	
	c. as a result of power relation	✓ [Article 294 paragraph (1) if the victim is a child **or** [Article 294 paragraph (2)]	✓ (Article 76E jo. Article 82) If the victim is a child, the act is committed by using violence or threat of violence, coercion, deception, a series of lies, or persuasion	
	d. with the same sex			
	c. Who is known or ought to be known as not being an adult	✓ [Article 292]		

c. In substantiating charges of rape, the Prosecutor must understand medical/ forensic evidence to be able to look for signs of intercourse through the matching of semen found on the female victim's body with the defendant by testing their hair, serology and DNA.

1) Establishing intercourse with a woman is done through the presentation of statements and/or expert statements that prove:

a) penetration of the penis inside the vagina; or

b) occurrence of ejaculation of discharge of semen into the vagina or anus, within the determinate forensic time relevant to the *tempus delicti.*

2) Strength of evidence of sexual intercourse is affected by:

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a) timeliness of medical examination performed after the commission of the offence;

b) uncontaminated condition of the evidence before being cleaned from the body of the person;

c) other factors that may bias the value of the evidence, such as old scars caused by past sexual activity and/or intercourse, high elasticity or resistance of the hymen to tear, and incomplete penetration.

3) Collecting evidence of intercourse from the offender is performed through the following:

a) medical examination to find spermatozoa cell component and seminal fluid within the vagina, to be performed not more than 7 (seven) days following intercourse;

b) determination of rape offender is done through medical examination of the offender's seminal fluid, DNA of the sperm cells, and other biological pieces of evidence collected from the person, such as hair, saliva, epithelial cells from the mouth found on that person.

d. Sexual intercourse is categorized as exploitative rape when such act is received by a male through the taking of advantage of a position of vulnerability of the women, such as consent to intercourse given by a minor.

d. Sexual intercourse performed with a [minor] under the Child Protection Law and the Criminal Code is deemed as statutory rape.

e. Concept of power relation under Article 294 of the Criminal Code

1) In cases involving indecent act or sexual intercourse without coercion, violence or threat of violence, but taking advantage of the position of vulnerability of the woman or child thereby creating a power relation, the offender may be charged under Article 294 of the Criminal Code.

2) Indecent act as referred to in Article 294 of the Criminal Code also covers sexual intercourse.

3) Although unlawfulness and intent are not the core elements of the offense *(delicts bestandelen),* in order to prove the absence of any exonerating and extenuating factors as described in paragraph 1), the Prosecutor must establish the presence such

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elements.

3. Substantiation of Domestic Violence
   a. The relationship between the offender and the victim in a household may be as follows:
      1) husband, wife, child;
      2) suami, isteri, dan anak;
      3) person having familial relationship with any of the persons referred to in point 1) due to blood, marriage, common wet nurse, care, and guardianship, who are living with the same household; and/or
      4) person assisting with domestic chores and living within the household.
   b. Child as referred to in paragraph a point 1) is any child who has not reached adulthood and whose parents are in a marriage.
   c. In the event the father and mother of the child has separated, the relationship between the child and either parent does not fall under the category of paragraph a point 1), but rather under paragraph a point 2), insofar as the child is living in the same location as one of the separated parents.
   d. In the event the child has reached 18 (eighteen years of age), such child does not fall under the category of paragraph a point 1), but rather falls under the category of paragraph a point 2), insofar as the child is living in the same location as one of the separated parents.
   e. A person assisting in the performance of domestic work and living in the household as referred to in paragraph a point 3) is established through related documents and/or witness statements proving that at the time the offense was committed (*tempus delictie*) such person was in fact [staying] with the household for the purpose of working in such household.
   f. Physical violence as defined under Article 44 paragraph (1) Law Number 3 of 2004 on Elimination of Domestic Violence only needs to be proven by the resulting pain, without the need to prove illness or impediment to perform work or pursue livelihood or carry out day to day activities, except where it is committed by the husband against the wife or vice versa.
   g. Elements that must considered to determine physical domestic violence that result

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in death must be differentiated from those in respect of murder, as physical violence is directed against the body, not the life of the person.

h. If the physical domestic violence is intended to take the life of a person, such act qualifies as murder.

i. Psychological violence is proven by the presence of fear, loss of self-esteem, loss of capacity take action, sense of powerlessness, without having to establish that they result in illness or impediment to perform work or generate livelihood or car out day to day activities, except if committed by a husband against the wife or vice versa.

4. Substantiation of Cases of Violence Against Children Under the Child Protection Law

a. Under Article 76C j.o. Article 80 paragraph (3) of Law Number 23 of 2002 as amended by Law Number 35 of 2014 on Child Protection, elements that must considered to determine physical domestic violence that result in death must be differentiated from those in respect of murder, as physical violence is directed against the body, not the life of the person.

b. If the act of violence as described in paragraph a is intended to take a life, then such act qualifies as murder as defined under the Criminal Code.

5. Substantiation of Cases of Neglect Under the Child Protection Law and the Anti-Domestic Violence Law

To determine acts relating to neglect as a criminal offense, the Prosecutor should duly observe the provisions of the laws set forth in the following table:

	Child Protection Law	**Anti-Domestic Violence Law**
Subject	Any person not having reached 18 (eighteen) years of age, including child still in the womb	A person within the household
Scope	Unfulfillment of physical, mental, spiritual, and social needs Article 76B	a. failure to provide sustenance, care, or maintenance, Article 49 paragraph (1) jo. Article 9 paragraph (1)
		b. Economic dependance through restriction of and/or prohibition from engaging in decent work within or outside the home, Article 49 paragraph (2) j.o. Article 9 paragraph (2)

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6. Substantiation of Trafficking in Persons Cases
   a. For the crime of trafficking in persons which results in the exploitation of the Child Victim, the criminal offender is sentenced regardless of the methods engaged by the criminal offender in recruiting, transporting, harboring, sending, transferring, or receiving [Child Victims].
   b. The crime of trafficking in persons as referred to in point a is categorized as a "substantive offense" (offense deemed to have been committed if the consequence of such offense as determined by law has materialized).
   c. In the event the victim of trafficking in persons engage in a crime as a result of coercion by the criminal offender, the victim cannot be prosecuted for a crime.
   d. Coercion as referred to in point c is a situation in which the victims are compelled to commit an act in such a way that it is against the will of the victims themselves.
   e. In the event that the victim of trafficking in persons commits a crime without any coercion, a Public Prosecutor may prosecute the victim.
7. Gross Human Rights Violations
   a. [A crime involving a direct attack against civilian population can be considered as a] crime against humanity and gross human rights violations if it can be established that such crime was committed in furtherance of the policies of the government or an agency organization.
   b. The definition of murder and rape in gross human rights violations is established as regulated in the Criminal Code.

CHAPTER VII

INDICTMENT AND ENFORCEMENT OF COURT JUDGMENTS

A. Preparation of Indictment.
   1. For criminal cases where women and/or children are criminal offenders or victims, in the juridical analysis apart from outlining the elements of the offense based on the evidence and legal facts at trial, a Public Prosecutor shall also to the furthest extent possible include relevant jurisprudence, theory and/or legal principles to support such evidence.

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2. Prior to elaborating on aggravating and mitigating matters, the Public Prosecutor shall outline the:
   a. special circumstances that underlie the crime committed by Female Criminal Offenders and/or Children; and
   b. consequences of the crime against the Victim.
3. The special circumstances and consequences of crimes as referred to in number 2 are described by taking into account, among others, the history of violence that has been experienced, and psychological conditions, position in vulnerable groups, conditions of gender stereotypes and power relations, psychological responses, or certain syndromes that demonstrate deviations or misinterpretations of a relationship causing the victim to tolerate the defendant's actions and other relevant conditions.
4. The description as referred to in number 3 is prepared based on evidence and legal facts at trial and considered as aggravating circumstances, mitigating circumstances or factors that must be considered.
5. Certain legal constructions, terminology, definitions and/or legal concepts in the relevant laws that support the elements of the crimes that are being charged, are properly described in the juridical analysis in the statement of claims (Applicant) supported by evidence in accordance with legal facts at trial and in the event that it is deemed need to be strengthened by legislation, jurisprudence, doctrine and/or secondary legal materials.
6. Child Custody in Social Service Institutions or other establishments is viewed as a period of detention in the Statement of Claims, whereas placement for the protection of the Child is not regarded as a period of detention in the Statement of Claim.
7. Placement of Children in Social Service Institutions or other establishments is not regarded as a period of detention in the Statement of Claims.
8. For crimes of domestic violence, a Public Prosecutor may include in the indictment for the Judge to sentence the defendant to undergo additional sentencing in the form of counseling under the supervision of a specific institution. Such additional sentence can be handed down if the criminal profiling assessment document provides a reference for the implementation of additional sentencing [for the defendant to undergo] counseling under [the supervision] of a specific institution.

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9. Documents as referred to in number [8] include:
   a. *Visum et repertum psikiatrikum* (VeRP);
   b. A psychiatric certificate;
   c. *Visum et repertum psikologikum;*
   d. Psychologist's certificate on the results of the suspect's mental health examination from a government-owned or regional government hospital; and/or
   e. Expert testimony.
10. The duration of the additional sentence in the form of counseling program is determined by the [result] of the criminal profiling.
11. For crimes of domestic violence, in the event legal facts have been obtained from the trial supported by the results of the Victim's psychiatric examination, the Public Prosecutor can consider for the defendant to be sentenced with additional restriction on movement, [therefore] the Public Prosecutor shall include in the indictment for the Judge to pass additional sentence on the restriction of movement.
12. The psychiatric examination of the victim as referred to in number 10 is conducted by:
   a. psychiatrist;
   b. psychologist; and/or
   c. a person who has certain certifications or competencies.
13. Additional punishment in the form of restriction on movement [imposed upon] the criminal offender as referred to in number [11] is determined by a distance of at least 100 (one hundred) meters from the victim for a period of at least 1 (one) month and a maximum of 1 (one) year.
14. Additional punishment and further actions arising from charges of sexual violence against children are enforced in accordance with the provisions of the legislations.

B. Enforcement of Court Judgments.
   1. The process of enforcing court judgments that have obtained permanent legal force in the form of corporal punishment against Female Criminal Offenders and Children to the furthest extent must be carried out by female prosecutors.
   2. Storage of case files, documents, and/or information [that contain sexual images/description] whose court judgments have permanent legal force, is carried out by taking into account the protection of information and/or documents [that contain

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sexual images/description] and the retention period [should be established] in accordance with the provisions of the legislation.

3. Destruction of case files, documents, and/or information [that contain sexual images/description] whose court judgments have permanent legal force, is enforced by ensuring that information and/or documents cannot be used, recovered, and/or displayed again.
4. Enforcement of Court Judgments Imposing Additional Punishments arising from Charges of Domestic Violence
5. In addition to the primary punishment, the Public Prosecutor in the indictment may ask the judge to impose additional punishments in the form of:
   a. Imposing a restraining order against the criminal offender to keep him/her away from the victim within a certain distance and time, as well as imposing restrictions on certain rights of the criminal offender; and/or
   b. A counseling program under the supervision of a hospital, clinic, group of counselors, or those with counseling expertise.
6. The additional punishment in the form of restriction on movements of the Criminal Offender must be enforced after the Convicted Offender has served his/her prison term, or [short-term] imprisonment in lieu of a fine.
7. In the event that the Convicted Offender is sentenced to a fine or probation, additional punishment is enforced after the court judgment has obtained permanent legal force *(inkracht van gewijsde)*.
8. The additional punishment in the form of restriction on movements is enforced by summoning the Convicted Offender and reading out the additional sentence as specified in the court's judgment to the Convicted Offender.
9. In the event the Convicted Offender fails to understand the additional sentence that was read out as referred to in number 4, the Public Prosecutor shall provide an explanation of the crime in question.
10. The enforcement of additional punishment involving the restriction on movements shall be recorded in writing.
11. In the event the Convicted Offender violates the enforcement of additional punishment as referred to in number 4, the prosecutor may notify the police to have the Convicted

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Offender be processed in accordance with the prevailing legislations.

12. In the enforcement of additional punishment in the form of a counseling program under the supervision of a specific institution, the prosecutor hands over the Criminal Offender to a hospital, clinic, group of counselors, or those who have the expertise to provide counseling and this process shall be recorded in writing.
13. Additional punishment in the form of a counseling program can be executed simultaneously with the sentence to a term of imprisonment or the imposition of a fine.

C. Enforcement of Court Judgments Imposing Additional Punishments and Measures for Criminal Offenders Arising from Charges of Sexual Violence Against Children

Court judgments with regard to the imposition of additional punishment and measures to be undertaken in cases arising from charges of sexual violence against children are enforced according to the provisions set forth in the legislations.

CHAPTER VIII
COMBINED CLAIMS OF DAMAGES, RESTITUTIONS, AND COMPENSATION

A. Combined Claims for Compensation

1. In the event that the judge decides to combine the claim for compensation with a criminal case, the Public Prosecutor shall summon the Victim or the injured party as the complainant in accordance with the day of the trial of the criminal case.
2. The Public Prosecutor shall request the complainant as referred to in number 1 to prepare documents or evidence of pecuniary losses [that the Complainant has] suffered, including reimbursement of costs that have been incurred as a direct result of the crime.
3. The examination of the claim for compensation is carried out together with the examination of criminal cases in the presence of the Complainant.
4. Burden of proof in claiming for compensation rests on the Complainant.
5. In the event that the Public Prosecutor, based on at least two valid pieces of evidence, believes that the defendant is guilty of a crime, the claim for compensation can be included in the criminal charge.
6. The inclusion of the value of the claim for compensation in criminal charges is

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calculated based on pecuniary losses that can be substantiated as a direct result of a crime.

7. The judgment on the claim for compensation has permanent legal force if the criminal case has acquired permanent legal force.
8. Judgments on compensation cases that are combined with criminal cases that have acquired permanent legal force are executed by the registrar/ bailiff.

B. Restitution

1. Examination on the Application for Restitution
   a. The application for and granting of a restitution is effected in accordance with the provisions set forth in the legislations.
   b. In particular with respect to Child Victim, parties representing Child Victim can apply for restitution at the stage of investigation or prosecution without going through LPSK.
   c. The documents that must be submitted to apply for restitution as referred to in point a shall at least contain:
      1) Identity of the Complainant;
      2) Identity of the Criminal Offender;
      3) A description of the crime experienced [by the Complainant];
      4) A description of losses suffered; and
      5) Amount of the restitution.
   d. Submitting application for restitution as referred to in point b must attach:
      1) photocopy of Victim's identity legalized by the authorized official;
      2) valid proof of loss;
      3) photocopy of death certificate which has been legalized by the competent authority if the Victim dies; and
      4) evidence of a special power of attorney if the application is submitted by the attorney of the Victim's parents, guardians, or heirs.
   e. The Victim as referred to in point b submits an application for restitution to the Public Prosecutor no later than 3 (three) days after the Child Victim is notified of his/her right to restitution.
   f. The notification as referred to in point e can be submitted during the diversion

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process, before or during the preliminary examination.

g. The Public Prosecutor conducts a completeness check upon the application for restitution as referred to in point c and point d no later than 7 (seven) days for Female Victims or 3 (three) days for Child Victims, starting from the date the application for restitution is received.

h. In the event that the application for restitution is submitted to LPSK, the Public Prosecutor is obliged to conduct a completeness check upon the application for restitution.

i. The completeness check of the application for restitution as referred to in point g shall be specified by the Public Prosecutor in a Memorandum Opinion on the completeness of the application for restitution.

j. Based on the results of the research on the completeness of the application for restitution, the Public Prosecutor shall render an opinion in the Memorandum Opinion as referred to in point i, with the following options:
   1) the file on the application for restitution is deemed incomplete therefore it shall be returned to the Applicant for further completion; or
   2) the complete file on the application for restitution is to be followed up by presenting evidence at trial.

k. In the event that the application for restitution is deemed incomplete as referred to in point j point 1), the Public Prosecutor shall submit a notification letter to the applicant to complete the application for restitution within a maximum period of 14 (fourteen) days or 3 (three) days in the case of a Child Victim, and comes into effect upon submission of the notification by the Public Prosecutor.

l. In the event that the application for restitution is not completed within the period as referred to in point k, the applicant is deemed to have withdrawn his/her application.

m. In the event that the application for restitution is deemed complete as referred to in point j item 2), or the application is well received from the LPSK along with the decision of LPSK and its considerations as referred to in point h, the Public Prosecutor shall draw up a notification letter of restitution to the suspect/defendant.

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n. In the notification letter as referred to in point m, the Public Prosecutor informs the suspect/defendant to deposit an amount of money with the bailiff of the local District Court and in the event that the court enters judgement of acquittal, or the amount of restitution is less than the amount of money deposited, therefore based on a judgment that has permanent legal force (*inkracht van gewijsde*), restitution or excess in restitution will be returned to the Defendant/Convicted Offender/Third Party who deposited the restitution.

o. The Public Prosecutor receives a copy of the receipt for the deposit of restitution from the bailiff of the local district court, as evidence and becomes an inseparable part of the case file.

p. If deemed necessary, the Public Prosecutor may request assistance in writing from LPSK to assess the amount of restitution and/or provide information at the court proceedings regarding the amount of restitution as an inherent part of its main duties and functions.

q. Restitution can be withdrawn at any time, before the Public Prosecutor reads out the criminal charge, by withdrawing a written request for restitution addressed to the Head of the Public Prosecution Office/Head of the Branch Prosecution Office.

r. Upon the withdrawal by the applicant as referred to in point q, the restitution cannot be re-applied.

s. In the case of withdrawing the application for restitution as referred to in point q, the Public Prosecutor shall draw up that contains:

   1) notification to the suspect/defendant of the withdrawal, by attaching a copy of the letter of withdrawal of the application for restitution from the applicant, therefore grants the right of the defendant to take back the restitution that was deposited with the registrar of the local district court effective immediately upon receiving the notification letter by bringing a notification letter from the Public Prosecutor; and

   2) Notification to the Head of the local District Court with regards to the withdrawal therefore grants the defendant the right to receive the restitution that has been deposited in the deposit account of the district court.

2. Substantiating the Application for Restitution

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a. In the event that the application for restitution or compensation is submitted after the case file has been transferred by the Public Prosecutor, the application is submitted and substantiated by the Public Prosecutor at trial prior to the examination of the defendant.

b. The public prosecutor substantiates the facts that support the elements of the crimes that are charged as well as substantiating evidence that the victim is entitled to restitution or compensation or damages as a result of the crime.

c. In the event that the completeness of the requirements for the application for restitution or compensation is submitted through LPSK, the Public Prosecutor must submit the decision of LPSK and its considerations, as required submission/evidence in court.

d. Compensation, reimbursement of costs or other losses that are a direct result of the crime requested in the application for restitution, compensation or damages combined with a criminal case is proven as pecuniary losses.

e. Compensation for death, serious injury or indignity experienced/suffered by the Victim in the request for restitution or compensation is proven as immaterial losses.

f. In the case for which restitution is requested, the Public Prosecutor substantiates the material and immaterial losses as referred to in points d and e by compiling evidence/documents showing a causal relationship between the losses incurred/suffered by the injured victim and the crime charged to the defendant.

g. In the event that there is a request for restitution, the public prosecutor substantiates and/or presents evidence that supports the:
   1) Loss of wealth and income;
   2) Suffering as a result of the crime;
   3) Medical and/or psychological treatment cost; and/or
   4) Other losses suffered by Female Victims as a result of crime in terms of trafficking in persons.

h. In the event that the public prosecutor deems it necessary or by order of a judge for the purpose of substantiating restitution or compensation at trial, the public prosecutor may request:

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1) LPSK to explain the calculation and/or response to restitution or compensation as an inherent part of its main duties and functions; and/or;
2) Victims and their parents/guardians to respond to restitution or compensation and/or corroborate evidence.

i. In the event that the suspect/defendant deposits a sum of money to the registrar of the district court for payment of restitution, the public prosecutor may consider a lighter criminal charge while still taking into account the legal facts at trial proportionally.

3. Enforcement of a Judgment on Restitution

a. Within 7 (seven) days since the issuance of the copy/excerpt of the court's judgment which has obtained permanent legal force (*inkracht van gewijsde*), the public prosecutor submits a statement of claim for restitution and a statement of ability to pay restitution to the convicted offender.

b. The statement letter as referred to in point a, is addressed directly to the convicted offender, or in the case that the convicted offender is difficult/cannot be found, the prosecutor prepares a letter to summon the convicted offender to pay restitution to the village head/local environment, the head of the police sector where the convicted offender resides or domiciles and the receipt of the summons (*relaas*) as intended, is submitted back by the person who made the summons to the prosecutor.

c. Prosecutors receive restitution payments from Convicted Offender and/or third parties to be handed over to victims.

d. In the event the Convicted Offender deposited the restitution money with the registrar of the district court, the Prosecutor shall request that restitution money be deposited with the Registrar of the District Court no later than 7 (seven) days after the judgment has permanent legal force and such money is to be handed over to the Victims.

e. The process of receiving payment of restitution by the Public Prosecutor is recorded in writing and signed by the submitting parties (Convicted Offender, Registrar of the District Court, and/or third party), and the Public Prosecutor.

f. Payment of restitution as referred to in point d shall also have a receipt for

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payment of restitution prepared affixed with a stamp duty which is signed by the Head of the Public Prosecution Office or the Head of the Branch Prosecution Office.

g. For cases involving Trafficking in Persons:

1) The Public Prosecutor shall convey to the Victim/heirs with regard to their right to notify the court in the event that the grant of restitution is not fulfilled until it exceeds the 14 (fourteen) day period since the court's judgment which has obtained permanent legal force (*inkracht van gewijsde*) is notified to the Convicted Offender.

2) The Public Prosecutor confiscates the assets of the Convicted Offender and auctions the assets for restitution payments based on a court order requested by the Victim/heir.

3) In the event the Convicted Offender is unable to pay restitution, the Convicted Offender shall serve a term of imprisonment in lieu of fine in accordance with the court's judgment.

h. In the event the Convicted Offender of a crime of terrorism does not pay restitution, subsequently within 14 (fourteen) days after the judgment has gained permanent legal force (*inkracht van gewijsde*), an imprisonment in lieu of restitution shall be enforced.

i. Confiscation of the Convicted Offender's assets as well as the enforcement of confinement/imprisonment in lieu of restitution shall be recorded in writing.

j. Upon receiving the payment of restitution from the Convicted Offender or a third party, the Public Prosecutor shall summon the Victim/heirs to receive their restitution.

k. Receipt of restitution as referred to in point j is submitted to the Victim/heirs and 4 (four) copies of the restitution payment receipt shall be prepared and signed by the Victim/his heirs as the recipient of the restitution.

1. A copy of the restitution receipt as referred to in point k is submitted to the Convicted Offender, Victim and the court along with a copy of the official report on the enforcement of restitution.

C. Compensation

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1. Request to Claim for Compensation
   a. Compensation is granted by the state, in this case, the Minister of Finance in the form of a sum of money as the Criminal Offenders are unable to pay full compensation in which they are responsible for as a result of committing crimes of terrorism and crimes of gross human rights violations.
   b. In the event that the application for compensation from LPSK is received at the pre-prosecution stage, the Public Prosecutor requests the investigator to combine the results of the investigation and the indictment in the case file.
   c. In the event that the handling of case related to women and/or children has entered the prosecution stage, LPSK submits a request for compensation along with LPSK's decision and considerations to the public prosecutor directly during the trial examination process, no later than before the examination of the defendant.
   d. In the event that the application for compensation from LPSK is received at the prosecution stage as referred to in point c, the Public Prosecutor shall include it in the statement of claim.
2. Substantiating Claim for Compensation
   a. In the event that the application for compensation from LPSK is received at the pre-prosecution stage, the Public Prosecutor requests the investigator to combine the results of the investigation and the indictment in the case file.
   b. In the event that the application for compensation is submitted after the case file has been transferred by the Public Prosecutor, the application is submitted and substantiated by the Public Prosecutor at trial prior to the examination of the defendant.
   c. The Public Prosecutor substantiates the facts that support the elements of the crimes as well as corroborating evidence that the victim is entitled to restitution, compensation or damages as a result of the crime.
   d. In the event that the application for compensation is submitted through LPSK, the Public Prosecutor is obliged to submit the LPSK Decision and its considerations, as required submission/evidence in court.
   e. Compensation, reimbursement of costs or other losses that are a direct result of the crime requested in the application for compensation combined with a criminal

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website: lpr.adb.org

case are proven as pecuniary and immaterial losses.

f. In the case for which compensation is requested, the Public Prosecutor substantiates the pecuniary losses and immaterial losses as referred to in point e without the need to show a causal relationship between the losses incurred/suffered by the injured victim and the crime charged with the defendant, as compensation is a form of state's responsibility.

g. In the event there is a request for compensation, the Public Prosecutor shall prove and/or present evidence that supports the evidence of:
   1) Losses due to each wound;
   2) Losses due to death;
   3) Loss of income/livelihood; and/or
   4) Loss of or damage to property.

h. In the event that the public prosecutor deems it necessary or by order of a judge for the purpose of substantiating compensation at trial, the public prosecutor may request:
   1) LPSK to provide explanation in terms of the calculation and/or response to compensation as an inherent part of its main tasks and functions; and/or
   2) The Victim or in the event the Victim is a child, together with their parents/guardian should provide a response to such compensation and/or corroborate evidence.

3. Enforcement of a Judgment on Compensation

a. The Public Prosecutor enforces a court judgment having permanent legal force *(inkracht van gewijsde)* which contains the provision of compensation by submitting a copy of a court judgment to LPSK no later than 7 (seven) days from the receipt of the copy of the court's judgment.

b. Submission of a copy of the court's judgment to LPSK as referred to in point a, is recorded in writing in the minutes of the enforcement of court judgments.

c. In the event that the court's judgment having permanent legal force (*inkracht van gewijsde*) containing the compensation as referred to in point a, and such judgment specifies the crime of gross human rights violation, a copy of the judgment shall be submitted by the Human Rights Court to the Attorney General.

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d. A copy of the minutes of enforcement of the judgment which has been duly signed by the Public Prosecutor/Attorney General and LPSK as referred to in point b, such copy shall be submitted to the relevant district court/human rights court.

CHAPTER IX

CONCLUDING PROVISIONS

This guideline comes into force on the date of its affirmation.

Affirmed in Jakarta
on 21 January 2021
ATTORNEY GENERAL
OF THE REPUBLIC OF INDONESIA

BURHANUDDIN

Note: As this is an unofficial translation, the English text is not authoritative and provided only for reference purposes.

E. Malaysia

i. Anti-Sexual Harassment Bill 2021*

* Malaysia's Dewan Rakyat (House of Representatives) passed the Anti-Sexual Harassment Bill 2021 with committee amendments on 20 July 2022. The bill as submitted to the committee appears below, with the committee amendments immediately following on pp. 460–462. A consolidated version was not publicly available at the time of publication of this booklet. The bill will now be tabled in the Dewan Negara (Senate). It will also require royal assent before it becomes effective as law.

ANTI-SEXUAL HARASSMENT BILL 2021

ARRANGEMENT OF CLAUSES

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3. Establishment of Tribunal
4. Members, terms of office and allowances
5. Disqualification
6. Secretary, officers and staff

Chapter 2

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7. Jurisdiction of Tribunal
8. Exclusion of jurisdiction of court
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Conduct of proceedings

10. Commencement of proceedings
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13. Right to appear at hearing
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Clause

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Chapter 4
Award and order of Tribunal

19. Award of Tribunal
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ADMINISTRATOR OF ANTI-SEXUAL HARASSMENT

24. Administrator
25. Functions and powers of Administrator

Part IV
GENERAL

26. Power to make regulations
27. Special provision for police report under any written laws

A BILL

i n t i t u l e d

An Act to provide for a right of redress for any person who has been sexually harassed, the establishment of the Tribunal for Anti-Sexual Harassment, the promotion of awareness of sexual harassment, and to provide for related matters.

[ ]

ENACTED by the Parliament of Malaysia as follows:

Part I

PRELIMINARY

Short title and commencement

1. (1) This Act may be cited as the Anti-Sexual Harassment Act 2021.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette*, and the Minister may appoint different dates for the coming into operation of different parts or provisions of this Act.

Interpretation

2. In this Act, unless the context otherwise requires—

"award" means an award made by the Tribunal in respect of any complaint or matter referred to it or any decision or order made by it under this Act;

"prescribed" means prescribed by the Minister in the regulations made under section 26;

"sexual harassment" means any unwanted conduct of a sexual nature, in any form, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is reasonably offensive or humiliating or is a threat to his well-being;

"Minister" means the Minister charged with the responsibility for women, family and community development;

"complainant" means a person who commences a proceeding before the Tribunal to have a matter dealt with by the Tribunal;

"Administrator" means the Administrator of Anti-Sexual Harassment under section 24;

"interlocutory order" means an order that—

(a) is made pursuant to a complaint of sexual harassment to the Tribunal in the course of any proceedings of the Tribunal; and

(b) is incidental to the principal object of that proceedings;

and includes any directions about the conduct of that proceedings, but does not include any partial or interim order making a final determination in respect of that proceedings;

"party" means a complainant or respondent;

"respondent" means a person against whom a proceeding is commenced by the complainant;

"Tribunal" means the Tribunal for Anti-Sexual Harassment established under section 3.

Part II

TRIBUNAL FOR ANTI-SEXUAL HARASSMENT

Chapter 1

Establishment and organization

Establishment of Tribunal

3. There shall be established a tribunal to be known as the "Tribunal for Anti-Sexual Harassment".

Members, terms of office and allowances

4. (1) The Tribunal shall consist of the following members who shall be appointed by the Minister:

(a) a President and a Deputy President to be appointed from amongst the members of the Judicial and Legal Service;

(b) not less than five other members which shall comprise of—

(i) persons who are members of or who have held office in the Judicial and Legal Service; or

(ii) persons who are admitted as advocates and solicitors under the Legal Profession Act 1976 [*Act 166*], the Advocates Ordinance of Sabah [*Sabah Cap. 2*] or the Advocates Ordinance of Sarawak [*Sarawak Cap. 110*], and who have not less than seven years' standing; and

(c) not less than five other members, as may be determined by the Minister, who have knowledge of or practical experience in matters relating to sexual harassment.

(2) Where the President is for any reason unable to perform his functions or during any period of vacancy in the office of the President, the Deputy President shall perform the functions of the President.

(3) The President, the Deputy President and the members of the Tribunal shall hold office for a term of three years and may be reappointed only for another term consecutively.

(4) The President, the Deputy President or the members of the Tribunal may at any time resign his office by giving three months' written notice to the Minister.

(5) The Minister may at any time revoke the appointment of members of the Tribunal appointed under paragraphs 4(1)*(b)* and *(c),* and fill any vacancy in its membership.

(6) The President and the Deputy President shall be paid such fixed allowances and other allowances as the Minister may determine.

(7) The members of the Tribunal appointed under paragraphs 4(1)*(b)* and *(c)* shall be paid a daily sitting allowance during the sitting of the Tribunal and such lodging, travelling and subsistence allowances as the Minister may determine.

Disqualification

5. The President, the Deputy President and the members of the Tribunal appointed under subsection 4(1) shall be disqualified from being a member of the Tribunal if—

(a) the person is adjudged bankrupt by a court of competent jurisdiction;

(b) the person is certified by a qualified medical officer to be physically or mentally incapable of continuing office;

(c) the Minister is of the opinion that the person has engaged in any paid office, commission or employment which conflicts with the duties of the person under this Act;

(d) the person's conduct, whether in connection with his duties as a member of the Tribunal or otherwise, has been such as to bring discredit to the Tribunal;

(e) the person has been convicted on, a charge in respect of—

(i) an offence involving fraud, dishonesty or moral turpitude;

(ii) an offence under any law relating to corruption; or

(iii) any other offence punishable with imprisonment, in itself only or in addition to or in lieu of a fine, for more than two years; or

(f) the person absents himself from three consecutive sittings of the Tribunal without leave of the President.

Secretary, officers and staff

6. The Minister shall appoint—

(a) a Secretary to the Tribunal; and

(b) such number of other officers and staff of the Tribunal as may be necessary to carry out the functions of the Tribunal.

Chapter 2

Jurisdiction of Tribunal

Jurisdiction of Tribunal

7. The Tribunal shall have jurisdiction to hear and determine any complaint of sexual harassment made by any person.

Exclusion of jurisdiction of court

8. (1) Where a complaint of sexual harassment is lodged by any person to the Tribunal, the issues in dispute in that complaint of sexual harassment, whether as shown in the initial complaint or as emerging in the course of the hearing, shall not be the subject of proceedings between the same parties in any court unless—

(a) the proceedings before the court were commenced before the complaint of sexual harassment was lodged with the Tribunal;

(b) the complaint of sexual harassment involves any conduct constituting a crime under the provisions of any written law; or

(c) the complaint of sexual harassment before the Tribunal is withdrawn or struck out.

(2) Where paragraph (1)*(a)* applies, the issues in dispute in the claim of sexual harassment to which those proceedings relate, whether as shown in the initial claim or emerging in the course of the hearing, shall not be the subject of proceedings between the same parties before the Tribunal unless the claim of sexual harassment before the court is withdrawn or struck out.

Determination of rules and procedure

9. (1) The proceedings of the Tribunal shall be conducted in accordance with such procedure as may be determined by the Tribunal.

(2) The President shall cause the procedure determined under subsection (1) to be reduced into writing and published in such a manner as the President deems fit.

(3) In conducting the proceedings under subsection (1), the Tribunal shall have the powers to—

(a) make an interlocutory order;

(b) determine the relevancy, admissibility and weight of any evidence;

(c) take evidence on oath or affirmation and for that purpose a member of the Tribunal may administer an oath or affirmation;

(d) order the provision of further particulars in a statement of complaint of sexual harassment or statement of reply;

(e) order the preservation and interim custody of any evidence for the purposes of the hearing; and

(f) summon the parties to the proceedings or any other person to attend before the Tribunal to give evidence or to produce any document, record or other thing in his possession or otherwise to assist the Tribunal in its deliberations.

(4) A summons issued by the Tribunal under this section shall be served and enforced as if it were a summons issued by a court.

(5) The Tribunal shall determine the complaint of sexual harassment on the balance of probabilities.

Chapter 3

Conduct of proceedings

Commencement of proceedings

10. Any person may lodge a complaint of sexual harassment under this Act with the Tribunal in a prescribed form together with a prescribed fee.

Notice of complaint of sexual harassment

11. Upon a complaint of sexual harassment being lodged under section 10, the Secretary to the Tribunal shall give a written notice in the prescribed form to the complainant and the respondent of the details of the day, time and place of the hearing.

Sittings of Tribunal

12. (1) Each sitting of the Tribunal shall be determined by the President and shall comprise of a panel of three members of the Tribunal as follows:

(a) the President or the Deputy President appointed under paragraph 4(1)*(a)*, or any other member of the Tribunal appointed under paragraph 4(1)*(b)*, as a Chairperson; and

(b) any other two of the members of the Tribunal appointed under paragraph 4(1)*(c)*.

(2) The panel for each sitting of the Tribunal in subsection (1) shall comprise of at least a woman.

(3) The Tribunal may sit in one or more sittings on such day and at such time and place as the President may determine.

(4) If the Chairperson referred to in paragraph (1)*(a)* presiding over any proceedings in respect of a complaint of sexual harassment dies or becomes incapacitated, or is for any other reason unable to complete or dispose of the proceedings, the complaint of sexual harassment shall be heard and continued and presided over by any other Chairperson as determined by the President.

(5) If any of the members of the Tribunal referred to in paragraph (1)*(b)* in respect of a complaint of sexual harassment dies or becomes incapacitated, or is for any other reason unable to complete or dispose of the proceedings, the President shall appoint any other member of the Tribunal to the panel to continue the proceedings.

(6) Where the term of appointment of any Chairperson or member of the Tribunal referred to in paragraph (1)*(b)* expires during the pendency of any proceedings in respect of a complaint of sexual harassment, the term of his appointment shall be deemed to have been extended until the final disposal of the complaint of sexual harassment.

Right to appear at hearing

13. (1) At the hearing of a complaint of sexual harassment, every party to the proceedings shall be entitled to attend and be heard.

(2) No party shall be represented by an advocate and solicitor at a hearing.

(3) Subject to subsections (1) and (2), a party who is a minor or any person under a disability may be represented by his next friend or guardian *ad litem*.

(4) Where a party who is a minor or any person under a disability is represented by his next friend or guardian *ad litem*, the Tribunal may impose such conditions as the Tribunal considers necessary to ensure that the other party to the proceedings is not substantially disadvantaged.

Hearings to be closed

14. All hearings before the Tribunal shall be closed to the public.

Tribunal may act in absence of party

15. The Tribunal may hear and determine a complaint of sexual harassment before it notwithstanding the absence of any party to the proceedings if it is proved to the satisfaction of the Tribunal that a notice of the hearing has been duly served on the absent party.

Negotiation for settlement

16. (1) The Tribunal may, as regards to every complaint of sexual harassment within its jurisdiction and with agreement of the parties, assess whether, in all the circumstances, it is appropriate for the Tribunal to assist the parties to negotiate an agreed settlement in relation to the complaint of sexual harassment.

(2) Without limiting the generality of subsection (1), in making an assessment the Tribunal shall have regard to any factors that, in the opinion of the Tribunal, are likely to impair the ability of either or both of the parties to negotiate an agreed settlement.

(3) Where the parties reach an agreed settlement, the Tribunal shall approve and record the agreed settlement and the agreed settlement shall then take effect as if it is an award of the Tribunal.

(4) The Tribunal shall proceed to determine the complaint of sexual harassment if—

(a) it appears to the Tribunal that it would not be appropriate for the Tribunal to assist the parties to negotiate an agreed settlement in relation to the complaint of sexual harassment; or

(b) the parties are unable to reach an agreed settlement in relation to the complaint of sexual harassment.

Reference to Judge of High Court on question of law

17. (1) Before the Tribunal makes an award under section 19, the Tribunal may, in its discretion, refer to a Judge of the High Court a question of law—

(a) which arose in the course of the proceedings;

(b) which, in the opinion of the Tribunal, is of sufficient importance to merit such reference; and

(c) the determination of which by the Tribunal raises, in the opinion of the Tribunal, sufficient doubt to merit such reference.

(2) If the Tribunal refers any question of law under subsection (1) for the decision of a Judge of the High Court, the Tribunal shall make its award in conformity with such decision.

(3) For the purposes of reference to the High Court on any question of law, a Federal Counsel authorized by the Attorney General may appear on behalf of the Tribunal in any proceedings before a Judge of the High Court.

Procedure where no provision is made

18. Where no provision is made relating to procedures of the Tribunal, subject to this Act and any regulations made under this Act, the Tribunal shall adopt such procedure as the Tribunal thinks fit.

Chapter 4

Award and order of Tribunal

Award of Tribunal

19. (1) The Tribunal shall make its award without delay and, where practicable, within sixty days from the first day the hearing before the Tribunal commences.

(2) The Tribunal shall state in writing reasons for the award or dismissal of the complaint of sexual harassment together with any finding of facts that the Tribunal has noted or recommendations that the Tribunal has made in those proceedings.

Order

20. (1) In making an award under section 19, the Tribunal may make any one or more of the following orders:

(a) an order for the respondent to issue a statement of apology to the complainant as specified in the order;

(b) if the complaint related to any act of sexual harassment which was carried out in public, an order for the respondent to publish a statement of apology to the complainant in any manner as specified in the order;

(c) an order for the respondent to pay any compensation or damages not exceeding two hundred and fifty thousand ringgit for any loss or damage suffered by the complainant in respect of the act of sexual harassment; or

(d) an order for the parties to attend any programme as the Tribunal thinks necessary.

(2) The Tribunal may make such ancillary or consequential orders or relief as may be necessary to give effect to any order made by the Tribunal.

(3) The Tribunal may dismiss a complaint of sexual harassment which the Tribunal considers to be frivolous or vexatious.

Criminal penalty for failure to comply with award

21. (1) Any person who fails to comply with an award made by the Tribunal under section 19 within thirty days from the date on which the award was made, commits an offence and shall, on conviction, be liable to any of the following:

(a) in the case where any compensation or damages is ordered by the Tribunal, a fine which is two times the total amount of the compensation or damages, or to imprisonment for a term not exceeding two years, or to both; or

(b) in the case where no compensation or damages is ordered by the Tribunal, a fine not exceeding ten thousand ringgit, or to imprisonment for a term not exceeding two years, or to both.

(2) In the case of a continuing offence, the person shall, in addition to the penalties specified under subsection (1), be liable to a fine not exceeding one thousand ringgit for each day or part of a day during which the offence continues after the conviction.

Award of Tribunal to be final

22. (1) An award made under subsection 16(3) or section 19 shall—

(a) subject to section 23, be final and binding on all parties to the proceedings; and

(b) be deemed to be an order of a court and be enforced accordingly by any party to the proceedings.

(2) For the purposes of paragraph (1)*(b)*, the Secretary to the Tribunal shall send a copy of the award made by the Tribunal to the court having jurisdiction in the place to which the award relates or in the place where the award was made and the court shall cause the copy of the award to be recorded.

Challenging award on ground of serious irregularity

23. (1) Any party to the proceedings of the Tribunal may, upon notice to the other party and to the Tribunal, apply to the High Court challenging an award in the proceedings only on the ground of serious irregularity affecting the award.

(2) If there is shown to be serious irregularity affecting the award, the High Court may—

(a) remit the award to the Tribunal, in whole or in part, for reconsideration; or

(b) set aside the award in whole or in part.

(3) For the purposes of this section, "serious irregularity" means an irregularity of one or more of the following kinds which the High Court considers has caused substantial injustice to the applicant:

(a) failure of the Tribunal to deal with all the relevant issues that were put to it; or

(b) uncertainty or ambiguity as to the effect of the award.

Part III

ADMINISTRATOR OF ANTI-SEXUAL HARASSMENT

Administrator

24. The Secretary General of the Ministry responsible for women, family and community development shall be the Administrator of Anti-Sexual Harassment.

Functions and powers of Administrator

25. (1) The Administrator shall have the following functions:

(a) to formulate policy or issue guidelines relating to the prevention or awareness of sexual harassment;

(b) to promote activities relating to the prevention or awareness of sexual harassment;

(c) to administer any matter relating to the prevention or awareness of sexual harassment; and

(d) to carry out any other functions for the betterment and proper implementation of this Act.

(2) The Administrator shall have all such powers as may be necessary for, or in connection with, or incidental to, the performance of its functions under this Act.

Part IV

GENERAL

Power to make regulations

26. (1) The Minister may make such regulations as may be necessary or expedient in respect of the Tribunal.

(2) Without prejudice to the generality of subsection (1), the regulations may be made for—

(a) prescribing the forms to be used in proceedings under this Act;

(b) prescribing and imposing fees and providing for the manner for collecting and disbursing such fees; and

(c) prescribing any other matters for the better carrying out of the provisions of this Act.

Special provision for police report under any written laws

27. Notwithstanding a complaint of sexual harassment being made under this Act, a complainant, or any other person shall not be precluded from lodging a police report for any offence relating to sexual harassment under any written laws.

EXPLANATORY STATEMENT

This Bill ("the proposed Act") seeks to provide for a right of redress for any person who have been sexually harassed, the establishment of the Tribunal for Anti-Sexual Harassment, the promotion of awareness of sexual harassment, and to provide for related matters.

Part I

2. Part I of the proposed Act deals with preliminary matters.

3. *Clause 1* contains the short title and seeks to empower the Minister to appoint a date for the commencement of the proposed Act.

4. *Clause 2* contains the definitions of certain words and expressions used in the proposed Act.

Part II

5. Part II of the proposed Act contains four chapters relating to the establishment of the Tribunal for Anti-Sexual Harassment ("Tribunal"), jurisdiction of the Tribunal, conduct of proceedings of the Tribunal and award and order of the Tribunal.

Chapter 1

6. *Chapter 1* contains provisions relating to the establishment and membership of the Tribunal.

7. *Clause 3* seeks to provide for the establishment of the Tribunal.

8. *Clause 4* seeks to provide for the membership of the Tribunal, terms of office of its members and the eligible allowances to be paid to the members of the Tribunal.

9. *Clause 5* seeks to provide for the provisions relating to disqualification of the President, the Deputy President and the members of the Tribunal.

10. *Clause 6* seeks to empower the Minister to appoint a Secretary to the Tribunal and such number of other officers and staff of the Tribunal as may be necessary to carry out the functions of the Tribunal.

Chapter 2

11. *Chapter 2* contains provisions relating to the jurisdiction of the Tribunal.

12. *Clause 7* seeks to provide that the jurisdiction of the Tribunal is to hear any complaint of sexual harassment made under Part II of the proposed Act by any person.

13. *Clause 8* seeks to provide for the exclusion of jurisdiction of court where a complaint of sexual harassment is lodged by any person to the Tribunal.

14. *Clause 9* seeks to provide for the determination of rules and procedure of the Tribunal.

Subclause 9(1) seeks to provide that proceedings of the Tribunal shall be conducted in accordance with such procedure as may be determined by the Tribunal.

Subclause 9(2) seeks to provide that the President shall cause the procedure determined under *subclause* 9(1) to be reduced into writing and published in such a manner as the President deems fit.

Subclause 9(3) seeks to empower the Tribunal to make certain orders in conducting the proceedings, among others, to make an interlocutory order, to order the preservation and interim custody of any evidence for the purposes of the hearing and to summon the parties to the proceedings.

Subclause 9(4) seeks to provide that the summons issued by the Tribunal shall be served and enforced as if it were a summons issued by a court.

Subclause 9(5) seeks to provide that the Tribunal shall determine the complaint of sexual harassment on the balance of probabilities.

Chapter 3

15. *Chapter 3* contains provisions relating to the conduct of proceedings of the Tribunal.

16. *Clause 10* seeks to provide that to commence a proceeding in the Tribunal, any person may lodge a complaint of sexual harassment under the proposed Act with the Tribunal in a prescribed form together with a prescribed fee.

17. *Clause 11* seeks to provide that the Secretary to the Tribunal shall give a written notice in the prescribed form to the complainant and the respondent of the details of the day, time and place of the hearing upon a complaint of sexual harassment being lodged.

18. *Clause 12* seeks to provide for the sittings of the Tribunal.

Subclause 12(1) seeks to provide that each sitting of the Tribunal shall be determined by the President and shall comprise of a panel of three members of the Tribunal which are the President or the Deputy President, or any other member of the Tribunal as a Chairperson and any other two of the members of the Tribunal appointed under paragraph 4(1)*(c)*.

Subclause 12(2) seeks to provide that the panel of each sitting of the Tribunal shall comprise of at least a woman.

Subclause 12(4) seeks to provide that where the Chairperson presiding over any proceedings in respect of a complaint of sexual harassment dies or becomes incapacitated, or is for any other reason unable to complete or dispose of the proceedings, the complaint of sexual harassment shall be heard and continued and presided over by any other Chairperson as determined by the President.

Subclause 12(5) seeks to provide that where any of the members of the Tribunal referred to in paragraph 12(1)*(b)* dies or becomes incapacitated, or is for any other reason unable to complete or dispose of the proceedings, the President shall appoint any other member of the Tribunal to the panel to continue the proceedings.

Subclause 12(6) seeks to provide that where the term of appointment of any Chairperson or member of the Tribunal expires during the pendency of any proceedings in respect of a complaint of sexual harassment, the term of his appointment shall be deemed to have been extended until the final disposal of the complaint of sexual harassment.

19. *Clause 13* deals with the provisions relating to the right to appear at a hearing before the Tribunal.

Subclause 13(1) seeks to provide that every party to the proceedings shall be entitled to attend and be heard at the hearing before the Tribunal.

Subclause 13(2) seeks to provide that no party shall be represented by an advocate and solicitor at a hearing before the Tribunal.

Subclauses 13(3) and *(4)* seek to provide that a party who is a minor or any person under a disability may be represented by his next friend or guardian *ad litem* and the Tribunal may impose such conditions as the Tribunal considers necessary to ensure that the other party to the proceedings is not substantially disadvantaged.

20. *Clause 14* seeks to provide that all hearings before the Tribunal shall be closed to the public.

21. *Clause 15* seeks to empower the Tribunal to hear and determine the complaint of sexual harassment in absence of any party to the proceedings if it is proved to the satisfaction of the Tribunal that a notice of the hearing has been duly served on the absent party.

22. *Clause 16* seeks to allow the Tribunal to assist the parties to negotiate for an agreed settlement whenever appropriate and the agreed settlement shall then take effect as an award of the Tribunal.

23. *Clause 17* seeks to provide for the reference to a Judge of High Court on a question of law.

Subclause 17(1) seeks to empower the Tribunal to refer to a Judge of the High Court on a question of law.

Subclause 17(2) seeks to provide that the Tribunal shall make its award in conformity with the decision of a Judge of the High Court relating to the question of law.

Subclause 17(3) seeks to provide that a Federal Counsel authorized by the Attorney General may appear on behalf of the Tribunal in any proceedings before a Judge of the High Court.

24. *Clause 18* seeks to provide that subject to the proposed Act and any regulations made under the proposed Act, the Tribunal shall adopt such procedure as the Tribunal thinks fit where no provision is made relating to procedures of the Tribunal.

Chapter 4

25. *Chapter 4* contains provisions relating to award and order of the Tribunal.

26. *Clause 19* seeks to provide that the Tribunal shall make its award within sixty days from the first day hearing before the Tribunal commences and the award shall be accompanied with the reasons for the award or dismissal of the complaint of sexual harassment together with any finding of the facts that the Tribunal has noted or recommendations that the Tribunal has made in those proceedings.

27. *Subclause 20(1)* seeks to empower the Tribunal, in making an award, to make any one or more of the following orders: an order for the respondent to issue a statement of apology to the complainant, an order for the respondent to publish a statement of apology, an order for the respondent to pay compensation or damages not exceeding two hundred and fifty thousand ringgit for any loss or damage suffered by the complainant or an order for the parties to attend any programme as the Tribunal thinks necessary.

Subclause 20(3) seeks to provide that the Tribunal may dismiss any complaint of sexual harassment which the Tribunal considers to be frivolous or vexatious.

28. *Clause 21* seeks to provide for the criminal penalties for non-compliance of any award made by the Tribunal.

29. *Clause 22* seeks to clarify that an award made by the Tribunal shall be final, binding on all parties to the proceedings and be deemed to be an order of a court and shall be enforced accordingly by any party to the proceeding.

30. *Clause 23* seeks to provide that any party to the proceedings of the Tribunal may apply to the High Court challenging an award in the proceedings only on the ground of serious irregularity affecting the award. If there is shown to be serious irregularity affecting the award, the High Court may remit the award in whole or in part to the Tribunal for reconsideration or set aside the award in whole or in part.

Part III

31. Part III of the proposed Act contains provisions relating to the Administrator of Anti-Sexual Harassment.

32. *Clause 24 s*eeks to provide that the Secretary General of the Ministry responsible for women, family and community development shall be the Administrator of Anti-Sexual Harassment.

33. *Clause 25* seeks to provide for the functions and powers of the Administrator of Anti-Sexual Harassment.

Part IV

34. Part IV of the proposed Act contains general provisions.

35. *Clause 26* seeks to empower the Minister to make any regulations as may be necessary or expedient in respect of the Tribunal.

36. *Clause 27* seeks to clarify that notwithstanding a complaint of sexual harassment being made under this Act, a complainant, or any other person shall not be precluded from lodging a police report for any offence relating to sexual harassment under any written laws.

FINANCIAL IMPLICATIONS

This Bill will involve the Government in extra financial expenditure the amount of which cannot at present be ascertained.

[PN(U2)2305]

ii. Committee Amendments to the Anti-Sexual Harassment Bill 2021*

* Malaysia's Dewan Rakyat (House of Representatives) passed the Anti-Sexual Harassment Bill 2021 with committee amendments on 20 July 2022. The bill as submitted to the committee appears on pp. 440–459 of this booklet, with the committee amendments appearing below. A consolidated version was not publicly available at the time of publication of this booklet. The bill will now be tabled in the Dewan Negara (Senate). It will also require royal assent before it becomes effective as law.

D.R. 18/2021

AMENDMENT IN COMMITTEE

ANTI-SEXUAL HARASSMENT BILL

ENGLISH LANGUAGE TEXT

1. Long Title

The long title of the Bill is amended by substituting for the words "the promotion of awareness" the words "to raise awareness and to prevent the occurrence".

2. Clause 7

Clause 7 of the Bill is amended—

(a) by renumbering the existing clause as subclause (1);

(b) by inserting after the renumbered subclause (1) the following subclause:

"(2) The complaint of sexual harassment made under subsection (1) shall refer to sexual harassment which occurs after the coming into operation of this Act."; and

(c) by inserting after the new subclause (2) the following subclause:

"(3) A complaint referred to the Tribunal under this Act is subject to the Limitation Act 1953 [*Act 254*].".

3. **Clause 13**

Clause 13 of the Bill is amended—

(a) in subclause (2), by inserting after the word "hearing" the words "unless, in the opinion of the Tribunal, the matter in question involves complex issues of law";

(b) by inserting after subclause (2) the following subsection:

"(3) If one party is allowed to be represented by an advocate and solicitor under subsection (2), the other party shall also be so entitled.";

(c) by renumbering the existing subclause (3) as subclause (4); and

(d) by renumbering the existing subclause (4) as subclause (5).

4. **Clause 25**

Paragraph 25(1)*(b)* of the Bill is amended by substituting for the word "activities" the words "any activity including to request any person to display any notice at any place".

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EXPLANATORY STATEMENT

1. Paragraph 1 seeks to amend the long title of the Bill to explain further the purpose of enacting the Bill.

2. Paragraph 2 seeks to amend clause 7 of the Bill by renumbering the existing clause as subclause (1) and to introduce new subclause (2) into clause 7 of the Bill to empower the Tribunal to hear and determine any complaint of sexual harassment which occurs after the coming into operation of this Act, with prospective effect. Paragraph 2 also seeks to insert new subclause (3) into clause 7 of the Bill to explain further that the Limitation Act 1953 [*Act 254*] shall apply to any complaint referred to the Tribunal.

3. Paragraph 3 seeks to amend clause 13 of the Bill to allow parties of the proceeding to be represented by an advocate and solicitor if in the opinion of the Tribunal, the matter in question involves complex issues of law. If one party is allowed to be represented by an advocate and solicitor, the other party shall also be so entitled.

4. Paragraph 4 seeks to amend subparagraph 25(1)*(b)* of the Bill to explain further in relation to the functions and powers of the Administrator to promote any activity including to request any person to display any notice at any place relating to the prevention or awareness of sexual harassment.

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F. Nepal

i. Domestic Violence (Offence and Punishment) Act, 2009 (2066)

Domestic Violence (Offence and Punishment) Act, 2066 (2009)

Date of Authentication and Publication

2066.1.14 (April 27, 2009)

Act No. 1 of the year 2066 (2009)

An Act relating to control the Domestic Violence

Preamble: Whereas, it is expedient to make provision to respect the right of every person to live in a secure and dignified life, to prevent and control violence occurring within the family and for matters connected therewith and incidental thereto making such violence punishable, and for providing protection to the victims of violence;

Now, therefore, be it enacted by the Constituent Assembly pursuant to Sub-article (1) of Article 81 of the Interim Constitution of Nepal, 2063 (2007).

1. **Short Title and Commencement**: (1) This Act may be called the "Domestic Violence (Crime and Punishment) Act, 2066 (2009)".

   (2) This Act shall come into force immediately.

2. **Definitions**: Unless the subject or context otherwise requires, in this Act,-

   (a) "Domestic Violence" means any form of physical, mental, sexual and economic harm perpetrated by person to a person with whom he/she has a family relationship and this word also includes any acts of reprimand or emotional harm.

   (b) "Domestic relationship" means a relationship between two or more persons who are living together in a shared household and are related by decent (consanguinity), marriage, adoption or are family

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members living together as a joint family; or a dependant domestic help living in the same family.

(c) "Physical harm" means an act of committing or causing bodily harm or injury holding as a captive, inflicting physical pain or any other act connected therewith and incidental thereto except the act of breaking the limbs of body *(Angabhanga)*.

(d) "Mental harm" means any act of threatening the Victim of physical torture, showing terror, reprimanding him/her, accusing him/her of false blame, forcefully evicting him/her from the house or otherwise causing injury or harm to the Victim emotionally and this expression also includes any discrimination carried out on the basis of thought, religion or culture and customs and traditions.

(e) "Sexual harm" means sexual misbehaviour, humiliation, discouragement or harm in self respect of any person; or any other act that hampers safe sexual health.

(f) "Economic harm" means deprivation from using jointly or privately owned properly or deprivation of or access to employment opportunities, economic resources or means.

(g) "Victim (Aggrieved person)" means any person who is, or has been, in a domestic relationship with the defendant and who alleges to have been subjected to an act of domestic violence by the perpetrator.

(h) "Perpetrator" means the person having family relations with the Victim and for whom the victim alleges to have been subjected to an act of domestic violence and this word also includes any person involved in the domestic violence or in the accomplice of the crime.

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(i) "Police Office" means a Police Office closest to the residence of the Victim, the perpetrator or that office which is closest to the scene of crime and this word also includes the Children or Women Cell or Police Post or Police Sub-post under the District Police Office.

(j) "Court" means a court appointed by the Government of Nepal by a Notification in the Nepal Gazette.

(k) "Prescribed" or "as prescribed" means prescribed or as prescribed in the Rules made under this Act.

3. **Domestic Violence not to be committed**: (1) No one shall commit; or aid or abet; or incite for the commission of for the act of domestic violence.

(2) A person who commits an act pursuant to Sub-section (1) shall be deemed to have committed an offence under this Act.

4. **Filing of complaint**: (1) A person who has knowledge of an act of domestic violence has been committed, or is being committed, or likely to be committed, may lodge a written or oral complaint setting out the details thereof, with the Police Office, National Women Commission or Local body.

(2) In case a complaint is received pursuant to Sub-section (1), in a written form, it shall be registered immediately and if it is received in an oral form it shall be registered upon setting out details in a written form and putting the signature of the complaint.

(3) In a case the complaint is filed before the National Women Commission, necessary action shall be taken in accordance with Prevailing National Women Commission law.

(4) In a case the complaint is filed before the Police Office, the Police Office shall produce the perpetrator within 24 hours of the

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complaint, excluding the time of travel and make arrest if he/she refuses to appear for the statement.

(5) In a case the complaint filed in the Local Body, the Local Body shall produce the perpetrator within 24 hours of the complaint, excluding the time of travel and requesting to arrest to the Police Office if he/she refuses to appear for the statement.

(6) If the Victim has been physically wounded or mentally tortured as a result of the act of domestic violence, he/she shall be immediately sent to the nearest hospital or health post for necessary check-up and an injury report shall be drawn up. If the medical report is caused to be prepared by the Local Body, a copy of it shall be sent to the Police Station.

(7) If it is found necessary, to provide protection to Victim and his/her dependants from the preliminary investigation on the complaint pursuant to Sub-section (1) of section 4, it shall be provided with immediately with the assistance of the Police Office.

(8) The police officer or local body upon recording the statements pursuant to Sub-sections (4) or (5) of Section 8 finds reason to believe that an act of domestic violence has been committed and the Victim so desires, may, within Thirty days from the date of registration of the complaint, conduct reconciliation between the parties.

(9) The assistance a psychologist, sociologist, social activist and a family member trusted by the Victim and any other witness as per necessity and availability may be taken while conducting reconciliation pursuant to Sub-section (8). In the course of such reconciliation psychological of and social effects on the Victim, as well as his/her right to privacy shall be taken into consideration.

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(10) The Police Officer or Local Body Officer shall ensure the presence of the perpetrator on the due date during the investigating, prosecuting and decision making process of the complaint.

(11) If the perpetrator fails to appear pursuant to Sub-sections (4) and (5); or he/she cannot be made present; or the parties fail to settle their dispute through reconciliation, the Police Officer and Local body, with the consent of the complainant shall, within fifteen days after the expiry of Thirty days as per Sub-section (8) shall forward to the court, the complaint mentioning all details, along with evidence and other legal documents incidental thereto.

(12) It shall be the duty of the Police Office to provide assistance pursuant to Sub-sections (5) and (7).

5. **Action to be taken by the Court**: (1) Upon receiving a complaint pursuant to Sub-section (11) of Section 4, the Court shall proceed the case as per this Act, on the basis of such complaint.

(2) Notwithstanding anything contained in Section 4, the Victim may directly file his/her complaint to the Court.

6. **Interim protection order may be granted**: (1) If the Court has reason to believe, on the basis of preliminary investigation of the complaint that the Victim needs to be given immediate protection, it may, till the time the final decision on the complaint is made, pass the following orders against the perpetrator:

(a) To allow the Victim to continue to live in the shared house, to provide him/her with food, clothes, to not cause physical injury to him/her and to behave with him/ her in a civilized and dignified manner.

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(b) To manage for necessary treatment or to give money for the treatment of the Victim if he/ she has suffered physical or mental injury.

(c) To make necessary arrangements for the separate stay of the perpetrator in a case that it's not conducive for them to live together, and make necessary arrangements for the maintenance of the Victim.

(d) To not insult, threaten or behave in an uncivilized manner; or not to cause to do these acts.

(e) To not harass the Victim by entering his/ her place of separate residence; or in public roads; or entering his/ her place of employment; or through the communication media or in any other manner.

(f) To carry out or cause to carry out necessary and relevant actions for the protection and welfare of the Victim.

(2) If it is found necessary to provide protection pursuant to Sub-section (1) from the preliminary investigation of the complaint, the Court shall issue an appropriate order for the protection of the minor children or any other dependent of the Victim.

7. **Proceedings to be held in camera**: (1) If it is so request by the Victim, the court shall conduct in camera proceedings and hearings of the complaint relating to this Act.

(2) During in camera proceedings and hearings pursuant to sub-section (1), the claimant, defendant, their legal practitioners and those who are so permitted by the Court, shall be allowed to enter into the court room.

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8. **Summary procedure to be Adopted**: The procedure mentioned in the Summary Procedure Act, 2028 (1971) shall be followed in the process and disposal of a case filed pursuant to this Act.

9. **Perpetrator to bear expenses of treatment**: (1) The total costs of treatment of the victim of the domestic violence, who has sustained physical or mental injuries so as to require medical help in the hospital, shall be borne by the perpetrator.

   (2) Notwithstanding anything contained in Sub-section (1), if the Court has reason to believe that the perpetrator is unable to pay such amount due to economic reasons, the court may order to the Service Center to provide treatment expenses to the Victim.

10. **Compensation to be Provided**: The Court may, depending on the nature of the act of domestic violence and degree, the pain suffered by the Victim, and also taking into account the economic and social status of the perpetrator and Victim, order the perpetrator to pay appropriate compensation to the Victim.

11. **Service Centre**: (1) The Government of Nepal, as per necessity, may establish Service Centers for the purpose of immediate protection of the Victim, and for the separate accommodation of the Victim during the course of treatment.

   (2) For the purpose of Sub-section (1), an organization may establish and operate Service Centers upon receiving approval as prescribed.

   (3) Service Centers operating pursuant to Sub-section (2) may be given financial and other aid from the Fund established under Section 12.

   (4) The Service Centre shall provide, as per necessity, legal aid, psycho-consultation service, psychological Service and economic aid to the Victim.

NEPAL LAW COMMISSION

(5) The provisions of management, operation and monitoring of Service Centre shall be as prescribed.

12. **Service Fund**: (1) The Government of Nepal shall establish a Service Fund for the operation of Service Centers established pursuant to Sub-section (1) of Section 11.

(2) The fund shall consist of the following amounts established pursuant to Sub-section (1):

(a) The amount received from the Government of Nepal,

(b) The amount received from any national or foreign organization, institution or individual,

(c) The amount received from any other source.

(3) The management and operation of the Service Fund shall be as prescribed.

13. **Penalty**: (1) A person who commits an act of domestic violence shall be punished with a fine of Three Thousand Rupees upto Twenty Five Thousand Rupees or Six months of imprisonment or both.

(2) A person who attempts to commit domestic violence or abets the crime or incites others to commit the crime shall be liable to half the punishment of the perpetrator.

(3) A person who has been punished once for the offence of domestic violence shall be liable to double the punishment upon every repetition of the offence.

(4) If a person holing a public post who commits the offence of domestic violence, he/she shall be liable to an additional ten percent punishment.

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(5) A person who disobeys the Court orders made pursuant to Section 6 shall be punished with a fine of Two Thousand Rupees upto Fifteen Thousand Rupees or Four months of imprisonment or both.

14. **Limitation**: The complaint, for an offence committed pursuant to this Act, shall be filed within Ninety days of the commission of the crime.

15. **No hindrance to file case pursuant to prevailing law**: Nothing in this Act shall prevent the investigation, trial and proceed in an offence which is punishable under this Act and prevailing law.

16. **To be as mentioned in the prevailing law**: This Act shall apply on matters mentioned herein and in other matters the prevailing laws shall apply.

17. **Power to frame Rules:** The Government of Nepal may frame necessary Rules to implement the objectives of this Act.

NEPAL LAW COMMISSION

ii. Sexual Harassment at Workplace (Prevention) Act, 2014 (2071)

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The Sexual Harassment at Workplace (Prevention) Act, 2014 (2071)

Date of Authentication and Publication

21 November, 2014 (2071/8/5)

Amending Act

1. An Act to Amend Some Nepal Acts, 2016 (2072) — 25 February, 2016 (2072/11/13)
2. An Act to Amend Some Nepal Acts to Correspond to the Constitution, 2019 (2075) — 3 March, 2019 (2075/11/19)

Act No. 7 of the Year 2013 (2071)

An Act to Provide for The Prevention of Sexual Harassment At Workplace

Nepal Law Commission

Preamble: Whereas, it is expedient to make necessary provisions for the prevention of sexual harassment at workplace by ensuring the right of every person to work in a safe, fair and dignified environment,

Now, therefore, be it enacted by the Constituent-Assembly in capacity of Legislative-Parliament, pursuant to Article 83 of the Interim Constitution of Nepal, 2007 (2063).

1. Short Title and Commencement: (1) This Act may be called "The Sexual Harassment at Workplace (Prevention) Act, 2014 (2071)."

(2) This Act shall come into force from the ninety-first day of its authentication.

2. Definition: Unless the subject or context otherwise requires, in this Act,-

(a) "Complaint Hearing Officer" means the Officer as referred to in Section 14.

(b) "Employee" means the incumbent employee or worker in a workplace.

(c) "Workplace" means the following body, institution or firm and also includes a place used in course of performance of work of such a body, institution or firm:-

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(1) a government body,

(2) a corporate body having partial or full ownership of the Government of Nepal,

(3) a body or a corporate body established pursuant to prevalent laws,

(4) a firm, body or a corporate body permitted or registered pursuant to prevalent laws to conduct any business, transaction or to deliver any service.

(d) "Sexual Harassment" means any act as referred to in Section 4.

(e) "Manager" means the Officer with the authority to take the final decision on matters relating to the administrative or business work, activity of any workplace, or delegated with the authority for that purpose and also includes the In-Charge of the Branch or Unit, if such a workplace has any Branch or Unit, elsewhere.

(f) "Customer" means a person present at the workplace with the intention of receiving any form of service and also includes a person present in the workplace, with such a person.

Nepal Law Commission

3. **Not to commit or cause to Commit Sexual Harassment:** No person shall commit or cause to be committed sexual harassment in workspace.

4. **To be considered as Sexual Harassment:** (1) If anyone commits or causes to be committed, the following acts by abusing one's position, power or authority to any employee or customer in the workplace by creating any form of pressure, influence or enticement or by discouraging, it shall be considered that sexual harassment has been committed: -

(a) To touch or attempt to touch any organ of the body with sexual intent,

(b) To use or display word, picture, newspaper, audio, visual, other information technology, medium, object or material related to obscene and sexual activity,

(c) To display or express obscene and sexual intent by writing, speaking or gesticulating,

(d) To make an offer for sexual activity,

(e) To tease or annoy with sexual intent

(2) Notwithstanding anything contained in clauses (a), (b) or (c) of sub-section (1), anything done in course of educational, informative, research oriented, treatment or lifesaving activity shall not be considered to be a sexual harassment.

5. **Responsibility of the Manager:** (1) The Manager shall, in order to ensure or to prevent that sexual harassment does not occur at workplace, do the followings:-

(a) To make necessary provisions in the law on terms and conditions of service of the employees on prevention of sexual harassment,

(b) To create alertness among the employees and customers in order to ensure that sexual harassment does not occur,

(c) To adopt necessary reformative measures in order to ensure that sexual harassment is not repeated,

(d) To provide psychological counselling services to the victim, as per necessity,

(e) To maintain a grievance box in the workplace.

(2) The Manager shall clearly inform the victim about the time limit for complaint against sexual harassment, procedures and complaint hearing authority.

6. **Hearing of a Complain:** (1) If anyone commits any form of sexual harassment to any employee or customer in the workplace, the victim employee, customer or anyone, as the case may be, may file a written or oral complain on their behalf to the manager against such a person, within fifteen days.

(2) The Manager shall, if any complaint is filed pursuant to sub-section (1), conduct investigation immediately on that matter.

(3) The Manager shall, if it is found by the investigation conducted pursuant to sub-section (2), that the accused has sexually harassed the complainant employee or customer, perform or cause to perform, any or all of the following actions:-

(a) To conduct conciliation between the victim and accused, if both parties agree to it,

(b) To cause the accused to apologize to the victim,

(c) To reprimand the accused person not to repeat such an act again,

Nepal Law Commission

(d) To order for reasonable compensation to be paid to the victim from the accused,

(f) To take departmental action against the accused in accordance to the laws relating to the terms and conditions of service.

(4) The Manager shall finalize the complain made pursuant to sub-section (1), within fifteen days from the date of complain.

7. Complain may be filed: (1) Notwithstanding anything contained in Section 6, if anyone commits sexual harassment to any employee or customer, in any form in the workplace, the victim employee, customer or anyone else on his or her behalf may file a complaint with evidence to the complaint hearing authority, within ninety days from the date on which sexual harassment has been committed against such a person.

(2) The victim employee, customer or anyone else on his or her behalf may file a complaint to the complaint hearing authority from the date of expiry of the time limit, if the complain made pursuant to Section 6 has not been finalized by the manager and, if any party is not satisfied with the decision of the Manager made pursuant to same Section, within seventy days of such a decision.

(3) The concerned person may file a complain to the complaint hearing authority against the manager, if the manager does not comply with the responsibilities or other provisions under this Act or the direction given by the complaint hearing authority or a body that causes inspection or monitoring, pursuant to Sections 9 and 10.

8. Conciliation may be done: (1) The victim of sexual harassment and the accused may file a joint petition to the complaint hearing authority for conciliation, with the agreement of both parties.

(2) The complaint hearing authority shall, if a joint petition is filed pursuant to sub-section (1), have to cause conciliation of the parties with necessary consultation.

(3) No fine in any form shall be levied for conducting conciliation pursuant to sub-section (2).

9. Protection of Complainant: (1) The manager shall not, remove an employee from service, take other departmental action or take any other actions against him or her including transfer, promotion of the concerned person that may impact his or her career development, merely on that ground that a complaint has been filed under this Act.

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(2) If the manager takes any action against any employee, such employee, contrary to sub-section (1), such an employee may file a petition to the complaint hearing authority setting out such a matter.

(3) While investigating the petition filed pursuant to sub-section (2), if the details of the petition seem to be reasonable, the complaint hearing authority shall give an order to the concerned manager to revoke or correct such a decision.

(4) If the complaint hearing authority issues an order referred to in sub-section (3), the concerned manager shall enforce such a decision upon expiry of time limit for appeal or if an appeal has been filed, within fifteen days of a decision over such an appeal.

(5) If any employee for the reason having made a complain pursuant to this Act, feels unsecure in any way in the workplace, such an employee may file a petition to the manager requesting for the security.

(6) The manager shall, if a petition referred to in sub-section (5), has been received, make proper arrangements for the security of such an employee in the workplace.

(7) If the manger fails to provide arrangement for the security of the employee filing a petition as referred to in sub-section (5) or if the manager himself or herself is the accused party, such an employee may request for his or her security to the local security agency and if such a request for security has been made the security agency shall make arrangements for the security of the concerned.

(8) The manger shall, if it is proved that an employee has committed sexual harassment and it does not seem appropriate to retain such an employee in the same office, transfer such an employee if the manager is empowered to do so himself or herself, or if the transfer is to be conducted by other officer or agency, write for the transfer to such an officer or agency, as the case may be.

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10. **To Conduct or Cause to Conduct Inspection and Monitoring:** The National Women's Commission or the higher body of the agency where the Manager is engaged shall, conduct or cause to be conducted inspection and monitoring, in regard to whether or not the manager has complied with the responsibilities and other provisions in this Act or Rules and Code of Conduct framed under to this Act,.

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11. **Report To Be Submitted:** (1) The person assigned for inspection and monitoring as referred to in Section 10, setting out the following matters; shall upon completion of inspection and monitoring submit a report to the concerned body:-

(a) The responsibilities or other provisions compiled with or not, by the concerned Manager,

(b) Matters concerning attention to the concerned Manager for compliance with the responsibilities or other provisions,

(c) Other necessary matters.

(2) If, upon examination of the report received pursuant to sub-section (1), it is found that the Manager has not complied with the responsibilities or other provisions under this Act or Rules and Code of Conduct framed under this Act, the body conducting or causing to conduct the inspection and monitoring shall give directions to the manager to comply with such responsibilities or other provisions.

(3) It shall be the duty of the concerned Manager to comply with the directions given pursuant to sub-section (2).

(4) If the matters set out in the report received pursuant to sub-section (1), requires for policy decision to be made by any agency, the agency conducting or causing to conduct the inspection and monitoring shall write to the concerned agency for necessary policy decisions.

Provided that, if the matter requires to take such a policy decision to be made by it, necessary actions shall be initiated to make a decision.

12. **Punishment:** (1) If anyone is convicted of committing sexual harassment against an employee or customer one shall be liable to the punishment, considering nature of an offense, with imprisonment not exceeding six months or with fine not exceeding fifty thousand rupees or with both.

(2) If any manager is found to have failed to comply with the responsibilities or other provisions under this Act, he or she shall be liable to the punishment with fine not exceeding twenty-five thousand Rupees.

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(3) If the manager fails to comply with the directions given by the complaint hearing authority or agency conducting or causing to conduct inspection or monitoring under Sections 9 or 10, he or she shall be liable to fine not exceeding twenty-five thousand Rupees.

(4) If the person convicted pursuant to this Section, commits such a punishable offense again, he or she shall be liable to the punishment with double sentence for each time.

(5) If any one is found to have filed a false complaint deliberately pursuant to this Act, he or she shall be liable to the fine not exceeding ten thousand Rupees.

(6) If any employee or person is convicted pursuant to this Section, the complaint hearing authority shall inform the concerned agency of the same.

13. **To Recover Compensation:** If upon investigation of the complaint filed pursuant to this Act, the accused person is convicted for sexual harassment, the complaint hearing authority shall punish such a person pursuant to Section 12 and order to recover the following compensation or amount to the victim:-

(a) Physical or mental damage, if any, reasonable compensation for such damage,

(b) The actual expenses incurred while making a complaint or in defending such a complaint.

14. **Complaint Hearing Authority:** (1) The Chief District Officer of the concerned District shall have the authority to initiate the proceedings and adjudicate the complaint filed under this Act.

(2) Notwithstanding anything contained in sub-section (1), the Principal Secretary of the concerned Province[3] shall have the authority to initiate the proceedings and adjudicate the complaint filed against the Chief District Officer.

15. **Procedures Relating to the Hearing of Complaint:** (1) The complaint hearing authority, while initiating the proceedings and adjudicating the complaint filed pursuant to Section 7, shall follow the procedures as set out in the Summary Procedures Act, 1971 (2028).

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[3] Amended by An Act to Amend Some Nepal Acts to Correspond to the Constitution, 2019 (2075).

Nepal Law Commission

(2) If the victim has requested in writing, the complaint hearing authority shall have to proceed the hearing of the complaint in camera.

16. **Appeal:** The person who is not satisfied with the decision of the complaint hearing authority pursuant to this Act may make an appeal, to the concerned District Court[♣] within thirty-five days of such decision.

17. **Enforcement of a decision or conciliation:** (1) The enforcement of a decision or conciliation made pursuant to this Act, shall be a duty of the concerned manager.

(2) If the manager does not enforce the decision or conciliation pursuant to sub-section (1), the concerned complainant, may file a petition to the complaint hearing authority by setting out the same details thereof.

(3) Upon receipt of a petition referred to in sub-section (2), the complaint hearing authority shall enforce such a decision or conciliation in accordance with the prevalent laws.

(4) Notwithstanding anything contained in sub-section (1), if the accused person is the manager, the complaint hearing authority shall itself, enforce the decision or conciliation within sixty days.

18. **To Include in the Curriculum of Training:** Each training providing body shall include the subject relating to sexual harassment and the prevention thereof, in the curriculum of the training.

19. **Not to bar institution of a case under prevailing laws:** If any act or action considered to be an offense under this Act is also punishable under other prevailing laws, institution of a case and punishment under such laws, shall not be considered to have been barred by this Act.

20. **Prevailing Law to be Applicable:** In matters specifically provided for in this Act, this Act shall be applicable and in other matters it shall be in accordance with the prevalent laws.

Nepal Law Commission

♣ Amended by Some Nepal Acts Amending Act, 2016 (2072)

21. **Code of Conduct may be framed:** (1) The Government of Nepal shall frame and introduce necessary Code of Conduct with regard to the prevention of sexual harassment.

(2) Each manager shall, in accordance with the nature of the workplace, have to frame and introduce separate Code of Conduct, subject to the Code of Conduct framed under sub-section (1).

(3) It shall be the duty of all concerned, to comply with the Code of Conducts framed pursuant to sub-sections (1) and (2).

22. **Power to frame rules:** The Government of Nepal may, in order to implement this Act, frame necessary rules.

Nepal Law Commission

iii. Criminal Offences (Sentencing and Execution) Act, 2017 (2074)

The Criminal Offences (Sentencing and Execution) Act, 2017 (2074)

Date of Authentication:

16 October 2017 (2074.6.30)

Ministry of Law, Justice and Parliamentary Affairs

Act Number 38 of the year 2017 (2074)

An Act Made to Provide for Determination and Execution of Sentences for Criminal Offences

Preamble: Whereas it is expedient to make legal provisions for the determination of appropriate sentences for offenders who commit criminal offences and the execution of such sentences, in order to maintain the interest and decency of the general public by creating a just, peaceful and safe society;

Now, therefore, the Legislature-Parliament under clause (1) of Article 296 of the Constitution of Nepal has made this Act.

Chapter – 1

Preliminary

1. **Short title and commencement:** (1) This Act is cited as the "Criminal Offenses (Sentencing and Execution) Act, 2017 (2074)".

    (2) Clauses (d), (e), (f) and (g) of Section 17, Sections 22, 25, 26, 27, 28, 29, 30, 31 and 49 of this Act shall come into force on a date appointed by the Government of Nepal by a

notification in the Nepal Gazette, and the other Sections shall come into force on the first date of the month of Bhadra 2075 (……….).

2. **Definitions:** Unless the subject or context otherwise requires, in this Act,-

(a) "Penal Code" means the National Penal (Code) Act, 2017;

(b) "offender" means a person who is convicted by a court of any offense;

(c) "law" means a law in force for the time being;

(d) "prescribed" or "as prescribed" means prescribed or as prescribed in the rules framed under this Act;

(e) "probation officer" means a probation officer appointed or designated pursuant to Section 49;

(f) "Probation and Parole Board" means the probation and parole board under Section 38;

(g) "Criminal Procedure Code" means the National Criminal Procedure (Code) Act, 2017;

(h) "Committee" means the sentence recommendation committee under Section 46.

3. **Application of the Act:** (1) This Act shall apply to the determination by a court of a sentence for any offence and execution thereof.

Ministry of Law, Justice and Parliamentary Affairs

(2) This Act shall not apply to the following:

(a) imposing a sentence for an offence relating to the contempt of court,

(b) imposing a sentence for a breach of the privilege, proceeding of which has been instituted by the Legislature-Parliament,

(c) in cases where any law provides for the non-applicability of this Act.

Ministry of Law, Justice and Parliamentary Affairs

Chapter – 2

General Principles of Sentencing

4. **Application of provisions of the Penal Code and Criminal Procedure Code:** (1) This Act shall be implemented subject to the Penal Code and the Criminal Procedure Code.

(2) Wherever used in this Act, the several terms defined in the Penal Code and Criminal Procedure Code shall have the respective meanings therein set forth.

(3) The principles set forth in the Penal Code shall also be applicable to the implementation of this Act.

5. **Lesser sentence to be imposed:** If any offence is punishable by law with a sentence that is lesser at the time of sentencing than the sentence at the time of commission of the offence, sentence shall be so determined that it is the lesser.

6. **Sentence under other law to be determined:** If any law provides for a sentence of imprisonment for a fixed term or a sentence of a fine or penalty of fixed amount for any offence, the offender of such offence shall be subjected to such imprisonment, fine or penalty accordingly.

7. **Sentence to be imposed under this Act:** Except for the cases set forth in Section 6, sentence for any offence shall be determined pursuant to this Act.

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8. **Sentence to be determined after conviction:** (1) A court shall determine a sentence to any person for any offense only after such person is convicted of such offence by the court in accordance with law.

(2) Sentence shall be determined pursuant to sub-section (1) not later than thirty days of the conviction.

9. **Separate hearing to be conducted:** (1) A sentence shall be determined for an offender pursuant to Section 8 by conducting a separate hearing.

Provided that no separate hearing shall be required for determining sentence for an offender of an offense punishable by sentence of imprisonment for up to three years or fine of up to thirty thousand rupees.

(2) Except in cases where a judge who declared conviction has died, retired or become unable to discharge duties because of a severe disease, the same judge himself or herself shall, in any other circumstance whatsoever, determine the sentence by conducting a hearing under sub-section (1).

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10. **Sentence to be determined by conducting hearing in open bench:** (1) Sentence shall be determined in open bench for an offender of a case other than a case that is required by law to be heard in camera.

(2) Sentence shall be determined under sub-section (1) in presence of the offender or his or her legal practitioner as well.

(3) Notwithstanding anything contained in sub-section (2), nothing shall bar the determination of a sentence under this Act even if the offender cannot be produced before the court for reason of security or public interest or the offender refuses to appear before the court or the offender is absconding or legal practitioner of the offender is not present.

(4) An offender who cannot be produced before the court under sub-section (3) may be produced through video-conferencing; and where an offender is so produced, the offender shall be deemed to have appeared before the court for the purpose of this Section.

11. More than one sentence not to be executed: (1) In determining a sentence for an offender who has committed more than one offense in a single **incident**, each offence shall be deemed to have been committed separately and separate sentence shall be determined for the same.

Provided that where sentence for more than one offence committed at the same time is to be executed, the sentence for the offense carrying the maximum sentence shall be executed.

(2) If two or more acts constitute an offence and any one of such acts is itself a separate offense, only the sentence for the offence carrying the maximum punishment shall be imposed.

(3) If an act constitutes separate offenses under the different Acts, the sentence provided by the Act which is the highest of the sentences under such Acts shall be executed.

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Provided that in determining the sentence, separate sentence shall be determined for each offense.

Explanation: For the purposes of this Section, imprisonment and fine shall be considered separate sentences and executed separately.

9. Order to be given to prepare pre-sentence report: (1) If, prior to determining the sentence for an offense punishable by imprisonment for more than three years or fine of more than thirty thousand rupees, the court thinks so necessary, it may order a probation officer or parole officer to prepare a pre-sentence report in respect of the offender.

(2) Upon receipt of the order pursuant to sub-section (1), the probation officer or parole officer shall prepare a report in respect of the offender, setting out the following matters:

(a) personal, social and cultural background of the offender,

(b) circumstances surrounding the commission of the offence,

(c) the offender's conduct before the commission of the offence,

(d) the offender's age,

(e) such other matters as considered necessary by the probation officer or parole officer.

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(3) After the preparation of the report under sub-section (2), the probation officer or parole officer shall submit such report to the court.

(4) Upon receipt of the report under sub-section (3), the court shall provide the report to the concerned government attorney, offender and his or her legal practitioner and, if the offender is a child, to his or her guardian.

(5) Upon receipt of the report under sub-section (4), such government attorney, offender, guardian or legal practitioner may submit his or her opinion on that report to the Court.

(6) Notwithstanding anything contained elsewhere in this Section, in cases where the probation officer or parole officer is not designated or appointed, the court shall order the legal practitioners of the plaintiff and the defendant to prepare the report under sub-section (1).

(7) Upon receipt of the order under sub-section (6), such legal practitioner shall prepare and submit such report to the Court.

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13. **Purposes of sentencing to be taken into account:** The court shall determine the sentence by taking into account all or any of the following purposes:

(a) to deter the offender or other persons from committing the offence,

(b) to protect the society or community,

(c) to deliver justice, along with compensation, to the victim,

(d) to assist in the offender's rehabilitation in the society, or to reform the offender,

(e) to isolate the offender from the society,

(f) to make the offender regret his or her offending and promote in the offender of a sense of acknowledgement that harm has been done to the victim or the community,

(g) to denounce the conduct prohibited by law.

14. Matters to be taken into account in determining sentence: The court shall determine a sentence by taking into account the following matters:

(a) sentence should not be disproportionate to the gravity of the offence and the degree of culpability of the offender,

(b) sentence should not be more severe than is necessary to achieve the purposes of sentencing,

(c) sentence should not be incompatible with or unequal to the sentence previously imposed on another offender of the offence committed in similar circumstances,

(d) in determining a sentence for two offences or imposing a sentence for another offence on an

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offender who is serving a sentence for one offence, the overall sentence should not be unjust and disproportionate,

(e) sentence of imprisonment should not be imposed where other sentence seems to be adequate in proportion to the offense.

15. Grounds for determining sentence: (1) A sentence shall be determined pursuant to this Act on the following grounds:

(a) the gravity of the offence and the degree of culpability of the offender,

(b) the circumstances surrounding the commission of offense,

(c) the gravity of the offence aggravating or mitigating factors,

(d) the offender's conduct and previous activities,

(e) purposes of the sentencing set forth in Section 13.

(2) In determining a sentence pursuant to sub-section (1), the sentence shall be determined as follows:

(a) the sentence of imprisonment for an offender who commits a heinous or grave offence,

(b) in sentencing a child, his or her reform and rehabilitation,

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(c) for a recidivist, a sentence that is double the sentence imposable for the last offense committed,

(d) the sentence of imprisonment for an offender who is dangerous to the society or the community,

(e) for an offender who, being a holder of a position or authority in any government office or public or body corporate, commits an offence by abusing such position or authority, the sentence that is one and half of the sentence imposable on such offence.

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16. **Matters to be taken into account in sentencing a child:** (1) In imposing a sentence on a child, the following matters shall also be taken into account:

(a) his or her best interests,

(b) the gravity of the offence and the degree of culpability,

(c) his or her personal circumstances,

Explanation: For the purposes of this clause, "personal circumstances" includes the age, education, family and social condition of the child, type of the offense, harm caused by the offense and the objective of the commission of the offence.

(d) compensation offered to the victim,

(e) remorse shown for the offence,

(f) desire for living a good and useful life.

(2) In imposing a sentence on a child below sixteen years of age, the sentence of imprisonment shall not be imposed except in cases where the child has committed a heinous or grave offence or is a recidivist.

17. Matters to be set out in determining sentence: (1) In determining a sentence pursuant to this Act, the following matters shall be set out in the decision or order:

(a) the reason for awarding the sentence,

(b) in the case of determination of the sentence of fine, the amount of fine to be paid by the offender, the date for payment of the fine, whether the fine is payable by installments, the sentence of imprisonment imposable for failure to pay the fine,

(c) in the case of determination of the sentence of imprisonment, the term of imprisonment, the date of being held in custody, the date of **completion of the service of imprisonment,**

(d) in the case of a community service order, the type, period and time of the service, and sentence imposable for failure to do the service,

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(e) in the case of determination of the sentence of imprisonment in a reform home or rehabilitation center, the period of **stay** in such home or center, the terms and conditions to be complied with and sentence imposable for failure to comply with such terms and conditions,

(f) whether the offender can be released on parole or not,

(g) if imprisonment is capable of suspension, the period of such suspension,

(h) if compensation is to be made, the amount of compensation, period and procedure for making compensation, and sentence imposable for failure to make compensation,

(i) in the case of conditional suspension of sentence for a child under sub-section (5) of Section 24, sentence imposable for violation of such condition,

(j) such other necessary matters as the court thinks appropriate.

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Chapter-3

Provisions Relating to Fine

18. Grounds for determination of sentence of fine: (1) The sentence of fine for an offence shall be determined, taking into account such offence and the maximum and minimum amount of fine, in addition to the other matters set forth in this Act.

(2) In determining the fine pursuant to sub-section (1), the following matters shall also be taken into account:

(a) the offender's financial status and **source of income,**

(b) financial harm caused to other person from the offence committed by the offender,

(c) benefit received by the offender or his or her family from the commission of the offence by the offender,

(d) implications of the fine to the family required to be maintained by the offender,

(e) the amount of compensation required to be paid to the victim,

(f) liability likely to be borne by the government due to non-payment of the fine,

(g) if the offender is a body corporate, the financial status and transactions of such body,

(h) if an amount is required to be deposited into the victim relief fund, such amount.

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Explanation: For the purposes of this clause, "victim relief fund" means the victim relief fund under Section 48.

(3) In determining a fine pursuant to sub-section (1), the fine shall be determined on the basis of the amount in controversy if such amount is set.

19. Fine to be so determined as not to be prejudicial to compensation: If, in imposing a fine pursuant to Section 18, the fine is to be so imposed that the offender must also pay compensation to the victim of the offence, the fine shall not be so imposed that the offender is unable to pay such compensation.

20. Fine to be paid immediately: (1) The offender must pay immediately the fine imposed pursuant to this Chapter.

(2) Notwithstanding anything contained in sub-section (1), if such offender, being unable to pay such fine immediately, furnishes any property as the security for such fine, the court may order the offender to so pay the fine in a maximum of three installments that such amount is paid up within one year.

21. Fine to be so determined as to be payable by each offender: In determining a fine for more than one offender in relation to any offence, the fine shall be so determined that each offender has to pay the fine according to the degree of the offending.

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Chapter – 4

Provisions Relating to Community Service

22. Power to order for community service: (1) If, in relation of an offender who is sentenced to imprisonment for a term not exceeding six months, having regard also to the offence committed by the offender, the age, conduct of the offender, the circumstances and the manner of the commission of the offence, it appears to the court that it is not appropriate to imprison the offender, the court may order the offender to do the community service or to do the community service for the remaining period after the offender has served the sentence of imprisonment for such period as the court deems appropriate in relation to such offence.

(2) The court shall make an order of community service only if the offender agrees to do the community service.

(3) For the purpose of this Section, the following work shall be considered as a community service:

(a) doing a public work for free,

(b) serving at a hospital, elderly home, orphanage for free,

(c) doing environment protection related work for free,

(d) teaching or serving at a public or community school for free,

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(e) providing or causing to be provided sports training for free,

(f) doing work at a benevolent organization for free,

(g) appearing before such **rehabilitation or reform organization** as designated by the court and doing such work as specified by such organization.

(4) In making the community service order pursuant to sub-section (1), the order shall be so made that the offender is required to do any work under sub-section (3) for a period that is equal to that of imprisonment imposed on the offender or to that of imprisonment which remains to be served by the offender.

(5) In determining the period under sub-section (4), the court shall also specify **the hours of work a day to** be done by the offender.

(6) In making an order of community service to be done by the offender pursuant to sub-section (1), the terms and conditions to be compiled with by him or her shall also be specified.

(7) If the offender does the community service under sub-section (3) in compliance with the terms and conditions under sub-section (6), the sentence of imprisonment imposed on him or her shall be deemed to have been served.

(8) The offender shall do the community service under the supervision of a probation officer or parole officer as designated by the Probation and Parole Board.

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(9) The court shall revoke the order under sub-section (1) if any offender fails to do the community service set forth in the order issued pursuant to this Section or does not comply with the terms and conditions under sub-section (6) or it is known after the issuance of the order of community service that the offender had committed any offence previously or the offender commits any other offence during that period.

(10) After the revocation of the order pursuant to sub-section (9), such offender must serve the sentence of imprisonment imposed on him or her or the remaining period of imprisonment to be served by him or her in prison.

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Chapter – 5

Provisions Relating to Imprisonment

23. **Sentence of imprisonment to be imposed if other sentence is not adequate:** Except as otherwise provided in this Act, any offender shall be sentenced to imprisonment in the event of the sentence of fine and community service being not adequate.

24. **Sentence of imprisonment may be suspended:** (1) In cases where an offender on whom a sentence of imprisonment for less than one year has been imposed has committed the offence for the first time and, having regard to the offence committed by the offender, the age, conduct of the offender, the circumstances and the manner of the commission of the offence, it appears to the court that it is not appropriate to imprison the offender, the court may, without implementing the sentence of imprisonment imposed on such offender, suspend such imprisonment.

(2) Suspension of the sentence of imprisonment under sub-section (1) may be made until three years from the date of its determination.

(3) Notwithstanding anything contained in sub-section (1), no sentence of imprisonment imposed on an offender other than a child held **guilty of any of the following offences** may be suspended:

(a) murder,

(b) rape,

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(c) human trafficking and transportation,

(d) arms, ammunition and explosive,

(e) corruption,

(f) taking of hostage and kidnapping,

(g) robbery,

(h) **counterfeiting of currency or government stamps**,

(i) foreign exchange,

(j) offence relating to narcotic drug trafficking and transaction,

(k) relating to ancient monument,

(l) relating to forest and wildlife,

(m) organized crime,

(n) money laundering,

(o) offence relating to torture or cruel, inhumane or degrading treatment,

(p) crime against humanity.

(4) In making a order of suspension of the sentence of imprisonment pursuant to sub-section (1), the order shall be so made that the offender is required to do the following during the period of suspension:

(a) to do a public work for free,

(b) to assist in any work of the victim of the offence,

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(c) to refrain from doing any act or conduct set forth in such order,

(d) to refrain from moving outside of his or her residence or any particular place,

(e) to refrain from committing any offence during the period of sentence or within three years of the service of such sentence,

(f) to remain within any place specified by the court,

(g) to remain in a treatment and rehabilitation center,

(h) to refrain from meeting a particular person.

(5) Notwithstanding anything contained in sub-section (4), in making suspension of the sentence for a child pursuant to sub-section (1), decision shall be made as follows, with or without specifying the terms and conditions, having regard also to his or her age and the circumstances of the commission of the offence:

(a) that any family member or guardian remind and counsel him or her of good human conduct,

(b) that any service providing agency or individual orient the child,

(c) that sole, group or family psychosocial counseling service be provided to the child,

(d) that the child remain under the guardianship and supervision of any family member, guardian,

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school, service provider individual or organization for a certain term, subject to the compliance with the specified terms and conditions.

(6) If the offender complies with the matters set forth in the order under sub-section (4) during the period of suspension, the offender shall be deemed to have served the sentence of imprisonment determined pursuant to sub-section (1).

(7) If the offender violates the order under sub-section (4), the court shall revoke the order under sub-section (1).

(8) After the order has been revoked pursuant to sub-section (7), such offender shall serve the wh**ole of the sentence of imprisonment imposed on him or her in prison.**

25. **Power to make order to send offender to reform home:** (1) If, in relation of an offender who is sentenced to imprisonment for a term of two years or less, having regard also to the offence committed by the offender, the age, conduct of the offender, the circumstances and the manner of the commission of the offence, it appears to the court that it is appropriate to hold him or her in a reform home instead of sending him or her to prison, the court may, on recommendation of a probation officer, send such offender to the reform home.

(2) Notwithstanding anything contained in sub-section (1), an offender who has committed any offence set forth in sub-section (3) of Section 24 shall not be sent to such reform home.

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(3) In sending an offender to a reform home pursuant to sub-section (1), the terms and conditions as determined by the Probation and Parole Board, to be compiled with by him or her, shall also be specified.

(4) If the offender serves the term of imprisonment in a reform home in compliance with the terms and conditions under sub-section (3), he or she shall be deemed to have served such term in prison.

(5) Notwithstanding anything contained elsewhere in this Section, if the offender does not reform his or her conduct or fails to comply with the terms and conditions under sub-section (3) or commits any offence punishable by imprisonment during that period, he or she must **serve**/spend the whole **period** of imprisonment under this Section in prison.

26. Power to make order to send offender to rehabilitation center: (1) If, in relation of an offender who is convicted of using narcotic drug or who is suffering from physical or mental infirmity or similar other offender, having regard to the offence committed by the offender, the age, conduct of the offender and the circumstances of the commission of the offence, it appears to the court that it is appropriate to send him or her to a rehabilitation center instead of sending him or her to prison, the court may, on recommendation of a probation officer, send such offender to the rehabilitation center.

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Explanation: For the purpose of this Section, "rehabilitation center" means an organization established with the aim of providing treatment and rehabilitative services to the offenders who are drug or other addicts or who are suffering from physical or mental infirmity.

(2) Notwithstanding anything contained in sub-section (1), an offender who has committed any offence set forth in sub-section (3) of Section 24 shall not be sent to a rehabilitation center.

(3) In sending an offender to a rehabilitation center pursuant to sub-section (1), the terms and conditions to be compiled with by him or her shall also be specified.

(4) If the offender serves the term of imprisonment in a rehabilitation center in compliance with the terms and conditions under sub-section (3), he or she shall be deemed to have served such term of imprisonment in prison.

(5) Notwithstanding anything contained elsewhere in this Section, if the offender remaining in a rehabilitation center does not reform his or her conduct or fails to comply with the terms and conditions under sub-section (3) or commits any offence punishable by imprisonment during that period, he or she must **serve**/spend the whole **period** of imprisonment under this Section in prison.

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27. Service of imprisonment in prison on the weekend or during the night only: (1) If, in relation of an offender sentenced to imprisonment for a term not exceeding one year, having regard to, *inter alia*, the offence committed by the offender, his or her age, conduct, the gravity of the offence and the manner of the commission of the offence, it appears to the court that it is not appropriate to hold him or her regularly in prison, the court may, for reasons to be recorded, so determine the sentence of imprisonment that such offender is required to remain in prison only on the weekend or only during the night on daily basis.

(2) Notwithstanding anything contained in sub-section (1), an offender who has committed any offence set forth in sub-section (3) of Section 24 shall not be sentenced to the punishment under this Section.

(3) In determining the sentence under sub-section (1), the court my specify the terms and conditions to be compiled with by the offender.

(4) If the offender held in prison pursuant to sub-section (1) serves such term of imprisonment in compliance with the terms and conditions under sub-section (3), he or she shall be deemed to have served such imprisonment in prison.

(5) If the offender held in prison pursuant to sub-section (1) fails to comply with the terms and conditions under sub-section (3) or commits any offence punishable by imprisonment during that period, he or she must **serve**/spend the whole **period** of imprisonment imposed on him or her in prison.

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28. Power to make order to hold offender in open prison: (1) The judge of the concerned District Court may, on recommendation of the chief of Prison Office, make an order to hold in open prison an offender who has served two-thirds of the term of imprisonment and has good conduct.

Explanation: For the purpose of this Section, "open prison" means any place specified by the Government of Nepal in a manner that a prisoner may work during the specified time even outside of the place where he or her is held.

(2) In sending an offender to an open prison pursuant to sub-section (1), terms and conditions to be complied with by the offender shall also be specified.

(3) If the offender sent to an open prison pursuant to sub-section (1) fails to comply with the terms and conditions under sub-section (2) or commits any offence punishable by imprisonment during that period, he or she must **serve**/spend the whole **period** of imprisonment imposed on him or her in prison.

29. Power to make order to place offender on parole: (1) The judge of the District Court may, on recommendation of the concerned District Probation and Parole Board, make an order to place on parole an offender who, upon being sentenced to imprisonment for more than one year, has served two-thirds of the sentence and has good conduct.

Provided that the following offender may not be placed on parole:

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(a) One who has been sentenced to life imprisonment,

(b) One who has been sentenced for the offence of corruption,

(c) One who has been sentenced for the offence of rape,

(d) One who has been sentenced for the offence of human trafficking and transportation,

(e) One who has been sentenced for the offence of organized crime,

(f) One who has been sentenced for the offence of money laundering,

(g) One who has been sentenced for an offence related to torture or cruel, inhumane or degrading treatment,

(h) One who has been sentenced for the offence of crime against humanity,

(i) One who has been sentenced for an offence relating to the crime against the state.

Explanation: For the purpose of this Section, "parole" means permission for a prisoner who has served two-thirds of the term of the sentence of imprisonment imposed on him or her to serve the remaining term **by spending life** in the society, subject to the compliance with the specified terms and conditions, under the supervision of the parole officer.

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(2) In making an order pursuant to sub-section (1), the terms and conditions so determined by the Probation and Parole Board as to be complied with by such offender during the period of parole shall also be specified.

(3) The parole officer shall monitor whether or not the offender has complied with the terms and conditions under sub-section (2).

(4) If the offender on parole under sub-section (1) complies with the terms and conditions under sub-section (2), the sentence of imprisonment imposed on him or her shall be deemed to have been served.

(5) If the offender on parole under sub-section (1) fails to comply with the terms and conditions under sub-section (2) or commits any offence punishable by imprisonment during that period, he or she must **serve**/spend the remaining **period** of imprisonment imposed on him or her in prison.

(6) Other provisions relating to parole shall be as prescribed.

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30. To have socialization: (1) Notwithstanding anything contained in this Act and other law, a prison may release an offender who, upon being sentenced to imprisonment for a term exceeding one year, is serving the sentence and bears good conduct, from prison on monthly or daily basis, for the following purpose, six months before the expiry of the term of imprisonment imposed on him or her:

(a) family reunion,

(b) establishment of social, cultural relation,

(c) social assimilation and rehabilitation,

(d) carrying on a business or employment,

(e) taking skill or employment-oriented training.

(2) In releasing an offender from prison pursuant to sub-section (1), terms and conditions to be complied with by such offender shall also be specified.

(3) In releasing an offender pursuant to sub-section (1), the period and time to be spent for such purpose shall also be specified.

(4) The person released pursuant to sub-section (1) shall submit a weekly report on the work he or she has done to the concerned prison.

(5) If a person released pursuant to sub-section (1) fails to comply with the terms and conditions under sub-section (2) or commits any offence during that period, he or she shall **serve**/spend the remaining **period** of imprisonment in prison.

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31. Engagement in physical labor in lieu of imprisonment: (1) If an offender who is above the age of 18 and physically fit, and has been sentenced to imprisonment for a term of three years or more so desires, the offender may be engaged in physical labor for public work.

(2) The sentence of imprisonment imposed on an offender who is engaged in physical labor for public work pursuant to sub-section (1) shall be deducted by additional one day in lieu of the labor done for every three days.

(3) Other provisions relating to engagement in physical labor for public work shall be as prescribed.

32. Prisoner may be allowed to leave prison: A prison may, in the following **circumstance**, permit a prisoner who, upon being sentenced to imprisonment, is serving the sentence of imprisonment in the prison to go out of the prison with necessary security:

(a) in the event of a close relative having fallen ill, to visit such patient on condition that he or she shall return to the prison on the same day,

(b) in the event of the death of a relative of whom crematory or obsequies rites have to be performed by the prisoner himself or herself, to perform such crematory or obsequies rites on condition that he or she shall return to the prison on the specified day.

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33. Reformative programs to be conducted: (1) In order to reform the conduct of prisoners serving the sentences of imprisonment, a prison shall conduct reformative programs and measures, including skill, education and employment oriented, morality,

disciplinary, physical, spiritual, meditation and **exercise related education** programs.

(2) A prison shall, in every sixth months, submit to the Probation and Parole Board a report setting out whether or not the prisoners have made significant reforms in their conduct as a result of the programs and measures conducted pursuant to sub-section (1).

(3) Other provisions relating to reformative programs shall be as prescribed.

34. Prisoner to be kept in hospital or similar other place: (1) If any offender sentenced to imprisonment pursuant to this Act becomes of unsound mind, the prison shall keep such offender in a hospital or similar other medical center.

(2) The period during which an offender is kept in a hospital or medical center pursuant to sub-section (1) shall be **included** in the period of the sentence of imprisonment served by the offender.

35. Computation of *fractions of* sentence: In imposing **a fraction of** sentence under this Act, a sentence of imprisonment for life shall be reckoned as equivalent to imprisonment for twenty-five years and the fraction of sentence thereof shall be imposed and executed in accordance with law.

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36. Execution of sentence of imprisonment imposed for different offences: In imposing the sentence of imprisonment for more than one offence on a person who, upon being sentenced to imprisonment, is serving the sentence of imprisonment, the sentence of imprisonment shall be imposed and executed as follows:

(a) where the period of the sentence of imprisonment under the previous judgment is longer than or equal to that of imprisonment under the latter judgment, the sentence of imprisonment imposed under the previous judgment shall be executed;

(b) where the period of the sentence of imprisonment under the latter judgment is longer than that of imprisonment under the previous judgment, the period of the sentence of imprisonment under the latter judgment shall be added to the extent it is longer than the previous judgment.

(2) Notwithstanding anything contained in sub-section (1), if a sentence of imprisonment is imposed for another offence on a person who is sentenced to imprisonment for any offence prior to completion of the previous sentence, the latter sentence of imprisonment shall be so executed as to be computed after the completion of the period of the previous imprisonment.

(3) Where a person is sentenced, in the same case, to various sentences of imprisonment for various offences in

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accordance with the laws in force, only the sentence of imprisonment **for the offence which is the longest of such sentences** shall be executed.

(4) If the sentences of imprisonment imposed under sub-section (3) are equal, only one of such sentences shall be executed.

(5) Notwithstanding anything contained elsewhere in this Section, where a separate sentence is provided by law for a recidivist or a **consolidated** offence, such sentence shall be executed.

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37. Remission of imprisonment: If an offender, except the following offender, has served three-fourth of the sentence of imprisonment and has reformed his or her conduct while in prison, the prison may make remission as prescribed from the sentence of imprisonment passed on him or her:

(a) one who has been sentenced to imprisonment for life,

(b) one who has been sentenced for the offence of rape,

(c) one who has been sentenced for the offence of corruption,

(d) one who has been sentenced for the offence of human trafficking and transportation,

(e) one who has been sentenced for the offence of taking of hostage and kidnapping,

(f) one who has been sentenced for the offence of organized crime,

(g) one who has been sentenced for the offence of money laundering,

(h) one who has been sentenced for an offence related to torture or cruel, inhumane or degrading treatment,

(i) one who has been sentenced for the offence of crime against humanity.

38. Probation and Parole Board: (1) There shall be a Federal Probation and Parole Board, as follows, also to render assistance in the social rehabilitation and integration of the offenders sentenced to imprisonment:

(a) Attorney General - Chairperson

(b) Secretary, Ministry of Law, Justice and Parliamentary Affairs - Member

(c) Secretary, Ministry of Home Affairs - Member

(d) Two psychologists, including one woman to the extent of availability, designated by the concerned Ministry - Member

(e) Inspector General, Nepal Police - Member

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(f) Criminologist or penologist designated by the concerned Ministry - Member

(g) Director General, Department of Prison Management - Member Secretary

(2) There shall be a State Probation and Parole Board as follows in each State, which is under the direct guidance, control and supervision of the Probation and Parole Board:

(a) Chief Attorney - Chairman

(b) Secretary, State Ministry of Law - Member

(c) Secretary, State Ministry of Home Affairs - Member

(d) Chief of Police, State Police

(e) Two psychologists, including one woman to the extent of availability, designated by the State Government - Member

(f) Criminologist or penologist designated by the State Government - Member

(g) Chief of the State body responsible for prison management - Member Secretary

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39. Functions, duties and powers of Probation and Parole Board: (1) In addition to the functions, duties and powers mentioned elsewhere in this Act, the functions, duties and powers of the Federal Probation and Parole Board shall be as follows:

(a) to formulate a probation and parole policy and recommend it to the Government of Nepal,

(b) to develop standards for **placing** prisoners on probation and parole,

(c) to develop terms and conditions to be abided by the offenders who are released on probation and parole,

(d) to supervise, control activities of, and give direction, as required, to the State Probation and Parole Board,

(e) to prepare a roster of persons who can be appointed or designated as the probation officer or parole officer, as required to make recommendation as to the execution of sentences and to assist in the rehabilitation of offenders pursuant to this Act,

(f) to carry out other necessary matters relating to probation and parole.

(2) The Probation and Parole Board shall, on its own, determine the rules of procedures required for the performance of its functions.

(3) The Probation and Parole Board may, as required, form a sub-committee to render assistance in its functions.

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(4) The terms of reference, rules of procedures and other necessary matters of a sub-committee formed pursuant to sub-section (3) shall be as specified by the Probation and Parole Board.

(5) The functions, duties and powers of the State Probation and Parole Board shall be as prescribed.

40. Computation of period of imprisonment: (1) The period of imprisonment shall be computed from the date of custody or detention of the offender, if so held in custody or detention, and from the date that the offender is held in prison, if not held in custody or detention.

(2) The period of imprisonment under sub-section (1) shall not include the day of release from detention or **prison.**

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Chapter – 6

Provision Relating to Compensation

41. Payment of compensation to be ordered: (1) If any injury is caused to the victim's body, life, property or reputation as a result of any offence, the court shall order that a reasonable amount of compensation be paid by the offender to the victim for such injury.

Provided that if a law provides for a separate compensation for any offence, the law shall apply accordingly.

(2) The amount of compensation under sub-section (1) shall be determined, having regard to the following matters:

(a) physical, bodily, mental and emotional injury caused to the victim,

(b) where the victim has died, the injury caused to his or her heir,

(c) the offender's financial source and condition,

(d) condition of the victim and his or her dependant,

(e) such other matters as the Court holds appropriate.

(3) The amount of compensation under sub-section (1) shall be ordered to include the medical expenses if the victim has sustained hurt or grievous hurt as a result of the offence, and the funeral and obsequies expenses, if the victim has died.

(4) Where an offender has caused **damage** to the victim's property, the court shall, in ordering the payment of

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compensation, order that such property be **restituted in its original position.**

(5) If a property cannot be restituted in its original position, the amount of compensation shall be ordered to be paid according to the price of such property where the price is set, and where the price cannot be so set, according to the price of such property that can be set at the time when damage was caused to it or the sentence passed.

(6) Payment of compensation may be ordered to be in cash or kind or both.

(7) If the victim of an offence has died prior to the payment of compensation pursuant to sub-section (1), the amount of compensation under sub-section (1) shall be ordered to be paid to his or her dependent heir.

42. Compensation to be paid immediately: (1) The offender shall immediately pay the amount of compensation passed under this Section.

(2) Notwithstanding anything contained in sub-section (1), if such person, being unable to pay the compensation immediately, furnishes any property as the security for such compensation, the court may order the offender to so pay the compensation in a maximum of three installments that such amount is paid up within one year.

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43. Compensation to be borne by each offender: In making an order for the payment of compensation for more than one offender in relation to any offence, such order shall be so made that each offender pay the compensation according to the degree of the offending.

44. To be as per agreement: (1) Notwithstanding anything contained elsewhere in this Chapter, the victim and the offender can enter into agreement on payment of compensation in relation to any offence.

(2) If the agreement under sub-section (1) is found reasonable, the court may make order for the compensation as per such agreement.

45. Imprisonment for non-payment of compensation: (1) If an offender who is required to pay compensation does not pay the amount of compensation within the period specified for its payment, compensation shall be ordered to be paid to the victim by making attachment to such offender's property.

(2) If the amount of compensation cannot be recovered from the property attached pursuant to sub-section (1) or if the offender required to pay compensation fails to do so, he or she shall be imprisoned by converting the amount of compensation into imprisonment at the rate of three hundred rupees for a day.

(3) Notwithstanding anything contained in this Act and the other laws, imprisonment under sub-section (2) shall not exceed four years.

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Chapter – 7

Miscellaneous

46. Sentence Recommendation Committee: There shall be a Sentence Recommendation Committee, as follows, also for the making of sentencing policy:

(a) Attorney General - Chairman

(b) Secretary, Ministry of Law, Justice and Parliamentary Affairs - Member

(c) Inspector General, Nepal Police - Member

(d) One person designated by the Government of Nepal from amongst the persons having gained at lest fifteen years of experience in the field of crime investigation or the penologists - Member

(e) One person designated by the Government of Nepal from amongst the persons having gained at least ten years of experience in the rehabilitation of offenders - Member

47. Functions, duties and powers of the Committee: (1) The functions, duties and powers of the Committee shall be as follows:

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(a) to develop standards for the determination of appropriate range of sentence to be imposed on the offender according to the gravity of offence,

(b) to conduct study and research the on prevailing penal policy and give suggestion to the Government of Nepal for reform thereof,

(c) to make opinion, advice and suggestion on sentence to be imposed in relation to any specific type of offences,

(d) to collect, update and analyze **data/records** of the offenders and give suggestion to the Government of Nepal on punishment,

(e) if there appears a need for making any reform in the laws in force on punishment, to give suggestion to the Government of Nepal for that purpose.

(2) The Committee shall, on its own, determine the rules of procedures required for the performance of its functions.

(3) The Committee may, as required, form a sub-committee to render assistance in its functions.

(4) The terms of reference, rules of procedures and other necessary matters of a sub-committee formed pursuant to sub-section (3) shall be as specified by the Committee.

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48. Victim relief fund to be established: (1) There shall be established a fund entitled the victim relief fund for the provision of relief to the victim of offence.

(2) The Government of Nepal shall credit into the fund established pursuant to sub-section (1) fifty percent of the amount recovered for a fine under the court or of the amount paid by an offender sentenced to imprisonment as a fine in lieu of such imprisonment, in accordance with the Penal Code.

(3) In addition to the amount to be credited pursuant to sub-section (2), any amount as so provided by law or received from the Government of Nepal or any other source shall be credited into the fund under sub-section (1).

(4) The operation of the fund under sub-section (1), classification of victims, grounds for the provision of relief amount to the victims from the fund, limits of such amount and procedure for its distribution shall be as prescribed.

49. Designation of probation officer or social activist: (1) The Government of Nepal may appoint or designate those persons who are experienced in rehabilitation or community service as the probation officer or parole officer.

(2) The qualification, terms of service and facilities of the probation officer or parole officer under sub-section (1) shall be as prescribed.

50. Power to make rules: The rules may be framed by the Supreme Court on the matters relating to court proceedings and by the

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Government of Nepal on the other matters, as required to implement the objectives of this Act.

51. Power to make manuals: The Government of Nepal may make and enforce necessary manuals subject to this Act and the Rules framed hereunder.

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iv. Act Relating to Children, 2018 (2075)

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The Act Relating to Children, 2075 (2018)

Date of authentication:
2075/06/02 (18 September 2018)

Act Number 23 of the year 2075 (2018)

An Act Made for Amendment and Consolidation of the Laws Relating to Children

Preamble:

Whereas, it is expedient to make amendment and consolidation of the laws relating to children in order to maintain the best interests of the children, by respecting, protecting, promoting and fulfilling the rights of the child.

Now, therefore, be it enacted by the Federal Parliament.

Chapter -1

Preliminary

1. **Short title and commencement**: (1) This Act may be cited as the "Act Relating to Children, 2075 (2018)".

   (2) It shall come into force immediately

2. **Definitions**: Unless the subject or the context otherwise requires, in this Act,-

   (a) "Orphan children" means orphan children as referred to in the prevailing laws.

   (b) "Investigating authority" means an official having authority under the prevailing laws to investigate into the offence.

   (c) "Offence" means a criminal offence as provided by the prevailing laws.

   (d) "Children in conflict with law" means the children accused of committing an offence, and this term also includes the children convicted by the Juvenile Court for committing an offence.

   (e) "Prescribed" or "as prescribed" means prescribed or as prescribed in the Rules framed under this Act.

   (f) "Diversion" means the act of bringing the child accused of committing an offence outside the ambit of the formal judicial proceedings by adopting any of the processes mentioned in Section 29.

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(g) "Observation chamber" means an observation chamber established pursuant to Section 22.

(h) "Family" means a child's father, mother, elder brother, younger brother, elder sister, younger sister, grand-father or grand-mother living in an undivided family and this term also includes other relative living in the undivided family.

(i) "Council" means the National Child Rights Council referred to in Section 59.

(j) "Children" means persons who have not completed the age of eighteen years.

(k) "Violence against children" means an act referred to in sub-section (2) of Section 66.

(l) "Juvenile Court" means a juvenile court constituted in accordance with sub-section (1) of Section 30 and this term also includes the juvenile bench constituted pursuant to sub-section (3) of the said Section.

(m) "Child pornography" means an act to take or make video or picture of children showing their sex organ or making them involve in imaginary sexual activities, to demonstrate vulgar picture through newspaper, poster, print, movie or other medium of communication, and this term also includes activities of production, sale, import, export, collection or dissemination of such materials.

(n) "Child welfare authority" means an official appointed or prescribed pursuant to Section 61.

(o) "Child home" means a child home established pursuant to Section 52.

(p) "Child sexual harassment/abuse" means an act referred to in sub-section (3) of Section 66.

(q) "Child reform home" means a child reform home established pursuant to Section 43.

(r) "Ministry" means the Ministry of Women, Children and Senior Citizens of the Government of Nepal.

(s) "Children in need of special protection" means the children referred to in Section 48.

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(t) "Guardian" means a person or institution appointed or having an obligation to protect the rights and interests of the child in accordance with this Act or the prevailing laws, and this term also includes a curator in the absence of the guardian.

(u) "Social service provider" means a person referred to in Section 62.

(v) "Local Level" means any Rural Municipality or Municipality.

Chapter -2

Rights of the Child

3. **Right to live**: (1) Every child shall have the right to live with dignity.

(2) The Government of Nepal, Province Government and Local Level shall take necessary measures required for preventive and security service including prevention of possible accidents, minimization of risks that may occur on the children, in order to protect the rights of the child to live and development.

4. **Right to name, nationality and identity**: (1) Every child shall have the right to have name with own identification and birth registration.

(2) The father or mother of a child, after his or her birth, shall give a name to him or her and register it according to the prevailing laws.

(3) The mother of a child born from rape or incest that is punishable by the prevailing laws shall register his or her birth by mentioning only the name of the mother if she so wishes.

(4) While giving name pursuant to sub-section (2), if the father or mother of a child is not available immediately or there is no possibility that they can be available, then the child may have the name given by any other family member or guardian who looks after him or her.

(5) Every child after birth may use the surname given by mutual consent of his or her parents or if such consent is not available he or she may use the surname of his or her father after his or her name.

(6) Notwithstanding anything contained in sub-section (5), the child, if he or she so wishes, may use the surname of his or her father or mother or both.

(7) A child whose paternal identity is not known may use his or her mother's surname after his or her name.

(8) If a dispute arises regarding the surname of any child, except as proved otherwise, it shall be deemed that the child is using his or her father's surname.

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(9) A child whose both father and mother are not identified may use the surname given by the guardian after his or her name.

(10) The child welfare authority shall be informed about it when the guardian gives the name and surname pursuant to sub-section (9).

(11) If the name of father, mother and grand-father, grand-mother must be mentioned pursuant to law in any formal legal proceeding or document, in cases where the father of the child is not known, he or she may mention his or her mother and parents' name and if the name of mother is also not known, mentioning that matter will suffice the requirement.

(12) The mother, father or guardian of a child shall not change his or her name, surname that hides the identity of the child with an intention to gain undue benefits.

5. **Right against discrimination**: (1) No discrimination shall be made against any child on grounds of religion, race, caste, tribe, sex, origin, language, culture, ideological thought, physical or mental condition, physical disability, marital status, family status, employment, health condition, economic or social condition of him or her or his or her family or guardian, geographical area or similar other ground.

(2) No one shall discriminate between son and daughter, son and son or daughter and daughter or children from ex-husband or wife or present husband or wife in maintenance, education or health care of children.

(3) No one shall make any kind of discrimination between their own son, daughter and adopted son, daughter.

(4) No discrimination shall be made with regard to maintenance, education and health care between children born to a man and woman before and after their marriage.

6. **Right to live and meet with the parents**: (1) No child shall be split or separated from his or her father or mother without his or her will.

(2) Notwithstanding anything contained in sub-section (1), the Juvenile Court may issue an order to separate any child from his or her father or mother and entrust him or her to any guardian's custody for the best interests of the child, if necessary.

Provided that the concerned party shall not be deprived of an opportunity to submit his or her explanation before issuing such an order.

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(3) Except for the condition where the Juvenile Court has made a restriction stating that it would be not in the interests of a child, the child living separately from the father or mother or both shall have the right to make direct contact or meet with the father or mother regularly.

(4) The person adopting a child shall allow the adopted child to meet, contact and make correspondence with his or her biological parents.

(5) Any person or institution responsible for alternate care shall allow the children under their care or guardianship to meet their biological parents or families.

7. **Right to protection**: (1) Every child shall have the right to obtain proper care, protection, maintenance, love and affection from his or her father, mother, other member of family or guardian.

(2) The parents shall have equal responsibility in relation to care, protection and maintenance of their children. In cases where the parents are divorced or living separately due to any other reasons, financial expenses for the maintenance of their children shall be borne by both parents according to their capacity.

(3) No father, mother, other member of the family or guardian shall abandon or leave the child of their own or under his or her guardianship unattended.

(4) Children with disabilities, war victims, displaced, under vulnerable conditions, or living on street shall have the right to special protection as prescribed from the State for their secured future.

(5) Every child shall have the right to protection against any type of physical or mental violence and torture, hatred, inhuman treatment, gender or untouchability-based mistreatment, sexual harassment and exploitation that might be caused by his or her father, mother, other family member or guardian, teacher and other person.

(6) Every child shall have the right to protection from being exploited economically and shall also be entitled to be protected from any activity which may be harmful to him or her or be obstacle to his or her education or detrimental to his or her health, physical, mental, moral, social development.

(7) No child shall be deployed in army, police and armed group and be used for armed conflict or political purpose directly or indirectly.

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(8) No one shall attack, or make hindrance to the operation and management of any school, including the place, service or facility, used for the best interests of children, with any excuse at times of armed conflict or in any adverse situation of whatever type.

(9) Children below fourteen years of age shall not be deployed in any risky work or used as a house-servant or house-maid.

(10) The Government of Nepal, Provincial Government and Local Level may follow the necessary measures and make and implement the standards for the protection of the children.

8. **Right to participate**: A child who is competent to form his or her own opinion shall have the right to participate in the decision-making process of family, community, school or other public institution or organization on the matters concerning him or her.

9. **Right to freedom of expression and information**: (1) Every child shall have the freedom to express his or her opinion pursuant to the prevailing laws.

(2) Every child shall have the right to demand and receive information on the subject of his or her right, interest and concern subject to the prevailing laws.

10. **Right to open organization and assemble peacefully**: (1) Every child shall have the right to open a child club or organization or the right to assemble peacefully for the protection and promotion of the rights of the child.

(2) The provisions regarding the opening of a child club or organization pursuant to sub-section (1) shall be as prescribed.

11. **Right to privacy**: (1) Every child shall have the right to privacy regarding the subject of his or her body, residence, property, document, data, correspondence and character.

(2) No one shall do, or cause to be done the act of creation of personal information, details, photo, collection of information, publishing, printing, demonstrating, sale and distributing or transmitting by any means that causes negative impact on the characteristics of a child or any shame, regret or domination to him or her.

(3) The details that provide the identity of a child along with the name, surname, address, age, sex, family background, economic status, offence committed by, and any details regarding action, if any taken, against a child who is victim or accused of an offence by the Juvenile Court, police office, guardian,

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caretaker, or any other body shall be kept confidential. The details of a child kept confidential shall not be used elsewhere except as provided by the law.

Provided that if such details have to be published for any study or research work, only the age or sex of the child, without disclosing his or her name, surname, address, other data which may reveal his or her identity and his or her family may be published.

12. **Special rights of children with disabilities**: (1) Special arrangements shall be made, as prescribed, for the children with disabilities.

(2) Every child with disability shall have the right to determine his or her own honour and prestige, to promote his or her own independency, to participate actively in the society and to live a life with dignity.

(3) Every child with disability shall have the right to obtain special care and to be assimilated in the society and to obtain the opportunity to education, training, health care, rehabilitation service, preparation for employment and entertainment for the development of his or her personality.

(4) Every child with disability shall have the right to equal access and utilize the public services and facilities.

13. **Right to nutrition and health**: (1) Every child shall have the right to proper nutrition, clean drinking water and the child up to two years of age shall also have the right to breast feeding.

(2) Pregnant women and children shall have the right to get necessary vaccination to prevent diseases and allow to utilize the physical and mental health services according to the national standards, to get information about body, reproduction and reproductive health according to age and maturity.

(3) Every child shall have the right to obtain free basic health service.

14. **Right to sports, entertainment and culture**: (1) Every child shall have the right to play games and participate in sports according to his or her age and interest.

(2) Every school shall encourage the children to participate in sports at the time other than study and for that purpose, provide for necessary playgrounds and sports materials.

(3) Every child shall have the right to child friendly entertainment according to his or her age, interest and requirement.

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(4) Every child shall have the right to take part in cultural activities according to his or her religion, culture, custom, tradition and conscience without causing any adverse effect on his or her interests.

15. **Right to education**: (1) Children below six years of age shall have the right to learn in a proper way according to their age and level of development and to pre-child development.

(2) Every child shall have the right to acquire free and compulsory education upto the basic level and free education upto the secondary level pursuant to the prevailing law in a child friendly environment.

(3) Every child shall have the right to acquire education through proper study materials and teaching method according to his or her special physical and mental condition, pursuant to the prevailing law.

(4) Dalit children shall have the right to acquire free education with scholarship pursuant to the prevailing law.

Chapter -3

Responsibility towards Children

16. **Priority to be given for the best interests of children**: (1) The officials of every organization and institution that carries out activities related to children shall adopt necessary child friendly process by giving priority to the best interests of children, while doing every activity.

(2) It shall be the responsibility of everyone to instantly help children whose life is in risk.

(3) The child welfare authority or Juvenile Court shall, while making arrangement for a child's alternative care, separating a child from his or her parents or guardian, making decision on who has to take care of and maintain a child after divorce between his or her father and mother shall adopt the process as prescribed for the best interests of the child pursuant to this Act.

(4) Public and private social institutions where children stay or which provide services to children shall, while constructing or refurbishing the physical structures, make necessary arrangement that is child friendly.

17. **Responsibility of the family or guardian**: (1) Both the father and mother shall have equal responsibility on the child's care, maintenance and overall development.

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(2) It shall be the responsibility of every father, mother, other members of the family or guardian to care, maintain and protect, to provide the opportunity for education, treatment, along with personality development of, to provide environment full of love and care and to guide properly for future certainty of the child.

(3) Father, mother, other family member or guardian shall provide suitable environment for acquiring education to every child of age to join school by admitting him or her to the school.

(4) Father, mother, other member of the family or guardian shall not engage the child on labour which may adversely affect his or her education, health and physical or mental development.

(5) Father, mother, other member of the family or guardian shall not leave the child below six years of age alone at home or any other place or send alone elsewhere, without being accompanied by an adult person.

18. **Obligation of the State**: The State shall make necessary arrangement for the basic needs including maintenance, protection, health and education of children in need of special protection, on the basis of the available means and resources.

19. **Responsibility of the media sector**: It shall be the responsibility of the media sector to publish and transmit information, without violating the rights of the child and causing adverse effect on the interests of the child.

Chapter -4

Relating to Juvenile Justice

20. **Matters to be considered while dispensing the juvenile justice**: A person, official and Juvenile Court involved in dispensing juvenile justice shall take into account the following matters, in the course of dispensing justice, in addition to the other matters as provided elsewhere in this Act:

(a) To take opinion of a child before making a decision that affects him or her,

(b) To provide an opportunity to father, mother, other family member or guardian to put their opinion before making decision on the subject matter associated with the interests and benefits of the child,

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(c) To use parlance, speak and behave according to the child's age, level of intellectual development, conscience and cultural norms and values,

(d) To use language preferred by the child and to take assistance of an interpreter as required while talking to him or her.

21. **To take a child under control**: (1) If information on an offence is received, the investigating authority shall immediately start investigation on it. While doing such investigation, if it appears that the investigation is not possible without taking the child accused of the offence under control, the investigating authority may take him or her under control.

(2) If it appears that it is no longer required to take a child under control, who has been taken under control, pursuant to sub-section (1), he or she shall be handed over to his or her family member or guardian or the nearest relative.

(3) If a child is taken under control pursuant to sub-section (1), the investigating authority shall give information about it to his or her family member, or guardian or close relative.

(4) The investigating authority shall not use force while taking a child under control pursuant to sub-section (1).

Provided that it shall not bar the using of minimum force required to take the child under control.

(5) The child taken under control pursuant to sub-section (1) shall, if possible, be referred to a child psychologist or a person working in the field of children's welfare in order to provide the required counselling service.

(6) If the child taken under control pursuant to sub-section (1) could deviate himself or herself pursuant to Section 27, the investigating authority may, notwithstanding anything contained in the prevailing law, take the deposition of him or her by himself or herself.

(7) The child taken under control pursuant to sub-section (1) may be kept in an observation chamber with the permission of the Juvenile Court for a maximum twenty-one days, not exceeding five days at a time.

(8) Notwithstanding anything contained in sub-section (7), if the Juvenile Court is of the opinion that it not reasonable to keep the child accused of offence in the observation chamber, having regard to the child's physical condition, age, circumstances at the time of commission of the offence or condition of the

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observation chamber, the Juvenile Court may make an order to investigate the case by entrusting such a child to his or her father, mother, other family member or guardian and in their absence to any social organization working in the field of protection of the rights and interests of the child or child reform home on the condition that the child shall make presence when the Juvenile Court so requires.

(9) While inquiring into the child taken under control, the investigating authority shall make it in the presence of his or her father, mother or guardian or children welfare authority or legal practitioner in a child friendly environment.

22. **Provision relating to establishment of observation chamber**: (1) The Government of Nepal may establish an observation chamber for the purpose of keeping a child taken under control on the charge of an offence, throughout the period of investigation.

(2) A separate room shall be arranged in every District Police Office until the observation room referred to in sub-section (1) is established.

(3) The child taken under control for investigation shall be provided with counselling by a child psychologist and psycho-social support as required.

(4) If any member of a child's family wishes to stay together with the child who is kept in the observation chamber for assistance, the investigating authority may give permission to stay together specifying the time and conditions as required.

(5) The provisions relating to the establishment, operation, management and monitoring of the observation chamber shall be as prescribed.

23. **Special provision relating to investigation and prosecution**: (1) Notwithstanding anything contained in the prevailing laws, the Government of Nepal shall form a separate unit in order to investigate into the cases of offences of which children are accused.

(2) The Government of Nepal may designate an official working at the District Police Office, who has got training on juvenile justice, to perform that function until the separate unit is formed pursuant to sub-section (1).

24. **Provision relating to trial**: (1) No child shall be detained in the course of trial and no bail or guarantee shall be demanded from him or her.

(2) Notwithstanding anything contained in sub-section (1), the Juvenile Court may, for reasons to be recorded, send a child accused of an offence to the child reform home during trial, in any of the following circumstances:

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(a) If there is adequate ground that the child's life would be in danger, someone would get hurt from him or her, such a child would go away or any other reason that it is not appropriate to put him or her elsewhere,

(b) If it appears from the evidence available for the time being that a child accused of an offence punishable by imprisonment for a term not exceeding three years or more or there is a reasonable ground to believe that he or she is an offender.

(3) Except in the circumstance referred to in sub-section (2), other child accused of offence may be entrusted to his or her father, mother, other family member or guardian, and in their absence to an institution or person working for the welfare of the children on a condition that the child will be presented as and when needed.

Provided that if the Juvenile Court deems that it is not appropriate to keep the child in the reform home, taking into account the child's physical condition, age, circumstances at the time of commission of the offence as mentioned in sub-section (2), it shall not bar the entrusting of such a child to his or her father, mother, other family member or guardian, and in their absence, to an institution or person protecting the rights and interests of the child, by specifying the conditions pursuant to this sub-section.

(4) While entrusting a responsibility of a child pursuant to sub-section (3), that person and the child shall be informed about the specified conditions and the consequences that must be borne if they have not been followed.

(5) If the child who is entrusted to someone pursuant to sub-section (3) does not follow the conditions specified by the juvenile court, the trial of the case may be made by keeping him or her in the child reform home.

25. Rights of child victim: A child victim shall have the right to child friendly justice as follows in every stage of investigation, prosecution and judicial process:

(a) To get information on the language he or she understands,

(b) To participate or be involved,

(c) To keep the details of personal identification confidential,

(d) To get recovery of the reasonable compensation from the offender,

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Provided that this clause shall not be considered as limiting the opportunity of the victim to receive compensation from the State.

(e) To get free legal aid and socio-psychological counselling service as required and to appoint a separate legal counsel if he or she so wishes,

(f) To get free service of the translator, sign language expert or interpreter if the victim does not understand the language used by the investigating authority or Juvenile Court,

(g) To get, free of cost, the copy of the documents including the decisions and orders made by the investigating authority or Juvenile Court,

(h) To get police protection for safety against the probable threat that may be caused from the offender or his or her party,

(i) To have his or her case heard in camera,

(j) To have the indirect presence of the defendant in the course of hearing of the case as required.

26. **Rights available to child in the course of hearing**: (1) A child accused of an offence shall have the following rights, in addition to the rights mentioned in the prevailing law and elsewhere in this Act, in the course of investigation and hearing of the case:

(a) Right to obtain information on the charge made against him or her, its proceeding, order issued or decision made on it directly or through his or her family or guardian,

(b) Right to receive free legal aid and other necessary support immediately in order to defend against the charge made against him or her,

(c) Right to have the case tried and settled by the competent judicial authority,

(d) Right to demand the presence of family or guardian required in all processes of juvenile justice delivery,

(e) Right to receive prompt and fair justice from the Juvenile Court,

(f) Right to have confidentiality in the process of juvenile justice delivery

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(g) Right to get information on the constitutional or legal rights,

(h) Right to have investigation, prosecution and hearing in the child friendly environment,

Explanation: For the purposes of this clause, "child friendly environment" means the treatment done with the child that is commensurate to the age, maturity and psychology of the child, this term also includes the use of the language understood by the child, creation of the fearless atmosphere, presence of his or her mother, father or other family member or guardian, addressing the personal needs of the child and the availability of the facilitator as required.

(i) Right to have an opportunity to participate in every stage of judicial proceedings and to put his or her own views independently,

(j) Right to allow the participation of the parents, guardian of the child, during the hearing of the case, if he or she so wishes,

(k) Right to stay separately from the offender, if the child so wishes where the father, mother, parents or guardian of the victim child is the perpetrator.

(2) The child accused of an offence shall be presumed to be innocent unless decided otherwise by the Juvenile Court, and such child shall not be compelled to give testimony against him or herself.

27. **To divert**: (1) Notwithstanding anything contained in the prevailing laws, the following authorities may, in the following circumstances, take decision to divert a child accused of an offence, if it appears reasonable to divert the child for his or her best interests:

(a) The investigating authority, where the claimed amount is upto five thousand rupees or the offence t is punishable by a fine of upto two thousand rupees or imprisonment for a term of upto two months,

(b) The government attorney, where the claimed amount is upto ten thousand rupees or the offence is punishable by a fine of upto five thousand rupees or imprisonment for a term of upto three years,

(c) The Juvenile Court, irrespective of the claimed amount or the amount of fine or term of imprisonment.

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(2) Notwithstanding anything contained in clause (c) of sub-section (1), a child shall not be diverted in a case punishable by imprisonment for a term of three years or more than three years shall not be diverted.

(3) The child or guardian may, if not satisfied with the order of diversion, file a petition in the Juvenile Court in the case of clauses (a) and (b) of sub-section (1) and in the High Court in the case of clause (c).

28. **Matters to be considered in making diversion**: The following matters shall be considered while making diversion:

(a) Confession of offence by the child,

(b) Consent of the concerned child, his or her father, mother and other family member, or guardian where there are no parents,

(c) Receipt of consent of the victim ensuring the rehabilitation of the victim party to the extent of possible,

(d) Nature of the offence and circumstances of its commission, gravity of the event, age, maturity and intellectual level, family environment of the child and the damage caused to the victim and his or her rehabilitation are to be considered.

29. **Procedures to be followed while making diversion**: (1) One or more of the following appropriate procedures shall be followed while diverting a child, also having regard to his or her desire:

(a) To have reconciliation or understanding between the child and the victim,

(b) To make the child realize the mistake,

(c) To provide necessary counselling to the child and his or her family,

(d) To send the child to any community service,

(e) To send the child to any institution for his care and protection,

(f) To release the child on supervision and direction of the child welfare authority,

(g) To entrust the child to his or her father, mother or other family member or guardian,

(h) To make the child participate in any training or educational program.

(2) While diverting a child by adopting any procedure referred to in clauses (d), (e), (f), (g) and (h) of sub-section (1), the period shall also be fixed.

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(3) While diverting a child by adopting the procedure referred to in clauses (d), (e), and (f) of sub-section (1), no diversion shall be made so that it exceeds the maximum term of punishment imposable for the commission of the offence.

(4) The investigating authority or government attorney shall, before diverting a child, obtain a report on study and analysis of physical and mental condition of the child by the child psychologist and child expert and economic, cultural condition and circumstances of the child by the social worker.

(5) The investigating authority, government attorney or Juvenile Court shall give the information about the diversion of the child pursuant to sub-section (1) to their respective higher office and Juvenile Court.

(6) If the child accused of an offence is diverted, such a dispute shall terminate, and its formal judicial proceeding shall be deemed to be concluded.

(7) The investigating authority, government attorney or Juvenile Court that has made diversion shall make arrangement to monitor, whether the diverted child has been continuously participating in the diversion procedure or not, through a probation officer.

(8) The following may be done to indemnify the damage caused to the victim while diverting a child:

(a) To compensate the victim or to have recovery of the actual loss and damage,

(b) To cause the property, profit or material acquired from the offence to be returned to the concerned owner,

(9) Other provisions relating to the diversion shall be as prescribed.

30. Formation of the Juvenile Court: (1) The Government of Nepal may, on recommendation of the Judicial Council, form the required number of Juvenile Courts to originally proceed, try and settle the offence committed by the children.

(2) The notice of formation of the Juvenile Courts pursuant to sub-section (1) shall be published in the Nepal Gazette, and the territorial jurisdiction and venue of such Courts shall be as mentioned in the same notice.

(3) A juvenile bench shall be formed in each District Court for the proceeding, hearing and settlement of the offence to be dealt with the juvenile court until the Juvenile Court is formed under sub-section (1).

(4) The juvenile bench referred to in sub-section (1) shall consist of the following members:

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(a) District Judge,

(b) Social service provider,

(c) Child psychologist or child specialist.

(5) The qualification, appointment, remuneration and other conditions of service of the social service provider, child psychologist or child specialist referred to in clauses (b) and (c) of sub-section (4) shall be as prescribed.

(6) Notwithstanding anything contained in sub-section (1), if an adult person is involved, along with the child, in any offence, the matter shall be proceeded, tried and settled by the Juvenile Court in the case of the child, and the matter shall be proceeded, tried and settled pursuant to the prevailing laws in the case of the adult person by establishing a separate case file.

31. **Exercise of jurisdiction of the Juvenile Court**: The exercise of jurisdiction of the Juvenile Court shall be made as prescribed.

32. **Proceeding by the Juvenile Court**: Even if the child attains the age of eighteen years during the proceeding of the case, such case shall be proceeded, tried and settled by the Juvenile Court itself.

33. **Cases to be transferred to the Juvenile Court:** If any child has been accused of offence before the commencement of this Act and the case is being originally tried by the District Court or other body pursuant to the prevailing laws, the case shall be transferred to the concerned Juvenile Court after the commencement of this Act.

34. **Provision relating to trial**: (1) The Juvenile Court shall try the case in a child friendly environment by taking into consideration the age and maturity of the child.

(2) The Juvenile Court shall make the child participate while trying the case and shall provide an opportunity to freely put his or her views.

35. **Provision of in camera bench**: (1) The trial and adjudication of the case against a child accused of an offence shall be carried out in camera bench except as otherwise ordered by the Juvenile Court.

(2) During the trial and adjudication of the case in-camera pursuant to sub-section (1), only the concerned child, his or her family member or guardian, victim, government attorney, concerned legal practitioner and the person permitted by the Juvenile Court may enter into the in-camera bench.

(3) The procedures of the in-camera bench shall be as prescribed.

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36. **Provisions relating to punishment**: (1) If the child is less than ten years of age at the time of commission of the offence, no case and punishment of any kind shall be instituted against and imposed on him or her.

(2) If a child of ten years of age or above but below fourteen years of age commits an offence that is punishable by a fine, the child shall be released after counseling him or her and if such a child commits an offence that is punishable by imprisonment, the child shall be punished with imprisonment for upto six months or be sent to the child reform home for a period not exceeding one year without subjecting him or her to imprisonment.

(3) If a child of fourteen years of age or above but below sixteen years of age commits an offence, the child shall be punished with half the punishment that is imposable on the person having attained majority pursuant to the prevailing law.

(4) If a child of sixteen years of age or above but below eighteen years of age commits an offence, the child shall be punished with two-thirds of the punishment that is imposable on the person of legal age pursuant to the prevailing law.

(5) The Juvenile Court shall, having regard, inter alia, to the age, sex, maturity of the child who is held to be subject to punishment pursuant to sub-section (2), (3) or (4), nature of the offence and also the circumstances of the commission of the offence, postpone his or her punishment or make any of following appropriate decisions as punishment, with or without specifying the terms and conditions:

(a) To counsel or advise the child about good human behaviours by any family member or guardian,

(b) To give orientation to the child through any institution or person that provides the service,

(c) To provide single, group or family psycho-social counselling service,

(d) To keep the child under the observation of any family member, guardian, school, person or institution that provides service for a fixed period subject to the observance of the specified terms and conditions,

(e) To send the child for community service that is suitable to his or her age, by specifying the nature and period of service,

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(f) To make the child stay in the child reform home for a period not exceeding that of the punishment imposed on him or her.

(6) If any person has caused a child to commit an offence, by teaching, giving pressure, ordering, luring or in any other manner, that person who has taught so, given pressure, ordered, lured or made to commit it shall be punished pursuant to law as if that person committed the offence on his or her own.

(7) Notwithstanding anything contained elsewhere in this Section, while punishing a child who has not completed sixteen years of age, no punishment of imprisonment shall be imposed on such a child except in cases where he or she has committed a heinous offence, grave offence or repeated the offence.

37. **Period for disposing of the case**: Notwithstanding anything contained in the prevailing laws, the Juvenile Court shall generally dispose of a case within one hundred twenty days from the date of filing of the case and the proceeding and adjudication of such a case shall be made on the basis of continuous hearing.

38. **Reform period may be reduced or remitted**: (1) If there is satisfactory improvement in the behaviour of a child kept in the child reform home or kept under the protection or supervision of any institution or person pursuant to the decision of the Juvenile Court, the child welfare authority may recommend the Juvenile Court to reduce or remit the period of reform of such a child.

(2) The Juvenile Court may reduce or remit the remaining period of reform of the child if it thinks it reasonable to reduce or remit the period of reform upon examining the recommendation received pursuant to sub-section (1).

39. **Restorative justice**: (1) While dispensing the juvenile justice, it shall be made in compliance with the principle of restorative justice.

(2) Other provisions relating to restorative justice shall be as prescribed.

40. **Not to be considered disqualified**: Notwithstanding anything contained in the prevailing laws, if any person becomes disqualified to receive any post or facility pursuant to law by the reason of the commission by him or her of any offence, he or she shall not be considered disqualified to receive that post or facility on the ground of the offence that he or she committed when he or she was a child.

41. **Punishment not to be counted**: (1) Notwithstanding anything contained in the prevailing laws, the offence committed by a person during childhood shall not be counted while counting repeated offence pursuant to this Act or the prevailing laws, for the purposes of punishment.

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(2) Notwithstanding anything contained in the prevailing laws, although any child commits an offence time and again, he or she shall not be subjected to additional punishment on the basis of repetition of the commission of the offence.

42. **Not to be handcuffed, shackled or kept in solitary confinement**: Notwithstanding anything contained in the prevailing laws, no child in conflict with law shall be handcuffed, shackled or kept in solitary confinement or detention, or prison.

43. **Provision relating to child reform home**: (1) The Government of Nepal shall establish the child reform home as required for the purpose of keeping the children in conflict with law until their reform and rehabilitation.

(2) Any institution may, with the approval of the Government of Nepal, establish a child reform home, for the purpose of sub-section (1).

(3) The Juvenile Court may monitor and inspect the child reform homes established within its territorial jurisdiction, issue necessary directives to such child reform homes and order such child reform homes to submit reports on the condition of reform of the children kept in such homes.

(4) If a child kept in a child reform home attains the age of eighteen years before completion of the period for which he or she has to remain in the child reform home, he or she shall be kept separately from the other children in the child reform home for the remaining period by considering, inter alia, the improvement seen in his or her behaviour, continuity of skills and education gained.

(5) The establishment, operation, monitoring and other arrangement of the child reform home shall be as prescribed.

44. **To shift children suffering from chronic or serious disease to another place**: (1) If any child kept in a child reform home needs continuous treatment because he or she has suffered from any chronic or serious disease or if the concerned doctor has recommended to shift any child somewhere else due to his or her physical or mental disability or his or her addiction to narcotics, the Juvenile Court may issue an order to shift such a child to another place for a certain period.

(2) An institution or person who keeps the child as per the order issued pursuant to sub-section (1) shall submit a report related to the health of the child to the concerned Juvenile Court in every six months.

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(3) If the child is found to be healthy or free from addiction on the basis of the report referred to in sub-section (2), the Juvenile Court may issue an order to return that child to his or her previous condition.

45. **Psycho-sociological and psychological study report**: (1) An individual psycho-sociological and psychological study report shall be prepared for the purpose of investigation, prosecution, proceeding, hearing or adjudication of the charge made against a child in conflict with law.

(2) The provisions regarding the preparation of the study report referred to in sub-section (1) shall be as prescribed.

46. **Central Juvenile Justice Committee:** (1) There shall be a Central Juvenile Justice Committee, as prescribed, at the central level for carrying out the functions, including making coordination between the various institutions working in the field related to juvenile justice.

(2) The meetings, functions, duties and powers of the Central Juvenile Justice Committee shall be as prescribed.

47. **District Juvenile Justice Committee:** (1) There shall be a District Juvenile Justice Committee in every district, and the formation, functions, duties and powers and rules of procedures of meetings of such Juvenile Justice Committee shall be as prescribed.

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CHAPTER 5

Special Protection and Rehabilitation of Children

48. **Children in need of special protection:** (1) The following children shall be deemed to be children in need of special protection:

(a) Orphan children,

(b) Children that have been left or found abandoned in hospitals or other public places or separated from parents or left unclaimed, with the identity of their parents unknown,

(c) Children that are deprived of appropriate care due to serious physical or mental disability or incapacity of their parents,

(d) Out of the children in conflict with law, those who have been referred for alternative care under the diversion process,

(e) Children who are staying in prison being dependent on their father or mother who is detained or imprisoned,

(f) Infants born due to rape or incestuous relationships that are punishable by law and concerning whom application has been made to the child welfare authority, stating inability to maintain them,

(g) Children who have been separated from their families for their best interests due to abuse, violence or neglect by their respective father, mother or guardian,

(h) Children who are earning their living by engaging in labour that is forced or bonded or hazardous or worst in form or that contravenes a prevailing law, who are addicted to smoking, drinking or other narcotic drugs, or are infected with HIV,

(i) Children who are experiencing difficulty leading normal life or whose lives are at risk, having been suffering from serious physical or mental health problems or serious disability, due to the inability of their parents or families to afford treatment,

(j) Children who are the victims of offences against children or are at such risks,

(k) Children who have lost both or either of their parents, or whose parents have disappeared, or have themselves got injured physically or mentally or disability due to a disaster or armed conflict,

(l) Children belonging to deprived Dalit communities,

(m) Such other children as may be specified as children in need of special protection by the Ministry by publishing a notice in the Nepal Gazette.

(2) Other services and support, including rescue, temporary protection, health treatment, psychosocial support, family reunion, rehabilitation, alternative care, family support, social security and socialization, as required, to children referred to in subsection (1) shall be as prescribed.

49. **<u>Provision of alternative care</u>:** (1) The children referred to in clauses (a), (b), (c), (d), (e), (f) and (g) shall be considered as children that require alternative care.

(2) The child welfare authority shall make arrangements for alternative care for the children referred to in sub-section (1) on the basis of the following order of priority:

(a) Relative from the side of the father or mother of the child,

(b) Family or person willing to provide care to the child,

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(c) Organization that provides foster **(family-modelled)** care,

(e) Children's home.

(3) Other provisions relating to alternative care shall be as prescribed.

50. **Protection of children:** (1) A person who has information about a child in need of special protection at any place shall give information thereof to the child welfare authority.

(2) If information is received pursuant to sub-section (1), the child welfare authority shall, if he or she finds it necessary to urgently rescue the child, rescue the child and keep him or her in a temporary protection service referred to in Section 69.

(3) The child welfare authority may make arrangements for providing necessary services, upon conducting inquiry on the basis of the information received pursuant to sub-section (1).

(4) The child welfare authority may entrust a social service provider in order to provide necessary services pursuant to sub-section (3), as prescribed.

(5) While conducting inquiry pursuant to sub-section (3), other services needed by the children in need of special protection shall be ensured. If it is deemed that special protection is not necessary and the child's father, mother, other family member or guardian has been traced, the child welfare authority may hand over the custody of such children to them.

(6) If the child welfare authority thinks that any support is needed for handing over the custody of the child to her or his father, mother, other family member or guardian pursuant to sub-section (5), he or she shall make arrangements for necessary services such as sponsorship or family support, by making coordination with the relevant organizations.

Clarification: For the purposes of this Section:

(a) "Sponsorship" means the act of making available financial support on the long-term or short-term basis for necessary maintenance and education for children by any person, organization or body.

(b) "Familial support" means the support provided for creating an environment that is conducive to safeguarding of children within the family by identifying and addressing the economic and social factors that lead the child's family to disintegration, while maintaining unity and harmony in the family.

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(7) If, in making examination and inquiry pursuant to sub-section (3), it appears that alternative care is necessary, the child welfare authority shall make arrangements for such care.

(8) In a case involving a child as a victim, the child welfare authority shall arrange for separating a child victim from her or his parents or family and keep him or her in a temporary protection service for a certain period of time, if the child so desires, or the parent or guardian is the perpetrator or because of their complicity with the perpetrator there is a possibility of greater risk to the child, or there is likelihood of obstruction in the examination, inquiry, proceedings and fact-finding of the incident.

(9) If, in spite of making examination and inquiry pursuant to sub-section (3), the paternity and maternity of the child cannot be determined, the child welfare authority shall recommend for her or his birth registration and government identity card setting out the identity.

51. **To appoint or designate guardian:** In providing the alternative care service pursuant to Section 49, arrangement shall be made for appointing or designating a guardian pursuant to the prevailing law.

52. **Establishment and operation of children's home:** (1) The Government of Nepal, Provincial Government and the Local Level shall establish children's homes, as required, for the purpose of protection of the children requiring special protection.

(2) The provisions relating to the establishment of children's home, qualifications of operators, operational licence, renewal, classification, management, operation standards and monitoring shall be as prescribed.

53. **Duration of stay at children's home:** The children requiring special protection shall be kept in children's homes until they have been properly rehabilitated or until they have attained the age of eighteen years.

54. **Family reunion to be made:** (1) Family reunion shall be made if the parents or guardians of the children staying in children's homes are traced and it is in the best interests of the children to do so.

(2) After the commencement of this Act, no child shall be kept in a children's home except as in accordance with Sections 49 and 69.

55. **Liability relating to rehabilitation and social reintegration:** It shall be the liability of the concerned children's home or child correction home to assist the

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child welfare authority in the rehabilitation and social reintegration of the children staying at that children's home or child correction home.

56. **Chief of the organization to be responsible:** (1) If an organization is entrusted with the guardianship of a child pursuant to this Chapter, the chief of the organization shall be deemed to have the ultimate responsibility for the care and maintenance of the child.

Clarification: For the purposes of this Section, "chief of the organization" means the chief executive officer or chairperson, managing director of such an organization acting in that capacity or such other officer as designated pursuant to the rules of that organization.

(2) If any organization that has been entrusted with the responsibility of guardianship acts in contravention of the prescribed conditions and procedures, the child welfare authority may prevent the organization from engaging in child protection activities, also setting out the conditions breached by it.

(3) If it is established from the monitoring that an organization that has been prevented pursuant to sub-section (2) has made desired improvements, the child welfare authority may remove the prevention made on the organization from engaging in child protection activities.

57. **Standards relating to child protection:** (1) A school, every public body, private sector as well as social organization directly working with children shall formulate and enforce child protection standards at the institutional level, in order to prevent violence against children or child sexual abuse, ensure protection of children and immediately take action on complaints.

(2) It shall be the liability of the school, chief of every public body, private sector and social organization to enforce the child protection standards formulated pursuant to sub-section (1).

58. **Monitoring and reporting:** (1) The person, guardian or organization that has assumed the responsibility of care and maintenance of children pursuant to this Act shall submit details of the children to the Local Child Rights Committee through the Child Welfare Authority concerned, within three weeks of the expiration of each fiscal year.

(2) Based on the details received pursuant to sub-section (1), the Local Child Rights Committee shall prepare and submit a report to the Provincial level

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Child Rights Committee and Local Level Child Rights Committee on an annual basis.

(3) The Provincial Child Rights Committee and Local Child Rights Committee shall periodically inspect and monitor the overall status of children and the quality and effectiveness of the available services within the Province and the Local Level, respectively.

Chapter- 6

Institutional Provisions Relating to Rights and Welfare of the Child

59. **National Child Rights Council:** (1) There shall be a National Child Rights Council, as prescribed, under the chairpersonship of the Government of Nepal, Minister for Women, Children and Senior Citizens, in order to protect and promote the rights and interests of the child.

(2) The provisions relating to the meeting, functions, duties and powers of the Council shall be as prescribed.

60. **Provincial and Local Level Child Rights Committee:** (1) There shall be a Provincial Child Rights Committee in each Province, to be chaired by the Minister of the Province overseeing the matters relating to children.

(2) There shall be a Local Child Rights Committee in each Local Level, to be chaired by a Member of the Rural Municipality or Municipality designated by the Vice-Chairperson or Deputy-Mayor of such Rural Municipal Executive or Municipal Executive respectively.

(3) The number of members of the Provincial Child Rights Committee and Local Child Rights Committee referred to in sub-sections (1) and (2), and the functions, duties and rights and procedures of meetings of the Committees shall be as determined by the Province and Local Level.

61. **Child welfare authority:** (1) There shall be a child welfare authority at the Local Level in order to, inter alia, respect, protect and promote the rights of the child to carry out child protection acts.

(2) Other provisions including the appointment, functions, duties and powers and the terms of service of the child welfare authority shall be as prescribed.

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62. <u>Social service provider and child psychologist</u>: (1) Any persons willing to work as social service providers and child psychologists shall get their names enlisted themselves with the Local Child Rights Committee, as prescribed.

(2) Social service providers and child psychologists may be appointed in required number, from among the social service providers and child psychologists enlisted in the list referred to in sub-section (1), for carrying out child protection related acts and delivering services at the Local Level.

(3) The social service providers and child psychologists appointed pursuant to sub-section (2) shall act under the direct guidance and supervision of the child welfare authority.

(4) The social service providers and child psychologists required for the juvenile court shall be appointed from among the social service providers and child psychologists enlisted pursuant to sub-section (1).

(5) The process of appointment, qualifications, functions, duties, powers, terms of service and other provisions related to social service providers and child psychologists shall be as prescribed.

63. <u>Child Fund</u>: (1) There shall be a child fund, also for performing acts such as immediate rescue, relief and rehabilitation and providing compensation to children.

(2) The fund referred to in sub-section (1) shall consist of the following amounts:

(a) Amounts received from the Government of Nepal, Provincial Government and Local Level,

(b) Amounts received from a foreign government, international agency, organization or individual,

(c) Amounts received from a native person, agency or organization,

(d) Amounts received in lieu of fines imposed by the juvenile court,

(e) Amounts received from any other source.

(3) The permission of the Government of Nepal, Ministry of Finance shall be obtained prior to receiving amounts pursuant to clause (b) of sub-section (2).

(4) The amounts of the fund referred to in sub-section (1) may also be made available to the children's fund of the Province and Local Level in accordance with law.

(5) The provisions relating to the management, operation and use of the fund referred to in sub-section (1) shall be as prescribed.

Chapter 7

Protection and Enforcement of the Rights of, and Liabilities Towards, the Child

64. **Local Level to enforce the rights of the child:** (1) If a person violates the rights of a child referred to in Chapter 2 or does not fulfil his or her liabilities towards the child referred to in Chapter 3, the concerned child or the stakeholder may file an application with the judicial committee of the Local Level where the child is residing, for the enforcement of such rights or liabilities.

(2) If an application is received pursuant to sub-section (1), the judicial committee may require the person concerned to appear within twenty-four hours, excluding the time required for journey, and make necessary inquiry.

(3) If, in making inquiry pursuant to sub-section (2), it appears that the person concerned has violated the rights of the child or has not fulfilled her or his liabilities towards the child, the judicial committee shall, within thirty days of the receipt of the application, order the person, organization or agency concerned at the Local Level to enforce the rights of the child or fulfil the liabilities towards the child.

(4) If, in making inquiry pursuant to sub-section (2), it appears that the matter of enforcing the rights of the child or fulfilment of the liabilities towards the child does not fall under its jurisdiction, the judicial committee shall write to the judicial committee of the other Local Level concerned to enforce the rights of the child or fulfil the liabilities towards the child.

(5) If a correspondence is received pursuant to sub-section (4), the judicial committee of the Local Level concerned shall make arrangements to enforce the rights of the child and fulfilment of the liabilities towards the child pursuant to sub-section (3).

(6) While enforcing the rights of the child or fulfilment of the liabilities towards the child pursuant to this Section, the judicial committee may give necessary suggestions to the child, guardian or family member or warning to the guardian or family member.

65. **To enforce the rights of the child:** (1) Notwithstanding anything contained in Section 64, if a person violates the rights of the child referred to in Chapter-2 or

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does not fulfil the liabilities towards the child referred to in Chapter-3, the concerned child or stakeholder may file an application directly to the concerned High Court to have the said rights enforced or the said liabilities fulfilled.

(2) If an application is received pursuant to sub-section (1), the High Court shall make necessary inquiry into the application and make an appropriate order to the person, organization or agency concerned to enforce the rights of the child or fulfil the duties towards the child.

(3) If, in making inquiry into the application received pursuant to sub-section (1), it appears that the guardian or family member has violated the rights of the child or has not fulfilled his or her liabilities towards the child, the High Court shall inform such a guardian or family member about the rights of the child and have him or her make commitment to not to repeat the violation of the rights of the child or to fulfil his or her liabilities towards the child.

(4) While making an order pursuant to sub-section (2), the High Court may warn the person or chief of the organization or agency that has violated the rights of the child or has not fulfilled their duties towards the child or to impose punishment on them and order the recovery of compensation from them pursuant to this Act.

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Chapter 8

Offences against the Child

66. **Offences against the child:** (1) If any person does any act of violence referred to in sub-section (2) or sexual abuse referred to in sub-section (3), he or she shall be deemed to have committed the offence against the child under this Act.

(2) If any person does any of the following acts against a child, he or she shall be deemed to have committed the act of violence against the child:

(a) To involve the child in addictions such as smoking, drinking or gambling,

(b) To allow him or her to enter to, or use him or her in, recreational facilities opened for the adults such as dance bars and casinos,

(c) To show him or her motion pictures or other audio-visual materials classified as for the adults only,

(d) To inflict physical or mental punishment on, or behave, in an undignified manner, him or her whether at home, school or any other place,

(e) To inflict physical injuries or effect to, terrorize or intimidate, humiliate, neglect, discriminate, exclude or hate, isolate, or cause mental torture to, him or her,

(f) To harass, cause pain to, him or her by using electronic or other means,

(g) To organize him or her for the political purpose or use him or her in a strike, shutdown, transportation strike, **sit-ins** or rally,

(h) To keep him or her in illegal confinement, detention, prison or house arrest, handcuff him or her,

(i) To treat him or her in a cruel or inhumane manner or torture him or her,

(j) To cause him or her to beg or disguise as an ascetic, monk or mendicant, except for the tradition, custom or any religious or cultural activity,

(k) To forcibly declare, or register him or her, as an orphan,

(l) To offer or dedicate him or her in the pretext of a pledge, religious or any other purpose, or subject him or her to violence, discrimination, neglect or exclusion or mockery in the pretext of the custom, culture or ritual,

(m) To engage him or her in a magic or circus show,

(n) To teach or train him or her to commit any offense or involve him or her in such offense,

(o) To fix his or her marriage, or marry, or cause to marry, him or her,

(p) To remove any organ of him or her in contravention of the prevailing law,

(q) To use him or her for medical or any other experiment,

(r) To keep him or her in a children's home, except in accordance with law.

(3) If any person does any of the following acts against a child, he or she shall be deemed to have committed child sexual abuse:

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(a) To show, or cause to show, him or her an obscene picture, audio-visual recording or other material of similar kind or display, or cause to display, such expression or gesture that reflects obscene or sexual conduct or behaviour to him or her or display, or cause to display, child pornography,

(b) To distribute, store or use any actual or fictitious obscene picture or audio-visual material of him or her,

(c) To propose, lure, coerce or threaten him or her for sexual activity,

(d) To use him or her in the production of an obscene act and material,

(e) To touch, kiss, hold sensitive parts of body of him or her, embrace him or her with sexual intent or cause him or her to touch or hold sensitive parts of own body or body of another person or render him or her unconscious with sexual intent or display, or cause him or her to display sexual organs,

(f) To use, or cause to use, him or her for stimulating sexual lust or sexual excitement,

(g) To use, or cause to use, him or her for the purpose of sexual gratification,

(h) To engage, or cause to engage, in child sexual exploitation,

(i) To use, or cause to use, him or her with the intent of providing sexual services,

(j) To use, or cause to use, him or her with the intent of engaging in sexual abuse,

(k) To use him or her in prostitution or other sexual work.

(4) Notwithstanding anything contained in sub-section (3), anything that is expressed by means of writing, speaking, gesturing or displaying any word, picture, audio, visual means and object or material on a sex related matter without displaying obscenity with the aim of imparting information and education or an act done in good faith in the course of making treatment of the child or saving the child from an accident or risk shall not be deemed to constitute an act of sexual abuse.

67. **Not to be deemed eligible:** (1) If it is held that a person who is serving in any public or private organization commits any offence against the child, the person shall be dismissed in accordance with the prevailing law, and, based on the gravity

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and nature of the offence, such a person shall not be deemed eligible for up to ten years to be involved in the future in any act involving direct contact with the child or to be appointed, nominated or elected to such a private institution or organization.

(2) A person who is convicted of child sexual abuse pursuant to this Act or the prevailing law shall be deemed to have committed a criminal offence involving moral turpitude.

68. To give information: (1) If the father, mother, guardian, one who directly provides services to the child such the caregiver, teacher, health-worker or any other person comes to know that any person has committed or is committing or going to commit act of violence or child sexual abuse against the child he or she shall give information thereof to the nearby police office immediately.

(2) The police office concerned shall immediately give the information referred to in sub-section (1) to the child welfare authority and seek necessary support.

(3) While giving information with the intent of protecting the child, no legal action shall be taken against the informant merely on the basis that he or she has given such information.

(4) The identity of the informant who gives information pursuant to sub-section (1) shall be kept confidential if he or she so desires.

69. Temporary protection service: The Government of Nepal shall make arrangements for temporary protection service for safe accommodation of the children who appear to be in need of immediate rescue and protection.

70. Rescue, protection and health check-up to be made: (1) If the police employee receives any information, complaint or report about violence against the child or child sexual abuse, he or she shall write, or cause to write, necessary details and register it, and if the child needs to be rescued immediately, rescue him or her and refer the victim child to a temporary protection service.

(2) If it appears that the child victim is in physical or mental pain, the police employee shall send him or her to a nearby hospital or health centre and have his or her health checked up and treated.

(3) While taking the statement of the child victim, the police employee shall do so in the presence of his or her parents, other family member or guardian if it

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is possible that they can so appear, and if they cannot so appear, in the presence of a female representative of a social organization or a social service provider.

Provided that if the parents, guardian or other family members are the perpetrator of violence against children or child sexual abuse, their presence shall not be allowed during the taking of such statement.

71. **Rehabilitation centre:** (1) The Government of Nepal shall establish rehabilitation centres, as required, for physical or mental treatment or social rehabilitation of the child victims of offences against the child.

(2) An organization may, for the purposes of sub-section (1), establish a rehabilitation centre by obtaining permission from the Government of Nepal as prescribed.

(3) The services and facilities to be made available at the rehabilitation centres and other provisions including those relating to the management, operation, monitoring of such centres shall be as prescribed.

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Chapter-9

Punishment, Compensation and Case Trying Authority

72. **Punishment:** (1) If any person, organization or body violates any of the child rights set forth in Chapter-2 or does not fulfil any of the liabilities towards the child set forth in Chapter-3, such a person or the chief of such organization or body shall be liable to a fine of up to fifty thousand rupees.

(2) If the guardian or any family member does not fulfil his or her liabilities or if the mother, father or guardian alters the name and surname of the child with the intention of acquiring undue benefits or misappropriates the child's property, such a mother, father or family member or guardian shall be liable to a fine of up to one hundred thousand rupees.

(3) A person who commits the offence against the child shall be liable to the following punishment, according to the degree of the offence:

(a) In the case of the commission of any act referred to in clause (a), (b), (c), (d), (e), (f) or (r) of sub-section (2) of Section 66 or sub-section (1) or (2) of Section 78, a fine of up to fifty thousand rupees and imprisonment for up to one year,

(b) In the case of the commission of any act referred to in clause (g), (j), (k), (l), (m), (o) or (q) of sub-section (2) of, or clause (a), (b), (c), (e), (f) or (i) of sub-section (3) of, Section 66, a fine of up to seventy-five thousand rupees and imprisonment for up to three years,

(c) In the case of the commission of any act referred to in clause (d) of sub-section (3) of Section 66, a fine of up to eighty thousand rupees and imprisonment for up to four years,

(d) In the case of the commission of any act referred to in clause (h) or (i) of sub-section (2) of Section 66, a fine of up to one hundred thousand rupees and imprisonment for up to five years,

(e) In the case of the commission of any act referred to in clause (n) of sub-section (2) of Section 66, half the punishment that is imposable on the liable to the offender of the offence that is taught or trained to be committed,

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(f) In the case of the commission of any act referred to in clause (p) of sub-section (2) of Section 66, a fine of up to five hundred thousand rupees and imprisonment for up to ten years,

(g) In case of an act as per clause (g) or (h) of Sub-section (3) of Section 66, the punishment that is imposable on the offender of rape under the prevailing law,

(h) In the case of the commission of any act referred to in clause (i) or (k) of sub-section (3) of Section 66, a fine of up to one hundred fifty thousand rupees and imprisonment for up to fifteen years.

(4) A person who incites another person, attempts or abets to commit any of the acts set forth in sub-sections (1), (2) and (3) shall be liable to the punishment of fine and imprisonment imposable on the principal offender.

(5) A person who does any act, in contravention of this Act or the rules framed under this Act, other than that contained in this Section, shall be liable to a fine of up to fifty thousand rupees or imprisonment for up to one year, or both punishments, according to the degree of the offence.

(6) If a person who has been punished once under this Act repeats such act, he or she shall be liable to an additional punishment of twenty-five per cent of the punishment imposable pursuant to this Section.

(7) Notwithstanding anything contained elsewhere in this Section, if an act referred to in sub-section (3) is also deemed to be an offence under any other prevailing law, no provision of this Section shall prevent the instituting of a separate case against, and imposing of punishment on, the offender for such offence under that law, and, if the punishment imposable on him or her under the prevailing law for the commission of any act in contravention of this Act exceeds the punishment set forth in this Section, he or she liable to the punishment accordingly.

(8) If any one establishes or operates a children's home, child correction home, observation chamber, rehabilitation centre or temporary protection service centre without obtaining permission under this Act, the Ministry may shut down such children's home, child correction home, observation chamber, rehabilitation centre or temporary protection service centre and impose a fine of up to one hundred thousand rupees on the person and organization involved, and may proceed with other additional actions in accordance with the prevailing law.

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73. **Compensation:** (1) The juvenile court shall cause the recovery of such a reasonable compensation in lump sum or instalments from the offender to the victim child that is not less than the amount of fine imposed on the offender committing the offence against the child under this Act and the prevailing law, having regard to, inter alia, the loss caused to the education, and physical and mental health, development and family of the child victim.

(2) In cases where the amount of fine cannot be recovered pursuant to sub-section (1) from the offender or if the Juvenile Court is of the opinion that such amount of fine, even if recovered, is negligible or inadequate in comparison to the offence against the child, the Juvenile Court shall cause the payment of a reasonable amount of compensation to the child victim from the Child Fund referred to in Section 63.

(3) If the child victim dies before receiving the amount of compensation referred to in sub-section (1), such amount shall be provided to his or her father, mother or, if they are not available, to other family member or guardian.

(4) If it is necessary to immediately carry out medical treatment of or provide compensation or any kind of relief to the child victim of an offence against the child under the prevailing law or offence against the child, interim compensation shall be provided in accordance with the prevailing law.

74. **Statute of limitation:** (1) In relation to any offence under Section 66, a case has to be filed within the statute of limitation, if any, specified in the prevailing law, and, if not so specified, within one year of the date of the commission of that offence.

(2) In cases where no case has been filed pursuant to sub-section (1), notwithstanding anything contained in the prevailing law, the statute of limitation for filing the case with respect to the offence against the child shall continue to exist until one year after such a child has attained the age of eighteen years.

75. **Power to try cases:** The Juvenile Court shall have the power to try and dispose of cases punishable under the sub-sections other than sub-section (8) of Section 72.

76. **Government of Nepal to be plaintiff:** In the cases under Section 66, the Government of Nepal shall be the plaintiff, and such cases shall be deemed to be included in Schedule 1 of the National Criminal Procedure (Code) Act 2017.

Chapter 10

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Miscellaneous

77. **Duties of the child:** (1) It shall be the duty of every child to respect his or her father, mother, guardian, other family members, teachers and social service providers and obey the advice, suggestion, guidance and instruction given by them, taking into consideration of his or her best interests.

78. **To maintain confidentiality:** (1) No person shall publish or broadcast through print or electronic media any details that discloses the identity of a child concerned with a case that is *sub judice* in the Juvenile Court.

(2) No person shall broadcast information or news through any communication media by disclosing the identity of a child victim of an offence against children.

(3) The police, government attorney or Juvenile Court shall make arrangements for maintaining records of child victims of the offences against children, without disclosing their names and identity.

(4) The investigation authority, government attorney and Juvenile Court shall keep the identity of children in conflict with law confidential. Copies of documents related to such charge shall not be given to any person other than the concerned police and government attorney's office, Juvenile Court, the child concerned, family members, guardian, legal practitioner of the concerned child and Central and District Child Justice Committee.

(5) Notwithstanding anything contained elsewhere in this Section, the details related to the child may be published or broadcast as follows, in the following circumstance:

(a) If publishing or broadcasting the details relating to the children in conflict with law does not adversely affect the interests of such children, such details, with the permission of the Juvenile Court,

(b) Data on the children in conflict with law may be published with the permission of the concerned agency, for any study or research, with the disclosure of their age or gender, without disclosing their names, surnames, personal details and addresses.

79. **Provisions relating to probation authority:** (1) The Government of Nepal shall appoint the probation authority in each district to carry out, inter alia, investigation into the concerned case, inspection of the observation chamber, diversion, and

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preparation of reports on the status of implementation of the orders by the Juvenile Court, in close contact with the children accused of offense.

(2) Until the probation authority is appointed, the Government of Nepal may designate any authority of the Government of Nepal to act as the probation authority.

(3) The functions, duties, powers and terms and conditions of service of, and other provisions relating to, the probation authority shall be as prescribed.

80. **Case not to be tried and disposed of without legal practitioner:** (1) Notwithstanding anything contained in the prevailing law, the Juvenile Court shall not try and dispose of a case involving a child charged with committing an offense until a legal practitioner is appointed for defending the child.

(2) In cases where no legal practitioner has been appointed on behalf of a child accused of an offense, the concerned Juvenile Court shall make arrangements to make service available from a paid legal practitioner or any other interested legal practitioner.

81. **Appeal:** (1) In the case of not being satisfied with the decision made by the Juvenile Court or by the Ministry pursuant to sub-section (8) of Section 72, an appeal may be filed in the concerned High Court within thirty-five days of such a decision.

(2) Notwithstanding anything contained in sub-section (1) and in the prevailing law, no appeal shall be admissible against a decision of the Juvenile Court that acquits a child, other than in the circumstances affecting justice because of erroneous interpretation of law, wrong use of precedent or non-admission of an admissible evidence or admission of a non-admissible evidence.

82. **Priority to be given in proceedings of case:** Priority shall be given to the proceedings, trial and disposal of cases involving children either as plaintiff or defendant in the courts other than the Juvenile Court.

83. **Basis for determining children's age:** While determining the age of a child, the following matters shall be taken as the basis:

(a) The date of birth recorded in the child's birth registration issued by the hospital,

(b) If the date of birth referred to in clause (a) is not available, the date of birth recorded in the child's birth registration certificate issued by the Local Registrar's Office,

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(c) If the certificate referred to in clause (b) is not available, the date of birth recorded in the child's school character certificate or the date of birth recorded at the time of child's admission to the school,

(d) If the certificate referred to in clause (b) or the date of birth is not available, the date recorded in the certificate of age issued by the hospital,

(e) If the certificate referred to in clause (d) is not available, the age recorded in the *Janmakundali* (birth chart), *Cheena* (horoscope), notes, or the age disclosed by the father, mother, guardian or any other family member of the child or similar other relevant evidence.

84. **Act to prevail:** The matters contained in this Act shall be governed by this Act and the other matters shall be governed by the prevailing law.

85. **Power to frame rules:** The Government of Nepal may frame necessary rules in order to implement the objectives of this Act.

Provided that the Supreme Court may frame the rules relating to procedures on the dispensation of juvenile justice.

86. **Power to frame guidelines and operational procedures:** (1) The Ministry may frame guidelines and operational procedures, as necessary, subject to this Act and the Rules framed under this Act.

(2) The Supreme Court may frame juvenile justice procedures or guidelines subject to this Act or the Rules framed under this Act.

87. **Amendment, repeal and saving:** (1) The following clause (a) shall be substituted for clause (a) of sub-section (1) of Section 4 of the Births, Deaths and Other Personal Events (Registration) Act, 2033 (1976):

"(a) Information on birth and death by the father, mother, any family member or guardian,"

(2) The Act Relating to Children, 2048 (1992) is hereby repealed.

(3) Any acts done and actions taken pursuant to the Act Relating to Children, 2048 (1992) shall be deemed to have been done and taken under this Act.

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v. Crime Victim Protection Act, 2018 (2075)

The Crime Victim Protection Act, 2075 (2018)

Date of Authentication:

2075/06/02 (18 September 2018)

Act Number 22 of the year 2075

An Act Made to Provide for the Protection of the Crime Victims

Preamble:

Whereas, it is expedient to make necessary provisions on the protection of the rights and interests of the victims, by making provisions also for compensation to the victims for damage sustained as a result of an offence, and reducing adverse effects caused to the victims of crimes, for getting information related to the investigation and proceedings of the cases in which they have been victimized, for getting justice along with social rehabilitation and compensation pursuant to law, while ensuring the right of crime victims to justice conferred by the Constitution of Nepal, which remains as an integral part of the process of offender justice;

Now, therefore, be it enacted by the Federal Parliament.

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Chapter-1

Preliminary

1. **Short title and commencement:** (1) This Act may be cited as the "Crime Victim Protection Act, 2075 (2018)."

(2) This Act shall commence immediately.

2. **Definitions:** Unless the subject or the context otherwise requires, in this Act, -

(a) "Court" means a court that is authorized by the prevailing law to try and settle any offence, and this also includes such other judicial authority or body authorized by law to try and settle any specific type of case.

(b) "Offence" means an offender offence in which the government is plaintiff pursuant to law, and the victim has died or has to bear damage.

(c) "Offender" means a person who is convicted by the court of an offence.

(d) "Fund" means the Victim Relief Fund established pursuant to law.

(e) "Prescribed" or "as prescribed" means prescribed or as prescribed in the rules framed under this Act.

(f) "Victim of second grade" means a person who has not been involved in the offence that has been committed or is being committed against the victim of first grade but who has to bear damage because of being an eyewitness of such offence, and this expression also includes the guardian of the minor victim of first grade who has not been involved in the offence but who has to bear damage because of having information about, or being an eyewitness of, the offence, and any of the following persons who have to bear damage because of having knowledge as to the offence committed against the victim of first grade:

   (1) Guardian of the victim of first grade,

   (2) Where the victim of first grade is a minor, and

   (3) Where the person who has to bear such damage is not involved in the offence.

(g) "Minor" means a person who has not attained the age of eighteen years.

(h) "Victim of first grade" means a person who has died or has sustained damage as a direct result of an offence that has been committed against the victim, irrespective of whether the perpetrator does not have to bear criminal liability on the ground of his or her age, mental unsoundness, diplomatic immunity or position or whether the identity of the perpetrator remains untraced or whether charge has not been made against the perpetrator or whether the case related to the offence has been withdrawn or whether the sentence imposed on the offender is pardoned or whether the perpetrator has not been convicted of the offence or irrespective of the family relation of the perpetrator with the victim, and this phrase also includes a person who has not been involved in the offence but has died or sustained damage in any of the following circumstances:

   (1) While preventing the person who is committing the offence from committing it,

   (2) While extending reasonable support and rescuing with the purpose of saving any person where an offence is being committed against such a person,

   (3) While trying to arrest the person who is committing or has committed the offence or extending support to the competent authority in the course of arresting the suspect, accused or offender.

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(i) "Family victim" means the victim's mother, father, husband, wife living in the undivided family of the victim or other member of the undivided family dependent on the victim, who is not involved in the offence against the victim of first grade who has died as a direct result of the offence.

(j) "Victim" means an individual who is the victim of first grade, victim of second grade and family victim.

(k) "Victim Protection Suggestion Committee" means the Victim Protection Suggestion Committee referred to in Section 44.

(l) "Guardian" means the guardian of a victim who remains as such or is appointed pursuant to the prevailing law.

(m) "Damage" means the following damage caused to the victim as a direct result of the offence:

(1) Grievous hurt,

(2) Pregnancy occurred due to rape,

(3) Contracting any communicable disease recognized by medical sciences that causes adverse impact on the physical or mental health or **life** of the victim,

(4) Mental anxiety, emotional trauma or damage identified by the medical doctor,

(5) Destruction of physical, intellectual, sexual or reproductive capacity or serious damage caused to such capacity,

(6) Adverse impact caused on the social, cultural or family prestige of the victim due to rape,

(7) Psychological or psychiatric damage,

Explanation: For the purposes of this sub-clause, the term "psychological or psychiatric damage" means the effect detected by the medical test, which is not recovered or reduced in short period and which inflicts negative effect upon the health of the victim.

(8) Financial or physical damage,

(9) Making physical beauty of the victim ugly.

3. **Not to be deemed victim:** (1) Notwithstanding anything contained elsewhere in this Act, where a person has sustained damage or died in the following circumstance, the person who has so sustained damage or died or his or her family member shall not be deemed to be a victim for the purposes of this Act:

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(a) While doing any act in the course of saving the body, life, property or chastity of his or her own or anyone else under the private defense pursuant to the prevailing law,

(b) While doing any act by a security employee who has been deputed or deployed by the order of the competent authority in the course of performing his or her duties pursuant to the prevailing law,

(c) While doing any act by the investigating authority having authority to investigate pursuant to the prevailing law, in the course of making investigation, subject to his or her jurisdiction,

(d) Any act done in a situation where the criminal liability need be borne pursuant to the prevailing law,

Provided that even if the criminal liability of the perpetrator need not be borne as a result of the perpetrator's age, mental unsoundness, diplomatic immunity or immunity enjoyable on the basis of position, it shall be deemed, for the purposes of this Act, that such a person has committed the offence, and the concerned person shall be deemed to be a victim due to the offence.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall prevent the Government of Nepal from providing relief to a person who has sustained damage or died due to the circumstance set forth in that sub-section.

Chapter-2

Rights and Duties of the Victims in Criminal Justice Process

4. **Right to get fair treatment:** The victim shall have the right to enjoy decent, fair, dignified and respectful treatment during the criminal justice process.

5. **Right against discrimination:** No discrimination shall be made on the ground of the victim's religion, colour, gender, caste, ethnicity, origin, language, marital status, age, physical or mental unsoundness, disability or ideology or similar other ground.

Provided that where the particular need of the victim who is a minor, senior citizen or a person with physical or mental disability is to be considered in the course of criminal justice process, it shall not be deemed to prevent from according a special treatment to such a victim as far as possible.

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6. Right to privacy: (1) The victim shall have the right to privacy in the course of investigation, enquiry, prosecution and court proceedings of the following offences:

(a) Rape,

(b) Incest,

(c) Human trafficking,

(d) Sexual harassment,

(e) Such other criminal offence as prescribed by the Government of Nepal by publishing a notice in the Nepal Gazette.

(2) No person shall disclose the identity of the victim in any manner, in the offences referred to in sub-section (1).

(3) Where it is required to have any deed executed by, take statement or deposition of, the victim in the course of investigation, enquiry and court proceedings of the offences referred to in sub-section (1), it shall be done as follows, if the victim so desires:

(a) By presenting the victim, without disclosing his or her identity,

(b) By making the victim change his or her actual voice,

(c) By using the audio-visual dialogue technology in such a way that the accused cannot see and hear,

(d) By making provision so that the accused cannot see or her or can only hear.

7. Right to information relating to investigation: (1) Where the victim so demands, the investigating authority or body shall provide him or her with information on the following matters as soon as possible:

(a) Medical, psychological, psychiatric, social, legal or any other service or counseling to be received by the victim pursuant to this Act or the prevailing law,

(b) Name and full address of the prosecuting body,

(c) Name, office and telephone number of the investigation authority,

(d) Progress report of investigation and enquiry,

(e) Name, age, address and complexion of the suspect,

(f) Where the suspect is arrested, description thereof,

(g) Matters expressed in relation to the offence by the suspect or any other person before the investigating authority,

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(h) Where the suspect has absconded from the custody of the investigating authority or has been arrested again, description thereof,

(i) Where the investigating authority has released a person remanded in custody or arrested in the course of investigation, upon considering that it is not necessary to keep that person in custody, description,

(j) General information about the investigation and enquiry processes to be carried out with respect to the offence pursuant to the prevailing law.

(2) Notwithstanding anything contained in clauses (d), (e), (f), (g) and (h) of sub-section (1), in cases where it is likely to adversely affect the investigation into the offence or to pose threat to body, life and property of the suspect or any person associated with him or her if such information is provided to the victim, the investigating authority shall not be compelled to provide such information to the victim, and the authority shall give information thereof, along the reasons why information could not be so provided, to the victim.

8. Right to information relating to prosecution: The prosecuting body or authority shall provide the victim with the following information as to the offence as soon as possible if the victim so demands:

(a) Where decision has been made not to institute the case, the ground and reason for making such decision not to institute the case,

(b) Where decision has been made to institute the case against any person but not to institute the case in the case of any person, the name, surname and address of the person against whom the decision has been made not to institute the case, and the ground and reason for making decision not to so institute the case,

(c) Where decision is made to institute the case, a certified copy of the charge-sheet,

(d) General information relating to the court proceedings that take place pursuant to the prevailing law,

(d) Where any additional claim has been made pursuant to the prevailing law with respect to the person against whom the case has been instituted or the person against whom the case has not been

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instituted for the time being, description thereof and the order made by the case trying authority in that respect.

(e) Where the victim is also an eyewitness of the offence, information relating to the role to be played by him or her as a witness,

(f) Where the accused who has absconded at the time of filing the charge-sheet is arrested in pursuance of the order of the case trying authority or voluntarily appears, description thereof,

(g) Where the Government of Nepal has decided to withdraw the case filed in the court in relation the offence, description thereof.

9. Right to information relating to judicial proceedings: The prosecuting body or authority or court or the concerned body shall provide the victim with the following information as soon as possible if the victim so demands:

(a) Where the accused has to remain in detention for trial, description thereof,

(b) Where the accused is not required to remain in detention for trial or the accused wo has been detained is released from detention, description thereof,

(c) Date, venue and time of hearing to be held by the court,

(d) Where the accused has made an application that he or she be released on bail, guarantee or on the condition of making appearance on the appointed date pursuant to the prevailing law, information related thereto and the content of the order made on such application,

(e) Description of the terms and conditions set by the case trying authority while releasing the accused on bail, guarantee or on the condition of making appearance on the appointed date or for the safety of the victim or close relative of the victim,

(f) Where the accused has filed a petition to the appellate level against the order made by the court of first instance pursuant to the prevailing law that he or she should be released on bail, guarantee or on the condition of making appearance on the appointed date, the notice of the petition and description of the order made on such a petition,

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(g) Where the accused held in detention for trial escapes from the detention has been rearrested or voluntarily appears, description thereof,

(h) Where the accused or offender has been released from detention or prison on the condition of supervision, the conditions of supervision, and where such conditions are altered, the details relating to the altered conditions and the date on which such alterations come into force,

(i) Whether the accused or offender released from detention on the condition of supervision has complied with the conditions of supervision or not,

(j) Where the accused or offender has been transferred from the prison pursuant to the prevailing law, description relating thereto,

(k) The punishment imposed on the offender and in the case of the sentence of imprisonment, the period when the service of the imprisonment completes,

(l) Where the offender has absconded prior to the service of the sentence of imprisonment or has been rearrested, description thereof,

(m) Where the punishment sentenced to the offender is pardoned, postponed, charged or reduced or where the offender gets clemency from the punishment under any legal provision prior to the service of the sentence of imprisonment, description thereof,

(n) Where the perpetrator against whom the case has not been instituted or who has not been sent to prison or who has been released from detention on the condition of remaining under supervision pursuant to the prevailing law violates the terms and conditions of supervision, the body to which the victim may make a complaint against it and the manner of making such a complaint,

(o) Name and address of the prison where the offender is serving the sentence,

(p) Where the offender has got probation, parole or community service or open prison or any other facility of similar type, description relating to this,

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(q) Whether the Government of Nepal has made an appeal or not against the decision made in relation to the offence,

(r) Where order has been made to summon the presence of the respondent on the appeal, if any, made by the defendant against the judgment, description thereof,

(s) Decision of the appellate level on the appeal made against the judgment, and its consequence,

(t) Where the offender has been put under supervision and an application is made by the offender or anyone else to change the terms and conditions of supervision or to revoke the order of supervision pursuant to the prevailing law, the decision made on that application,

(u) Where the accused or offender has died while in detention or prison, description thereof,

(v) Where the Government of Nepal sends back a foreign accused or offender out of the territory of the State of Nepal pursuant to the prevailing law or deports him or her to a foreign state or government, description thereof.

10. **Right to become safe:** The victim shall have the right to become safe from attack, damage, fears, intimidation or threat likely to be made or exerted by the suspect, accused, offender or person related to him or her or the witness of the accused against the victim or close relative of the victim and person dependent on the victim.

11. **Right to express opinion:** (1) The victim shall be entitled to express his or her opinion before the concerned authority on the following matters:

(a) While making a charge against the suspect for the offence concerned,

(b) Where it is required to make decision for not instituting the case in relation to the suspect,

(c) Where it is required to make agreement with the accused by way of plea bargaining as to the charge pursuant to the prevailing law,

(e) Where request is to be made to the case trying authority for a clemency in the punishment imposable pursuant to the prevailing law,

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(f) Where additional claim is to be made to the charge-sheet filed before the case trying authority pursuant to the prevailing law,

(g) Where a pre-sentencing report is to be prepared before specification of the sentence for the offender pursuant to the prevailing law,

(h) While specifying sentence for the offender pursuant to the prevailing law,

(i) Where investigation is to be carried out pursuant to the prevailing law as to whether the accused has mental or physical capacity to commit the offence,

(j) Where decision is to be made to send him or her to the service of diversion program in the case of the accused or offender,

(k) Where decision is to be made to provide probation, parole, suspended sentence, open prison, community service or any other service of similar type to the offender pursuant to the prevailing law,

(l) While conducting hearing as to whether or not consent is to be granted for withdrawing the case related to the offence that is *sub judice* in the court pursuant to the prevailing law.

(2) For expressing an opinion pursuant to sub-section (1), the concerned authority shall provide the victim with a reasonable time.

12. Right to appoint legal practitioner: The victim may appoint a separate legal practitioner in the criminal justice process if he or she so wishes.

13. Right of attendance and participation in hearing: (1) Except as otherwise ordered by the court, the victim shall have the right to attend and put forward his or her opinion in the proceedings relating to hearing by the court in relation to the offence.

Provided that where the victim is also a witness of the case, the court may prevent him or her from attending the particular proceeding until he or she makes deposition as the witness.

(2) The court shall make order or decision, also upon considering the statement expressed by the victim pursuant to sub-section (1).

14. Right to stay in separate chamber in the course of hearing: (1) In the course of the hearing of the offence, the court may provide a separate chamber for the victim so that he or she can stay separately from the accused, person related to the accused and witness of the accused.

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(2) Where it is not possible and practical to provide a separate chamber pursuant to sub-section (1), the court shall make necessary arrangement for the safety and interest of the victim so that the accused, person related to the accused and witness of the accused cannot contact the victim, except as otherwise ordered by the court.

15. **Right to have property returned:** (1) The concerned investigating authority shall return the property of the victim taken under control in the course of investigation or for evidence, immediately after the completion of investigation.

(2) Where the property taken under control pursuant to sub-section (1) is to be submitted to the court for evidence or there is a dispute as to the ownership or possession of the property, the property shall not be returned before the dispute is settled.

(3) Notwithstanding anything contained in sub-section (2), the court may, if it so thinks necessary, make an order to return such property before the dispute is settled.

16. **To hold discussion as to the case related to offence:** In the following circumstances, the court may, with the consent of both the victim and the accused, hold discussion between the victim and the accused on any matter related to the offence:

(a) Where the court is satisfied that such discussion would assist in the settlement of the dispute,

(b) Where the discussion is held under the supervision of the court,

(a) Where holding discussion is not prejudicial to public interest and justice.

17. **Right to make written application:** (1) Where the Government of Nepal has the right to make application or appeal against any order or decision of the court if it is not satisfied with such order of decision, the victim may make a written application to the concerned body or authority, requesting that application or appeal be made against that order or decision.

(2) The application referred to in sub-section (1) has to be made within fifteen days from the date of receipt of information of such an order or decision.

(3) The concerned body or authority that has the right to make application or appeal against the decision, order or decision referred to in sub-section (1) shall make decision by considering such an application.

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(4) Information of the decision referred to in sub-section (3) shall be given to the victim.

18. Right to get information as to compensation: (1) Where the victim is entitled to obtain compensation pursuant to this Act or other prevailing law and the victim seeks information with respect to it, the prosecuting authority shall give the victim information about the action required to be taken in order to obtain compensation.

(2) Where the prosecuting authority has the authority to take action relating to compensation on behalf of the victim pursuant to the prevailing law, the prosecuting authority shall, at the request by the victim, take such necessary action as to be taken on behalf of the victim.

19. Right of compensation and social rehabilitation: (1) The victim shall have the right to obtain compensation for the damage he or she has sustained, pursuant to this Act.

(2) For the social rehabilitation of the victim, the Government of Nepal, Provincial Government and Local Level may, with mutual coordination, conduct necessary plan and program based on the available resources and means.

20. Right to make application or appeal: (1) Where the concerned victim is not satisfied with the order or decision made by the court on any offence, the victim may make application or appeal if such application or appeal can be made against such order or decision pursuant to the prevailing law, setting out the ground and reason.

(2) Where no period is specified in the concerned law for making the application or appeal referred to in sub-section (1), such application or appeal has to be made within fifteen days from the date of receipt of information of the order or decision.

(3) The concerned authority has to make decision upon considering the ground and reason mentioned in the application referred to in sub-section (1), and give information of such decision to the applicant as well.

21. Duties of the victim: For the purposes of this Act, the duties of the victim shall be as follows:

(a) To make or give inform or notice as to the offence on time to the competent body or authority pursuant to the prevailing law,

(b) To assist the investigating or prosecuting authority in the course of investigation and prosecution of the offence,

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(c) To refrain from failing to appear before the investigating authority or court in order to save the person involved in the offence, or to refrain from making statement, deposition or submitting any evidence for that purpose even upon being in appearance,

(d) To provide his or her own real name, surname, address, telephone number, email address and provide information of the change, if any, made therein, as soon as possible.

22. To respect the right: The authorities who are involved in the process of investigation, prosecution, enquiry of the offence and dispensation of justice shall pay proper attention to respecting and implementing the rights of the victim conferred pursuant to this Act and the prevailing Nepal law.

23. Application may be made for the enforcement of rights: (1) For the enforcement of the rights conferred by this Chapter, the victim may make an application to High Court concerned.

(2) Where it appears, from the application made pursuant to sub-section (1), that the right of the victim has been encroached or infringed, the High Court may issue an appropriate order for the enforcement of such right.

(3) While issuing an order pursuant to sub-section (2), the High Court may write to the concerned body or authority to take departmental action against the official who has deliberately encroached, infringed or curtailed the rights of the victim, pursuant to the prevailing Nepal law relating to the conditions of his or her service.

(4) Where a correspondence is received pursuant to sub-section (3), the concerned authority shall take departmental action against such official pursuant to the prevailing law.

24. Action not be invalid: Any decision, order or act already made or done pursuant to the prevailing law, this Act or the Rules framed under this Act shall not be void or invalid for the sole reason that the rights of the victim could not be enjoyed by the victim or have been violated or rejected.

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Chapter-3

Victim Impact Report

25. Victim impact report may be submitted: (1) The victim may, if he or she so desires, submit a victim impact report to the prosecuting authority in such format

and setting out such descriptions as prescribed, mentioning the damage or impact directly caused to or upon him or her from the offence, prior to the filing of the charge sheet of the offence in the court.

(2) Where the victim himself or herself is not able to submit the report referred to in sub-section (1) because of the victim being a minor or a person who needs guardianship legally or for any other reasonable reason, his or her guardian or the representative under law may submit such a report on behalf of the victim.

(3) Notwithstanding anything contained in sub-section (1), where the victim is not able to submit the victim impact report prior to the filing of the charge sheet in the court, due to a force majeure event, such a report, such a report, accompanied by the evidence of the occurrence of such an event, may be submitted to the authority filing the charge sheet within one month from the date on of filing of the charge sheet in the court.

(4) Where the victim wishes to keep confidential the victim impact report referred to in sub-section (1) or (2), he or she shall also set out in the report the content that he or she intends to keep confidential and the reason for it.

(5) The prosecuting authority shall submit to the concerned court the victim impact report submitted pursuant to sub-section (1) along with the charge sheet, and the victim impact report submitted pursuant to sub-section (3), within three days from the date of receipt.

26. **Duplicate copy may be demanded:** (1) The accused or offender who desires to receive a duplicate copy of the victim impact report submitted to the court pursuant to sub-section (5) of Section 25 may get the duplicate copy of such a report from the court.

(2) Notwithstanding anything contained in sub-section (1), the court may refuse to issue a duplicate copy of the victim impact report in following conditions:

(a) Where the accused is absconding,

(b) Where the issuance of the duplicate copy would be prejudicial to the safety and privacy of the victim,

(c) Where the victim desires to keep the victim impact report confidential.

27. **Victim impact report may be taken as the basis:** (1) The court may also take the victim impact report as the basis while determining the sentence for the offender.

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(2) Notwithstanding anything contained in sub-section (1), while determining the sentence punishment, the court shall not take as the basis that part of which duplicate copy has been refused to be issued or that part of the report which has been kept confidential.

28. **Not to make presumption that less damage has been caused from the offence:** No presumption shall, by the sole reason that the victim has not submitted the victim impact report pursuant to this Chapter, be made that less damage or impact has been caused from the offence to or upon the victim.

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Chapter-4

Compensation

29. **Power to make order for interim compensation:** (1) Where it is required to have treatment of the victim or provide compensation or any kind of relief amount immediately, the court may make an order for getting such a person medically treated or providing compensation or relief amount in an interim manner.

(2) Where the order referred to in sub-section (1) is made, the victim shall be provided with compensation or relief amount from the Fund.

(3) Where the accused person is convicted of the offence upon judgment by the court, the court shall order such an offender to pay the amount of compensation or relief amount provided pursuant to sub-section (2) to the Fund within thirty-five days of the date on which the judgment was made.

(4) Where so ordered by the court pursuant to sub-section (3), such an offender shall pay to the Fund the amount of compensation or relief, and where he or she does not pay such amount within that period, it shall be recovered from any assets belonging to such an offender as government arrears, within sixty days of the date on which the judgment was made.

30. **To get compensation recovered from offender himself or herself:** (1) The court may, while making final settlement of the case, make an order that a reasonable amount be paid, as compensation, by the offender to the victim.

(2) While making order for the payment of the compensation pursuant to sub-section (1), the court shall ascertain as to whether the victim has obtained the interim compensation or not pursuant to Section 29.

(3) Where the court makes an order pursuant to sub-section (1) that compensation be paid by the offender to the victim who has already obtained

interim compensation pursuant to Section 29, only the amount that remains after returning the amount of interim compensation obtained by the victim to the Fund shall be provided to the victim.

(4) Notwithstanding anything contained elsewhere in this Section, where it appears that the victim cannot get compensation because the offender has no property or where the offence is established but the offender cannot be held to be convicted or where the case related to the offence is withdrawn pursuant to the prevailing law, the court may make an order that appropriate amount be paid as compensation to the victim from the Fund.

(5) The amount of compensation shall be provided to the victim from the Fund within thirty-five days from the receipt of the order pursuant to sub-section (4).

31. Bases to be taken while determining the amount of compensation: While determining the amount of compensation to be provided to the victim, the court may take any or all of the following matters as the basis:

(a) Reasonable expenses borne or to be borne by the victim for medical, psychological or psychiatric counseling,

(b) Expenses of medical treatment borne or to be borne by the victim,

(c) Unexpected travel expenses borne by the victim,

Explanation: For the purpose of this clause, "unexpected travel expenses" means the reasonable expenses incurred in transport while traveling more than ten kilometers for receiving counselling or treatment service which the victim requires immediately to lessen the damage caused to the victim as a direct result of the offence because such service is not available within the distance of ten kilometers from the victim's place of settlement or workplace or the scene of crime.

(d) Expenses for legal practitioner borne by the victim,

(e) Damage caused to the personal capacity of the victim as a direct result of the offence,

(f) Financial loss borne or to be borne by the victim,

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Provided that where the victim has obtained or is obtain compensation for such financial loss from the insurance pursuant to law, compensation shall not be provided pursuant to this clause.

(g) Expenses incurred or to be incurred in repairing or maintaining the damaged personal goods or purchasing new ones,

(h) The victim's income generation capacity lost or damaged as a direct result of the offence,

(i) Negative effect caused to the physical beauty of the victim,

(j) Damage caused to physical, intellectual, sexual or reproductive capacity of the victim,

(k) In the case of the offence of rape, negative effect caused from such offence to the social, cultural or family prestige or relationship of the victim,

(l) Where the victim becomes pregnant due to rape, expenses incurable in abortion or giving birth to and nurturing the baby,

(m) Medical treatment expenses in the case of abortion caused from the offence,

(n) Reasonable expenses spent by the victim in good faith to become safe from additional offence that is likely to be committed against him or her, where the special condition is attracted,

Explanation: For the purposes of this Section "special condition" means the condition where the victim has sustained or has to sustain unnatural impact or effect as a direct result of the offence committed against the victim, by taking undue advantage of the physical or mental condition of, or the place of residence, workplace of, the victim or special location of the scene of crime at the time of the commission of the offence.

(o) Mental or emotional damage borne by the victim,

(p) Other appropriate grounds according to the nature and effect of the damage,

(q) In the case of the victim whom special condition is applicable to, reasonable expenses incurred by the victim in good faith to save the victim of first grade from additional offence,

(r) Guardian's patronage lost by the minor children.

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32. To consider group of offences as one offence: For the purpose of providing compensation pursuant to this Act, compensation shall be provided by considering a group of offences as one offence.

Explanation: For the purposes of this Section "group of offences" means two or more than two offences that are connected for the following reasons:

(1) Having been committed by the same person or group of persons against the same person in the same incident, or having the same characteristics between these offences for any other reasons, and

(2) Death of the victim or damage caused to the victim from the offence.

33. Compensation not available in more than one status: No person may receive the compensation referred to in this Act as the victim of first grade, victim of second grade and family victim or in more than one form or status in any other form.

34. Compensation not to be provided: Notwithstanding anything contained elsewhere in this Act, the following victims shall not be provided with compensation pursuant to this Act:

(a) One who commits the offence in relation to which compensation is to be received, attempts to commit it, entices or conspires to commit, or assists in the commission of, or is an accomplice involved in, the offence,

(b) One who makes claims for compensation referred to in this Act in the capacity of the victim of first grade where the offence has been committed against him or her when he or she was involved in any other offence or due to that reason,

(c) A family victim of the person who has died when he or her was going to commit an offence against any one or due to that reason,

(d) A person who is entitled to receive compensation pursuant to the prevailing law under the insurance provision of third party with respect to the damage caused due to a motor vehicle accident,

Provided that nothing herein contained shall bar the provision of compensation pursuant to this Act in cases where such a person was killed or injured by using a motor vehicle with the intention of killing or injuring.

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(e) A victim of second grade or family victim who has information that the victim of first grade has been involved in any other offence or has reasonable reason to receive such information,

Provided that this provision shall not be applicable to a person who is a witness at the time of the commission of the offence for which compensation is to be received.

(f) A person who is victim of an offence and whose treatment has been made free on behalf of the government or whose treatment expenditure has been borne by the government and there is a possibility that the victim may get recovery,

Provided that nothing herein contained shall bar the provision of compensation in the case of a damage other than the expenses for medical counseling or medical treatment.

(g) A victim prisoner who is in detention upon being sentenced to imprisonment pursuant to the prevailing law and has suffered mental injury due to the offence committed against him or her while in detention,

Provided that nothing herein contained shall bar the provision of compensation also for the mental injury caused from being imprisoned for the sole reason of not being able to pay the fine imposed on him or her pursuant to the prevailing law.

(h) A person who has been convicted of the offence against the State under the prevailing law,

(i) A person who has been convicted of any organized crime under the prevailing law,

(j) Except for a victim who is a minor or of unsound mind, a person who has become victim of an offence committed against him or her due to provocation by him or her to commit the offence against him or her or due to the conduct of the victim,

(k) A person who does not make information or complaint in relation to the investigation of, court proceedings on, the offence, who makes a false information or complaint, who does not assist the investigating or prosecuting authority or who makes a statement, deposition or submits evidence with the objective of saving the

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person involved in the offence, or who, for that purpose, makes such a statement or deposition in the court that is contrary to the statement made before the investigating authority,

(l) A person who has received, or appears to receive, financial support or compensation from any other source of the Government of Nepal with respect to the offence for which he or she is entitled to obtain compensation,

(m) A person who appears to be unjust for being provided with compensation from the perspective of justice,

(n) A person who makes an application to the effect that he or she does not wish to obtain compensation,

(o) A person who is yet to pay such fine, claimed amount or any other amount as ordered by the order of the court or such revenue or other amount payable by the victim to the Government of Nepal,

(p) Where it is held that a false complaint has been made,

(q) Such a victim in cases where the perpetrator is likely to receive the benefit of compensation because of the fact that both the victim and the perpetrator are both the members of an undivided family at the time of the commission of the offence,

Provided that nothing herein contained shall bar the provision of compensation to the victim pursuant to this clause in the following conditions:

(1) Where the perpetrator is not bound to bear the criminal liability pursuant to the prevailing law because of his or her age or mental unsoundness,

(2) Where there is no legal provision entitling the victim to compensation from the offender in such an offence, or even if it exists such a provision, it does not appear that the victim will be able to obtain compensation from the perpetrator because there is no property in the name of the perpetrator or the undivided family or for any other reason but it is proved that the victim has lived apart upon separating the bread and board from the undivided family consisting of the perpetrator after the offence has been committed, or

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(3) A woman who is a victim of rape or a child born from her.

35. Compensation amount to get first priority: Notwithstanding anything contained in the prevailing law, where the offender has also to pay compensation to the victim, in addition to the fine, government claimed amount, ten percent, twenty percent fee, public claimed amount or any other amount, by a judgment of the court, the first priority shall be given to the compensation to be received by the victim pursuant to this Act from the amount recovered from the offender.

36. To be recovered as government arrears: Where the offender does not provide the victim with the amount of compensation ordered by the court to be recoverable to the victim pursuant to this Act, the court shall get it provided to the victim by recovering it from the movable and immovable property of the offender as government arrears.

37. To receive compensation by dependent child or guardian: Where the victim dies before obtaining the compensation pursuant to this Act, his or her child dependent on him or her or guardian shall be entitled to such amount of compensation.

38. To deduct the amount received earlier for compensation: While making payment of the amount of compensation to the victim pursuant to this Act, only the amount that remains after deducting the amount received by him or her earlier for interim compensation shall be provided.

39. To pay the amount of compensation to the Fund: If the victim does not appear to receive the compensation until six months from the date on which information as to his or her entitlement to compensation was given pursuant to this Act, the amount of such compensation amount shall be paid to the Fund after that period.

40. No entitlement of any one else to the amount of compensation: Notwithstanding anything contained in the prevailing law, no one else shall have entitlement to the amount obtained as compensation pursuant to Section 29 or 30 of this Act except where such amount is to be returned, deducted or recovered pursuant to this Act.

Chapter-5

Compensation Levy

41. Provisions relating to compensation levy: (1) The offender shall pay the following amount to the Fund, as the compensation levy:

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(a) Two hundred rupees where punishment of imprisonment for less than one year is imposed,

(b) Four hundred rupees where punishment of imprisonment for one year to two years is imposed,

(c) Six hundred rupees where punishment of imprisonment for two years to three years is imposed,

(d) Eight hundred rupees punishment of imprisonment for three years to four years is imposed,

(e) One thousand rupees where punishment of imprisonment for four years to five years is imposed,

(f) One thousand three hundred rupees where punishment of imprisonment from five years to eight years is imposed,

(g) One thousand eight hundred rupees where punishment of imprisonment from eight years to twelve years is imposed,

(h) Two thousand two hundred rupees where punishment of imprisonment for above twelve years but below life imprisonment is imposed,

(i) Two thousand eight hundred rupees where punishment of life imprisonment is imposed.

(2) The offender who has been sentenced to a fine only but not to imprisonment shall pay the compensation levy in such an amount as to be set by four percent of the fine so imposed.

(3) Where the offender is sentenced to both punishments of imprisonment and fine, he or she shall pay the compensation levy in such an amount which becomes the higher, out of that to be set from the imprisonment and fine pursuant to sub-section (1) or (2).

(4) The court shall determine the compensation levy pursuant to this Section while making judgment on the offence concerned.

(5) The compensation levy referred to in this Section shall be credited to the Fund.

42. **Liability to pay compensation levy not to be deemed terminated:** (1) Even if it is required to pay a fine or bear any other pecuniary liability as well for the offence in relation to which the compensation levy is to be paid pursuant to Section 41 or

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to pay compensation paid to the victim, the liability to pay the compensation levy referred to in Section 41 shall not be deemed to have terminated.

(2) Even in cases where the sentence imposed on the offender is pardoned, postponed, changed or lessened or remitted or suspended pursuant to the prevailing law, the liability of the offender to pay the compensation levy referred to in Section 41 shall not be deemed to have terminated.

43. Power to make order to lessen, or dispense with the requirement to pay, the compensation levy: (1) If any offence is not able to pay the compensation levy referred to in Section 41, he or she may make an application, along with the basis, ground, reason therefor and evidence thereof, to the court concerned for an order that the compensation be lessened or the requirement to pay it be dispensed with.

(2) While inquiring into the application made pursuant to sub-section (1), where the court thinks that there is a reasonable condition that such an offender cannot pay the compensation levy, the court may make an order that the compensation levy referred to in Section 41 be lessened or the requirement to pay it be dispensed with.

Chapter-6

Victim Protection Suggestion Committee

44. Victim Protection Suggestion Committee: (1) There shall be a Victim Protection Suggestion Committee as follows, for making suggestions to the Government on the protection of the rights and interests of the crime victims:

(a) Attorney General -Coordinator

(b) Chairperson, Nepal Law Commission -Member

(c) Secretary, Government of Nepal, Ministry of Finance -Member

(d) Secretary, Government of Nepal, Ministry of Law, Justice and Parliamentary Affairs -Member

(e) Inspector General of Police, Nepal Police -Member

(f) One expert designated by the Government of Nepal from among the persons who have made significant contribution in the field of victimology or criminal justice -Member

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(2) The tenure of the member referred to in clause (f) of sub-section (1) shall be of five years.

(3) Notwithstanding anything contained in sub-section (2), the Government of Nepal may at any time remove the member referred to in clause (f) of sub-section (1) if he or she has incompetence or bad conduct or fails to perform his or her duties honestly.

Provided that prior to so removing from the office, he or she shall not be deprived of an opportunity to submit his or her clarification.

45. Functions of the Victim Protection Suggestion Committee: (1) The functions of the Victim Protection Suggestion Committee shall be as follows:

(a) To make suggestions to the Government of Nepal as to the improvement and revision to be made in the existing law for the protection of the rights and interests of the victims,

(b) To make suggestions to the Government of Nepal as to the policy measures to be adopted by the Government of Nepal for the security of the victims and mitigation of damage and adverse effects sustained by the victims from the offence,

(c) Where Nepal is to become a party to an international treaty or agreement related to the rights of the victims, to make recommendation to the Government of Nepal to that effect, along with the reason,

(d) To make suggestions to the Government of Nepal to operate such particular service as is necessary upon identifying the needs of the victims.

(2) Having regard also to the suggestions of the Victim Protection Suggestion Committee, the Government of Nepal shall operate the services including relief, social rehabilitation, counseling, financial, physical, social, legal aid/support for the security, protection of the rights and interests of the crime victims, and for mitigating the damage, negative impact and effect sustained or to be sustained by the victims due to the offence.

46. Meeting allowance: The coordinator and members of the Victim Protection Suggestion Committee shall get such meeting allowance as prescribed by the Government of Nepal for participating in the meeting of the Committee.

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Chapter-7

Miscellaneous

47. To provide from the Fund: The victim shall be provided compensation in a reasonable amount from the Fund for the damage sustained as a result of any offence committed by a perpetrator who does not have to bear the criminal liability due to his or her age, mental unsoundness, diplomatic immunity and any other reason.

48. To claim for compensation: While making prosecution in any offence, the victim of first grade, victim of second grade and family victim shall have to make an explicit claim for compensation to be obtained by them.

49. To provide information: The concerned body or authority who is involved in the proceedings of such matters or who maintains the records of such information or who has the access to such information shall provide such information to the body or authority who has the duty to provide information to the victim pursuant to this Act.

50. To give a notice of final hearing: (1) Notwithstanding anything contained in the prevailing law, the court shall give a notice of final hearing of the case related to the offence to the concerned Government Attorney Office in advance of at least seven days.

(2) After receiving information pursuant to sub-section (1), the Government Attorney Office shall, as promptly as possible, give information of final hearing to the concerned victim to the extent possible.

51. Modes of giving notice to the victim: The concerned body or authority who has the duty to give a notice to the victim pursuant to this Act may give it in writing, orally, by telephone or electronic means so that it will remain in the record, as required.

52. Power to appoint representative: For the enjoyment or enforcement of the rights of the victim conferred by this Act, the victim may appoint his or her representative or attorney pursuant to the prevailing law, and when so appointed, the victim shall be deemed to have enjoyed or enforced his or her rights through such a representative or attorney.

53. Power to frame Rules: The Government of Nepal may, in consultation with the Committee, frame necessary rules for the implementation of the objectives of this Act.

54. Power to make directives: The Government of Nepal may, subject to this Act or the Rules framed under this Act, make necessary directives in relation to the provision of compensation to the victims.

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vi. Right to Safe Motherhood and Reproductive Health Act, 2018 (2075)

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The Right to Safe Motherhood and Reproductive Health Act, 2075 (2018)

Date of Authentication

2075/6/2 (18 September 2018)

Act Number 9 of the year 2075 (2018)

An Act Made to Provide for the Right to Safe Motherhood and Reproductive Health

Preamble: Whereas, it is expedient to make necessary provisions on making motherhood and reproductive health service safe, qualitative, easily available and accessible, in order to respect, protect and fulfill the right to safe motherhood and reproductive health of the women conferred by the Constitution of Nepal,

Now, therefore be it enacted by the Federal Parliament.

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Chapter-1

Preliminary

1. **Short title and commencement:** (1) This Act may be cited as the "Right to Safe Motherhood and Reproductive Health Act, 2075 (2018)."

   (2) This Act shall come into force immediately.

2. **Definitions:** Unless the subject or the context otherwise requires, in this Act,-

   (a) "Emergency obstetric care" means the service available twenty-four hours to manage any complications in case such complications appear during the condition of pregnancy, child delivery or child birth.

   (b) "Basic emergency obstetric care" means the basic service such as administering antibiotic, magnesium sulfate or oxytocin, taking out entangled placenta and fetus membrane, give birth to infant with the help of vacuum and cleansing uterus in the case of occurrence of miscarriage.

   (c) "Teenager" means a person who is of the age group of over ten years up to nineteen years.

   (d) "Abortion" means the act of fetus coming out or taking it out of the womb or before the fetus remained in the uterus born naturally.

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(e) "Contraception" means the measures to prevent pregnancy by creating obstruction in the common process of ovulation, melting over sperm and ovum or ovum implantation.

(f) "Contraceptives" means hormone-based or other means to help in the work of contraception.

(g) "Abortion service" means the abortion service performed in a licensed health institution, by the licensed health worker upon fulfilling the process under this Act.

(h) "Obstetric care" means the service referred to in Section 5.

(i) "Pregnancy" means a period from the first day of the last menstruation occurred prior to conception up to remaining of fetus in the womb of a woman.

(j) "Prescribed" or "as prescribed" means prescribed or as prescribed in the rules framed under this Act.

(k) "Newborn essential care" means the care including keeping the newborn warm, caring of navel and eyes, breast feeding, administering necessary vaccines.

(l) "Newborn emergency care" means administering antibiotic, managing including hypothermia for the newborn during the state of infection, and managing the problems relating to respiration of such a new born.

(m) "Family planning" means the plan to determine number of children or gap between pregnancies upon self interest by using or not using the contraceptives.

(n) "Reproductive health" means physical, mental and social health condition related to reproductive system, process and function.

(o) "Right to reproductive health" means the right referred to in Section 3.

(p) "Morbidity" means the state of adversely affecting reproductive system due to reproduction, pregnancy, abortion, labor and sexual behavior, and this term also includes uterus prolapse, travail cavity, infertility, pelvic caner and similar other state of such types that affects reproductive system.

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(q) "Midwife" means a trained health worker to help in child birth of the pregnant woman.

(r) "Ministry" means the Ministry of the Government of Nepal looking after the matters relating to health.

(s) "Comprehensive emergency obstetric care" means blood transmission and surgery service, in addition to basic emergency obstetric care mentioned in clause (b).

(t) "Safe motherhood" means motherhood service to be provided to women pursuant to this Act during the state of pregnancy, labor and child birth.

(u) "Health institution" means a hospital, nursing home, medical college or health academy operated in governmental, non-governmental, community or private level, and the term also includes primary health center, health post or health institution operated under any other name.

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Chapter-2

Right to Reproductive Health

3. **Right to reproductive health:** (1) Every woman and teenager shall have the right to obtain education, information, counseling and service relating to sexual and reproductive health.

(2) Every person shall have the right to obtain service, counseling and information relating to reproductive health.

(3) Every woman shall have the right to safe motherhood and reproductive health. Every woman shall have the right to determine the gap between births or the number of children.

(4) Every person shall have the right to get information regarding contraceptives and use them.

(5) Every woman shall have the right to obtain abortion service pursuant to this Act.

(6) Every woman shall have the right to nutritious, balanced diet and physical rest during the condition of pregnancy and child birth and morbidity.

(7) Every woman shall have the right to get necessary counseling, obstetric care, and postpartum contraceptive service.

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(8) Every woman shall have the right to get emergency obstetric care, basic emergency obstetric care, comprehensive emergency obstetric care, essential care for the new born baby and emergency care of the new born baby.

(9) Every person shall have the right to get reproductive health service needed during different situation of his/her lifecycle, in easily available, acceptable and safe manner.

(10) Every person shall have the right to make a choice of reproductive health service.

4. **To remain confidential:** The reproductive health service obtained by every person and information regarding this shall remain confidential.

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Chapter-3

Safe Motherhood and Newborn Baby

5. **Right to get obstetric service:** (1) Every woman shall have the right to get her examined or checked whether she is pregnant or not, upon going to a health institution.

(2) The health institution concerned shall have to provide the pregnant woman, coming to get service pursuant to sub-section (1), with the services as follows:

(a) To check health at least four times during the pregnancy in normal condition,

(b) To check health as per the advice of a physician or competent health worker during the prescribed condition except that referred to in clause (a),

(c) To receive appropriate counseling relating to health care,

(d) To obtain safety measures and minimum care to be adopted during pregnancy.

6. **To provide obstetric care:** (1) A governmental and community health institution providing obstetric care shall have to arrange competent health worker to provide obstetric care, or midwife or other trained health worker if such a competent health worker is not available.

(2) The non-governmental and private health institution fulfilling the standard prescribed by the Government of Nepal shall have to provide obstetric care in a respectful manner.

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7. **Emergency obstetric and newborn care:** (1) The governmental and community health institutions providing obstetric care shall have to provide obstetric care in a respectful manner.

(2) The non-governmental and private health institutions fulfilling the standard prescribed by the Government of Nepal shall have to provide emergency obstetric and newborn care.

(3) In case the health institutions referred to in sub-sections (1) and (2) are not able to manage the complications that arise while providing service by them, they shall have to refer to a governmental or community health institution to the extent possible and to a non-governmental and private institution if not possible.

(4) It shall be the duty of the health institution concerned to manage the health complications of the conditions related to the pregnant, childbirth or newborn who comes upon being referred pursuant to sub-section (3).

(5) The health institution providing emergency obstetric and newborn care shall have to make provision of resting place as prescribed for the pregnant women of the condition as prescribed.

8. **Health care of newborn baby:** The health institutions providing obstetric care shall have to make provisions relating to health care of the newborn baby as per the standard prescribed.

9. **To maintain record of the births of infants:** (1) Each health institution shall have to maintain record of the infants born in that health institution.

(2) On the basis of the record referred to in sub-section (1), the health institution shall have to provide the father or mother with the certificate of the infant born in its health institution by stating the name of father or mother of the infant.

(3) Each health institution shall have to maintain a record revealing the number of the dead infants and the women who have undergone miscarriage or abortion.

(4) Each health institution shall have to maintain a record of dead women, if any, who come for the obstetric care.

10. **Right to obtain family planning service:** (1) Every person shall have the right to information, make choice relating to family planning, and get other services relating to family planning.

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(2) The service relating to family planning as prescribed shall have to be obtained from the health institution as prescribed.

(3) Other matters relating to family planning shall be as prescribed.

11. Not to get family planning performed forcefully: It is forbidden to get family planning of any one performed forcefully by coercing, or threatening or enticing or tempting or without obtaining written consent of such person.

12. Not to get contraceptives used forcefully: It is forbidden to get the contraceptives used by coercing any one, or threatening or enticing or tempting or without obtaining consent of such person.

13. Right to obstetric leave: (1) Any woman working in a governmental, non-governmental or private organization or institution shall have the right to get obstetric leave with pay, for a minimum of ninety-eight days before or after the delivery.

(2) In case the obstetric leave referred to in sub-section (1) is not sufficient to any pregnant woman, such a woman shall have the right to get leave without pay, for a maximum of one year upon the recommendation of the expert doctor.

(3) A governmental, non-governmental or private organization or institution shall have to make necessary arrangement for the woman working in its office for breast feeding during the office hours up to two years from the birth of the infant.

(4) Even if any pregnant woman gives birth to a dead infant or if the infant dies after birth, such a woman shall enjoy the leave referred to in sub-section (1).

(5) If the wife of a male employee working in a governmental, non-governmental or private organization or institution is going to deliver a baby, such an employee shall get the obstetric care leave with remuneration for fifteen days before or after delivering the baby.

14. To provide additional leave: If complicated surgery is to be conducted as per the opinion of the specialist doctor due to morbidity, the governmental, non-governmental or private organization or institution shall have to provide the woman working in its office with an additional leave with pay for a maximum of thirty days before or after conducting such surgery.

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Chapter-4

Safe Abortion

15. To perform safe abortion: A pregnant woman shall have the right to get safe abortion performed in any of the following circumstances:

(a) Fetus (gestation) up to twelve weeks, with the consent of the pregnant woman,

(b) Fetus (gestation) up to twenty-eight weeks, as per the consent of such woman, after the opinion of the licensed doctor that there may be danger upon the life of the pregnant woman or her physical or mental health may deteriorate or disabled infant may be born in case the abortion is not performed,

(c) Fetus (gestation) remained due to rape or incest, fetus (gestation) up to twenty-eight weeks with the consent of the pregnant woman,

(d) Fetus (gestation) up to twenty-eight weeks with the consent of the woman who is suffering from H.I.V. or other incurable disease of such nature,

(e) Fetus (gestation) up to twenty eight weeks with the consent of the woman, as per the opinion of the health worker involved in the treatment that damage may occur in the womb due to defects occurred in the fetus (gestation), or that there is such defect in the fetus of the womb that it cannot live even after the birth, that there is condition of disability in the fetus (gestation) due to genetic defect or any other cause.

16. Not to get abortion conducted forcefully: (1) Except in the circumstance as referred to in Section 15, no one shall conduct or get abortion conducted with an intention to get the abortion conducted or knowingly or having reason to believe that the abortion can occur.

(2) No one shall get the abortion conducted by coercing a pregnant woman, threatening, enticing or tempting her.

(3) If any of the following acts is committed, it shall be deemed to have got abortion performed:

(a) Getting abortion conducted pursuant to sub-section (2),

(b) Miscarriage that occurs while something is done to the pregnant woman with some enmity,

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(c) Making assistance to commit acts referred to in clauses (a) and (b),

(4) While conducting abortion, in case the abortion does not occur instantly but a living infant is born, and if the infant, which is born as a result of such an act dies immediately, it shall be deemed to have got the abortion conducted for the purposes of this Section.

17. Not to commit abortion upon identifying sex: (1) No one shall commit or cause to be committed an act to identify the sex of the fetus in the womb.

(2) A pregnant woman shall not be pressurized or compelled or intimidated or coerced or enticed or entrapped in undue influence to identify the sex of the fetus.

(3) Conducting abortion or causing it to be conducted, by identifying the sex pursuant to sub-sections (1) and (2), is prohibited.

18. Safe abortion service: (1) The licensed health worker who has fulfilled the prescribed standards and qualification shall have to provide the pregnant woman with safe abortion service pursuant to Section 15 in the licensed health institution.

(2) Appropriate technology and process of the service to be provided as referred to in sub-section (1) shall be as prescribed.

(3) The pregnant woman who wants to obtain the safe abortion service shall have to give consent in the prescribed format to the health institution which has obtained a license, or to the health worker who has obtained a license.

(4) Notwithstanding anything contained in sub-section (3), in the case of a woman who is an insane, who is not in a condition to give consent instantly or who has not completed the age of eighteen years, her guardian or curator shall have to give consent.

(5) Notwithstanding anything contained in sub-section (4), in the case of a woman who is below the age of eighteen years, safe abortion service shall have to be provided by considering her best interests.

19. To maintain confidentiality: (1) The licensed health institution or licensed health worker shall have to keep confidential all records, information, documents related to reproductive health of the pregnant woman and counseling and service provided to her.

(2) Notwithstanding anything contained in sub-section (1) the records relating to such information, document and counseling service may be made available on the following conditions:

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(a) If information is demanded by the investigation authority or court in course of investigation and hearing of any lawsuit,

(b) If it is required to quote without revealing identity of the related woman for the purpose of study, research or monitoring relating to safe abortion,

(c) If the woman concerned demands herself the records thereof.

Chapter-5

Morbidity

20. Right to obtain morbidity care: (1) Every woman shall have the right to get her examined, obtain counseling and receive treatment relating to morbidity by or in the health institution.

(2) It shall be the duty of the concerned health institution or health worker to provide information of the matters relating to the care to be followed on the condition of morbidity and in the condition following the surgery, and the hazards likely to be caused by it while providing service referred to in sub-section (1) in a manner that such information is understandable.

21. Not to displace: No one shall divorce, expel from home or displace anyone or get any one divorced, expelled or displaced by showing the reason of morbidity.

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Chapter-6

Budget Appropriation and Grant for Motherhood and Reproductive Health

22. To appropriate grant amount: (1) The Government of Nepal shall have to appropriate grant amount through its budget every year for every Local Level for the purpose of motherhood and reproductive health service.

(2) The Provincial Government shall have to appropriate certain amount through its budget as grant every year, as per the Provincial law, for the Local Level for the purpose of motherhood and reproductive health service.

(3) The Local Level concerned shall have to spend the amount appropriated as per sub-sections (1) and (2) for the motherhood and reproductive health of the economically extremely destitute women as prescribed.

23. To appropriate budget by Local Level: (1) The Local Level shall have to appropriate necessary budget from its annual budget for the purposes of motherhood and reproductive health service.

(2) While appropriating budget as referred to in sub-section (1), it shall have to be appropriated in such a way that governmental and community health institutions providing motherhood and reproductive health service receive it.

24. Reproductive Health Coordination Committee: (1) In order to make necessary suggestions to the Government of Nepal for preparing policies, plans and programs relating to safe motherhood and reproductive health, there shall be one Reproductive Health Coordination Committee as follows:

(a) Secretary, Ministry of Health and Population -Chairperson

(b) Joint-secretary, Ministry of Women, Children and Senior Citizens -Member

(c) Joint-Secretary, Ministry of Education, Science and Technology -Member

(d) Director General, Department of Health Services -Member

(e) Representative, Nepal Medical Council -Member

(f) Representative, Nepal Nursing Council -Member

(g) Representative, Nepal Health Professional Council -Member

(h) Legal Officer, Ministry of Health and Population -Member

(i) Two representatives including one woman nominated by the Ministry from among the professional institutions/persons conducting studies and research or extending service in the field of reproductive health and right to reproduction -Member

(j) One representative of Nepal Health Volunteers Association designated by the Ministry -Member

(k) Director, Family Welfare Division, Health Service Department -Member-secretary

(2) The Coordination Committee may invite the expert engaged in the sector of reproductive health and right to reproduction to the meeting as required.

(3) The procedures relating to the meeting of the Committee shall be as determined by the Committee itself.

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Chapter-7

Offence and Punishment

25. Offence deemed to have been committed: If one commits any of the following acts, one shall be deemed to have been committed the offence under this Act:

(a) To deprive one of receiving the obstetric care referred to in Section 5,

(b) Refusal to provide obstetric care by any health institution providing obstetric care pursuant to Section 6,

(c) Referral to other health institution deliberately even upon the treatment being possible in his or her health institution, or,

(d) Non-issuance of birth certificate by the health institution pursuant to Section 9,

(e) Forceful conduction of family planning as referred to in Section 11,

(f) Making forceful use of contraceptive as referred to in Section 12,

(g) Conduction of abortion as referred to in Section 16,

(h) Commission of any act to identify sex of the fetus in contrary with the provisions of sub-sections (1) and (2) of Section 17,

(i) Causing abortion upon identifying sex as referred to in sub-section (3) of Section 17,

(j) Breaching, or causing to be breached of, confidentiality in contravention of the provisions of sub-section (2) of Section 19,

(k) Making or causing to be made displacement in contrary to the provision of Section 21,

(l) Making discrimination contrary to the provision of Section 29.

26. Punishment: If one commits, or causes to be committed, any act that is deemed to be the offence as referred to in Section 25, one shall be liable to the following punishment according the gravity of the offence:

(a) Imprisonment for a term not exceeding six months or fine not exceeding fifty thousand rupees or both the penalties for committing or getting committed the offence referred to in clauses (a), (b), (c), (d) and (l),

(b) Imprisonment for three months to six months and fine not exceeding fifty thousand rupees for committing or getting committed the offence referred to in clauses (e) and (f),

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(c) Punishment referred to in Section 188 of National Criminal Code, 2074 (2017) for committing or causing to be committed the offence referred to in clauses (g), (h) and (i),

(d) Fine not exceeding fifty thousand rupees for committing or causing to be committed the offence as referred to in clause (j),

(e) Imprisonment for a term not exceeding one year and fine not exceeding one hundred thousand rupees or both the penalties for committing or causing to be committed the offence referred to in clause (k).

27. Provision of compensation: A person who is victimized from the offence under this Act shall be provided with reasonable compensation by the perpetrator.

Chapter-8

Miscellaneous

28. To provide disability friendly service: While providing services including family planning, reproductive health, safe motherhood, safe abortion, emergency obstetric and newborn care, morbidity under this Act, such services shall have to be adolescent and disability friendly.

29. Not to discriminate: No one shall discriminate on the right to get monthly services including family planning, reproductive health, safe motherhood, safe abortion, emergency obstetric and newborn care, morbidity on the ground of one's origin, religion, color, caste, ethnicity, sex, community, occupation, business, sexual and gender identity, physical or health condition, disability, marital status, pregnancy, ideology, state of being infected with or vulnerable to any disease or germ, state of morbidity, personal relationship or any other similar ground.

30. Provision of protection home: For the protection of reproductive health of a woman who is mentally disabled, neglected from the house, family or relatives or raped, the Federal, Provincial and Local Levels shall have to make arrangement with reciprocal coordination for keeping such a woman in a protection home.

31. To give directives: (1) The Ministry may give necessary directives to health institutions to provide service of reproductive health.

(2) It shall be the duty of the concerned health institution to comply with the directives received pursuant to sub-section (1).

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32. Service charge: (1) The governmental health institution or health institution that receives government grants shall have to provide free reproductive health service.

(2) Private, non-governmental and community health institutions may take service charge as prescribed for providing reproductive health service.

(3) Notwithstanding anything contained in sub-section (2), private, non-governmental and community health institutions and health workers shall have to make the service easily available, and provide free service (quota) as prescribed for the person who is unable to pay the service charge.

33. Obstetric allowance: The Government of Nepal shall have to provide the extremely destitute woman who delivers baby with obstetric allowance as prescribed.

34. Saving of act done in good faith: Notwithstanding anything contained elsewhere in this Act, no legal action shall be instituted against any health institution and health worker for any matter of the reproductive health service provided in good faith.

35. Authority to try cases: (1) The concerned District Court shall have the authority to originally adjudicate the cases of the offence under this Act.

(2) A person who is not satisfied with the punishment or order made by the District Court pursuant to sub-section (1) may make an appeal in the concerned High Court.

36. Government of Nepal to become plaintiff: (1) The Government of Nepal shall become the plaintiff in the cases referred to in Section 25.

(2) The cases referred to in Section 25 shall be deemed to have been included in Schedule-1 of the National Criminal Procedure Code, 2074 (2017).

37. Limitation: No complaint shall lie after the expiry of six months from the date of knowledge of the commission of any offence under this Act.

38. To be in accordance with prevailing law: The matters contained in this Act shall be governed by this Act and the matters not contained in this Act shall be in accordance with the prevailing law.

39. Power to frame rules: The Government of Nepal may frame necessary rules in order to implement this Act.

40. To issue directives: The Ministry may frame and implement the necessary directives subject to this Act and the rules framed under this Act.

Nepal Law Commission

G. Pakistan

i. Guidelines to Be Followed in Gender-Based Violence Cases

TO BE SUBSTITUTED FOR THE SAME NUMBER AND DATE

LAHORE HIGH COURT, LAHORE

Phone No. 042-99212951 Ext.274
E-mail: - lt.ddj@lhc.gov.pk
Fax No. 042-99212281

No. 22377/HC/DDJ/DRIT
Dated 18 /October, 2017

From

The Director General,
Directorate of District Judiciary,
Lahore High Court, Lahore.

To

All the District & Sessions Judges,
In the Punjab.

Subject: - ***GUIDELINES TO BE FOLLOWED IN CASES OF GENDER BASED VIOLENCE (GBV)***

Dear Sir,

I am directed to refer to the subject cited above and to inform that **Hon'ble the Chief Justice** has been pleased to approve guidelines to be followed in cases of Gender Based Violence (GBV) in the light of **Salman Akram Raja Case (PLJ 2013 SC 107),** however the word "chief examination" in para 2(5) has been substituted with **examination-in-chief** and word "sessions" in pars 2(6) has been omitted. The footnote has also been numbered accordingly.

2. You are, therefore, requested to circulate these guidelines among all respected Judges working on Criminal side under your kind control, to comply with in letter and spirit.

Yours faithfully,

MUHAMMAD AKMAL KHAN
Director General
Directorate of District Judiciary

NUMBER & DATE EVEN

Copy is forwarded for kind information to: -

i. Principal Staff Officer to Hon'ble Chief Justice, Lahore High Court, Lahore.
ii. Private Secretary to Hon'ble Justice Ayesha A. Malik, Judge, Lahore High Court, Lahore.
iii. Staff Officer to Registrar, Lahore High Court, Lahore.

Director General
Directorate of District Judiciary

GUIDELINES TO BE FOLLOWED IN CASES OF GENDER BASED VIOLENCE (GBV) IN THE LIGHT OF PLJ 2013 SC 107 (SALMAN AKRAM RAJA CASE)

1. And Whereas there is a need to build upon the directives given by the Supreme Court in Salman Akram Raja vs. The Government of Punjab through Chief Secretary, Civil Secretariat, Lahore and others[1] in respect of victims and vulnerable witnesses in rape trials, and extend them with suitable adaption to apply to women complainants, victims and vulnerable witnesses, such as women , children or persons with disabilities who are giving evidence in cases of violence;
2. The Lahore High Court, Lahore shall prioritize the gender-based violence cases. The courts shall conduct trials in a gender-sensitive manner and incorporate the directions of the Supreme Court in Salman Akram Raja vs. The Government of Punjab through Chief Secretary, Civil Secretariat, Lahore and others[2], Section 13 of the Criminal Law (Amendment) (Offences related to Rape) Act 2016[3]. The international best practices shall be followed in dealing with gender-based violence cases, such as a courtroom set-up responsive to the needs of women and other vulnerable witnesses. In particular, the courts shall act upon the guidelines issued by Lahore High Court, Lahore, as follows:
    1) *The magistrate unless there are compelling reasons shall record thestatement of the Victim under Section 164, Cr.P.C. in the day on which the application is moved by the Investigation Officer. The Magistrate before proceeding to record the statement shall ensure that the victim (child, women or any vulnerable person) is made comfortable and he/she is free of any extraneous pressure.*
    2) *If the victims of rape are reluctant to appear before a male magistrate as they cannot express their agony appropriately before them, therefore if requested the statement of victim be recorded before female Magistrate, where ever is available.*
    3) *An endeavor shall be made to commit such cases of offence to the Court of Sessions expeditiously and preferably within 15 days.*

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[1] See note 9.

[2] Section 13 provides:

[3]"13. Amendment of section 352, Act V of 1898.-In the Code, in section 352, the existing provision shall be re-numbered as sub-section (1) of that section and after sub-section (1) re-numbered as aforesaid, the following new sub-sections shall be inserted namely:-

'(2) Notwithstanding anything contained in sub-section (1), the trial of offences under section 354A, 376, 376A, 377 and 377B of the Pakistan Penal Code. 1860 (Act XLV of 1860) shall be conducted in camera;

Provided that the Presiding Officer, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the Court.

(3) Where any proceedings are held under sub-section (2), the Government may adopt appropriate measures, including holding of the trial through video link or usage of screens, for the protection of the victim and the witnesses.

(4) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish or broadcast any matter in relation to any such proceedings, except with the permission of the Court.'"

4) *In such cases where a victim shall be given an opportunity to have a state counsel and in cases where a victim has a private lawyer, she may be allowed to retain the private lawyer.*
5) *That as far as possible examination-in-chief and cross-examination of the victim must be conducted on the same day.*
6) *The Court shall maintain a panel of psychiatrists, psychologists and experts in sign language etc. who would assist in recording the statement of victim are vulnerable as and when requested by the Court.*
7) *If it is brought to the notice of the Court from a support person/advocate/victim/Police/Prosecution department regarding threats received by the victim or his/her family members to compromise the matter, the Court shall immediately direct the Assistant Superintendent of Police to look into the matter and provide an action taken report before the Court within 2 days. The Court must ensure that protection is provided to the victim and her family.*
8) *In cases in which the witness is sent back unexamined and is bound down, the Court shall ensure that at least the travelling expenses for coming to and from for attending the Court are paid.*
9) *At the time of recording of evidence of the victim or vulnerable witness irrelevant persons be excluded from the Court. This may include an order that the accused is to be excluded from the court provided that the accused shall be able to see and hear the evidence given.*
10) *The proceedings of such cases be conducted in camera.*
11) *Conducting a trial after regular court hours where appropriate.*
12) *Where possible evidence of victim of violence should be recorded through video conferencing so that the victims do not need to be present in the Court*
13) *Availability of screens, one-way glass, or other arrangements such as closed circuit television so that a victim does not have to see the accused person in court when giving evidence.*

14) *Questions put in cross-examination on behalf of accused should be given in writing to the Presiding Officer who should put them to the victim or to a vulnerable witness in a language which is clear and not degrading.*

There are certain other international best practices and guidelines to be incrementally introduced into the courts: -

1) *A supportive person/Advocate may be allowed to the victim/survivors or witness' choice to be present while evidence is being given.*
2) *To make adjustments to the proximity of lawyers the dock and the witness box to the witness giving evidence in*
3) *Examination and cross examination of the victim/survivor are restricted to issue relevant to the case and are not frivolous or for the purposes of embarrassing or humiliating the victim/survivor including through the introduction of evidence of victim/survivor's past sexual behavior, history, or reputation.*

4) *To develop practice guideline for the examination and cross-examination of such a witness to help ensure that questions are asked to the victim/witness using appropriate language manner and content.*
5) *Witness Care Video Link Rooms may be established to record evidence of the victim or vulnerable witness so that they feel comfortable in recording of their statement at a place where there is no physical interaction with the accused.*
6) *An audio-visual pre-recording of a statement or evidence of the victim may be allowed, either in part or in whole, to be replayed and admitted as their evidence at the trial. Such pre-recording can include the whole of the evidence of the victim; their evidence in chief cross examination, and re-examination.*
7) *Other procedural or practice guidelines to be developed where women or their relatives and representatives indicate their wish not to proceed with a case of violence or witnesses resile from their earlier statements;*
8) *Such other procedural or practical guidelines for other issues which ever so to overcome or remove constraints and barriers to women's access to justice in cases of gender-based violence.*

MUHAMMAD AKMAL KHAN
Director General
Directorate of District Judiciary

ii. Updated Practice Note for the Model Gender-Based Violence Cases Court, Lahore (Incorporating Underlined Refinements Suggested by the District and Sessions Court Judges in Lahore)

PRACTICE NOTE FOR CASES IN GENDER–BASED VIOLENCE COURTS ("GBV COURTS")

THE PURPOSE OF THE GBV COURT

1. The purpose of the GBV Court is to enable cases which concern gender-based violence offences[1] to be prioritized and conducted in a gender-sensitive manner. The GBV Court applies to the victims of gender-based violence; these victims would include women, children, and other vulnerable witnesses[2] including persons who may regard themselves as having a different gender identity.[3] The purpose of GBV Court also recognises the fact that the victims of gender-based violence are mainly women (and girl children) and they often do not report violence against them for fear of retribution, shame, social stigma, and lack of community support. In addition, victims may also not be confident or fearful of coming to the court to give evidence because the court processes are intimidating and they feel re-victimised. The GBV Court and the Practice Note are a response to provide court and judicial officials who are specialized and gender-sensitive regarding gender-based violence and include procedures to ensure cases are heard fairly and expeditiously and in a way that will avoid or minimize undue trauma to victims, children, and other vulnerable witnesses.

PURPOSE OF THE PRACTICE NOTE

2. The purpose of this Practice Note is to enable the "Guidelines to be followed in Cases of gender-based violence (GBV)" No. 22325 dated 17 October 2017 ("the Guidelines), to e implemented in practice with clarity and consistency.
3. At the same time the Practice Note is to be applied flexibly if particular situations require some modification in order to maintain the purpose and principles of the Guidelines.

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[1] Gender based violence (GBV) is an act of violence that results in or is likely to result in physical, sexual, psychological or economic harm or suffering. It includes threats of such acts, coercion or arbitrary deprivations of liberty whether occurring public or in private and it includes domestic violence. The violence is primarily committed on the victim by reason of her/his sex or gender. Examples of gender based violence include offences under Sections 300-302, 310 - A, 315, 324, 332, 336-A and B, 337, 337-A – 337-Z, 354, 354A, 359 to 369, 362 to 374, 364 - A, 365- B, 376, 376(2) – 376(4), 371- A, 377, 496, 496 - A, 498 – A, 498 – B, 498 – C and 509 of PPC and Sections 3, 4, 11, 12,14,17 – 23 of the Prevention of Electronic Crimes Act.

[2] Vulnerable witnesses would include also persons with mental or other disabilities.

[3] Including persons protected under the Transgender Persons (Protection of Rights) Act, 2018.

4. The Practice Note will also apply to the treatment of other witnesses giving evidence in such cases, either for the prosecution or defense, and it includes the accused, with modifications as the situation may require. It is important for all witnesses in the court to have the best conditions be able to give their best evidence.

OUTSIDE THE COURT ROOM

5. On reaching the Court to precinct, the victim is to be met by a "Female Support Officer,"[4] who will escort the victim to a protected place so as to avoid contact with the accused or their family or friends as well as the general public.
6. The Female Support Person is to settle victim, but is not to talk about any of the details of the case.
7. The Female Support Person is to bring the victim either to the "e-courtroom" or to the court as required, and remain with the victim while the victim gives evidence.
8. The victim may be accompanied or spoken to by their private counsel or prosecutor as required.
9. The prosecutor or counsel for the victim should speak with the victim and find out whether the victim wishes to give evidence from the "e-courtroom," or in the courtroom with a screen, or in the court room without a screen. This may also be confirmed by the Female Support Officer.

THE SET UP OF THE COURT ROOM

10. Adjustments are to be made to the courtroom to improve the comfort for persons in the court which include, making adjustments to the witness box and the accused box so that the witnesses and the accused are able to sit and have water and tissues available to them during the trial process.
11. The lawyers, both prosecution and defence, are to be seated at a separate bar table during the trial process. Lawyers are to remain seated during the trial process unless they are speaking or are questioning the witnesses, in which case the counsel may either sit or stand.
12. If the victim gives evidence in the court room, it is required that the victim be allowed to enter the court room in the absence of the accused and be seated in the witness box behind a screen. When the accused returns to the court room, the accused should not be visible to the victim.
13. The victim will then give evidence with a screen which prevents the victim from seeing and being seen by the accused, unless identification of the perpetrator is required. If identification is required then the victim may move away from behind the screen to also

[4] A "Female Support Officer" is an employee of the court which is designated to fulfill this role.

be able to view accused person. The female support person should be seated near to where the victim is giving evidence.

14. If the victim so chooses, the victim may give evidence in court without the use a screen.
15. Further, other arrangements may be made by the Judge in the court room according to the needs of the victim and having regard to the particular circumstances.

SET UP AND USE OF THE e-COURTROOM

16. Video facilities are to be made available in the trial court room to permit evidence to be given by the victim from the e-courtroom outside the trial court and be seen and heard on a screen in the trial court. This is to enable the victim to give evidence without coming into the trial court.
17. The e-courtroom used for child victims or child witnesses should preferably be in a child court precinct if one is conveniently available, or if not, in a room which has a child friendly environment[5] and away from contact with adult court participants.
18. The positioning of the video camera should allow the victim to see the trial courtroom and particularly the Judge and counsel, but not the accused person, unless it is necessary for the victim to identify the person whom the victim says was the perpetrator of the conduct alleged.
19. If identification is required then the camera may be repositioned so as to include a view of the accused person.
20. The view that persons in the trial court will have is of the victim only, who will be seated unless there is, a need for identification or as per the requirement of the case.
21. Persons present in the e-courtroom will be the female support officer and or any person such as an interpreter as required.
22. The Female Support Officer is to settle the victim in the room before commencement of their evidence.
23. If the victim is required to use communication aids[6] to assist in giving their evidence or to draw or identify certain objects then the Female Support Officer is to show this to the victim.
24. The Female Support Officer is also to inform the Judge if the victim indicates that she/he needs a break because she/he is tired or becomes upset.

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[5] A child-friendly environment is a space, even if small, which includes removable toys and decor which are age appropriate to help the child feel more comfortable when giving evidence.

[6] Communication aids include paper, markers, anatomically detailed drawings or dolls or toys, or cards which give short answers or other means as required for the witness and to include requirements for a child as well as persons with mental or physical or other disabilities.

PROCESSES FOR THE TRIAL AND TAKING OF EVIDENCE

25. The Judge will usually list three cases on each day of hearing unless the circumstances suggest a different listing arrangement.
26. The Judge at the commencement of the trial may acquaint counsel and the accused on matters related to the procedures to be followed in the Court.

PROCESS FOR TAKING OF THE EVIDENCE OF THE VICTIM AND THE WITNESSES

Settling the victim and witnesses

27. The judge shall decide the procedure to be followed, which in his/her opinion is most appropriate for both prosecution and defence with modification as required including evidence of the victim. Additional or modified requirements are to be made for child victims and child witnesses as set out below under "Child Victim and Child Witness Requirements"
28. The Judge will introduce himself or herself to all including the victim and explain who the other persons in the court room are.
29. Questions asked by the Judge would include the following from the witnesses including the victims:
    (a) asking whether they have any concerns about security for themselves or their family in relation to the case and may make orders as may be appropriate.
    (b) asking questions to settle them and to ensure that they are comfortable for the giving of the evidence, including whether they are comfortable with giving evidence, from the "e-court, or in the court with or without the screen as they choose;.
    (c) explaining to the witness the importance of their telling the Judge if they do not understand the questions and that is not shameful to say they do not understand;
    (d) explaining to the witness that it is very important to know if the witness does not understand as the witness may give an unintended answer;
    (e) informing the witness that if they feel tired or need a break they should tell the Female Support Officer.
30. A similar overall procedure should also be followed by the Judge with other witnesses as well as the accused if this is appropriate, with modification as required.

Trial process

31. The trial is to proceed and be completed without any adjournment where possible. Adjournment is only be permitted by the Judge for good reason. In particular, the whole of the evidence of the victim, including examination, cross examination and re-examination, is as far as possible to be conducted on the same day.

32. The Judge is to ensure that all questions asked of the victim are to be done with gender sensitivity and in appropriate language having regard to the victim's age, educational level, cultural background, physical or mental disabilities as well as being asked in an appropriate manner and tone. (Qanun-e-Shadat, Order 1984 (QSO) Arts 146 and 148).
33. In addition the court may also limit questions asked of the victim where that is appropriate and it includes unnecessarily repetitive questions.
34. In accordance with the Guidelines, questions put in cross-examination on behalf of the accused should be given in writing or as the court think fit according to circumstances of the case, the Judge who should put them to the victim or to a vulnerable witness in a language which is clear and not degrading. The Judge may give directions as to the manner in which this is to be undertaken.
35. Additional or modified requirements are to be made for child victims and child witnesses as set out below under the "Child Victim and Child Witness Requirements."

PROTECTION ORDERS

36. When the Judge orders that a summons be issued to the victim or witnesses, the Judge may include a further direction endorsed or attached to the summons form which asks the victim or witness "Do you require any police protection for yourself or family prior to the trial"
37. The process server is to be directed to ask this question of the victim or witness, or in relation to a child, the parent or guardian of the child as appropriate.
38. If the victim indicates "yes" by a signature or mark, the process server is then to arrange that protection requested be provided by the relevant SP cell. The SP Cell without any delay inform to the court of arrangements done.
39. The process server is then to report back to the court on the process, which was followed, and the protection, which was arranged.
40. Any person-receiving summons who is related to the case including victim or witnesses may file an application to the court through their counsel as early as possible for protection.
41. The Judge may at any time make orders to provide specific protection and arrangements in order to give security for the victim/witnesses and or other relevant family or persons. Further the Judge may direct that the SP Cell to arrange for any person related to the case applying for protection.

PROCEDURES WHEN THE VICTIM OR OTHER WITNESSES RESILE FROM PREVIOUS STATEMENTS

42. Having regard to the concerning number of cases involving non-compoundable offences in which on the date of trial, the victim resiles from earlier statements and further where other witnesses also resile from their statements, the Judge may adopt any of the following procedures or a combination of such procedures or another procedure which the Judge considers appropriate to address this issue. Additional or modified requirements are to be made for child victims and child witnesses as set out below under "Child Victim and Child Witness Requirements."

    (a) **Procedure 1.** The Judge may clear the court of all persons (including the accused) leaving only the victim and a court reporter person or alternatively the Judge may bring the victim and a court reporter into chambers. The Judge may then ask questions of the victim as to why she/he has resiled and ascertain whether the victim has been exposed to any pressure and further whether there has been any compromise of the case through family pressure or agreement between the accused and the victim's family. These questions and answers are to be recorded.

        The Judge may thereafter make appropriate orders as to the process of the case and this may include making appropriate protection orders.

    (b) **Procedure 2.** The Judge may adjourn the case until the following day or some other early suitable day, and make appropriate protection orders and arrangements to protect the victim or witness and or other relevant family or persons. On the resumed day the Judge may undertake Procedure 1.

    (c) **Procedure 3.** The Judge may adjourn the case to another day. The Judge may direct that the Assistant Superintendent of Police/Subdivisional Police Officer of Concerned Area, look into the matter including whether the victim and/or other witnesses have been pressured into making a false statements and provide a report on the actions before the court within 7 days, or such further extension as the Judge may order. The Judge may make appropriate protection orders.

    (d) **Procedure 4.** The Judge may instead direct that the trial continue and that the victim and other witnesses be required to give evidence either on that day or another early day with appropriate protection orders. If this Procedure is directed by the Judge, then the following processes would apply:

        (i) The victim and other witnesses who seek to resile are to be informed about in an appropriate sensitive manner of the process which will take place in the court them to give evidence.

        (ii) If the victim or witness is an adult and is declared hostile, the cross examination of the victim by both the prosecutor and the defendant is not required to be in writing in the manner indicated in the Guidelines and Practice Note No. 2 paragraph 33.

(iii) Particular care needs to be taken by the Judge to ensure that the victim is not subjected to undue pressure by the nature and manner of this procedure.

(iv) After all of the relevant evidence in the case is called, the facts and the findings of the Judge will be assessed and based on the totality of the evidence.

PROCEDURES WHERE THE VICTIM DOES NOT ATTEND COURT

43. If the victim does not attend Court on the day set for hearing, the case may be adjourned to another date and a further summons may be issued for her attendance as provided in sections 87 and 88 CrPC.

44. If a further summons is so issued, then the Judge should give directions on the manner in which the victim is to be brought to the court, so as to ensure this is undertaken sensitively.

45. If the victim cannot be found or again does not attend, the prosecution may still proceed with the trial if there appears to be sufficient evidence which can be called to prove the commission of the offence, even without the attendance of the victim, subject to the Judge deciding that the accused should be acquitted pursuant to section 265K CrPC.

CHILD VICTIM AND CHILD WITNESS REQUIREMENTS

Settling the child victim and witness

46. The questions asked to settle the child should be open questions which are short, simple, one topic at a time, using language and expressions which are appropriate to age, educational level, cultural background, physical or mental disabilities of the child.

47. The questions should be limited in number and not connected in any way to the circumstances of the alleged offending.

48. The manner of questioning should be empathetic but not overly friendly and allow the child to respond in their own way.

49. The answers to these questions will assist the judge in understanding the communication capacity of the child and also the ability of the child to know the importance of telling the truth when giving their evidence.

Trial process for child victim and witness

50. In additions to items 31 to 34, best practice indicates that every child should be given a break at least after 45 mins of questioning, or earlier if they appear tired or stressed.

51. It is critical that item 34 is followed and that questions to be asked in cross examination are put in writing first by counsel and then asked by the Judge. Preferably the questions should be open questions which allow the child to respond in their own way.

Resiling of child victim or witness

52. If the victim or witness is a child then the Judge is to discuss the process to be followed with prosecution and defence counsel, in particular in relation to Item 42 Procedure 4 so that questions are still in writing with modifications to ensure that the best interest of the child is taken into account in the questioning process.

COURTS POWER TO ASK QUESTION, CALL WITNESSES ETC.

53. In relation to the cases which come before the court, in particular in relation to cases where there is resiling or where the victim does not attend court, it is important for the court to appropriately utilise its powers given pursuant to Sections 540 CrP.C and 161 QS0

54. Pursuant to Section 540 CrP.C the Judge is empowered to summon any person as a witness, or examine any person in attendance, although not summoned as a witness. The Judge may also recall and re-examine any person already examined, if the evidence of such a witness appears to be essential to the just decision of the case.

55. Pursuant to Article 161 QSO. In order to discover or to obtain proper proof of relevant facts, the Judge may ask any question the Judge pleases, in any form at any time, of any witness, or of the parties about any fact either relevant or irrelevant. In addition the Judge may order the production of any document or thing. Neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross examine any witness upon any answer given in reply to any such question. This is subject to the proviso contained in that section

56. This would include processes of the prosecutor giving up the victim and witnesses and having them declared hostile and then opening the victim and witnesses for cross examination by the Prosecutor and Defence Counsel.

iii. Atif Zareef v. The State (Supreme Court of Pakistan, 4 January 2021)

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Manzoor Ahmad Malik
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Syed Mansoor Ali Shah

Criminal Appeal No.251/2020 & Criminal Petition No.667/2020
(Against the judgment of Lahore High Court, Rawalpindi Bench, dated 09.06.2016, passed in Crl. A. No.393/2013, and Capital Sentence Reference No.14-T/2013 and against the Order dated 09.06.2020 of that Court declining suspension of sentence in Crl. Misc 822/M of 2020.)

Atif Zareef, etc (in both cases)
…Appellants/Petitioners

versus

The State (in both cases)
…Respondent

For the appellants: /petitioners — Sardar Abdul Raziq Khan, ASC. (in both cases)

For the State: — Mirza Abid Majeed, DPG.

Date of hearing and short order: 04.01.2021

JUDGMENT

Syed Mansoor Ali Shah, J.- According to the crime report,[1] 20 year old Saadia Rani ("complainant") while travelling to *Rawalpindi* from *Kotli Sattian* with one Hameed Abbasi (PW-2) on 28.08.2012, was intercepted on the roadway by the appellants and others, taken off-road and raped. After the gruesome act, the complainant, straight from the place of alleged occurrence, went to the police station and reported the matter. She nominated (i) Sajjad Hussain alias Jajji, (ii) Sher Baz Khan alias Sheru, (iii) Atif Zareef and two unknown persons as perpetrators who, all five, allegedly committed rape on her, one after the other. Later (iv) Nafees Ahmed and (v) Waqas Hameed were nominated by her as having committed rape on herin supplementary statement recorded the next day. Her statement under Section 164 of the Code of Criminal Procedure, 1898 ("Cr.P.C") was also recorded by a learned Magistrate on 29.08.2012, wherein she reiterated her version of having been raped by the aforesaid five persons.

[1] FIR No.126/2012, P.S. Kotli Sattian, district Rawalpindi, offence u/s 376(2), PPC.

2. Sajjad Hussain alias Jajji and Waqas Hameed became proclaimed offenders, while Sher Baz Khan alias Sheru, Atif Zareef and Nafees Ahmed ("appellants") were sent up for trial and found guilty of having committed rape on the complainant (PW-1). They were convicted under Section 376(2) of the Pakistan Penal Code, 1860 ("PPC") and sentenced to death with the direction to pay Rs.500,000/- as compensation to the complainant or in default thereof to undergo simple imprisonment for six months by the trial court. The appellants challenged their conviction and sentence in appeal before the High Court, and the trial court also sent the Capital Sentence Reference (CSR) to the High Court for confirmation of the death sentence or otherwise. The appeal and the CSR were heard together by the High Court. Vide the impugned judgment, the High Court maintained the conviction of the appellants, however, reduced their sentence to that of imprisonment for life and extended them benefit of Section 382-B, Cr.P.C. also.

3. We have heard the learned counsel for the parties at length and examined the record of the case minutely with their able assistance. The prosecution evidence produced in the case to prove the charge against the appellants consists of: (i) the testimony of the complainant (PW-1) as to commission of rape on her by the appellants and others; (ii) the testimony of Hameed Abbasi (PW-2) as to taking away the complainant by the appellants and others; (iii) the medical evidence including the medico-legal report (Ex-PA) and the statement of Dr. Shehla Waqar (PW-5), confirming commission of sexual assault on the complainant; (iv) the Chemical Examiner's report (Ex-PR) that reported detection of semen in the vaginal swabs of the complainant; and (v) the DNA test report (Ex-PS) that reported matching of the DNA found in the vaginal swabs of the complainant with that of the appellant Sher Baz Khan alias Sheru and matching of the DNA found in the stained section of the *Shalwar* of the complainant with that of the appellant Atif Zareef.

4. We observe that the complainant while appearing as PW-1 deposed each and every detail of the gruesome act committed on her, and her testimony could not be shaken as to any material part of the occurrence stated by her. The suggestions in cross-examination relating to her alleged immoral character and her alleged illicit relation with Hameed Abbasi (PW-2) were strongly denied by her. In any case, the questions targeting her character had no relevance to the matter on trial, i.e., the commission of rape on her. The complainant being an educated lady, studying in B. Ed. after completing her B.A degree at the

time of this agonizing incident had no reason to falsely implicate the appellants, and that too with a such self-deprecating allegation that would tarnish her honour and dignity. The bald assertion of the appellants, without any supporting evidence, that they had seen her in a compromising position with Hameed Abbasi (PW-2) was even otherwise of little value to discredit the testimony of the complainant, which is found to be trustworthy and confidence inspiring.

5. Hameed Abbasi (PW-2) also deposed how he and the complainant, who were travelling to *Rawalpindi* from *Kotli Sattian,* were interrupted by the appellants and how the complainant was taken away by them on the day of occurrence. His statement, thus, fully corroborates the version of the complainant as to her forcible taking away by the appellants and some other persons. It is true that he admitted in cross-examination that he did not see the appellants committing rape with the complainant. Rape is a crime that is usually committed in private, and there is hardly any witness to provide direct evidence of having seen the commission of crime by the accused person. The courts, therefore, do not insist upon producing direct evidence to corroborate the testimony of the victim if the same is found to be confidence inspiring in the overall particular facts and circumstances of a case, and considers such a testimony of the victim sufficient for conviction of the accused person. A rape victim stands on a higher pedestal than an injured witness, for an injured witness gets the injury on the physical form while the rape victim suffers psychologically and emotionally.[2] In the present case, the testimony of the complainant as to commission of rape on her on the day of occurrence is supported by the medical evidence, i.e., the medico-legal report (Ex-PA) and the statement of Dr. Shehla Waqar (PW-5). The potency test of the said appellants was also positive. The involvement of Sher Baz Khan alias Sheru and Atif Zareef in commission of this offence is corroborated by the DNA test report (Ex-PS), which is considered, due to its scientific accuracy and conclusiveness, as a gold standard to establish the identity of an accused and a very strong corroborative piece of evidence. The prosecution has thus proved its case against the appellants, Sher Baz Khan alias Sheru and Atif Zareef beyond reasonable doubt. We, therefore, uphold their conviction recorded by the trial court and confirmed by the High Court, and also maintain the sentence passed on them by the High Court. The appeal to their extent is dismissed.

[2] See State of U.P. v. Munshi, AIR 2009 SC 370.

6. So far as the case of the appellant Nafees Ahmad is concerned, we find it to be distinguishable from that of the other appellants. He was not nominated by the complainant in the FIR, nor was there any explanation given in the supplementary statement (Ex-DA), wherein he was nominated, as to how the complainant came to know that he was that unknown person who had committed rape on her with other persons. This gap in the prosecution evidence casts a reasonable doubt about his involvement in the occurrence especially when it is appreciated in view of his negative DNA test report. The possibility of mistaken identification of the unknown person, as being Nafees Ahmad, cannot be ruled out. The prosecution thus could not prove its case against the appellant, Nafees Ahmad, beyond reasonable doubt. The rule of giving benefit of doubt to accused person is essentially a rule of caution and prudence, and is deep rooted in our jurisprudence for safe administration of criminal justice. Releasing a guilty by mistake is better than punishing an innocent by mistake. We, therefore, accept this appeal to the extent of appellant Nafees Ahmad, set aside his conviction and sentence, and acquit him of the charge by extending him the benefit of doubt. He shall be released forthwith if not required to be detained in any other case.

7. It is important to observe that, while examining and reappraising the evidence available on record, we have noted that during the cross-examination of prosecution witnesses, particularly the complainant/victim (PW-1), Gul Hameed Abbasi (PW-2) and Muhammad Latif, Investigating Officer (PW-10), the defence tried to build a case that Mst. Sadia Rani, the complainant/victim (PW-1), was a woman of immoral character for having illicit relations with Gul Hameed Abbasi (PW-2), and therefore her testimony was unreliable and untrustworthy. The lady Doctor Shehla Waqar, WMO (PW-5), who medically examined Mst. Sadia Rani (PW-1), the complainant/victim, and issued the MLR (Ex-PA) was also cross examined on these lines. A portion of her cross examination is relevant and being reproduced:

> "It is correct that there is nowhere mentioned in Ex-PA that hymen was freshly ruptured or old ruptured. It is correct that in Ex-PA there is nowhere mentioned whether the vagina was admitting one finger or two fingers. It is correct that by doing this it can be assessed that whether the victim was virgin or habitual."

In this background of the case, we find it important to examine whether recording sexual history of the victim by carrying out "two-finger test" (TFT) or the "virginity test" has any scientific justification or evidentiary relevance to determine the commission of the sexual assault of rape,

and whether the myth that "unchaste", "impure" or "immoral" women are more likely to consent to sexual intercourse and are not worthy of reliance have any legal basis. This further begs the questions whether "sexual history", "sexual character" or the very "sexuality" of a rape survivor can be used to paint her as sexually active and unchaste and use this to discredit her credibility; and whether her promiscuous background can be made basis to assume that she must have consented to the act. These important questions require to be examined in the light of our Constitution, the law and modern forensic science as it stands today.

Modern forensic science - sexual history and virginity testing

8. Lynn Enright in her book "Vagina - a Re-education"[3] writes that we are taught from an early age that the hymen is associated with female purity. It is imagined as a sheath protecting the opening of the vagina. But this is false. The hymen has no biological function, it has been made into a symbol of virginity around the world. These inaccuracies are largely rooted in misogyny. Medical jurisprudence textbooks had previously prescribed certain tests of medical evaluation to determine prior virginity of an alleged rape victim, *viz,* assessment of the elasticity of her vaginal orifice by insertion of two fingers in her vagina and examination of the state of her genitals particularly the hymen. These textbooks had a significant impact on the adjudication of rape cases in the British India, as well as, in Pakistan and India post-independence.[4]Our National Commission on the Status of Women (NCSW) has reported[5] that crime of rape is viewed in the patriarchal context of sexual conduct of the survivor. Rape is also seen as a crime of lust and passion rather than a crime of control. Since then, much water has flown under the bridge, and today modern forensic science shuns the virginity test as being totally irrelevant to the sexual assault. The latest edition of the *Modi*'s *Textbook of Medical Jurisprudence and Toxicology*[6]states: "The pre-occupation of the medical community was to examine the hymenal status of the victim and determination of vaginal laxity to give opinion on past sexual history. It is time to get past the assessment of virginity and focus attention on appropriate medical care and psychological counseling. It will be illegal, irrelevant and wholly inappropriate to record a finding whether the

[3] Allen & Unwin, 2019
[4] See Kolsky, Elizabeth, "The Body Evidencing the Crime: Rape on Trial in Colonial India 1860- 1947" (2010); DurbaMitra and Mrinal Satish, "Testing Chastity, Evidencing Rape: Impact of Medical Jurisprudence on Rape Adjudication in India" (2014).
[5]Sohail Akbar Warraich, "Access to Justice for Survivors of Sexual Assault" – A pilot study by National Commission on the Status of Women (NCSW), Government of Pakistan. 2017
[6] 26th Edition. Lexis Nexis publications.

victim was sexually active or not prior to and after the incident." The latest scientific research studies dispute accuracy of such virginity tests and opinions.[7]The World Health Organization (WHO), the Office of the High Commissioner of the United Nations and the United Nations Entity for Gender Equality and the Empowerment of Women have stated in "*Eliminating Virginity Testing: An Interagency Statement*"[8] that "virginity testing, also referred to as hymen, two-finger or pre vaginal examination...has no scientific merit or clinical indication" and "the appearance of a hymen is [also] not a reliable indication of intercourse and there is no known examination that can prove a history of vaginal intercourse." They have clarified that "like all human tissues, vaginal and hymnal tissue can be injured during trauma...[T]he purpose of the examination for sexual assault is to evaluate for and treat injuries...not to assess virginity status."

9. Modern forensic science thus shows that the two finger test must not be conducted for establishing rape-sexual violence, and the size of the vaginal introitus[9] has no bearing on a case of sexual violence. The status of hymen is also irrelevant because hymen can be torn due to several reasons such as cycling, riding among other things. An intact hymen does not rule out sexual violence and a torn hymen does not prove previous sexual intercourse. Hymen must therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual violence. Only those findings that are relevant to the episode of sexual assault, i.e., findings such as fresh tears, bleeding, oedema, etc., are to be documented. "Rape is a crime and not a medical diagnosis to be made by the medical officer treating the victim...[T]he only statement that can be made by the medical officer is whether there is evidence of recent sexual activity and about injuries noticed in and around the private parts. The duty of the medical officer extends principally to provide adequate healthcare and comfort to the victim and secondarily to assist the prosecution with appropriate medical evidence."[10]The medical officers instead of burdening themselves with reporting about the sexual history of the

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[7] See Eliminating virginity testing: an interagency statement, World Health Organization (2018); Strengthening the medico-legal response to sexual violence, WHO and UNODC (2015); Statement on Virginity Testing, Independent Forensic Expert Group (2015); Jim Anderst and N. Kellogg, I. Jung: "Reports of Repetitive Penile-Genital Penetration Often Have No Definitive Evidence of Penetration" (2009).

[8] A joint interagency statement released in 2018 for eliminating virginity tests in rape cases titled "Eliminating Virginity Testing: An Interagency Statement"

[9]The Latin word "introitus" comes from "intro", into, within + "ire", to go = to go into. In anatomy, an introitus is thus an entrance, one that goes into a canal or hollow organ such as the vagina. The vagina is a muscular canal extending from the cervix to the outside of the body.

[10]Modi's Textbook of Medical Jurisprudence and Toxicology, 26th Edition. LexisNexis publications. P.766.

victim must ensure, according to *Modi*'s *Textbook of Medical Jurisprudence and Toxicology*,[11]in a case of sexual offence of rape to examine the external genital area for evidence of injury, seminal stains and stray pubic hair.

10. Due to a combination of lack of training, inexperience the medico-legal certificate's (MLC) casually report the two finger test, to show that the vagina can admit phallus-like fingers to conclude that the survivor was sexually active at the time of the assault or a 'virgin" as perceived by the society. Neither of these tests have any basis in medical science. Medical language of MLC is riddled with gender biases and immediately calls into question the character of the rape survivor. It is used to support the assumption that a sexually active woman would easily consent for sexual activity with anyone. The World Health Organization (WHO), the Office of the High Commissioner of the United Nations and the United Nations Entity for Gender Equality and the Empowerment of Women in *"Eliminating Virginity Testing: An Interagency Statement"* proclaim, "the practice is a violation of the victim's human rights and is associated with both immediate and long-term consequences that are detrimental to her physical, psychological and social well-being." In view of this firm and reliable Interagency Statement, examination of a rape victim by the medical practitioners and use of the medical evidence collected in such examination by the courts should be made only to determine the question whether or not the alleged victim was subjected to rape, and not to determine her virginity or chastity.

Constitutionality of "sexual history"

11. Dragging sexual history of the rape survivor into the case by making observations about her body including observations like "the vagina admits two fingers easily" or "old ruptured hymen" is an affront to the reputation and honour of the rape survivor and violates Article 4(2)(a) of the Constitution, which mandates that no action detrimental to the body and reputation of person shall be taken except in accordance with law. Similarly Article 14 of our Constitution mandates that dignity shall be inviolable, therefore, reporting sexual history of a rape survivor amounts to discrediting her independence, identity, autonomy and free choice thereby degrading her human worth and offending her right to dignity guaranteed under Article 14 of the Constitution which Right to dignity under Article 14 of the Constitution is an absolute right and not subject to law. Dignity means *human*

[11] 26th Edition. LexisNexis publications. P 797.

worth: simply put, every person matters. No life is dispensable, disposable or demeanable. Every person has the right to live, and the right to live means right to live with dignity. A person should live as "person" and no less.[12] Human dignity hovers over our laws like a guardian angel; it underlies every norm of a just legal system and provides an ultimate justification for every legal rule.[13] Therefore, right to dignity is the crown of fundamental rights under our Constitution and stands at the top, drawing its strength from all the fundamental rights under our Constitution and yet standing alone and tall, making *human worth* and *humanness* of a person a far more fundamental a right than the others, a right that is absolutely non-negotiable.

12. A woman, whatever her sexual character or reputation may be, is entitled to equal protection of law. No one has the license to invade her person or violate her privacy on the ground of her alleged immoral character. Even if the victim of rape is accustomed to sexual intercourse, it is not determinative in a rape case; the real fact-in-issue is whether or not the accused committed rape on her. If the victim had lost her virginity earlier, it does not give to anyone the right to rape her.[14] In a criminal trial relating to rape, it is the accused who is on trial and not the victim. The courts should also discontinue the use of painfully intrusive and inappropriate expressions, like "habituated to sex", "woman of easy virtue", "woman of loose moral character", and "non-virgin", for the alleged rape victims even if they find that the charge of rape is not proved against the accused. Such expressions are unconstitutional and illegal.

13. It appears that the courts had been allowing opinion evidence of the medical experts as to the said tests to be brought on record in cases of rape in view of the provisions of Article 151(4) of the Qanun-e-Shahadat Order, 1984 ("QSO") [Section 155(4) of the erstwhile Evidence Act, 1872] which provided that "when a man is prosecuted for rape or an attempt to ravish, it may be shown that the victim was of generally immoral character to impeach her credibility." This has now become inadmissible in evidence after the omission of Article 151(4) of the QSO by the Criminal Law Amendment (Offences Relating to Rape) Act, 2016. Earlier, a Full Bench of the Federal Shariat Court of Pakistan had also declared the provisions of Article 151(4) of the QSO to be

[12] Erin Daly and James R May. Dignity Law: Global Recognition, Cases and Perspectives. 2020
[13] Denise G. Reaume, Indignities: Making a Place for Human Dignity in Modern Legal Thought, 28 Queen's L.J. 62 (2002)
[14] See Shakeel v. State, PLD 2010 SC 47; Shahzad v. State, 2002 SCMR 1009; State of U.P. v. Munshi, AIR 2009 SC 370.

repugnant to the Injunctions of Islam, in *Mukhtar Ahmad v. Govt. of Pakistan.*[15]

14. While the omission of Article 151(4) of the QSO implies prohibition on putting questions to a rape victim in cross-examination, and leading any other evidence, about her alleged "general immoral character" for the purpose of impeaching her credibility. Section 12(3) of the Punjab Witness Protection Act, 2018 has specifically provided that "the court shall forbid a question to the victim of a sexual offence relating to any sexual behavior of the victim on any previous occasion with the accused or any other person, unless such a question, in the opinion of the court, is a relevant fact in the case". Therefore, evidence relating to sexual history should not be admitted in order to draw inferences supporting the 'twin myths', namely, that by reason of that sexual history, it is more likely that the complainant may have consented or become less worthy of belief.

15. Omission of Article 151(4) of the QSO by the Legislature leaves no doubt in discovering and ascertaining the intention of the Legislature that in a rape case the accused cannot be allowed to question the complainant about her alleged "general immoral character. Declaration of the Federal Shariat Court of Pakistan as to the provisions of Article 151(4) of the QSO, since omitted, also bars such questions. However, it may be important to underline that the omission of Article 151(4) of the QSO implies prohibition on questions put in cross-examination or the defence evidence led as to the reputation of the complainant to show her as of "generally immoral character", and not on the questions put or defence evidence led to prove that some other person, and not the accused, is perpetrator and source of semen or injury found on the body of the complainant; nor does that omission completely shun the admissibility of questions in cross-examination or defence evidence, on the previous sexual relation of the complainant with the accused when the accused takes the defence, and intends to prove, that the complainant consented to the sexual activity that is an issue in the case. Section 12(3) of the Punjab Witness Protection Act, 2018 codifies this position when it obligates the court to forbid a question to the victim of a sexual offence relating to any sexual behavior of the victim on any previous occasion with the accused or any other person, but also empowers the court to allow such a question if, in the court's opinion, it is a relevant fact in the case. To the same effect are the provisions of Article 146 of the QSO, under which the court may

[15] PLD 2009 FSC 65.

forbid such questions if it finds that they are 'indecent' or 'scandalous', but can allow them if they relate to facts-in-issue or to matters necessary to be known in order to determine whether or not the facts-in-issue existed. However, while allowing or disallowing such questions the court must be conscious of the possibility that the accused may have been falsely involved in the case, and should balance the right of the accused to make a full defence and the potential prejudice to the complainant's rights to dignity and privacy, to keep the scales of justice even for both.[16]

16. Foregoing are the reasons for our short order dated 04.1.2021, whereby Criminal Appeal No.251/2020 was partly allowed in the above terms. For ease of reference and completion of record, the said short order is reproduced hereunder:-

> "For reasons to be recorded later, the instant criminal appeal is allowed to the extent of appellant No.3 Nafees Ahmad s/o Muhammad Ashraf and his conviction and sentence is set aside. He is acquitted of the charge framed against him. He is behind the bars and is ordered to be released forthwith, if not required to be detained in any other case. The instant criminal appeal, however, is dismissed to the extent of appellant No.1 Atif Zareef and appellant No.2 Sher Baz Khan @ Sheru."

Criminal Petition No.667/2020:

17. Through this petition, the appellants have sought suspension of their sentences. Since the main appeal has been decided, this petition has become infructuous and is accordingly dismissed and leave refused.

Direction to I.G., Punjab Police

18. Before parting with the judgment, we consider it just and proper to highlight that two accused persons, Sajjad Hussain alias Jajji and Waqas Hameed (proclaimed offenders), allegedly involved in this case are still at large despite lapse of a period of about 8 years since the incident. It appears that the case file has been dumped under the dust of time. We, therefore, direct the office to send a copy of this judgment to the Inspector General of Police, Punjab who shall personally supervise the efforts of the District Police, Rawalpindi in bringing the proclaimed offenders to justice, in accordance with the law. The Inspector General of Police, Punjab shall submit the progress report in this regard within one month from the date of receipt of copy of this

[16] See Section 276(1) of the Canadian Criminal Code that contains guiding principles in this regard.

judgment, which shall be placed before us in Chambers for our perusal.

Judge

Judge

Judge

Islamabad,
04th January, 2021.
Approved for reporting.
<صداقت>

iv. Haseen Ullah v. Mst. Naheed Begum, et al. (Supreme Court of Pakistan, 23 November 2021)

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Umar Ata Bandial
Mr. Justice Sajjad Ali Shah
Mr. Justice Syed Mansoor Ali Shah

Civil Petition No.1289 of 2020.
(Against the orders of Peshawar High Court, Peshawar dated 09.03.2020 passed in W.P. No.3215-P of 2018)

Haseen Ullah

……. Petitioner

Versus

Mst. Naheed Begum, etc

…….Respondent(s)

For the petitioner: Mr. Attaullah Khan Tangi, ASC.

Respondent(s): N.R.

Date of hearing: 23.11.2021

JUDGMENT

Syed Mansoor Ali Shah, J.- "This is a male-dominated society; men since ages have always been more concerned about their rights by using religion for their own convenience, especially in matrimonial matters, but forget religion when it comes to their duty and obligation towards their women"[1], this seems to hold true in the present case. This case where a husband disputes the payment of maintenance and dower to his wife, provides an occasion to underline the principles, duties and obligations of a husband towards his wife under the Islamic law with regard to maintenance and dower.

2. The respondent, Naheed Begum, instituted a suit, in the Family Court, Tangi Charsadda, for recovery of her *dower* i.e.,1-Jarab[2] of agriculture land (mentioned in column No. 16 of her Nikahnama) and *maintenance* for herself and her five minor children (three daughters and two sons) against the petitioner, her husband, who had contracted a second marriage and was living with his second wife. The Family Court decreed the suit to the extent of her claim for maintenance of her minor children, but rejected her claims

[1] Sabiha Hussain, Unfolding the reality of Islamic rights of women: Mahr and maintenance rights, Pakistan Journal of Women Studies: Alam-e-Niswan 20, No. 2 (2013).
[2] Equals to 4-Kanal

for recovery of her dower and maintenance. The District Court dismissed her appeal, maintaining the judgment of the Family Court. She then invoked the constitutional jurisdiction of the Peshawar High Court, under Article 199 of the Constitution of Pakistan, for redress of her grievance against the judgments of the Courts below. The High Court allowed her constitution petition, reversed the judgments of the Courts below, and decreed her claims of dower and maintenance, vide its judgment dated 09.03.2020. It is against this judgment of the High Court that the petitioner, Haseen Ullah, has filed the present petition for leave to appeal.

3. We have heard the learned counsel for the petitioner in detail and with his able assistance, perused the record of the case minutely.

4. The High Court and the Courts below have differed on interpreting the entries of columns No.13 to 16 of the *Nikahnama* of the parties, which are reproduced hereunder for ready reference:

(1)سات تولہ سونے کی زیورات قیمت ایک لاکھ ساٹھ ہزار روپیہ	مہر کی رقم	۱۳
	رکی کتنی رقم معجّل ہے اور کتنی موجل	۱۴
تقریباً	آیا مہر کا کچھ حصہ شادی کے موقع پر ادا کیا گیا اگر کیا گیا تو کس قدر	۱۵
(2)ایک جرب اراضی بمقام کشمیر آباد نزد خادی کلے۔	آیا پورے مہر یا اس کے کسی حصہ کے عوض میں کوئی جائیداد دینی ہے کہ دی گئی ہے تو اس جائیداد کی صراحت اور اس کی قیمت جو فریقین کے مابین طے پائی ہے۔	۱۶

English translation:

13	**Amount of dower:**	(1) 7-tola gold ornaments valuing Rs.1,60,000/-
14	**How much of the dower is *mu'ajjal* (prompt) and how much is *ghair mu'ajjal* (deferred):**	[blank]
15	**Whether any portion of the dower was paid at the time of marriage, If so, how much:**	Almost [all]
16	**Whether any property was given in lieu of the whole or any portion of the dower, if so, its specification and price agreed to between the parties:**	(2) 1-Jarab land in Kashmirabad near Khadi Kalay

The Family Court observed that the dower mentioned in column No.16 of the *Nikahnama* was payable only if the dower specified in

column No.13 had not been paid, and as the respondent admitted to have received the dower of seven tola gold ornaments specified in column No.13, she was not entitled to claim the dower mentioned in column No.16 of the *Nikahnama*. The District Court, in appeal, endorsed this finding with the observation that four Kanal agriculture land mentioned in column No.16 was to be given only in lieu of seven tola gold ornaments specified as dower in column No.13 of the *Nikahnama*, which the respondent had admittedly received. The High Court has held that the facts and circumstances of the case clearly show that the dower mentioned in column No.16 was in addition to, not in lieu of, the one specified in column No.13 of the Nikahnama.

5. We find that the Family Court and District Court have acted on what the heading of column 16 *prima facie* suggest, i.e., the mentioning of any property that is given "in lieu of the whole or any portion of the dower", without ascertaining the intent of the parties. This approach of the said Courts is not in consonance with the settled principles of construction of contracts. Needless to say that *Nikahnama* is a deed of marriage-contract entered into between the parties, husband and wife, and the contents of its clauses/columns, like clauses of other contracts, are to be construed and interpreted in the light of intention of parties.[3] The High Court has rightly ascertained the intent of the parties for mentioning four Kanal agriculture land in column No.16 of the *Nikahnama*, irrespective of its placement in a particular column. It is a matter of common knowledge that the persons who solemnize Nikah or the Nikah Registrars are mostly laymen, not well-versed of legal complications that may arise from mentioning certain terms agreed to between the parties in any particular column of the *Nikahnama.* Therefore, it becomes the foremost duty of courts dealing with disputes arising out of the terms entered in the *Nikahnama,* to ascertain the true intent of the parties and give effect thereto accordingly, and not be limited and restricted by the form of the heading of the particular columns wherein those terms are mentioned.

6. We, on our own independent appraisal of the facts and circumstances of the case, agree with the finding of the High Court,

[3] Abdul Haq v. WAPDA 1991 SCMR 1436; HBFC v. Shahinshah Humayun 1992 SCMR 19; Sandoz Limited v. Federation 1995 SCMR 1431

which is not only supported by the contents of the compromise deed dated 18.12.2012 executed by both the petitioner and the respondent, but also by the contents of the entries of columns No. 13 and 16 of the Nikahnama. The figures (1) and (2) mentioned in columns No.13 and 16 respectively leave little room to guess what the true intention of the parties was; they clearly show that both (1) seven tola gold ornaments mentioned as dower in column No.13 and (2) four Kanal agriculture land mentioned in column No.16 were the dower. The figures (1) and (2) need not be mentioned if only one of them was to be payable as dower. Further, seven tola gold ornaments and four Kanal agriculture land have no parity of value to be agreed as an alternate of each other. Therefore, the finding of the High Court on the issue of dower is perfectly correct and is in consonance with the principles of law enunciated by this Court in the cases of *Asma Ali*[4] and *Yasmeen Bibi.*[5]

7. As for the claim of the respondent for her maintenance, the Family Court and the District Court held that since the respondent is not residing with the petitioner she is not entitled to maintenance. The High Court has overturned these findings and held the respondent entitled to receive maintenance from the petitioner, while observing that the respondent showed her willingness to go with the petitioner during hearing the petition, but the petitioner, who had contracted second marriage, flatly refused to take her to his house. We find nothing wrong in the decision of the High Court. A wife who is willing to, but cannot, discharge her marital obligations for no fault of her own, rather is prevented to do so by any act or omission of her husband is legally entitled to receive her due maintenance from her husband, and the latter cannot benefit from his own wrong.

8. As per Section 2 of the West Pakistan Muslim Personal Law (*Shariat)* Application Act 1962, the questions regarding dower are to be decided, subject to the provisions of any enactment for the time being in force, in accordance with Muslim Personal Law *(Shariat)* in cases where the parties are Muslims. It hardly needs reiterating that the Holy Quran and the Sunnah of the Prophet of Islam (pbuh)

[4] Asma Ali v. Masood Sajjad PLD 2011 SC 221.
[5] Yasmeen Bibi v. Ghazanfar Khan P L D 2016 SC 613.

are the primary sources of Muslim Personal Law *(Shariat)* in Islam. The payment of dower *(mahr)* at the time of marriage was a customary practice in Arabia before the advent of Islam, but it was paid to the guardians of the bride, such as, her father or other male relative, as bride-price and the bride herself did not receive a penny of it. This practice of paying dower as bride-price to the male guardians of the bride was reformed by the Islam through the *Quranic* commands[6] of paying dower as the bride-wealth to the bride herself, who becomes the sole owner of it. The Holy Quran also forbids the Believers to take back anything from their wives out of the paid dower even it be a great sum.[7] In Islam, the payment of dower to bride at marriage is an obligation that is imposed by the God Almighty, and is thus an intrinsic and integral part of a Muslim marriage. It is considered an obligatory bridal gift offered by the bridegroom to the bride graciously as a manifestation of his love and respect for her. Some Muslim men compliment the obligatory bridal gift, dower, with other gifts and presents as per their financial capacity.[8]

9. Under the Islamic law a wife's right to be maintained by her husband is absolute so long as she remains faithful to him and discharges, or is willing to discharge, her own matrimonial obligations. A Muslim husband is bound to maintain his wife even if no term in this regard is agreed to between them at the time of marriage or she can maintain herself out of her own resources[9]. The Holy Quran[10] enunciates that men are the protectors and maintainers of women because the God Almighty has given the one more strength than the other and because they support them from their money. And the Holy Prophet of Islam (pbuh) has instructed Muslim men to provide their wives with maintenance in a fitting manner[11] and declared it to be the right of the women[12].

[6] Al-Quran, Chapter 4 verses 4, 24, 25, Chapter 5 verse 5, Chapter 33 verse 50, Chapter 60 verse 10.
[7] Al-Quran, Chapter 2, verse 229 and Chapter 4 verse 20.
[8] Tirkey, S., A critical analysis of dower (mahr) in theory and practice in British India through court records from 1800 to 1939 [Master's Thesis, the American University in Cairo]. AUC Knowledge Fountain (2020).
[9] Azizah Mohd, et al., Muslim Wifes Rights To Maintenance: Husbands Duty To Maintain A Working Wife In Islamic Law (2010) 18 IIUMLJ 103.
[10] Al-Quran, Chapter 4 verses 34.
[11] Imam Muslim, Sahih Muslim, Translation by Abdal Hamid Saddiqi, Kitab al-Haj, Vol. II, pp. 615-616.
[12] Al-Mubarakpuri, Tuhfat al-Ahwadhi bi Sharh Jamia Altarmidhi, Second Edition, Vol. 4, Maktabat al-Salafiyyah, Medina (1965), p. 326.

10. We note that the petitioner, instead of paying the maintenance and giving the dower to the respondent willingly and graciously, has been evading his legal as well as moral obligation on one and the other pretext, as he first totally denied to have agreed to, and mentioning in Nikahnama, the term of giving four Kanal agriculture land as dower to the respondent, in his written statement, and later started opposing it with the argument that it was an alternate to be given only if seven tola gold ornaments mentioned in column No.13 had not been paid. It is regrettable that the petitioner, an educated person who belongs to the noble profession of teaching, does not realize his obligation to pay the dower agreed upon by him at the time of marriage with the respondent, not only under the law of the land but also under the commandments of the God Almighty given in the Holy Quran to persons who proclaim to be Muslim. He has by his such conduct forced his wife to fight for her right to receive her maintenance and dower in four courts, from the Family Court to the Supreme Court. His such conduct is highly deplorable.

11. For the above reasons, we find the present petition baseless and vexatious and therefore dismiss it with costs throughout.

Judge

Judge

Islamabad,
23rd November, 2021.
Approved for reporting
Sadaqat

Judge

H. Philippines

i. Republic Act No. 9262 (Anti-Violence against Women and Their Children Act of 2004)

S. No. 2723
H. Nos. 5516 and 6054

Republic of the Philippines
Congress of the Philippines
Metro Manila

Twelfth Congress
Third Regular Session

Begun and held in Metro Manila, on Monday, the twenty-eighth day of July, two thousand three.

[REPUBLIC ACT NO. 9262]

AN ACT DEFINING VIOLENCE AGAINST WOMEN AND THEIR CHILDREN, PROVIDING FOR PROTECTIVE MEASURES FOR VICTIMS, PRESCRIBING PENALTIES THEREFOR, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

SECTION 1. *Short Title.* - This Act shall be known as the "Anti-Violence Against Women and Their Children Act of 2004".

SEC. 2. *Declaration of Policy.* - It is hereby declared that the State values the dignity of women and children and guarantees full respect for human rights. The State also recognizes the need to protect the family and its members particularly women and children, from violence and threats to their personal safety and security.

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Towards this end, the State shall exert efforts to address violence committed against women and children in keeping with the fundamental freedoms guaranteed under the Constitution and the provisions of the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child and other international human rights instruments of which the Philippines is a party.

SEC. 3. *Definition of Terms.* - As used in this Act, (a) *"Violence against women and their children"* refers to any act or a series of acts committed by any person against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate, within or without the family abode, which result in or is likely to result in physical, sexual, psychological harm or suffering, or economic abuse including threats of such acts, battery, assault, coercion, harassment or arbitrary deprivation of liberty. It includes, but is not limited to, the following acts:

A. *"Physical violence"* refers to acts that include bodily or physical harm;

B. *"Sexual violence"* refers to an act which is sexual in nature, committed against a woman or her child. It includes, but is not limited to:

a) rape, sexual harassment, acts of lasciviousness, treating a woman or her child as a sex object, making demeaning and sexually suggestive remarks, physically attacking the sexual parts of the victim's body, forcing her/him to watch obscene publications and indecent shows or forcing the woman or her child to do indecent acts and/or make films thereof, forcing the wife and mistress/lover to live in the conjugal home or sleep together in the same room with the abuser;

b) acts causing or attempting to cause the victim to engage in any sexual activity by force, threat of force, physical or other harm or threat of physical or other harm or coercion;

c) Prostituting the woman or her child.

C. *"Psychological violence"* refers to acts or omissions causing or likely to cause mental or emotional suffering of the victim such as but not limited to intimidation, harassment, stalking, damage to property, public ridicule or humiliation, repeated verbal abuse and marital infidelity. It includes causing or allowing the victim to witness the physical, sexual or

psychological abuse of a member of the family to which the victim belongs, or to witness pornography in any form or to witness abusive injury to pets or to unlawful or unwanted deprivation of the right to custody and/or visitation of common children.

D. *"Economic abuse"* refers to acts that make or attempt to make a woman financially dependent which includes, but is not limited to the following:

1. withdrawal of financial support or preventing the victim from engaging in any legitimate profession, occupation, business or activity, except in cases wherein the other spouse/partner objects on valid, serious and moral grounds as defined in Article 73 of the Family Code;

2. deprivation or threat of deprivation of financial resources and the right to the use and enjoyment of the conjugal, community or property owned in common;

3. destroying household property;

4. controlling the victim's own money or properties or solely controlling the conjugal money or properties.

(b) *"Battery"* refers to an act of inflicting physical harm upon the woman or her child resulting to physical and psychological or emotional distress.

(c) *"Battered Woman Syndrome"* refers to a scientifically defined pattern of psychological and behavioral symptoms found in women living in battering relationships as a result of cumulative abuse.

(d) *"Stalking"* refers to an intentional act committed by a person who, knowingly and without lawful justification follows the woman or her child or places the woman or her child under surveillance directly or indirectly or a combination thereof.

(e) *"Dating relationship"* refers to a situation wherein the parties live as husband and wife without the benefit of marriage or are romantically involved over time and on a continuing basis during the course of the relationship. A casual acquaintance or ordinary socialization between two individuals in a business or social context is not a dating relationship.

(f) *"Sexual relations"* refers to a single sexual act which may or may not result in the bearing of a common child.

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(g) *"Safe Place or Shelter"* refers to any home or institution maintained or managed by the Department of Social Welfare and Development (DSWD) or by any other agency or voluntary organization accredited by the DSWD for the purposes of this Act or any other suitable place the resident of which is willing temporarily to receive the victim.

(h) *"Children"* refer to those below eighteen (18) years of age or older but are incapable of taking care of themselves as defined under Republic Act No. 7610. As used in this Act, it includes the biological children of the victim and other children under her care.

SEC. 4. *Construction*. - This Act shall be liberally construed to promote the protection and safety of victims of violence against women and their children.

SEC. 5. *Acts of Violence Against Women and Their Children*. - The crime of violence against women and their children is committed through any of the following acts:

(a) Causing physical harm to the woman or her child;

(b) Threatening to cause the woman or her child physical harm;

(c) Attempting to cause the woman or her child physical harm;

(d) Placing the woman or her child in fear of imminent physical harm;

(e) Attempting to compel or compelling the woman or her child to engage in conduct which the woman or her child has the right to desist from or to desist from conduct which the woman or her child has the right to engage in, or attempting to restrict or restricting the woman's or her child's freedom of movement or conduct by force or threat of force, physical or other harm or threat of physical or other harm, or intimidation directed against the woman or her child. This shall include, but not limited to, the following acts committed with the purpose or effect of controlling or restricting the woman's or her child's movement or conduct:

(1) Threatening to deprive or actually depriving the woman or her child of custody or access to her/his family;

(2) Depriving or threatening to deprive the woman or her children of financial support legally due her or her family, or deliberately providing the woman's children insufficient financial support;

(3) Depriving or threatening to deprive the woman or her child of a legal right;

(4) Preventing the woman in engaging in any legitimate profession, occupation, business or activity, or controlling the victim's own money or properties, or solely controlling the conjugal or common money, or properties;

(f) Inflicting or threatening to inflict physical harm on oneself for the purpose of controlling her actions or decisions;

(g) Causing or attempting to cause the woman or her child to engage in any sexual activity which does not constitute rape, by force or threat of force, physical harm, or through intimidation directed against the woman or her child or her/his immediate family;

(h) Engaging in purposeful, knowing, or reckless conduct, personally or through another, that alarms or causes substantial emotional or psychological distress to the woman or her child. This shall include, but not be limited to, the following acts:

(1) Stalking or following the woman or her child in public or private places;

(2) Peering in the window or lingering outside the residence of the woman or her child;

(3) Entering or remaining in the dwelling or on the property of the woman or her child against her/his will;

(4) Destroying the property and personal belongings or inflicting harm to animals or pets of the woman or her child; and

(5) Engaging in any form of harassment or violence;

(i) Causing mental or emotional anguish, public ridicule or humiliation to the woman or her child, including, but not limited to, repeated verbal and emotional abuse, and denial of financial support or custody of minor children or denial of access to the woman's child/ children.

SEC. 6. *Penalties.* - The crime of violence against women and their children, under Section 5 hereof shall be punished according to the following rules:

(a) Acts falling under Section 5(a) constituting attempted, frustrated or consummated parricide or murder or homicide shall be punished in accordance with the provisions of the Revised Penal Code.

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If these acts resulted in mutilation, it shall be punishable in accordance with the Revised Penal Code; those constituting serious physical injuries shall have the penalty of *prision mayor*; those constituting less serious physical injuries shall be punished by *prision correccional*; and those constituting slight physical injuries shall be punished by *arresto mayor*.

Acts falling under Section 5(b) shall be punished by imprisonment of two (2) degrees lower than the prescribed penalty for the consummated crime as specified in the preceding paragraph but shall in no case be lower than *arresto mayor*.

(b) Acts falling under Section 5(c) and 5(d) shall be punished by *arresto mayor*;

(c) Acts falling under Section 5(e) shall be punished by *prision correccional*;

(d) Acts falling under Section 5(f) shall be punished by *arresto mayor*;

(e) Acts falling under Section 5(g) shall be punished by *prision mayor*;

(f) Acts falling under Section 5(h) and Section 5(i) shall be punished by *prision mayor*.

If the acts are committed while the woman or child is pregnant or committed in the presence of her child, the penalty to be applied shall be the maximum period of penalty prescribed in this section.

In addition to imprisonment, the perpetrator shall (a) pay a fine in the amount of not less than One hundred thousand pesos (P100,000.00) but not more than Three hundred thousand pesos (P300,000.00); (b) undergo mandatory psychological counseling or psychiatric treatment and shall report compliance to the court.

SEC. 7. *Venue*. - The Regional Trial Court designated as a Family Court shall have original and exclusive jurisdiction over cases of violence against women and their children under this law. In the absence of such court in the place where the offense was committed, the case shall be filed in the Regional Trial Court where the crime or any of its elements was committed at the option of the complainant.

SEC. 8. *Protection Orders*. - A protection order is an order issued under this Act for the purpose of preventing further acts of violence against a woman or her child specified in Section 5 of this Act and granting other necessary relief. The relief granted under a protection

order should serve the purpose of safeguarding the victim from further harm, minimizing any disruption in the victim's daily life, and facilitating the opportunity and ability of the victim to independently regain control over her life. The provisions of the protection order shall be enforced by law enforcement agencies. The protection orders that may be issued under this Act are the barangay protection order (BPO), temporary protection order (TPO) and permanent protection order (PPO). The protection orders that may be issued under this Act shall include any, some or all of the following reliefs:

(a) Prohibition of the respondent from threatening to commit or committing, personally or through another, any of the acts mentioned in Section 5 of this Act;

(b) Prohibition of the respondent from harassing, annoying, telephoning, contacting or otherwise communicating with the petitioner, directly or indirectly;

(c) Removal and exclusion of the respondent from the residence of the petitioner, regardless of ownership of the residence, either temporarily for the purpose of protecting the petitioner, or permanently where no property rights are violated, and, if respondent must remove personal effects from the residence, the court shall direct a law enforcement agent to accompany the respondent to the residence, remain there until respondent has gathered his things and escort respondent from the residence;

(d) Directing the respondent to stay away from petitioner and any designated family or household member at a distance specified by the court, and to stay away from the residence, school, place of employment, or any specified place frequented by the petitioner and any designated family or household member;

(e) Directing lawful possession and use by petitioner of an automobile and other essential personal effects, regardless of ownership, and directing the appropriate law enforcement officer to accompany the petitioner to the residence of the parties to ensure that the petitioner is safely restored to the possession of the automobile and other essential personal effects, or to supervise the petitioner's or respondent's removal of personal belongings;

(f) Granting a temporary or permanent custody of a child/children to the petitioner;

(g) Directing the respondent to provide support to the woman and/or her child if entitled to legal support. Notwithstanding other laws to the contrary, the court shall order an appropriate percentage of the income or salary of the respondent to be withheld regularly by

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the respondent's employer and for the same to be automatically remitted directly to the woman. Failure to remit and/or withhold or any delay in the remittance of support to the woman and/or her child without justifiable cause shall render the respondent or his employer liable for indirect contempt of court;

(h) Prohibition of the respondent from any use or possession of any firearm or deadly weapon and order him to surrender the same to the court for appropriate disposition by the court, including revocation of license and disqualification to apply for any license to use or possess a firearm. If the offender is a law enforcement agent, the court shall order the offender to surrender his firearm and shall direct the appropriate authority to investigate on the offender and take appropriate action on the matter;

(i) Restitution for actual damages caused by the violence inflicted, including, but not limited to, property damage, medical expenses, childcare expenses and loss of income;

(j) Directing the DSWD or any appropriate agency to provide petitioner temporary shelter and other social services that the petitioner may need; and

(k) Provision of such other forms of relief as the court deems necessary to protect and provide for the safety of the petitioner and any designated family or household member, provided petitioner and any designated family or household member consents to such relief.

Any of the reliefs provided under this section shall be granted even in the absence of a decree of legal separation or annulment or declaration of absolute nullity of marriage.

The issuance of a BPO or the pendency of an application for a BPO shall not preclude a petitioner from applying for, or the court from granting a TPO or PPO.

SEC. 9. *Who May File Petition for Protection Orders.* - A petition for protection order may be filed by any of the following:

(a) the offended party;

(b) parents or guardians of the offended party;

(c) ascendants, descendants or collateral relatives within the fourth civil degree of consanguinity or affinity;

(d) officers or social workers of the DSWD or social workers of the local government units (LGUs);

(e) police officers, preferably those in charge of women and children's desks;

(f) *Punong Barangay* or *Barangay Kagawad*;

(g) lawyer, counselor, therapist or healthcare provider of the petitioner;

(h) at least two (2) concerned responsible citizens of the city or municipality where the violence against women and their children occurred and who has personal knowledge of the offense committed.

SEC. 10. *Where to Apply for a Protection Order.* - Applications for BPOs shall follow the rules on venue under Section 409 of the Local Government Code of 1991 and its implementing rules and regulations. An application for a TPO or PPO may be filed in the regional trial court, metropolitan trial court, municipal trial court, municipal circuit trial court with territorial jurisdiction over the place of residence of the petitioner: *Provided, however*, That if a family court exists in the place of residence of the petitioner, the application shall be filed with that court.

SEC. 11. *How to Apply for a Protection Order.* - The application for a protection order must be in writing, signed and verified under oath by the applicant. It may be filed as an independent action or as an incidental relief in any civil or criminal case the subject matter or issues thereof partakes of a violence as described in this Act. A standard protection order application form, written in English with translation to the major local languages, shall be made available to facilitate applications for protection orders, and shall contain, among others, the following information:

(a) names and addresses of petitioner and respondent;

(b) description of relationships between petitioner and respondent;

(c) a statement of the circumstances of the abuse;

(d) description of the reliefs requested by petitioner as specified in Section 8 herein;

(e) request for counsel and reasons for such;

(f) request for waiver of application fees until hearing; and

(g) an attestation that there is no pending application for a protection order in another court.

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If the applicant is not the victim, the application must be accompanied by an affidavit of the applicant attesting to (a) the circumstances of the abuse suffered by the victim and (b) the circumstances of consent given by the victim for the filing of the application. When disclosure of the address of the victim will pose danger to her life, it shall be so stated in the application. In such a case, the applicant shall attest that the victim is residing in the municipality or city over which court has territorial jurisdiction, and shall provide a mailing address for purposes of service processing.

An application for protection order filed with a court shall be considered an application for both a TPO and PPO.

Barangay officials and court personnel shall assist applicants in the preparation of the application. Law enforcement agents shall also extend assistance in the application for protection orders in cases brought to their attention.

SEC. 12. *Enforceability of Protection Orders.* - All TPOs and PPOs issued under this Act shall be enforceable anywhere in the Philippines and a violation thereof shall be punishable with a fine ranging from Five Thousand Pesos (P5,000.00) to Fifty Thousand Pesos (P50,000.00) and/or imprisonment of six (6) months.

SEC. 13. *Legal Representation of Petitioners for a Protection Order.* - If the woman or her child requests in the application for a protection order for the appointment of counsel because of lack of economic means to hire a *counsel de parte*, the court shall immediately direct the Public Attorney's Office (PAO) to represent the petitioner in the hearing on the application. If the PAO determines that the applicant can afford to hire the services of a *counsel de parte*, it shall facilitate the legal representation of the petitioner by a *counsel de parte*. The lack of access to family or conjugal resources by the applicant, such as when the same are controlled by the perpetrator, shall qualify the petitioner to legal representation by the PAO.

However, a private counsel offering free legal service is not barred from representing the petitioner.

SEC. 14. *Barangay Protection Orders (BPOs); Who May Issue and How.* - Barangay Protection Orders (BPOs) refer to the protection order issued by the *Punong Barangay* ordering the perpetrator to desist from committing acts under Section 5(a) and (b) of this Act. A *Punong Barangay* who receives applications for a BPO shall issue the protection order to the applicant on the date of filing after *ex parte* determination of the basis of the application. If the *Punong Barangay* is unavailable to act on the application for a BPO, the application shall

be acted upon by any available *Barangay Kagawad*. If the BPO is issued by a *Barangay Kagawad*, the order must be accompanied by an attestation by the *Barangay Kagawad* that the *Punong Barangay* was unavailable at the time of the issuance of the BPO. BPOs shall be effective for fifteen (15) days. Immediately after the issuance of an *ex parte* BPO, the *Punong Barangay* or *Barangay Kagawad* shall personally serve a copy of the same on the respondent, or direct any barangay official to effect its personal service.

The parties may be accompanied by a non-lawyer advocate in any proceeding before the *Punong Barangay*.

SEC. 15. *Temporary Protection Orders*. - Temporary Protection Orders (TPOs) refers to the protection order issued by the court on the date of filing of the application after *ex parte* determination that such order should be issued. A court may grant in a TPO any, some or all of the reliefs mentioned in this Act and shall be effective for thirty (30) days. The court shall schedule a hearing on the issuance of a PPO prior to or on the date of the expiration of the TPO. The court shall order the immediate personal service of the TPO on the respondent by the court sheriff who may obtain the assistance of law enforcement agents for the service. The TPO shall include notice of the date of the hearing on the merits of the issuance of a PPO.

SEC. 16. *Permanent Protection Orders*. - Permanent Protection Order (PPO) refers to protection order issued by the court after notice and hearing.

Respondents non-appearance despite proper notice, or his lack of a lawyer, or the non-availability of his lawyer shall not be a ground for rescheduling or postponing the hearing on the merits of the issuance of a PPO. If the respondent appears without counsel on the date of the hearing on the PPO, the court shall appoint a lawyer for the respondent and immediately proceed with the hearing. In case the respondent fails to appear despite proper notice, the court shall allow *ex parte* presentation of the evidence by the applicant and render judgment on the basis of the evidence presented. The court shall allow the introduction of any history of abusive conduct of a respondent even if the same was not directed against the applicant or the person for whom the applicant is made.

The court shall, to the extent possible, conduct the hearing on the merits of the issuance of a PPO in one (1) day. Where the court is unable to conduct the hearing within one (1) day and the TPO issued is due to expire, the court shall continuously extend or renew the TPO for a period of thirty (30) days at each particular time until final judgment is issued. The extended or renewed TPO may be modified

by the court as may be necessary or applicable to address the needs of the applicant.

The court may grant any, some or all of the reliefs specified in Section 8 hereof in a PPO. A PPO shall be effective until revoked by a court upon application of the person in whose favor the order was issued. The court shall ensure immediate personal service of the PPO on respondent.

The court shall not deny the issuance of protection order on the basis of the lapse of time between the act of violence and the filing of the application.

Regardless of the conviction or acquittal of the respondent, the Court must determine whether or not the PPO shall become final. Even in a dismissal, a PPO shall be granted as long as there is no clear showing that the act from which the order might arise did not exist.

SEC. 17. *Notice of Sanction in Protection Orders.* - The following statement must be printed in bold-faced type or in capital letters on the protection order issued by the *Punong Barangay* or court:

"Violation of this order is punishable by law."

SEC. 18. *Mandatory Period For Acting on Applications For Protection Orders.* - Failure to act on an application for a protection order within the reglementary period specified in the previous sections without justifiable cause shall render the official or judge administratively liable.

SEC. 19. *Legal Separation Cases.* - In cases of legal separation, where violence as specified in this Act is alleged, Article 58 of the Family Code shall not apply. The court shall proceed on the main case and other incidents of the case as soon as possible. The hearing on any application for a protection order filed by the petitioner must be conducted within the mandatory period specified in this Act.

SEC. 20. *Priority of Applications for a Protection Order.* - *Ex parte* and adversarial hearings to determine the basis of applications for a protection order under this Act shall have priority over all other proceedings. Barangay officials and the courts shall schedule and conduct hearings on applications for a protection order under this Act above all other business and, if necessary, suspend other proceedings in order to hear applications for a protection order.

SEC. 21. *Violation of Protection Orders.* - A complaint for a violation of a BPO issued under this Act must be filed directly with any municipal trial court, metropolitan trial court, or municipal circuit

trial court that has territorial jurisdiction over the barangay that issued the BPO. Violation of a BPO shall be punishable by imprisonment of thirty (30) days without prejudice to any other criminal or civil action that the offended party may file for any of the acts committed.

A judgment of violation of a BPO may be appealed according to the Rules of Court. During trial and upon judgment, the trial court may *motu proprio* issue a protection order as it deems necessary without need of an application.

Violation of any provision of a TPO or PPO issued under this Act shall constitute contempt of court punishable under Rule 71 of the Rules of Court, without prejudice to any other criminal or civil action that the offended party may file for any of the acts committed.

SEC. 22. *Applicability of Protection Orders to Criminal Cases.* - The foregoing provisions on protection orders shall be applicable in criminal cases and/or shall be included in the civil actions deemed impliedly instituted with the criminal actions involving violence against women and their children.

SEC. 23. *Bond to Keep the Peace.* - The Court may order any person against whom a protection order is issued to give a bond to keep the peace, to present two sufficient sureties who shall undertake that such person will not commit the violence sought to be prevented.

Should the respondent fail to give the bond as required, he shall be detained for a period which shall in no case exceed six (6) months, if he shall have been prosecuted for acts punishable under Section 5(a) to 5(f) and not exceeding thirty (30) days, if for acts punishable under Section 5(g) to 5(i).

The protection orders referred to in this section are the TPOs and the PPOs issued only by the courts.

SEC. 24. *Prescriptive Period.* - Acts falling under Sections 5(a) to 5(f) shall prescribe in twenty (20) years. Acts falling under Sections 5(g) to 5(i) shall prescribe in ten (10) years.

SEC. 25. *Public Crime.* - Violence against women and their children shall be considered a public offense which may be prosecuted upon the filing of a complaint by any citizen having personal knowledge of the circumstances involving the commission of the crime.

SEC. 26. *Battered Woman Syndrome as a Defense.* - Victim-survivors who are found by the courts to be suffering from battered woman syndrome do not incur any criminal and civil liability

notwithstanding the absence of any of the elements for justifying circumstances of self-defense under the Revised Penal Code.

In the determination of the state of mind of the woman who was suffering from battered woman syndrome at the time of the commission of the crime, the courts shall be assisted by expert psychiatrists/psychologists.

SEC. 27. *Prohibited Defense.* - Being under the influence of alcohol, any illicit drug, or any other mind-altering substance shall not be a defense under this Act.

SEC. 28. *Custody of Children.* - The woman victim of violence shall be entitled to the custody and support of her child/children. Children below seven (7) years old or older but with mental or physical disabilities shall automatically be given to the mother, with right to support, unless the court finds compelling reasons to order otherwise.

A victim who is suffering from battered woman syndrome shall not be disqualified from having custody of her children. In no case shall custody of minor children be given to the perpetrator of a woman who is suffering from Battered Woman Syndrome.

SEC. 29. *Duties of Prosecutors/Court Personnel.* - Prosecutors and court personnel should observe the following duties when dealing with victims under this Act:

a) communicate with the victim in a language understood by the woman or her child; and

b) inform the victim of her/his rights including legal remedies available and procedure, and privileges for indigent litigants.

SEC. 30. *Duties of Barangay Officials and Law Enforcers.* - Barangay officials and law enforcers shall have the following duties:

(a) respond immediately to a call for help or request for assistance or protection of the victim by entering the dwelling if necessary whether or not a protection order has been issued and ensure the safety of the victim/s;

(b) confiscate any deadly weapon in the possession of the perpetrator or within plain view;

(c) transport or escort the victim/s to a safe place of their choice or to a clinic or hospital;

(d) assist the victim in removing personal belongings from the house;

(e) assist the barangay officials and other government officers and employees who respond to a call for help;

(f) ensure the enforcement of the Protection Orders issued by the *Punong Barangay* or by the courts;

(g) arrest the suspected perpetrator even without a warrant when any of the acts of violence defined by this Act is occurring, or when he/she has personal knowledge that any act of abuse has just been committed, and there is imminent danger to the life or limb of the victim as defined in this Act; and

(h) immediately report the call for assessment or assistance of the DSWD, Social Welfare Department of LGUs or accredited non-government organizations (NGOs).

Any barangay official or law enforcer who fails to report the incident shall be liable for a fine not exceeding Ten Thousand Pesos (P10,000.00) or whenever applicable criminal, civil or administrative liability.

SEC. 31. *Healthcare Provider Response to Abuse* - Any healthcare provider, including, but not limited to, an attending physician, nurse, clinician, barangay health worker, therapist or counselor who suspects abuse or has been informed by the victim of violence shall:

(a) properly document any of the victim's physical, emotional or psychological injuries;

(b) properly record any of victim's suspicions, observations and circumstances of the examination or visit;

(c) automatically provide the victim free of charge a medical certificate concerning the examination or visit;

(d) safeguard the records and make them available to the victim upon request at actual cost; and

(e) provide the victim immediate and adequate notice of rights and remedies provided under this Act, and services available to them.

SEC. 32. *Duties of Other Government Agencies and LGUs.* - Other government agencies and LGUs shall establish programs such as, but not limited to, education and information campaign and seminars or

symposia on the nature, causes, incidence and consequences of such violence particularly towards educating the public on its social impacts.

It shall be the duty of the concerned government agencies and LGUs to ensure the sustained education and training of their officers and personnel on the prevention of violence against women and their children under this Act.

SEC. 33. *Prohibited Acts.* - A *Punong Barangay, Barangay Kagawad* or the court hearing an application for a protection order shall not order, direct, force or in any way unduly influence the applicant for a protection order to compromise or abandon any of the reliefs sought in the application for protection order under this Act. Section 7 of the Family Courts Act of 1997 and Sections 410, 411, 412 and 413 of the Local Government Code of 1991 shall not apply in proceedings where relief is sought under this Act.

Failure to comply with this Section shall render the official or judge administratively liable.

SEC. 34. *Persons Intervening Exempt from Liability.* - In every case of violence against women and their children as herein defined, any person, private individual or police authority or barangay official who, acting in accordance with law, responds or intervenes without using violence or restraint greater than necessary to ensure the safety of the victim, shall not be liable for any criminal, civil or administrative liability resulting therefrom.

SEC. 35. *Rights of Victims.* - In addition to their rights under existing laws, victims of violence against women and their children shall have the following rights:

(a) to be treated with respect and dignity;

(b) to avail of legal assistance from the PAO of the Department of Justice (DOJ) or any public legal assistance office;

(c) to be entitled to support services from the DSWD and LGUs;

(d) to be entitled to all legal remedies and support as provided for under the Family Code; and

(e) to be informed of their rights and the services available to them including their right to apply for a protection order.

SEC. 36. *Damages.* - Any victim of violence under this Act shall be entitled to actual, compensatory, moral and exemplary damages.

SEC. 37. *Hold Departure Order.* - The court shall expedite the process of issuance of a hold departure order in cases prosecuted under this Act.

SEC. 38. *Exemption from Payment of Docket Fee and Other Expenses.* - If the victim is an indigent or there is an immediate necessity due to imminent danger or threat of danger to act on an application for a protection order, the court shall accept the application without payment of the filing fee and other fees and of transcript of stenographic notes.

SEC. 39. *Inter-Agency Council on Violence Against Women and Their Children (IAC-VAWC).* - In pursuance of the abovementioned policy, there is hereby established an Inter-Agency Council on Violence Against Women and their Children, hereinafter known as the Council, which shall be composed of the following agencies:

(a) Department of Social Welfare and Development (DSWD);

(b) National Commission on the Role of Filipino Women (NCRFW);

(c) Civil Service Commission (CSC);

(d) Commission on Human Rights (CHR);

(e) Council for the Welfare of Children (CWC);

(f) Department of Justice (DOJ);

(g) Department of the Interior and Local Government (DILG);

(h) Philippine National Police (PNP);

(i) Department of Health (DOH);

(j) Department of Education (DepEd);

(k) Department of Labor and Employment (DOLE); and

(l) National Bureau of Investigation (NBI).

These agencies are tasked to formulate programs and projects to eliminate VAW based on their mandates as well as develop capability programs for their employees to become more sensitive to the needs of their clients. The Council will also serve as the monitoring body as regards to VAW initiatives.

The Council members may designate their duly authorized representative who shall have a rank not lower that an assistant secretary or its equivalent. These representatives shall attend Council meetings in their behalf, and shall receive emoluments as may be determined by the Council in accordance with existing budget and accounting rules and regulations.

SEC. 40. *Mandatory Programs and Services for Victims.* -The DSWD, and LGUs shall provide the victims temporary shelters, provide counseling, psycho-social services and/or, recovery, rehabilitation programs and livelihood assistance.

The DOH shall provide medical assistance to victims.

SEC. 41. *Counseling and Treatment of Offenders.* - The DSWD shall provide rehabilitative counseling and treatment to perpetrators towards learning constructive ways of coping with anger and emotional outbursts and reforming their ways. When necessary, the offender shall be ordered by the Court to submit to psychiatric treatment or confinement.

SEC. 42. *Training of Persons Involved in Responding to Violence Against Women and their Children Cases.* - All agencies involved in responding to violence against women and their children cases shall be required to undergo education and training to acquaint them with:

a. the nature, extent and causes of violence against women and their children;

b. the legal rights of, and remedies available to, victims of violence against women and their children;

c. the services and facilities available to victims or survivors;

d. the legal duties imposed on police officers to make arrest and to offer protection and assistance; and

e. techniques for handling incidents of violence against women and their children that minimize the likelihood of injury to the officer and promote the safety of the victim or survivor.

The PNP, in coordination with LGUs, shall establish an education and training program for police officers and barangay officials to enable them to properly handle cases of violence against women and their children.

SEC. 43. *Entitlement to Leave.* - Victims under this Act shall be entitled to take a paid leave of absence up to ten (10) days in addition to other paid leaves under the Labor Code and Civil Service Rules and Regulations, extendible when the necessity arises as specified in the protection order.

Any employer who shall prejudice the right of the person under this section shall be penalized in accordance with the provisions of the Labor Code and Civil Service Rules and Regulations. Likewise, an employer who shall prejudice any person for assisting a co-employee who is a victim under this Act shall likewise be liable for discrimination.

SEC. 44. *Confidentiality.* - All records pertaining to cases of violence against women and their children including those in the barangay shall be confidential and all public officers and employees and public or private clinics or hospitals shall respect the right to privacy of the victim. Whoever publishes or causes to be published, in any format, the name, address, telephone number, school, business address, employer, or other identifying information of a victim or an immediate family member, without the latter's consent, shall be liable to the contempt power of the court.

Any person who violates this provision shall suffer the penalty of one (1) year imprisonment and a fine of not more than Five Hundred Thousand Pesos (P500,000.00).

SEC. 45. *Funding.* - The amount necessary to implement the provisions of this Act shall be included in the annual General Appropriations Act (GAA).

The Gender and Development (GAD) Budget of the mandated agencies and LGUs shall be used to implement services for victim of violence against women and their children.

SEC. 46. *Implementing Rules and Regulations.* - Within six (6) months from the approval of this Act, the DOJ, the NCRFW, the DSWD, the DILG, the DOH, and the PNP, and three (3) representatives from NGOs to be identified by the NCRFW, shall promulgate the Implementing Rules and Regulations (IRR) of this Act.

SEC. 47. *Suppletory Application.* - For purposes of this Act, the Revised Penal Code and other applicable laws, shall have suppletory application.

SEC. 48. *Separability Clause.* - If any section or provision of this Act is held unconstitutional or invalid, the other sections or provisions shall not be affected.

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SEC. 49. *Repealing Clause.* - All laws, presidential decrees, executive orders and rules and regulations, or parts thereof, inconsistent with the provisions of this Act are hereby repealed or modified accordingly.

SEC. 50. *Effectivity.* - This Act shall take effect fifteen (15) days from the date of its complete publication in at least two (2) newspapers of general circulation.

Approved.

JOSE DE VENECIA JR.
Speaker of the House of Representatives

FRANKLIN M. DRILON
President of the Senate

This Act, which is a consolidation of Senate Bill No. 2723 and House Bill Nos. 5516 and 6054, was finally passed by the Senate and the House of Representatives on January 29, 2004 and February 2, 2004, respectively.

ROBERTO P. NAZARENO
Secretary General House of Representatives

OSCAR G. YABES
Secretary of the Senate

Approved: MAR 0 8 2004

GLORIA MACAPAGAL-ARROYO
President of the Philippines

PGMA Helegram # 25031

ii. Republic Act No. 11313 (Safe Spaces Act of 2019)

Republic of the Philippines
Congress of the Philippines
Metro Manila
Seventeenth Congress
Third Regular Session

Begun and held in Metro Manila, on Monday, the twenty-third day of July, two thousand eighteen

AN ACT DEFINING GENDER-BASED SEXUAL HARASSMENT IN STREETS, PUBLIC SPACES, ONLINE, WORKPLACES, AND EDUCATIONAL OR TRAINING INSTITUTIONS, PROVIDING PROTECTIVE MEASURES AND PRESCRIBING PENALTIES THEREFOR

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

Section 1. Short Title. – This Act shall be known as the ***"Safe Spaces Act"***.

Sec. 2. Declaration of Policies. – It is the policy of the State to value the dignity of every human person and guarantee full respect for human rights. It is likewise the policy of the State to recognize the role of women in nation-building and ensure the fundamental equality before the law of women and men. The State also recognizes that both men and women must have equality, security and safety not only in private, but also on the streets, public spaces, online, workplaces and educational and training institutions.

Sec. 3. Definition of Terms. —As used in this Act;

(a) *Catcalling* refers to unwanted remarks directed towards a person, commonly done in the form of wolf-whistling and misogynistic, transphobic, homophobic, and sexist slurs;

(b) *Employee* refers to a person, who in exchange for remuneration, agrees to perform specified services for another person, whether natural or juridical, and whether private or public, who exercises fundamental control over the work, regardless of the term or duration of agreement: Provided, That for the purposes of

this law, a person who is detailed to an entity under a subcontracting or secondment agreement shall be considered an employee;

(c) *Employer* refers to a person who exercises control over an employee: Provided, That for the purpose of this Act, the status or conditions of the latter's employment or engagement shall be disregarded;

(d) *Gender* refers to a set of socially ascribed characteristics, norms, roles, attitudes, values and expectations identifying the social behavior of men and women, and the relations between them;

(e) *Gender-based online sexual harassment* refers to an on the conduct targeted at a particular person that causes or likely to cause another mental, emotional or psychological distress, and fear of personal safety, sexual harassment acts including unwanted sexual remarks and comments, threats, uploading or sharing of one's photos without consent, video and audio recordings, cyberstalking and online identity theft;

(f) *Gender identity and/or expression* refers to the personal sense of identity as characterized, among others, by manner of clothing, inclinations, and behavior in relation to masculine or feminine conventions. A person may have a male or female identity with physiological characteristics of the opposite sex, in which case this person is considered transgender;

(g) *Public spaces* refer to streets and alleys, public parks, schools, buildings, malls, bars, restaurants, transportation terminals, public markets, spaces used as evacuation centers, government offices, public utility vehicles as well as private vehicles covered by app-based transport network services and other recreational spaces such as, but not limited to, cinema halls, theaters and spas; and

(h) *Stalking* refers to conduct directed at a person involving the repeated visual or physical proximity, non-consensual communication, or a combination thereof that cause or will likely cause a person to fear for one's own safety or the safety of others, or to suffer emotional distress.

ARTICLE I
GENDER-BASED STREETS AND PUBLIC SPACES SEXUAL HARASSMENT

Sec . 4. *Gender-Based Streets and Public Spaces Sexual Harassment.* – The crimes of gender-based streets and public spaces sexual harassment are committed

through any unwanted and uninvited sexual actions or remarks against any person regardless of the motive for committing such action or remarks.

Gender-based streets and public spaces sexual harassment includes catcalling, wolf-whistling, unwanted invitations, misogynistic, transphobic, homophobic and sexist slurs, persistent uninvited comments or gestures on a person's appearance, relentless requests for personal details, statement of sexual comments and suggestions, public masturbation or flashing of private parts, groping, or any advances, whether verbal or physical, that is unwanted and has threatened one's sense of personal space and physical safety, and committed in public spaces such as alleys, roads, sidewalks and parks. Acts constitutive of gender-based streets and public spaces sexual harassment are those performed in buildings, schools, churches, restaurants, malls, public washrooms, bars, internet shops, public markets, transportation terminals or public utility vehicles.

Sec. 5. *Gender-Based Sexual Harassment in Restaurants and Cafes, Bars and Clubs, Resorts and Water Parks, Hotels and Casinos, Cinemas, Malls, Buildings and Other Privately-Owned Places Open to the Public.* – Restaurants, bars, cinemas, malls, buildings and other privately-owned places open to the public shall adopt a zero-tolerance policy against gender -based streets and public spaces sexual harassment. These establishments are obliged to provide assistance to victims of gender-based sexual harassment by coordinating with local police authorities immediately after gender-based sexual harassment is reported, making CCTV footage available when ordered by the court, and providing a safe gender-sensitive environment to encourage victims to report gender-based sexual harassment at the first instance.

All restaurants, bars, cinemas and other places of recreation shall install in their business establishments clearly-visible warning signs against gender -based public spaces sexual harassment, including the anti- sexual harassment hotline number in bold letters, and shall designate at least one (1) anti-sexual harassment officer to receive gender-based sexual harassment complaints. Security guards in these places may be deputized to apprehend perpetrators caught in flagrante delicto and are required to immediately coordinate with local authorities.

Sec. 6. *Gender-Based Sexual Harassment in Public Utility Vehicles.* – In addition to the penalties in this Act, the Land Transportation Office (LTO) may cancel the license of perpetrators found to have committed acts constituting sexual harassment in public utility vehicles, and the Land Transportation Franchising and Regulatory Board (LTFRB) may suspend or revoke the franchise of transportation operators who commit gender-based streets and public spaces sexual harassment

acts. Gender-based sexual harassment in public utility vehicles (PUVs) where the perpetrator is the driver of the vehicle shall also constitute a breach of contract of carriage, for the purpose of creating a presumption of negligence on the part of the owner or operator of the vehicle in the selection and supervision of employees and rendering the owner or operator solidarily liable for the offenses of the employee.

Sec. 7. *Gender-Based Sexual Harassment in Streets and Public Spaces Committed by Minors.* – In case the offense is committed by a minor, the Department of Social Welfare and Development (DSWD) shall take necessary disciplinary measures as provided for under Republic Act No. 9344, otherwise known as the "Juvenile Justice and Welfare Act of 2006".

Sec. 8. *Duties of Local Government Units (LGUs).* — local government units (LGUs) shall bear prim ary responsibility in enforcing the provisions under Article I of this Act. LGUs shall have the following duties:

(a) Pass an ordinance which shall localize the applicability of this Act within sixty (60) days of its effectivity;

(b) Disseminate or post in conspicuous places a copy of this Act and the corresponding ordinance;

(c) Provide measures to prevent gender-based sexual harassment in educational institutions, such as information campaigns and anti-sexual harassment seminars;

(d) Discourage and impose fines on acts of gender-based sexual harassment as defined in this Act;

(e) Create an anti-sexual harassment hotline; and

(f) Coordinate with the Department of the Interior and Local Government (DILG) on the implementation of this Act.

Sec. 9. *Role of the DILG.* – The DILG shall ensure the full implementation of this Act by:

(a) Inspecting LGUs if they have disseminated or posted in conspicuous places a copy of this Act and the corresponding ordinance;

(b) Conducting and disseminating surveys and studies on best practices of LGUs in implementing this Act; and

(c) Providing capacity-building and training activities to build the capability of local government officials to implement this Act in coordination with the Philippine Commission on Women (PCW), the Local Government Academy (LGA) and the Development Academy of the Philippines (DAP).

Sec. 10. *Implementing Bodies for Gender-Based Sexual Harassment in Streets and Public Spaces.* – The Metro Manila Development Authority (MMDA), the local units of the Philippine National Police (PNP) for other provinces, and the Women and Children's Protection Desk (WCPD) of the PNP shall have the authority to apprehend perpetrators and enforce the law: Provided, That they have undergone prior Gender Sensitivity Training (GST). The PCW, DILG and Department of Information and Communications Technology (DICT) shall be the national bodies responsible for overseeing the implementation of this Act and formulating policies that will ensure the strict implementation of this Act.

For gender-based streets and public spaces sexual harassment, the MMDA and the local units of the PNP for the provinces shall deputize its enforcers to be Anti-Sexual Harassment Enforcers (ASHE). They shall be deputized to receive complaints on the street and immediately apprehend a perpetrator if caught in flagrante delicto. The perpetrator shall be immediately brought to the nearest PNP station to face charges of the offense committed. The ASHE unit together with the Women's and Children's Desk of PNP stations shall keep a ledger of perpetrators who have committed acts prohibited under this Act for purposes of determining if a perpetrator is a first-time, second-time or third-time offender. The DILG shall also ensure that all local government bodies expedite the receipt and processing of complaints by setting up an Anti-Sexual Harassment Desk in all barangay and city halls and to ensure the set-up of CCTVs in major roads, alleys and sidewalks in their respective areas to aid in the filing of cases and gathering of evidence. The DILG, the DSWD in coordination with the Department of Health (DOH) and the PCW shall coordinate if necessary to ensure that victims are provided the proper psychological counseling support services.

Sec. 11. *Specific Acts and Penalties for Gender-Based Sexual Harassment in Streets and Public Spaces.* – The following acts are unlawful and shall be penalized as follows:

(a) For acts such as cursing, wolf-whistling, catcalling, leering and intrusive gazing, taunting, cursing, unwanted invitations, misogynistic, transphobic, homophobic, and sexist slurs, persistent unwanted comments on one's appearance, relentless requests for one's personal details such as name, contact and social media details or destination, the use of words, gestures or actions that ridicule on the basis of

sex gender or sexual orientation, identity and/or expression including sexist, homophobic, and transphobic statements and slurs, the persistent telling of sexual jokes, use of sexual names, comments and demands, and any statement that has made an invasion on a person's personal space or threatens the person's sense of personal safety –

(1) The first offense shall be punished by a fine of One thousand pesos (PI,000.00) and community service of twelve hours inclusive of attendance to a Gender Sensitivity Seminar to be conducted by the PNP in coordination with the LGU and the PCW;

(2) The second offense shall be punished by arresto menor (6 to 10 days) or a fine of Three thousand pesos (P3,000.00)

(3) The third offense shall be punished by arresto menor (11 to 30 days) and a fine of Ten thousand pesos (P10, 000.00).

(b) For acts such as making offensive body gestures at someone, and exposing private parts for the sexual gratification of the perpetrator with the effect of demeaning, harassing, threatening or intimidating the offended party including flashing of private parts, public masturbation, groping, and similar lewd sexual actions –

(1) The first offense shall be punished by a fine of Ten thousand pesos (P10,000.00) and community service of twelve hours inclusive of attendance to a Gender Sensitivity Seminar, to be conducted by the PNP in coordination with the LGU and the PCW;

(2) The second offense shall be punished by arresto menor (11 to 30 days) or a fine of Fifteen thousand pesos (P15,000.00);

(3) The third offense shall be punished by arresto mayor (1 month and 1 day to 6 months) and a fine of Twenty thousand pesos (P20,000.00).

(c) For acts such as stalking, and any of the acts mentioned in Section 11 paragraphs (a) and (b), when accompanied by touching, pinching or brushing against the body of the offended person; or any touching, pinching, or brushing against the genitalia, face, arms, anus, groin, breasts, inner thighs, face, buttocks or any part of the victim's body even when not accompanied by acts mentioned in Section 11 paragraphs (a) and (b) –

(1) The first offense shall be punished by arresto menor (11 to 30 days) or a fine of Thirty thousand pesos (P30,000.00), provided that it includes attendance in a Gender Sensitivity Seminar, to be conducted by the PNP in coordination with the LGU and the PCW;

(2) The second offense shall be punished by arresto mayor (1 month and 1 day to 6 months) or a fine of Fifty thousand pesos (P50,000.00);

(3) The third offense shall be punished by arresto mayor in its maximum period or a fine of One hundred thousand pesos (P 100,000.00)

ARTICLE II
GENDER-BASED ONLINE SEXUAL HARASSMENT

Sec. 12. *Gender-Based Online Sexual Harassment.* – Gender-based online sexual harassment includes acts that use information and communications technology in terrorizing and intimidating victims through physical, psychological, and emotional threats, unwanted sexual misogynistic, transphobic, homophobic and sexist remarks and comments online whether publicly or through direct and private messages, invasion of victim's privacy through cyberstalking and incessant messaging, uploading and sharing without the consent of the victim, any form of media that contains photos, voice, or video with sexual content, any unauthorized recording and sharing of any of the victim's photos, videos, or any information online, impersonating identities of victims online or posting lies about victims to harm their reputation, or filing false abuse reports to online platforms to silence victims.

Sec. 13. *Implementing Bodies for Gender-Based Online Sexual Harassment.* — For gender-based online sexual harassment, the PNP Anti-Cybercrime Group (PNPACG) as the National Operational Support Unit of the PNP is primarily responsible for the implementation of pertinent Philippine laws on cybercrime, shall receive complaints of gender-based online sexual harassment and develop an online mechanism for reporting real-time gender-based online sexual harassment acts and apprehend perpetrators. The Cybercrime Investigation and Coordinating Center (CICC) of the DICT shall also coordinate with the PNPACG to prepare appropriate and effective measures to monitor and penalize gender-based online sexual harassment.

Sec. 14. *Penalties for Gender-Based Online Sexual Harassment.* – The penalty of prision correccional in its medium period or a fine of not less than One hundred

thousand pesos (P100,000.00) but not more than Five hundred thousand pesos (P500,000.00), or both, at the discretion of the court shall be imposed upon any person found guilty of any gender-based online sexual harassment.

If the perpetrator is a juridical person, its license or franchise shall be automatically deemed revoked, and the persons liable shall be the officers thereof, including the editor or reporter in the case of print media, and the station manager, editor and broadcaster in the case of broadcast media. An alien who commits gender-based online sexual harassment shall be subject to deportation proceedings after serving sentence and payment of fines.

Exemption to acts constitutive and penalized as gender-based online sexual harassment are authorized written orders of the court for any peace officer to use online records or any copy thereof as evidence in any civil, criminal investigation or trial of the crime: Provided, That such written order shall only be issued or granted upon written application and the examination under oath or affirmation of the applicant and the witnesses may produce, and upon showing that there are reasonable grounds to believe that gender-based online sexual harassment has been committed or is about to be committed, and that the evidence to be obtained is essential to the conviction of any person for, or to the solution or prevention of such crime.

Any record, photo or video, or copy thereof of any person that is in violation of the preceding sections shall not be admissible in evidence in any judicial, quasi-judicial, legislative or administrative hearing or investigation.

ARTICLE III
QUALIFIED GENDER-BASED STREETS, PUBLIC SPACES AND ONLINE SEXUAL HARASSMENT

Sec. 15. *Qualified Gender-Based Streets, Public Spaces and Online Sexual Harassment.* – The penalty next higher in degree will be applied in the following cases:

(a) If the act takes place in a common carrier or PUV, including, but not limited to, jeepneys, taxis, tricycles, or app-based transport network vehicle services, where the perpetrator is the driver of the vehicle and the offended party is a passenger:

(b) If the offended party is a minor, a senior citizen, or a person with disability (PWD), or a breastfeeding mother nursing her child;

(c) If the offended party is diagnosed with a mental problem tending to impair consent;

(d) If the perpetrator is a member of the uniformed services, such as the PNP and the Armed Forces of the Philippines (AFP), and the act was perpetrated while the perpetrator was in uniform; and

(e) If the act takes place in the premises of a government agency offering frontline services to the public and the perpetrator is a government employee.

ARTICLE IV
GENDER-BASED SEXUAL HARASSMENT IN THE WORKPLACE

Sec. 16. *Gender-Based Sexual Harassment in the Workplace.* – The crime of gender-based sexual harassment in the workplace includes the following:

(a) An act or series of acts involving any unwelcome sexual advances, requests or demand for sexual favors or any act of sexual nature, whether done verbally, physically or through the use of technology such as text messaging or electronic mail or through any other forms of information and communication systems, that has or could have a detrimental effect on the conditions of an individual's employment or education, job performance or opportunities;

(b) A conduct of sexual nature and other conduct-based on sex affecting the dignity of a person, which is unwelcome, unreasonable, and offensive to the recipient, whether done verbally, physically or through the use of technology such as text messaging or electronic mail or through any other forms of information and communication systems;

(c) A conduct that is unwelcome and pervasive and creates an intimidating, hostile or humiliating environment for the recipient: Provided, That the crime of gender-based sexual harassment may also be committed between peers and those committed to a superior officer by a subordinate, or to a teacher by a student, or to a trainer by a trainee; and

(d) Information and communication system refers to a system for generating, sending, receiving, storing or otherwise processing electronic data messages or electronic documents and includes the computer system or other similar devices by or in which data are recorded or stored and any procedure related to the recording or storage of electronic data messages or electronic documents.

Sec. 17. *Duties of Employers.* – Employers or other persons of authority, influence or moral ascendancy in a workplace shall have the duty to prevent, deter, or punish the performance of acts of gender-based sexual harassment in the workplace. Towards this end, the employer or person of authority, influence or moral ascendancy shall:

(a) Disseminate or post in a conspicuous place a copy of this Act to all persons in the workplace;

(b) Provide measures to prevent gender-based sexual harassment in the workplace, such as the conduct of anti-sexual harassment seminars;

(c) Create an independent internal mechanism or a committee on decorum and investigation to investigate and address complaints of gender-based sexual harassment which shall;

(1) Adequately represent the management, the employees from the supervisory rank, the rank-and-file employees, and the union, if any;

(2) Designate a woman as its head and not less than half of its members should be women;

(3) Be composed of members who should be impartial and not connected or related to the alleged perpetrator;

(4) Investigate and decide on the complaints within ten days or less upon receipt thereof;

(5) Observe due process;

(6) Protect the complainant from retaliation; and

(7) Guarantee confidentiality to the greatest extent possible

(d) Provide and disseminate, in consultation with all persons in the workplace, a code of conduct or workplace policy which shall;

(1) Expressly reiterate the prohibition on gender-based sexual harassment;

(2) Describe the procedures of the internal mechanism created under Section 17(c) of this Act; and

(3) Set administrative penalties.

Sec. 18. *Duties of Employees and Co-Workers* – Employees and co-workers shall have the duty to:

(a) Refrain from committing acts of gender-based sexual harassment;

(b) Discourage the conduct of gender-based sexual harassment in the workplace;

(c) Provide emotional or social support to fellow employees, co-workers, colleagues or peers who are victims of gender-based sexual harassment; and

(d) Report acts of gender-based sexual harassment witnessed in the workplace.

Sec. 19. *Liability of Employers*. – In addition to liabilities for committing acts of gender-based sexual harassment, employers may also be held responsible for:

(a) Non-implementation of their duties under Section 17 of this Act, as provided in the penal provisions: or

(b) Not taking action on reported acts of gender-based sexual harassment committed in the workplace.

Any person who violates subsection (a) of this section, shall upon conviction, be penalized with a fine of not less than Five thousand pesos (P5,000.00) nor more than Ten thousand pesos (P10,000.00).

Any person who violates subsection (b) of this section, shall upon conviction, be penalized with a fine of not less than Ten thousand pesos (P10,000.00) nor more than Fifteen thousand pesos (P 15,000.00).

Sec. 20. *Routine Inspection*. – The Department of Labor and Employment (DOLE) for the private sector and the Civil Service Commission (CSC) for the public sector shall conduct yearly spontaneous inspections to ensure compliance of employers and employees with their obligations under this Act.

ARTICLE V
GENDER-BASED SEXUAL HARASSMENT IN EDUCATION AND TRAINING INSTITUTIONS

Sec.21. *Gender Based Sexual Harassment in Educational and Training Institutions.* — All schools, whether public or private, shall designate an officer-in-charge to receive complaints regarding violations of this Act, and shall ensure that the victims are provided with a gender-sensitive environment that is both respectful to the victims' needs and conducive to truth-telling.

Every school must adopt and publish grievance procedures to facilitate the filing of complaints by students and faculty members. Even if an individual does not want to file a complaint or does not request that the school take any action on behalf of a student or faculty member and school authorities have knowledge or reasonably know about a possible or impending act of gender -based sexual harassment or sexual violence, the school should promptly investigate to determine the veracity of such information or knowledge and the circumstances under which the act of gender-based sexual harassment or sexual violence were committed, and take appropriate steps to resolve the situation. If a school knows or reasonably should know about acts of gender-based sexual harassment or sexual violence being committed that creates a hostile environment, the school must take immediate action to eliminate the same acts, prevent their recurrence, and address their effects.

Once a perpetrator is found guilty, the educational institution may reserve the right to strip the diploma from the perpetrator or issue an expulsion order.

The Committee on Decorum and Investigation (CODI) of all educational institutions shall address gender-based sexual harassment and online sexual harassment in accordance with the rules and procedures contained in their CODI manual.

Sec. 22. *Duties of School Heads.* – School heads shall have the following duties:

(a) Disseminate or post a copy of this Act in a conspicuous place in the educational institution;

(b) Provide measures to prevent gender-based sexual harassment in educational institutions, like information campaigns:

(c) Create an independent internal mechanism or a CODI to investigate and address complaints of gender-based sexual harassment which shall:

(1) Adequately represent the school administration, the trainers, instructors, professors or coaches and students or trainees, students and parents, as the case may be;

(2) Designate a woman as its head and not less than half of its members should be women;

(3) Ensure equal representation of persons of diverse sexual orientation, identity and/or expression, in the CODI as far as practicable;

(4) Be composed of members who should be impartial and not connected or related to the alleged perpetrator;

(5) Investigate and decide on complaints within ten (10) days or less upon receipt thereof;

(6) Observe due process;

(7) Protect the complainant from retaliation; and

(8) Guarantee confidentiality to the greatest extent possible

(d) Provide and disseminate, in consultation with all persons in the educational institution, a code of conduct or school policy which shall:

(1) Expressly reiterate the prohibition on gender-based sexual harassment;

(2) Prescribe the procedures of the internal mechanism created under this Act; and

(3) Set administrative penalties.

Sec. 23. *Liability of School Heads.* —In addition to liability for committing acts of gender-based sexual harassment, principals, school heads, teachers, instructors, professors, coaches, trainers, or any other person who has authority, influence or moral ascendancy over another in an educational or training institution may also be held responsible for:

(a) Non-implementation of their duties under Section 22 of this Act, as provided in the penal provisions; or

(b) Failure to act on reported acts of gender-based sexual harassment committed in the educational institution.

Any person who violates subsection (a) of this section, shall upon conviction, be penalized with a fine of not less than Five thousand pesos (P5,000.00) nor more than Ten thousand pesos (P10,000.00).

Any person who violates subsection (b) of this section, shall upon conviction, be penalized with a fine of not less than Ten thousand pesos (P10,000.00) nor more than Fifteen thousand pesos (P15,000.00).

Sec. 24. *Liability of Students*. – Minor students who are found to have committed acts of gender-based sexual harassment shall only be held liable for administrative sanctions by the school as stated in their school handbook.

Sec. 25. *Routine Inspection*. – The Department of Education (DepEd), the Commission on Higher Education (CHED), and the Technical Education and Skills Development Authority (TESDA) shall conduct regular spontaneous inspections to ensure compliance of school heads with their obligations under this Act.

ARTICLE VI
COMMON PROVISIONS

Sec. 26. *Confidentiality*. – At any stage of the investigation, prosecution and trial of an offense under this Act, the rights of the victim and the accused who is a minor shall be recognized.

Sec. 27. *Restraining Order*. – Where appropriate, the court, even before rendering a final decision, may issue an order directing the perpetrator to stay away from the offended person at a distance specified by the court, or to stay away from the residence, school, place of employment, or any specified place frequented by the offended person.

Sec. 28. *Remedies and Psychological Counselling*. – A victim of gender- based street, public spaces or online sexual harassment may avail of appropriate remedies as provided for under the law as well as psychological counselling services with the aid of the LGU and the DSWD, in coordination with the DOH and the PCW. Any fees to be charged in the course of a victim's availment of such remedies or psychological counselling services shall be borne by the perpetrator.

Sec. 29. *Administrative Sanctions*. —Above penalties are without prejudice to any administrative sanctions that may be imposed if the perpetrator is a government employee.

Sec. 30. *Imposition of Heavier Penalties*. – Nothing in this Act shall prevent LGUs from coming up with ordinances that impose heavier penalties for the acts specified herein.

Sec. 31. *Exemptions.* —Acts that are legitimate expressions of indigenous culture and tradition, as well as breastfeeding in public shall not be penalized.

ARTICLE VII
FINAL PROVISIONS

Sec. 32. *PNP Women and Children's Desks.* – The women and children's desks now existing in all police stations shall act on and attend to all complaints covered under this Act. They shall coordinate with ASHE officers on the street, security guards in privately-owned spaces open to the public, and anti-sexual harassment officers in government and private offices or schools in the enforcement of the provisions of this Act.

Sec. 33. *Educational Modules and Awareness Campaigns.* – The PCW shall take the lead in a national campaign for the awareness of the law. The PCW shall work hand-in-hand with the DILG and duly accredited women's groups to ensure all LGUs participate in a sustained information campaign and the DICT to ensure an online campaign that reaches a wide audience of Filipino internet-users. Campaign materials may include posters condemning different forms of gender-based sexual harassment, informing the public of penalties for committing gender-based sexual harassment, and infographics of hotline numbers of authorities.

All schools shall educate students from the elementary to tertiary level about the provisions of this Act and how they can report cases of gender-based streets, public spaces and online sexual harassment committed against them. School courses shall include age -appropriate educational modules against gender-based streets, public spaces and online sexual harassment which shall be developed by the DepEd, the CHED, the TESDA and the PCW.

Sec. 34. *Safety Audits.* – LGUs are required to conduct safety audits every three (3) years to assess the efficiency and effectivity of the implementation of this Act within their jurisdiction . Such audits shall be multisectoral and participatory, with consultations undertaken with schools, police officers, and civil society organizations.

Sec. 35. *Appropriations.* – Such amounts as may be necessary for the implementation of this Act shall be indicated under the annual General Appropriations Act (GAA). National and local government agencies shall be authorized to utilize their mandatory Gender and Development (GAD) budget, as provided under Republic Act No. 9710, otherwise known as "The Magna Carta of

Women" for this purpose. In addition, LGUs may also use their mandatory twenty percent (20%) allocation of their annual internal revenue allotments for local development projects as provided under Section 287 of Republic Act No. 7160, otherwise known as the "Local Government Code of 1991".

Sec. 36. *Prescriptive Period*. – Any action arising from the violation of any of the provisions of this Act shall prescribe as follows:

(a) Offenses committed under Section 11(a) of this Act shall prescribe in one (1) year;

(b) Offenses committed under Section 11(b) of this Act shall prescribe in three (3) years;

(c) Offenses committed under Section 11(c) of this Act shall prescribe in ten (10) years;

(d) Offenses committed under Section 12 of this Act shall be imprescriptible; and

(e) Offenses committed under Sections 16 and 21 of this Act shall prescribe in five (5) years.

Sec. 37. *Joint Congressional Oversight Committee*. – There is hereby created a Joint Congressional Oversight Committee to monitor the implementation of this Act and to review the implementing rules and regulations promulgated. The Committee shall be composed of five (5) Senators and five Representatives to be appointed by the Senate President and the Speaker of the House of Representatives, respectively. The Oversight Committee shall be co-chaired by the Chairpersons of the Senate Committee on Women, Children, Family Relations and Gender Equality and the House Committee on Women and Gender Equality.

Sec. 38. *Implementing Rules and Regulations (IRR)*. – Within ninety (90) days from the effectivity of this Act, the PCW as the lead agency, in coordination with the DILG, the DSWD, the PNP, the Commission on Human Rights (CHR), the DOH, the DOLE, the DepEd, the CHED, the DICT, the TESDA, the MMDA, the LTO, and at least three (3) women's organizations active on the issues of gender-based violence, shall formulate the implementing rules and regulations (IRR) of this Act.

Sec. 39. *Separability Clause*. —If any provision or part hereof is held invalid or unconstitutional, the remaining provisions not affected thereby shall remain valid and subsisting.

Sec. 40. *Repealing Clause.* – Any law, presidential decree or issuance, executive order, letter of instruction, administrative order, rule or regulation contrary to or inconsistent with the provisions of this Act is hereby repealed, modified or amended accordingly.

Sec. 41. *Effectivity*. – This Act shall take effect fifteen days after its publication in the Official Gazette or in any two (2) newspapers of general circulation in the Philippines.

iii. Rule on Examination of a Child Witness (Administrative Matter No. 000-4-07-SC, Supreme Court of the Philippines, 15 December 2000 and amended subsequently)

RULE ON EXAMINATION OF A CHILD WITNESS *(A.M. No. 004-07-SC)*

SECTION 1. *Applicability of the Rule.* — Unless otherwise provided, this Rule shall govern the examination of child witnesses who are victims of crime, accused of a crime, and witnesses to crime. It shall apply in all criminal proceedings and non-criminal proceedings involving child witnesses.

SECTION 2. *Objectives.* — The objectives of this Rule are to create and maintain an environment that will allow children to give reliable and complete evidence, minimize trauma to children, encourage children to testify in legal proceedings, and facilitate the ascertainment of truth.

SECTION 3. *Construction of the Rule.* — This Rule shall be liberally construed to uphold the best interests of the child and to promote maximum accommodation of child witnesses without prejudice to the constitutional rights of the accused.

SECTION 4. *Definitions.* —

(a) A "child witness" is any person who at the time of giving testimony is below the age of eighteen (18) years. In child abuse cases, a child includes one over eighteen (18) years but is found by the court as unable to fully take care of himself or protect himself from abuse, neglect, cruelty, exploitation, or discrimination because of a physical or mental disability or condition.

(b) "Child abuse" means physical, psychological, or sexual abuse, and criminal neglect as defined in Republic Act No. 7610 and other related laws.

(c) "Facilitator" means a person appointed by the court to pose questions to a child.

(d) "Record regarding a child" or "record" means any photograph, videotape, audiotape, film, handwriting, typewriting, printing, electronic recording, computer data or printout, or other memorialization, including any court document, pleading, or any copy or reproduction of any of the foregoing, that contains the name, description, address, school, or any other personal identifying information about a child or his family and that is produced or maintained by a public agency, private agency, or individual.

(e) A "guardian *ad litem*" is a person appointed by the court where the case is pending for a child who is a victim of, accused of, or a witness to a crime to protect the best interests of the said child.

(f) A "support person" is a person chosen by the child to accompany him to testify at or attend a judicial proceeding or deposition to provide emotional support for him.

(g) "Best interests of the child" means the totality of the circumstances and conditions as are most congenial to the survival, protection, and feelings of security of the child and most encouraging to his physical, psychological, and emotional development. It also means the least detrimental available alternative for safeguarding the growth and development of the child.

(h) "Developmental level" refers to the specific growth phase in which most individuals are expected to behave and function in relation to the advancement of their physical, socio-emotional, cognitive, and moral abilities.

(i) "In-depth investigative interview" or "disclosure interview" is an inquiry or proceeding conducted by duly trained members of multidisciplinary team or representatives of law

enforcement or child protective services for the purpose of determining whether child abuse has been committed.

SECTION 5. *Guardian Ad Litem.* —

(a) The court may appoint a guardian *ad litem* for a child who is a victim of, accused of, or a witness to a crime to promote the best interests of the child. In making the appointment, the court shall consider the background of the guardian *ad litem* and his familiarity with the judicial process, social service programs, and child development, giving preference to the parents of the child, if qualified. The guardian *ad litem* may be a member of the Philippine Bar. A person who is a witness in any proceeding involving the child cannot be appointed as a guardian *ad litem*.

(b) The guardian *ad litem:*

(1) Shall attend all interviews, depositions, hearings, and trial proceedings in which a child participates;

(2) Shall make recommendations to the court concerning the welfare of the child;

(3) Shall have access to all reports, evaluations, and records necessary to effectively advocate for the child, except privileged communications;

(4) Shall marshal and coordinate the delivery of resources and special services to the child;

(5) Shall explain, in language understandable to the child, all legal proceedings, including police investigations, in which the child is involved;

(6) Shall assist the child and his family in coping with the emotional effects of crime and subsequent criminal or non-criminal proceedings in which the child is involved;

(7) May remain with the child while the child waits to testify;

(8) May interview witnesses; and

(9) May request additional examinations by medical or mental health professionals if there is a compelling need therefor.

(c) The guardian *ad litem* shall be notified of all proceedings but shall not participate in the trial. However, he may file motions pursuant to sections 9, 10, 25, 26, 27 and 31(c). If the guardian *ad litem* is a lawyer, he may object during trial that questions asked of the child are not appropriate to his developmental level.

(d) The guardian *ad litem* may communicate concerns regarding the child to the court through an officer of the court designated for that purpose.

(e) The guardian *ad litem* shall not testify in any proceeding concerning any information, statement, or opinion received from the child in

the course of serving as a guardian *ad litem*, unless the court finds it necessary to promote the best interests of the child.

(f) The guardian *ad litem* shall be presumed to have acted in good faith in compliance with his duties described in sub-section (b).

SECTION 6. *Competency.* — Every child is presumed qualified to be a witness. However, the court shall conduct a competency examination of a child, *motu proprio* or on motion of a party, when it finds that substantial doubt exists regarding the ability of the child to perceive, remember, communicate, distinguish truth from falsehood, or appreciate the duty to tell the truth in court.

(a) *Proof of Necessity.* — A party seeking a competency examination must present proof of necessity of competency examination. The age of the child by itself is not a sufficient basis for a competency examination.

(b) *Burden of Proof*. — To rebut the presumption of competence enjoyed by a child, the burden of proof lies on the party challenging his competence.

(c) *Persons allowed at competency examination.* — Only the following are allowed to attend a competency examination:

(1) The judge and necessary court personnel;

(2) The counsel for the parties;

(3) The guardian *ad litem*;

(4) One or more support persons for the child; and

(5) The defendant, unless the court determines that competence can be fully evaluated in his absence.

(d) *Conduct of examination.* — Examination of a child as to his competence shall be conducted only by the judge. Counsel for the parties, however, can submit questions to the judge that he may, in his discretion, ask the child.

(e) *Developmentally appropriate questions.* — The questions asked at the competency examination shall be appropriate to the age and developmental level of the child; shall not be related to the issues at trial; and shall focus on the ability of the child to remember, communicate, distinguish between truth and falsehood, and appreciate the duty to testify truthfully.

(f) *Continuing duty to assess competence.* — The court has the duty of continuously assessing the competence of the child throughout his testimony.

SECTION 7. *Oath or Affirmation.* — Before testifying, a child shall take an oath or affirmation to tell the truth.

SECTION 8. *Examination of a Child Witness.* — The examination of a child witness presented in a hearing or any proceeding shall be done in open

court. Unless the witness is incapacitated to speak, or the question calls for a different mode of answer, the answers of the witness shall be given orally.

The party who presents a child witness or the guardian *ad litem* of such child witness may, however, move the court to allow him to testify in the manner provided in this Rule.

SECTION 9. *Interpreter for Child.* —

(a) When a child does not understand the English or Filipino language or is unable to communicate in said languages due to his developmental level, fear, shyness, disability, or other similar reason, an interpreter whom the child can understand and who understands the child may be appointed by the court, *motu proprio* or upon motion, to interpret for the child.

(b) If a witness or member of the family of the child is the only person who can serve as an interpreter for the child, he shall not be disqualified and may serve as the interpreter of the child. The interpreter, however, who is also a witness, shall testify ahead of the child.

(c) An interpreter shall take an oath or affirmation to make a true and accurate interpretation.

SECTION 10. *Facilitator to Pose Questions to Child.* —

(a) The court may, *motu proprio* or upon motion, appoint a facilitator if it determines that the child is unable to understand or respond to questions asked. The facilitator may be a child psychologist, psychiatrist, social worker, guidance counselor, teacher, religious leader, parent, or relative.

(b) If the court appoints a facilitator, the respective counsels for the parties shall pose questions to the child only through the facilitator. The questions shall either be in the words used by counsel or, if the child is not likely to understand the same, in words that are comprehensible to the child and which convey the meaning intended by counsel.

(c) The facilitator shall take an oath or affirmation to pose questions to the child according to the meaning intended by counsel.

SECTION 11. *Support Persons.* —

(a) A child testifying at a judicial proceeding or making a deposition shall have the right to be accompanied by one or two persons of his own choosing to provide him emotional support.

(1) Both support persons shall remain within the view of the child during his testimony.

(2) One of the support persons may accompany the child to the witness stand, provided the support person does not completely obscure the child from the view of the opposing party, judge, or hearing officer.

(3) The court may allow the support person to hold the hand of the child or take other appropriate steps to provide

emotional support to the child in the course of the proceedings.

(4) The court shall instruct the support persons not to prompt, sway, or influence the child during his testimony.

(b) If the support person chosen by the child is also a witness, the court may disapprove the choice if it is sufficiently established that the attendance of the support person during the testimony of the child would pose a substantial risk of influencing or affecting the content of the testimony of the child.

(c) If the support person who is also a witness is allowed by the court, his testimony shall be presented ahead of the testimony of the child.

SECTION 12. *Waiting Area for Child Witnesses.* — The courts are encouraged to provide a waiting area for children that is separate from waiting areas used by other persons. The waiting area for children should be furnished so as to make a child comfortable.

SECTION 13. *Courtroom Environment.* — To create a more comfortable environment for the child, the court may, in its discretion, direct and supervise the location, movement and deportment of all persons in the courtroom including the parties, their counsel, child, witnesses, support persons, guardian *ad litem*, facilitator, and court personnel. The child may be allowed to testify from a place other than the witness chair. The witness chair or other place from which the child testifies may be turned to facilitate his testimony but the opposing party and his counsel must have a frontal or profile view of the child during the testimony of the child. The witness chair or other place from which the child testifies may also be rearranged to allow the child to see the opposing party and his counsel, if he chooses to look at them, without turning his body or leaving the witness stand. The judge need not wear his judicial robe.

Nothing in this section or any other provision of law, except official in-court identification provisions, shall be construed to require a child to look at the accused.

Accommodations for the child under this section need not be supported by a finding of trauma to the child.

SECTION 14. *Testimony During Appropriate Hours.* — The court may order that the testimony of the child should be taken during a time of day when the child is well-rested.

SECTION 15. *Recess During Testimony.* — The child may be allowed reasonable periods of relief while undergoing direct, cross, re-direct, and re-cross examinations as often as necessary depending on his developmental level.

SECTION 16. *Testimonial Aids.* — The court shall permit a child to use dolls, anatomically-correct dolls, puppets, drawings, mannequins, or any other appropriate demonstrative device to assist him in his testimony.

SECTION 17. *Emotional Security Item.* — While testifying, a child

shall be allowed to have an item of his own choosing such as a blanket, toy, or doll.

SECTION 18. *Approaching the Witness.* — The court may prohibit a counsel from approaching a child if it appears that the child is fearful of or intimidated by the counsel.

SECTION 19. *Mode of Questioning.* — The court shall exercise control over the questioning of children so as to (1) facilitate the ascertainment of the truth, (2) ensure that questions are stated in a form appropriate to the developmental level of the child, (3) protect children from harassment or undue embarrassment, and (4) avoid waste of time.

The court may allow the child witness to testify in a narrative form.

SECTION 20. *Leading Questions.* — The court may allow leading questions in all stages of examination of a child if the same will further the interests of justice.

SECTION 21. *Objections to Questions.* — Objections to questions should be couched in a manner so as not to mislead, confuse, frighten, or intimidate the child.

SECTION 22. *Corroboration.* — Corroboration shall not be required of a testimony of a child. His testimony, if credible by itself, shall be sufficient to support a finding of fact, conclusion, or judgment subject to the standard of proof required in criminal and non-criminal cases.

SECTION 23. *Excluding the Public.* — When a child testifies, the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made to protect the right to privacy of the child or if the court determines on the record that requiring the child to testify in open court would cause psychological harm to him, hinder the ascertainment of truth, or result in his inability to effectively communicate due to embarrassment, fear, or timidity. In making its order, the court shall consider the developmental level of the child, the nature of the crime, the nature of his testimony regarding the crime, his relationship to the accused and to persons attending the trial, his desires, and the interests of his parents or legal guardian. The court may, *motu proprio*, exclude the public from the courtroom if the evidence to be produced during trial is of such character as to be offensive to decency or public morals. The court may also, on motion of the accused, exclude the public from trial, except court personnel and the counsel of the parties.

SECTION 24. *Persons Prohibited from Entering and Leaving Courtroom.* — The court may order that persons attending the trial shall not enter or leave the courtroom during the testimony of the child.

SECTION 25. *Live-link Television Testimony in Criminal Cases Where the Child is a Victim or a Witness.* —

(a) The prosecutor, counsel, or the guardian *ad litem* may apply for an order that the testimony of the child be taken in a room outside the courtroom and be televised to the courtroom by live-link television.

Before the guardian *ad litem* applies for an order under this section, he shall consult the prosecutor or counsel and shall defer to the judgment of the prosecutor or counsel regarding the necessity of applying for an order. In case the guardian *ad litem* is convinced that the decision of the prosecutor or counsel not to apply will cause the child serious emotional trauma, he himself may apply for the order.

The person seeking such an order shall apply at least five (5) days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(b) The court may *motu proprio* hear and determine, with notice to the parties, the need for taking the testimony of the child through live-link television.

(c) The judge may question the child in chambers, or in some comfortable place other than the courtroom, in the presence of the support person, guardian *ad litem*, prosecutor, and counsel for the parties. The questions of the judge shall not be related to the issues at trial but to the feelings of the child about testifying in the courtroom.

(d) The judge may exclude any person, including the accused, whose presence or conduct causes fear to the child.

(e) The court shall issue an order granting or denying the use of live-link television and stating the reasons therefor. It shall consider the following factors:

(1) The age and level of development of the child;

(2) His physical and mental health, including any mental or physical disability;

(3) Any physical, emotional, or psychological injury experienced by him;

(4) The nature of the alleged abuse;

(5) Any threats against the child;

(6) His relationship with the accused or adverse party;

(7) His reaction to any prior encounters with the accused in court or elsewhere;

(8) His reaction prior to trial when the topic of testifying was discussed with him by parents or professionals;

(9) Specific symptoms of stress exhibited by the child in the days prior to testifying;

(10) Testimony of expert or lay witnesses;

(11) The custodial situation of the child and the attitude of the members of his family regarding the events about which he will testify; and

(12) Other relevant factors, such as court atmosphere and formalities of court procedure.

(f) The court may order that the testimony of the child be taken by live-link television if there is a substantial likelihood that the child would suffer trauma from testifying in the presence of the accused, his counsel or the prosecutor as the case may be. The trauma must be of a kind which would impair the completeness or truthfulness of the testimony of the child.

(g) If the court orders the taking of testimony by live-link television:

(1) The child shall testify in a room separate from the courtroom in the presence of the guardian *ad litem;* one or both of his support persons; the facilitator and interpreter, if any; a court officer appointed by the court; persons necessary to operate the closed-circuit television equipment; and other persons whose presence are determined by the court to be necessary to the welfare and well-being of the child;

(2) The judge, prosecutor, accused, and counsel for the parties shall be in the courtroom. The testimony of the child shall be transmitted by live-link television into the courtroom for viewing and hearing by the judge, prosecutor, counsel for the parties, accused, victim, and the public unless excluded.

(3) If it is necessary for the child to identify the accused at trial, the court may allow the child to enter the courtroom for the limited purpose of identifying the accused, or the court may allow the child to identify the accused by observing the image of the latter on a television monitor.

(4) The court may set other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the best interests of the child.

(h) The testimony of the child shall be preserved on videotape, digital disc, or other similar devices which shall be made part of the court record and shall be subject to a protective order as provided in section 31(b).

SECTION 26. *Screens, One-way Mirrors, and Other Devices to Shield Child from Accused.* —

(a) The prosecutor, counsel, or the guardian *ad litem* may apply for an order that the chair of the child or that a screen or other device be placed in the courtroom in such a manner that the child cannot see the accused while testifying. Before the guardian *ad litem* applies for an order under this section, he shall consult with the prosecutor or counsel subject to the second and third paragraphs of section 25(a) of this Rule. The court shall issue an order stating the reasons and describing the approved courtroom arrangement.

(b) If the court grants an application to shield the child from the accused while testifying in the courtroom, the courtroom shall be arranged to enable the accused to view the child.

SECTION 27. *Videotaped Deposition.* —

(a) The prosecutor or the guardian *ad litem* may apply for an order that a deposition be taken of the testimony of the child and that it be recorded and preserved on videotape. Before the guardian *ad litem* applies for an order under this section, he shall consult with the prosecutor or counsel subject to the second and third paragraphs of section 25(a).

(b) If the court finds that the child will not be able to testify in open court at trial, it shall issue an order that the deposition of the child be taken and preserved by videotape.

(c) The judge shall preside at the videotaped deposition of a child. Objections to deposition testimony or evidence, or parts thereof, and the grounds for the objection shall be stated and shall be ruled upon at the time of the taking of the deposition. The other persons who may be permitted to be present at the proceeding are:

(1) The prosecutor;

(2) The defense counsel;

(3) The guardian *ad litem*;

(4) The accused, subject to sub-section (e);

(5) Other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child;

(6) One or both of his support persons, the facilitator and interpreter, if any;

(7) The court stenographer; and

(8) Persons necessary to operate the videotape equipment.

(d) The rights of the accused during trial, especially the right to counsel and to confront and cross-examine the child, shall not be violated during the deposition.

(e) If the order of the court is based on evidence that the child is unable to testify in the physical presence of the accused, the court may direct the latter to be excluded from the room in which the deposition is conducted. In case of exclusion of the accused, the court shall order that the testimony of the child be taken by live-link television in accordance with section 25 of this Rule. If the accused is excluded from the deposition, it is not necessary that the child be able to view an image of the accused.

(f) The videotaped deposition shall be preserved and stenographically recorded. The videotape and the stenographic notes shall be transmitted to the clerk of the court where the case is pending for safekeeping and shall be made a part of the record.

(g) The court may set other conditions on the taking of the deposition that it finds just and appropriate, taking into consideration the best interests of the child, the constitutional rights of the accused, and other relevant factors.

(h) The videotaped deposition and stenographic notes shall be subject to a protective order as provided in section 31(b).

(i) If, at the time of trial, the court finds that the child is unable to testify for a reason stated in section 25(f) of this Rule, or is unavailable for any reason described in section 4(c), Rule 23 of the 1997 Rules of Civil Procedure, the court may admit into evidence the videotaped deposition of the child in lieu of his testimony at the trial. The court shall issue an order stating the reasons therefor.

(j) After the original videotaping but before or during trial, any party may file any motion for additional videotaping on the ground of newly discovered evidence. The court may order an additional videotaped deposition to receive the newly discovered evidence.

SECTION 28. *Hearsay Exception in Child Abuse Cases* — A statement made by a child describing any act or attempted act of child abuse, not otherwise admissible under the hearsay rule, may be admitted in evidence in any criminal or non-criminal proceeding subject to the following rules:

(a) Before such hearsay statement may be admitted, its proponent shall make known to the adverse party the intention to offer such statement and its particulars to provide him a fair opportunity to object. If the child is available, the court shall, upon motion of the adverse party, require the child to be present at the presentation of the hearsay statement for cross-examination by the adverse party. When the child is unavailable, the fact of such circumstance must be proved by the proponent.

(b) In ruling on the admissibility of such hearsay statement, the court shall consider the time, content and circumstances thereof which provide sufficient indicia of reliability. It shall consider the following factors:

(1) Whether there is a motive to lie;

(2) The general character of the declarant child;

(3) Whether more than one person heard the statement;

(4) Whether the statement was spontaneous;

(5) The timing of the statement and the relationship between the declarant child and witness;

(6) Cross-examination could not show the lack of knowledge of the declarant child;

(7) The possibility of faulty recollection of the declarant child is remote; and

(8) The circumstances surrounding the statement are such that

there is no reason to suppose the declarant child misrepresented the involvement of the accused.

(c) The child witness shall be considered unavailable under the following situations:

(1) Is deceased, suffers from physical infirmity, lack of memory, mental illness, or will be exposed to severe psychological injury; or

(2) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

(d) When the child witness is unavailable, his hearsay testimony shall be admitted only if corroborated by other admissible evidence.

SECTION 29. *Admissibility of Videotaped and Audiotaped In-depth Investigative or Disclosure Interviews in Child Abuse Cases.* — The court may admit videotape and audiotape in-depth investigative or disclosure interviews as evidence, under the following conditions:

(a) The child witness is unable to testify in court on grounds and under conditions established under section 28 (c).

(b) The interview of the child was conducted by duly trained members of a multidisciplinary team or representatives of law enforcement or child protective services in situations where child abuse is suspected so as to determine whether child abuse occurred.

(c) The party offering the videotape or audiotape must prove that:

(1) the videotape or audiotape discloses the identity of all individuals present and at all times includes their images and voices;

(2) the statement was not made in response to questioning calculated to lead the child to make a particular statement or is clearly shown to be the statement of the child and not the product of improper suggestion;

(3) the videotape and audiotape machine or device was capable of recording testimony;

(4) the person operating the device was competent to operate it;

(5) the videotape or audiotape is authentic and correct; and

(6) it has been duly preserved.

The individual conducting the interview of the child shall be available at trial for examination by any party. Before the videotape or audiotape is offered in evidence, all parties shall be afforded an opportunity to view or listen to it and shall be furnished a copy of a written transcript of the

proceedings.

The fact that an investigative interview is not videotaped or audiotaped as required by this section shall not by itself constitute a basis to exclude from evidence out-of-court statements or testimony of the child. It may, however, be considered in determining the reliability of the statements of the child describing abuse.

SECTION 30. *Sexual Abuse Shield Rule.* —

(a) *Inadmissible evidence.* — The following evidence is not admissible in any criminal proceeding involving alleged child sexual abuse:

(1) Evidence offered to prove that the alleged victim engaged in other sexual behavior; and

(2) Evidence offered to prove the sexual predisposition of the alleged victim.

(b) *Exception.* — Evidence of specific instances of sexual behavior by the alleged victim to prove that a person other than the accused was the source of semen, injury, or other physical evidence shall be admissible.

A party intending to offer such evidence must:

(1) File a written motion at least fifteen (15) days before trial, specifically describing the evidence and stating the purpose for which it is offered, unless the court, for good cause, requires a different time for filing or permits filing during trial; and

(2) Serve the motion on all parties and the guardian *ad litem* at least three (3) days before the hearing of the motion.

Before admitting such evidence, the court must conduct a hearing in chambers and afford the child, his guardian *ad litem*, the parties, and their counsel a right to attend and be heard. The motion and the record of the hearing must be sealed and remain under seal and protected by a protective order set forth in section 31(b). The child shall not be required to testify at the hearing in chambers except with his consent.

SECTION 31. *Protection of Privacy and Safety.* —

(a) *Confidentiality of records.* — Any record regarding a child shall be confidential and kept under seal. Except upon written request and order of the court, a record shall only be released to the following:

(1) Members of the court staff for administrative use;

(2) The prosecuting attorney;

(3) Defense counsel;

(4) The guardian *ad litem*;

(5) Agents of investigating law enforcement agencies; and

(6) Other persons as determined by the court.

(b) *Protective order.* — Any videotape or audiotape of a child that is part of the court record shall be under a protective order that provides as follows:

(1) Tapes may be viewed only by parties, their counsel, their expert witness, and the guardian *ad litem.*

(2) No tape, or any portion thereof, shall be divulged by any person mentioned in sub-section (a) to any other person, except as necessary for the trial.

(3) No person shall be granted access to the tape, its transcription or any part thereof unless he signs a written affirmation that he has received and read a copy of the protective order; that he submits to the jurisdiction of the court with respect to the protective order; and that in case of violation thereof, he will be subject to the contempt power of the court.

(4) Each of the tape cassettes and transcripts thereof made available to the parties, their counsel, and respective agents shall bear the following cautionary notice:

"This object or document and the contents thereof are subject to a protective order issued by the court in (*case title*), (*case number*). They shall not be examined, inspected, read, viewed, or copied by any person, or disclosed to any person, except as provided in the protective order. No additional copies of the tape or any of its portion shall be made, given, sold, or shown to any person without prior court order. Any person violating such protective order is subject to the contempt power of the court and other penalties prescribed by law."

(5) No tape shall be given, loaned, sold, or shown to any person except as ordered by the court.

(6) Within thirty (30) days from receipt, all copies of the tape and any transcripts thereof shall be returned to the clerk of court for safekeeping unless the period is extended by the court on motion of a party.

(7) This protective order shall remain in full force and effect until further order of the court.

(c) *Additional protective orders.* — The court may, *motu proprio* or on motion of any party, the child, his parents, legal guardian, or the guardian *ad litem*, issue additional orders to protect the privacy of the child.

(d) *Publication of identity contemptuous.* — Whoever publishes or causes to be published in any format the name, address, telephone number, school, or other identifying information of a child who is or is alleged to be a victim or accused of a crime or a witness thereof, or an immediate family of

the child shall be liable to the contempt power of the court.

(e) *Physical safety of child; exclusion of evidence.* — A child has a right at any court proceeding not to testify regarding personal identifying information, including his name, address, telephone number, school, and other information that could endanger his physical safety or his family. The court may, however, require the child to testify regarding personal identifying information in the interest of justice.

(f) *Destruction of videotapes and audiotapes.* — Any videotape or audiotape of a child produced under the provisions of this Rule or otherwise made part of the court record shall be destroyed after five (5) years have elapsed from the date of entry of judgment.

(g) *Records of youthful offender.* — Where a youthful offender has been charged before any city or provincial prosecutor or before any municipal judge and the charges have been ordered dropped, all the records of the case shall be considered as privileged and may not be disclosed directly or indirectly to anyone for any purpose whatsoever.

Where a youthful offender has been charged and the court acquits him, or dismisses the case or commits him to an institution and subsequently releases him pursuant to Chapter 3 of P.D. No. 603, all the records of his case shall also be considered as privileged and may not be disclosed directly or indirectly to anyone except to determine if a defendant may have his sentence suspended under Article 192 of P.D. No. 603 or if he may be granted probation under the provisions of P.D. No. 968 or to enforce his civil liability, if said liability has been imposed in the criminal action. The youthful offender concerned shall not be held under any provision of law to be guilty of perjury or of concealment or misrepresentation by reason of his failure to acknowledge the case or recite any fact related thereto in response to any inquiry made to him for any purpose.

"Records" within the meaning of the sub-section shall include those which may be in the files of the National Bureau of Investigation and with any police department or government agency which may have been involved in the case. (Art. 200, P.D. No. 603)

SECTION 32. *Applicability of Ordinary Rules.* — The provisions of the Rules of Court on deposition, conditional examination of witnesses, and evidence shall be applied in a suppletory character.

SECTION 33. *Effectivity.* — This Rule shall take effect on December 15, 2000 following its publication in two (2) newspapers of general circulation.

OCA CIRCULAR NO. 101-2019

TO : *All Designated and Statutory Family Court Judges (Acting Presiding/Assisting) of the Regional Trial Courts*

SUBJECT : *En Banc Resolution Dated 09 October 2018 in A.M. No. 00-4-07-SC (Re: Proposed Rule on Examination of a Child Witness) Relative to the Amendment of Section 25 of the Rule on Examination of a Child Witness by Expanding the Use of Live-Link Television and Equivalent Applicable ICTs*

For your **information and guidance**, quoted below is the Resolution dated 09 October 2018 of the Honorable Court En Banc in A.M. No. 00-4-07-SC *(Re: Proposed Rule on Examination of a Child Witness):*

> **A.M. No. 00-4-07-SC** (Re: Proposed Rule on Examination of a Child Witness). — Acting on Resolution No. 03-2018 of the Committee on Family Courts and Juvenile Concerns, the Court Resolved to **APPROVE** the amendment of Section 25 of the Rule on Examination of a Child Witness by expanding the use of live-link television and equivalent applicable ICTs, to read as follows:
>
> Section 25. Live-link television testimony in **cases where the child is a witness**. —
>
> xxx xxx xxx **[Amendment in bold]**
>
> The above Amendment shall take effect on December 1, 2018, following its publication in two (2) newspapers of general circulation in the Philippines.

iv. Protocols and Procedures in the Promulgation, Publication, and Posting on the Websites of Decisions, Final Resolutions, and Final Orders Using Fictitious Names/Personal Circumstances (Amended Administrative Circular No. 83-2015, Supreme Court of the Philippines, 5 September 2017)

September 5, 2017

SUPREME COURT AMENDED ADMINISTRATIVE CIRCULAR NO. 83-15

TO : *All Justices and Clerks of Court of the Supreme Court*

All Justices and Clerks of Court of the Court of Appeals and the Sandiganbayan

All Judges and Clerks of Court of the Regional Trial Courts, Metropolitan Trial Courts, Municipal Trial Courts in Cities, and Municipal Trial Courts

CC : *Office of the Court Administrator*

Office of the Reporter

Public Information Office

Supreme Court Library

Other Court Libraries

SUBJECT : *Protocols and Procedures in the Promulgation, Publication, and Posting on the Websites of Decisions, Final Resolutions, and Final Orders Using Fictitious Names/Personal Circumstances*

WHEREAS, the Court issued Guidelines for the purpose of protecting the privacy and dignity of victims, including their relatives, in cases where the confidentiality of court proceedings and the identities of parties is mandated by law.

Thus, for the guidance of all courts, their respective clerks of court, and other court personnel, we issue the present Amended Administrative Circular (Protocol) reiterating and supplementing our Guidelines in A.M. No. 12-7-15-SC by further detailing the procedures in the promulgation, publication, and posting of **decisions, resolutions, and final and interlocutory orders** in the cases covered by this Protocol.

I. COVERED CASES

1. This Protocol shall govern the procedure in the promulgation, publication and posting of decisions, resolutions, and final and interlocutory orders of the courts **in cases where the confidentiality of the identities of**

the parties, records, and court proceedings is mandated by law and/or by the rules.

2. Confidentiality of the identities of the parties, records, and court proceedings is mandated by the following laws: Republic Act (R.A.) No. 7610 [1] in cases of child abuse, exploitation, and discrimination; Article 266-A of the Revised Penal Code; R.A. No. 8505 [2] in cases of rape and other forms of sexual abuse or assault; R.A. No. 9208 [3] in cases of human trafficking; R.A. No. 9262 [4] in cases of violence against women and their children; and R.A. No. 9344 [5] as amended by Republic Act 10630, in cases involving children at risk and those in conflict with the law; Republic Act No. 9775 [6] in cases of child pornography; Republic Act No. 10175 [7] and;Republic Act No. 10364, [8] an act to institute Policies to Eliminate Trafficking in Persons especially Women and Children, etc.

3. This Protocol shall also apply to cases where the confidentiality of the identities of the parties, records, and court proceedings is mandated by laws or rules not expressly mentioned herein and by similar laws or rules to be enacted in the future.

II. PROSPECTIVE AND LIMITED RETROACTIVE APPLICATION

1. The decisions, resolutions, and orders issued or promulgated or to be issued or promulgated by the courts in cases covered by this Protocol shall be modified in accordance with the provisions of this Amended Administrative Circular.

2. The modification of previously issued and promulgated decisions, resolutions, and orders shall extend only to those published on the Official Website of the Supreme Court *(SC Website)* beginning 1996, the earliest year when decisions of the Court were uploaded and made publicly accessible.

3. Henceforth, application systems, database management systems, and all other software systems which store, retrieve, display, print, and process confidential data in any digitized form using any type of electronic device must be designed, developed, and implemented to enforce confidentiality in accordance with this Amended Circular using appropriate techniques such as, but not limited to, encryption, data masking, data replacement, and user access rights restriction.

III. MODIFICATION REQUIREMENTS FOR COVERED CASES

1. The cases covered by this Protocol shall be modified in the following manner:

a. By replacing, with **Fictitious Initials**, the **complete names** of the women and children victims in the decisions, resolutions, and orders of the court in cases covered by this Protocol. For example,

AAA should be written in place of the name of the woman victim in the crime of rape.

The courts may, in the exercise of their discretion, use different combinations of letters as long as the fictitious initials used shall not identify, directly or indirectly, the individual whose real name is replaced by the fictitious initials.

b. The **personal circumstances** or other information which tend to establish or compromise, directly or indirectly, the identities of the women and children victims, such as, but not limited to, their date of birth, complete address, complete names of parents, relatives, or other household members, shall be**blotted out** from the decision, resolution, and order of the courts in covered cases.

The complete names and personal circumstances of the victim's family members or relatives, who may be mentioned in the court's decision or resolution, shall likewise be similarly treated.

c. At the victim's instance or, if the victim is a minor, that of his or her guardian, the complete name of the accused may be replaced by fictitious initials and his or her personal circumstances blotted out from the decision, resolution, or order if the name and personal circumstances of the accused may tend to establish or compromise the victims' identities. The victims or their guardians should manifest to the trial court at the earliest opportunity, *i.e.*, after the filing of the complaint, information, or original petition, their desire to have the name of the accused be replaced with fictitious initials and his personal circumstances be blotted out from the decision, resolution, and order of the court.

If the accused is a minor, the complete name of the accused shall be replaced with fictitious initials and his or her personal circumstances, except for the fact of minority, shall be blotted out from the decision, resolution or order.

d. As to **geographical location**, the decisions, resolutions, and orders in covered cases should refer only to the province where the incident occurred or where the crime was committed. References to the specific *barangay* or town should be blotted out from the body of the decision, resolution, or order if its identification could lead to the disclosure of the identities of the women or children victims.

2. The Court shall determine the use of fictitious initials in place of the victims' complete names at the earliest opportunity, *i.e.*, after the filing of the complaint, information, **or original petition and shall then issue an Order or Resolution to this effect**.

3. The fictitious initials determined by the Court to replace the real names of the victims in covered cases should be used consistently in the body and dispositive portion of the decision, resolution, or order and in all subsequent court issuances. The court may, however, use the real names of the victims in its issuance of interlocutory orders, where the identification of the victims is necessary to avoid mistake or confusion in the enforcement of these orders.

4. The use of fictitious initials, however, may be waived by the victims in accordance with Title IV of this Protocol.

5. The order or resolution issued by the Court under Title III, Paragraph 2 of this Amended Protocol shall be effective in all subsequent proceedings in the case, even under Rules 38 of the Rules of Court and on appeal to the higher courts under Rules 41, 42, 45 or 47 of the Rules of Court.

6. The court's order or resolution shall also apply to petitions for *certiorari*, prohibition or *mandamus*, under Rule 65 of the Rules of Court, filed by either the accused-appellant or the minor, children victims or women victims, as petitioner/petitioners, assailing the proceedings, orders, or judgment by a lower court in covered cases.

7. In cases where the victims or their guardians have manifested their desire to replace the complete name of the accused with fictitious initials, the caption or title of the case should be written as follows:

a. The fictitious initials in the caption or title of the case shall be followed by the case number, or government record (G.R.) number, assigned to the case written in parenthesis. For example, in the lower courts, *'People of the Philippines v. AAA* (Case No. _____).'

b. If the case is appealed to the higher courts, the fictitious initials shall be followed by the case number assigned by the appellate court with proper notation of the original case number of the case before the trial court written in parenthesis. For example, *'BBB v. People (current appellate court case number [formerly lower court case number]).'*

c. If the case filed is a separate and independent **petition for *certiorari*, prohibition or *mandamus* under Rule 65 of the Rules of Court**, the fictitious initials shall be followed by the case number assigned by the higher court. Examples are: *'BBB v. Public/Private Respondents (Case No. ____),' and 'People of the Philippines and BBB v. Public/Private Respondents (Case No. _____).'*

8. The rules, under this Protocol, shall also be observed in modifying the decisions, resolutions, and orders to be uploaded and already uploaded on the SC Website or the SC E-Library.

IV. WAIVER BY THE VICTIMS

1. The women and children victims, in covered cases, may, at any time, consent to the disclosure of their real names and personal circumstances in the decisions, resolutions, and orders of the court. In such case, the victims giving the consent must personally, or with the assistance of counsel, execute a written waiver in the presence of the handling Court or before a notary public.

2. In cases where the victim giving the consent is a minor, the waiver must be executed by the minor's parent or guardian. In the absence of a parent or guardian, the court shall designate a person who shall execute the waiver on the minor's behalf. The person so designated by the court must fully explain the consequences of the waiver to the minor. The waiver may be executed in the presence of the handling Court or before a notary public, and must be approved by the handling Court.

3. For good and meritorious cause shown to the handling Court, the waiver, under this Protocol, may be revoked by those who gave their consent to the disclosure of their real names and personal circumstances in the decisions, resolutions, and orders of the court.

4. The revocation of the waiver must be in writing and executed in the presence of the handling Court or before a notary public. In the latter case, the revocation shall be effective upon the approval thereof by the handling Court.

5. In cases where the waiver was executed on behalf of a minor, the revocation of such waiver may be executed by either the minor's parent, guardian or person duly designated by the handling Court for the said purpose. The handling Court to which the revocation is submitted shall give its approval if, in the exercise of its discretion, the revocation will serve the greater good of the women or children victims. The handling Court shall set the terms for the modification of decisions, resolutions, or orders between the time a waiver is made and its revocation. aScITE

6. The women or children victims waiving the confidentiality of their identities or revoking such waiver must present the waiver or revocation of the waiver, duly executed under the provisions of Title IV of this Protocol, to the handling Judge or the Court, office or officer responsible for the modification of the decisions, resolutions, and orders in cases covered by this Protocol.

V. PROMULGATION OF DECISION, FINAL RESOLUTION OR FINAL ORDER

FIRST LEVEL AND SECOND LEVEL COURTS

1. In the promulgation of decisions (original, amended or new), final resolutions, and final orders, in covered cases, in the First Level and Second

Level Courts, the handling Court shall prepare two (2) copies of its decision, final resolution or order. The **first copy** shall be the unmodified version of the decision, final resolution or order, where the real names of the victim/victims are used and their personal circumstances are disclosed. The **second (modified) copy** shall be the version of the decision, resolution or order, where the fictitious name/names and personal circumstances of the victim/victims are used in accordance with this Amended Protocol.

2. The **first copy** or unmodified version of the decision, final resolution or order of the handling Court is confidential and shall be placed, after the promulgation thereof, by the Branch Clerk of Court, in a **blue-colored envelope**, duly signed, dated, the docket number of the case in the Court written thereon by the Branch Clerk of Court and sealed. If the handling Court renders an amended decision, final resolution or order, the Judge of the handling Court shall prepare two (2) copies of the amended decision, final resolution or order; the **first copy** containing the genuine name/names and personal circumstances of the victim/victims; and a **second (modified) copy** containing the fictitious name/names and personal circumstances of said victim/victims and accused if warranted. The Branch Clerk of Court thereof shall, after the promulgation of the amended decision, final resolution or order of the Court, open the **blue-colored envelope**, upon written authority of the Judge of the handling Court, and place the **first copy** of the amended decision, final resolution or order in the same **blue-colored envelope**, duly resealed, re-authenticated, and redated, and the docket number of the case in the Court written thereon by the Branch Clerk of Court.

3. Only the authenticated hard copies of the **second (modified) copy** of the promulgated decision and amended or new decision, final resolution or order of the handling Court shall be released to and served on the parties in accordance with the Rules of Court.

4. The **blue-colored envelope** containing the **first copy** of the original and/or amended or new decisions, final resolutions or orders of the Court shall be attached to and form part of the record of the case. The **second (modified) copy** of the original and/or amended or new decision, final resolution or order shall be attached to and form part of the open records of the case.

5. The **blue-colored envelope** cannot be opened or reopened without the written authority of the Judge of the handling Court; or in the absence of the Judge of the handling Court, by the pairing Judge of the handling Court; or in the absence of the pairing Judge of the handling Court, by the Executive Judge of the handling Court.

6. The **blue-colored envelope** may also be reopened upon written order of the Appellate Court or by the Supreme Court.

COURT OF APPEALS AND SANDIGANBAYAN

1. The member of the Court of Appeals chosen by a Division (Regular or Special) to be the *ponente* shall submit to the Court two (2) copies of the decision, final resolution or order of the Court. The **first copy** contains the genuine name/names, personal circumstances and other information of the victim/victims. The**second (modified) copy** contains the fictitious name and personal circumstances of such victim/victims and accused if warranted. Any member of the Court who opts to file a concurring, dissenting or separate opinion shall likewise submit to the Court a **first copy** which contains the genuine name/names of the victim/victims, and a **second (modified) copy** which contains the fictitious name/names and personal circumstances of the victim/victims of such opinion. The fictitious name/names and personal circumstances of the victim/victims and accused if warranted contained in the **second (modified) copy** of the dissenting, concurring or separate opinions of the other Justice/Justices of the Court shall be the same as those contained in the **second (modified) copy** of the decision, final resolution or final order of the *ponente*.

2. After the promulgation of the final copy and **second (modified) copy** of the decision, final resolution or order of the Court, in accordance with the Internal Rules of the Court of Appeals and the Rules of Court, the Division Clerk of Court shall place the **first copy** of the decision, final resolution or order as well as any concurring, dissenting or separate opinions of the other member/members of the division, in a **blue-colored envelope**, seal the envelope, write thereon the date and the docket number of the case in the Court of Appeals, authenticate the envelope, and cause the delivery thereof to the Reporter of the Court of Appeals for safekeeping.

3. If the original decision is amended or reversed, after the promulgation of the original decision, the *ponente* shall prepare and submit to the Court two (2) copies thereof, the **first copy** of the amended decision, final resolution or order containing the genuine name/names and personal circumstances of the victim/victims, and a **second (modified) copy** containing the fictitious name/names and personal circumstances of said victim/victims and accused if warranted. The**first copy** of the amended or new decision, final resolution or order as well as any concurring, dissenting or separate opinion of other member/members of the Division shall be promulgated by the Division Clerk of Court, who shall thereafter retrieve the **blue-colored envelope** containing the original copy of the **first copy** of the original decision, final resolution or order of the Court from the Reporter of the Court, open the envelope and place the amended or new decision/resolution in the same **blue-colored envelope**, redate, re-authenticate and reseal the same and return the said envelope containing the original and amended or new decisions, resolutions, and any

concurring, dissenting or separate opinion to the Reporter of Court of Appeals for safekeeping.

4. The sealed **blue-colored envelope** containing the original copy of the **first copy** of the original and amended or new decisions, final resolutions and orders of the Court cannot be opened or reopened except by the Division Clerk of Court as provided herein, or as directed by the Supreme Court, or unless with the written authority of the *ponente*, or by the Chairperson of the Division if the *ponente* has died or retired, resealed and re-authenticated and the docket number of the case written thereon.

5. After the promulgation of the original, amended or new decision, final resolution or order of the Court, the Division Clerk of Court shall furnish the*ponente*, the parties, the Solicitor General, the Director of Prisons if the accused is detained, and the Information and the Statistical Data Division and Judicial Records Division with hard copies of the **second (modified) copy** of the original, amended or new decision, final resolution or order, and attach the **second (modified) copy**thereof to the *rollo* of the case.

6. Only a hard copy of the **second (modified) copy** of the original and amended or new decision, final resolution or order of the Court may be published in the Official Gazette or in the Philippine Reports or Supreme Court Website if authorized by the Supreme Court.

7. The foregoing rules shall apply in the Sandiganbayan except that, after the promulgation of the original and/or amended or new decision, final resolution or order of the Sandiganbayan, the Division Clerk of Court shall place the **first copy** thereof in a **blue-colored envelope**, duly dated, authenticated and sealed, and the docket number of the case in the Sandiganbayan written thereon, and caused to be delivered to the Executive Director of the Legal and Technical Staff of the Sandiganbayan for safekeeping.

SUPREME COURT

1. The member of the Supreme Court, who is assigned by the Court (Division or En Banc) to write the decision, final resolution or order of the Court, shall prepare and submit to the members of the Court, a **first copy** thereof where the real or genuine name/names or identities and personal circumstances of the victim/victims are used, and a **second (modified) copy**, which contains the fictitious name/names and personal circumstances of the victim/victims and accused if warranted, as modified in accordance with the Title III, Paragraph 2 of the Amended Protocol. Any other member or members of the Court opting to dissent from or concur with the majority opinion or to write a separate opinion shall also submit to the Chief Justice or Division Clerk of Court a **first copy** and a **second (modified) copy** of such dissenting,

concurring or separate opinion containing the same fictitious names or identities and personal circumstances of the victim/parties contained in the *ponencia*.

2. The Judicial Staff Head of the *ponente* shall submit the **first copy** and the **second (modified) copy** of the decision, final resolution or order, together with any other opinion, for authentication, by the Chairperson of the Division and certification by the Chief Justice and for promulgation by the Clerk of Court, as official Court action in the case. The Judicial Staff Head of the member/members of the Court shall likewise submit a **first copy** and a **second (modified) copy** of the concurring, dissenting or separate opinion of such member/members.

3. In addition, the Judicial Staff Head of the *ponente* shall submit the electronic copies of the **second (modified) copy** of the decision, final resolution or order, accompanied by the certification, in writing, of said Judicial Staff Head of the *ponente*, of the authenticity of said copies, placed in a **brown-colored envelope**, separately marked, dated and authenticated.

4. After the promulgation of the decision, final resolution, or order of the Court, the Clerk of Court (Division or En Banc) shall place the original hard copy of the **first copy** of the decision, final resolution or order of the Court and of any concurring/dissenting or separate opinion, if any, in a **red-colored envelope**, duly sealed, initialled and dated by the Clerk of Court who shall indicate, on the envelope, the docket number of the case in the Supreme Court and cause the delivery of the envelope and its contents to the Office of the Reporter for safekeeping. HEITAD

The Clerk of Court (En Banc or Division) shall place the original hard copy of the **second (modified) copy** of the decision, final resolution or order of the Court as well as any concurring, separate or dissenting opinion of the other Justice or Justices inside a **yellow-colored envelope**, dated and authenticated by the Clerk of Court, and the docket number of the case in the Supreme Court written thereon and deliver the envelope and its contents to the Office of the Reporter for safekeeping.

5. Authenticated hard copies of the original of the **second (modified) copy** of the decision, final resolution or order, dissenting, concurring or separate opinion, together with the **brown-colored envelope** containing the electronic copies thereof shall be delivered to the Clerk of Court of the Court *(Division or En Banc)*who shall cause the delivery of the **brown-colored envelope** and its contents to the Management Information Systems Office (MISO) and shall cause the service of the authenticated hard copies of the **second (modified) copy** upon the parties, in accordance with the provisions of the Rules of Court, and provide hard copies of the same to the Management Information Systems Office (MISO), Public Information Office (PIO), Office of the Court Administrator (OCA), Office of the Chief Attorney

(OCAT), the Supreme Court Library and the Philippine Judicial Academy (PHILJA).

6. As soon as authenticated hard copies of the **second (modified) copy** of the decision, final resolution or order of the Court shall have been served on the parties and disseminated in accordance with the Rules of Court, the Clerk of Court or the Division Clerk of Court shall deliver to the Office of the Reporter a reproduction of a hard copy of the **second (modified) copy** of the decision, final resolution or order of the Court and of any other opinion of the other member/members of the Court for the preparation of the concise synopsis and syllabus of such decision, final resolution or order duly approved by the writer of the decision or by the Chief Justice, if the writer has retired or is no longer in the judicial service, prior to publication in the Philippine Reports.

7. If the original decision, final resolution or order is amended or a new decision is rendered, after the promulgation of the original decision, the *ponente*shall submit to the Court a **first copy** of the amended decision, final resolution or order containing the genuine name and personal circumstances of the victim/victims and a **second (modified) copy** containing the fictitious name/names and personal circumstances of the victim/victims and accused if warranted. The**first copy** and the **second (modified) copy** of the amended or new decision as well as any concurring, dissenting or separate opinion, shall be transmitted to the Clerk of Court (Division or En Banc) for promulgation after which the Clerk of Court (Division or En Banc) shall retrieve from the Office of the Reporter, the **red-colored envelope** containing the **first copy** of the original decision, final resolution or order as well as the **yellow-colored envelope** containing the **second (modified) copy** of the original or amended or new decision of the Court and place the **first cop**y of the amended or new decision, final resolution or order inside the **red-colored envelope** and re-authenticate, redate and reseal the same. The Clerk of Court shall place the **second (modified) copy** of the amended or new decision, final resolution or order and any concurring/dissenting or separate opinion, in the same **yellow-colored envelope**, redate the envelope, and authenticate the same and cause the return of the two (2) envelopes and the contents thereof to the Office of the Reporter for safekeeping.

8. The **red-colored envelope** containing the **first copy** of the original and/or amended or new decision, final resolution or order of the Court cannot be opened except by the Clerk of Court (En Banc or Division) as provided in the Amended Protocol, or, unless with the written authority of the *ponente* or by the Chairperson of the Division or by the Chief Justice of the Supreme Court in an En Banc case if the *ponente* has died, retired or on leave, then re-authenticated, resealed and the docket number of the case written thereon by the Clerk of Court.

VI. RESPONSIBILITY FOR THE MODIFICATION OF PROMULGATED DECISIONS, FINAL RESOLUTIONS AND ORDERS

1. In the first and second level courts, only the Presiding Judge of the handling Court, or the Branch Clerk of Court designated by the Judge of the handling Court to modify the decision, final resolution or order of the Court shall be responsible for the modification of decisions (original or amended), final resolutions and orders in their respective courts conformably with Title III, Paragraphs 2 to 7 (a, b and c) of the Amended Protocol.

2. Only the *ponente* of the case in the Supreme Court, the Court of Appeals or Sandiganbayan or the Head of the Judicial Staff or any of the lawyers in the legal staff of the *ponente* who is designated by the latter to modify the original or amended decision, final resolution or order of the Court shall be responsible for the modification of said decision, final resolution of order of the Court conformably with Title III, Paragraphs 2 to 7 (a, b and c) of this Amended Protocol. Any member of the Supreme Court, Court of Appeals or Sandiganbayan opting to file any concurring, dissenting or separate opinion or any lawyer in the legal staff of said member and designated by the latter to modify any concurring, dissenting or separate opinion shall be responsible for the modification thereof.

3. The Head of the Public Information Office (PIO) of the Supreme Court shall be responsible for the modification of decisions, final resolutions or orders of the Supreme Court, in covered cases, published on the official website of the Supreme Court (SC Website) beginning 1996 up to July 26, 2015 when the Supreme Court issued its Administrative Circular No. 83-2015 which became effective on July 27, 2015.

VII. PUBLICATION AND POSTING OF DECISIONS AND FINAL RESOLUTIONS/ORDERS

1. Only the **HARD COPY** of the **<u>second (modified) copy</u>** of the decision (original, amended or new), final resolution or order of the Supreme Court and any separate, concurring or dissenting opinion, in covered cases, shall be published in the Philippine Reports, Supreme Court Reports Annotated or in Official Gazette, with the synopsis and syllabus prepared by the Office of the Reporter. Other decisions and signed resolutions not so published may also be published in the Philippine Reports in the form of memoranda prepared by the Office of the Reporter.

2. The Public Information Office (PIO) may choose and submit the decisions, final resolutions and orders of the Court in covered cases for publication in the Official Gazette and the Supreme Court Website.

3. Only the **<u>second (modified) copy</u>** of decisions, final resolutions, final orders, and separate, concurring or dissenting opinion in covered cases

promulgated by the Supreme Court shall be posted on the SC Website and the Supreme Court E-Library.

4. Likewise, only the **second (modified) copy** of decisions, final resolutions and orders promulgated by the Court of Appeals, Sandiganbayan and the lower courts in covered cases may also be posted in the SC Website, if so directed by the Supreme Court.

VIII. PROHIBITION AGAINST RELEASE TO THE PUBLIC AND THE MEDIA

1. Hard and soft copies of **first copies** of promulgated decisions, final resolutions and orders in covered cases, and the records, including copies thereof, certified and issued by the Clerk of Court of the First and Second Level Courts, Court of Appeals, Sandiganbayan or the Supreme Court, containing the real name/names and personal circumstances of the victim/victims and other parties mentioned in Title III, of the Amended protocol, above, shall not be released to the public and to the media, except with the written authority of the handling Court in First and Second Level Courts or by the Division in the Court of Appeals or Sandiganbayan which rendered said decision, final resolution or order; or by the Division of the Supreme Court, in Division cases; or by the Supreme Court En Banc, in En Banc cases, which rendered said decision, final resolution or order; or when the victim/parties have a written waiver in accordance with Title IV of this Amended Protocol.

2. Neither shall the records containing the real names and personal circumstances of the parties, mentioned in Title III, Paragraph 4 above, be released to the public and to the media, except with the authority of the Judges/Justices as hereinabove provided.

3. Any Court Official or employee having personal knowledge or verified information of any decision, final resolution or order of the Court, in covered cases, containing the genuine name/names and personal circumstances of the victim/victims and accused if warranted in the **hard and soft copy of the second (modified) copy** thereof is mandated to submit immediately a written report thereof to the Executive Judge of the handling Court concerned, in the First and Second Level Courts; or to the Chairperson of the concerned division of the Court of Appeals and Sandiganbayan or to the Presiding Justice thereof; or the Chairperson of the concerned Division in the Supreme Court or the Chief Justice of the Supreme Court as the case may be for appropriate action. ATICcS

XI. LIABILITY

1. The court officials or staff members responsible for the modification of the decisions, final resolutions and orders by the courts, in covered cases, or tasked to handle the covered cases under the terms of this Amended Protocol, as well as the court employees designated to carry out tasks related to the

implementation of this Amended Protocol, must strictly observe the provisions thereof.

2. The Court Administrator, in consultation and coordination with the Executive Judges of the First Level and Second Level Courts and the Clerks of Court thereof; the Presiding Justice, in consultation and coordination with the Associate Justices of the Court of Appeals and of the Reporter of the Court of the Court of Appeals, the Clerk of Court and Division Clerks of Court of the Court of Appeals; the Presiding Justice, in consultation and coordination with the Associate Justices of the Sandiganbayan as well as the Division Clerks of Courts and the Chief of the Legal and Technical Staff thereof, must adopt measures, rules and systems within their Courts or Offices, within three (3) months from the approval by the Supreme Court En Banc of the Amended Protocol to fully implement the terms and purposes of this Amended Protocol via appropriate Circulars or amendments of their respective "Internal Rules" for said purpose.

3. The unauthorized release to the public or to the media of hard or soft copies of the **first copy** of the decisions (original, amended or new), final resolutions or orders of the courts, in covered cases, as well as true copies thereof, certified and issued by the Clerks of Court of the First and Second Level Courts, Appellate Courts and the Supreme Court as well as the unauthorized use and revelation of the genuine name/names and personal circumstances of the victim/victims and accused if warranted, in covered cases, in the hard or soft copies of the **second (modified) copy** of said decisions, final resolutions or orders of the Court shall be considered grave offenses and shall be punishable with the penalties provided under the Civil Service Rules on Administrative Cases for grave offenses, without prejudice to the criminal or civil liabilities that the violators may incur under applicable laws.

4. Court officials and employees, by themselves and/or in connivance with private individuals, who violate and/or fail or refuse to comply with and/or abide by the terms and conditions of the Amended Protocol, may be held liable for indirect contempt, under Rule 71, Section 3 of the Rules of Court and for a grave offense, under the Civil Service Rules on administrative cases; and civilly and/or criminally liable, under the appropriate laws and rules.

5. Third parties who do not have any direct responsibility for the implementation of this Amended Protocol and who violate the confidentiality covered by this Amended Protocol, by themselves or with connivance with Court Officials and employees may be held liable under the appropriate laws or rules.

X. EFFECTIVITY

This Amended Protocol shall take effect on upon approval thereof by the Supreme Court and the publication thereof in a newspaper of general circulation.

Issued this 5th day of September, 2017.

ANTONIO T. CARPIO
Acting Chief Justice

Footnotes

1. *Known as the "Special Protection of Children against Abuse, Exploitation and Discrimination Act."*
2. *Known as the "Rape Victim Assistance and Protection Act of 1998."*
3. *Known as the "Anti-Trafficking in Persons Act of 1998."*
4. *Known as the "Anti-Violence against Women and Their Children Act of 2004."*
5. *Known as the "Juvenile Justice and Welfare Act of 2006."*
6. *Known as the "Anti-Child Pornography Act of 2009."*
7. *Cybercrime Prevention Act of 2012, Section 4 (c) (1) and (4) (c) (2).*
8. *Known as the Expanded Anti-Trafficking in Persons Act of 2012.*

(Protocols and Procedures in the Promulgation, Publication, and Posting on the Websites of Decisions, Final Resolutions, and Final Orders Using Fictitious Names/Personal Circumstances, Supreme Court Amended Administrative Circular No. 83-15, [September 5, 2017])

v. Guidelines on the Use of Gender-Fair Language in the Judiciary and Gender-Fair Courtroom Etiquette (Administrative Matter No. 21-11-25-SC, Supreme Court of the Philippines, 15 February 2022)

GUIDELINES ON THE USE OF GENDER-FAIR LANGUAGE IN THE JUDICIARY AND GENDER-FAIR COURTROOM ETIQUETTE

WHEREAS, Article II, Section 11 of the 1987 Constitution recognizes the policy of the State to value the dignity of every human person and guarantee full respect for human rights;

WHEREAS, Article II, Section 14 of the 1987 Constitution recognizes the role of women in nation-building, with the State mandate to ensure the fundamental equality of women and men before the law;

WHEREAS, to attain such equality, Congress enacted Republic Act No. 7192, otherwise known as "Women in Development and Nation Building Act," requiring all government departments and agencies to review and revise all their regulations, circulars, issuances, and procedures to remove gender bias;

WHEREAS, under Section 13 of Republic Act No. 9710, or "The Magna Carta for Women," gender-sensitive language shall be used at all times to further the avowed policy of abolishing the unequal structures and practices that perpetuate discrimination and inequality in society;

WHEREAS, the Supreme Court issued Administrative Circular No. 82-2006 dated 19 September 2006 on the use of Gender-Fair Language in the Judiciary, adopting *in toto* Memorandum Circular No. 12, S. 2005 of the Civil Service Commission entitled "Use of Non-Sexist Language in All Official Documents, Communications and Issuances";

WHEREAS, the said Administrative Circular was further reiterated by the Supreme Court through Memorandum Order No. 90-2021, on 24 September 2021;

WHEREAS, in Republic Act No. 11313, the State recognized the dignity of every human person, and penalized various acts, including the use of words that ridicule on the basis of sex, gender or sexual orientation, identify and/or expression such as sexist, homophobic, and transphobic statements and slurs;

WHEREAS, the said Memorandum Circular must be expanded, reinforced, supplemented and contextualized for wider and more nuanced adaptation and application in the Judiciary's multi-faceted systems and processes;

NOW, THEREFORE, upon the recommendation of the Committee on Gender Responsiveness in the Judiciary, the Court *en banc* **RESOLVES TO ADOPT** the "GUIDELINES ON THE USE OF GENDER-FAIR LANGUAGE IN THE JUDICIARY AND GENDER-FAIR COURTROOM ETIQUETTE."

GUIDELINES ON THE USE OF GENDER-FAIR LANGUAGE IN THE JUDICIARY

Language is the most widely used medium of communication, both written and oral. It articulates consciousness (thoughts, feelings, needs), reflects culture (encodes and transmits cultural meanings and values), and affects socialization (the absorption of cultural assumptions and biases affects the younger society members' behavior and beliefs).[1] Hence, the need to recognize the importance of transforming language from traditional usage to a more liberating one, that which is gender-sensitive.[2]

Sexist language "devalues members of one sex, almost invariably women, and thus fosters gender inequality."[3] Indeed, it has been pointed out that "[t]he use of gendered generics can communicate subtle sexism, distract, and create ambiguity."[4]

Our courts are courts of evidence, and its power to take judicial notice of matters is limited.[5] Therefore, courts cannot and should not perpetuate gender stereotypes, which rest on unfounded generalizations regarding the characteristics and roles of binary and non-binary genders,[6] but indisputably influence the perspectives of the judges and litigants alike. This is evident with respect to matters at issue before the courts, as well as in the language the courts employ in adjudication.

I. ELIMINATE language, written and spoken, that excludes or renders invisible persons of another gender and/or people with diverse sexual orientation, gender identity and expression, and sex characteristics (SOGIESC).[7]

1. The use of the generic masculine.

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[1] THELMA B. KINTANAR, ed., GENDER-FAIR LANGUAGE: A PRIMER, University Center for Women's Studies, University of the Philippines (1998), at 5.
[2] Civil Service Comm'n Memorandum Circular No. 12, s. 2005, dated 19 September 2006.
[3] KINTANAR, *supra* note 1, at 5.
[4] Leslie M. Rose, *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?*, 17 DUKE J. GENDER LAW & POL. 81 (2010), at 94.
[5] RULES OF COURT, rule 129, secs. 1 and 2.
[6] *See* Bangkok General Guidance for Judges on Applying a Gender Perspective in Southeast Asia, Bangkok, Thailand, 25 June 2016.
[7] See KINTANAR, *supra* note 1, at 5.

STOP using the generic term "man" and similar terms to subsume all of humanity.

START using gender-neutral mass nouns such as people, person(s), human(s), human being(s), humankind, humanity, the human race.

Examples:

Negligence is the omission to do something which a reasonable man would do.[8]

Negligence is the omission to do something which a reasonable person would do.

Piracy is a crime not against any particular state but against all mankind.[9]

Piracy is a crime not against any particular state but against all of humanity.

START including women in a general statement about the human condition.

Example:

Man is naturally endowed with the faculties of understanding and free will.[10]

Men and women are naturally endowed with the faculties of understanding and free will.

It was difficult to justify inequality in religious treatment by a new nation that severed its political bonds with the English

[8] BJDC Construction v. Lanuzo et al., G.R. No. 161151, 24 March 2014, citing Layugan v. Intermediate Appellate Court, G.R. No. L-73998, 14 November 1988.
[9] People v. Lol-lo and Saraw, G.R. No. 17958, 27 February 1922.
[10] People v. Madarang, G.R. No. 132319, 12 May 2000.

crown which violated the self-evident truth that all men are created equal.[11]

It was difficult to justify inequality in religious treatment by a new nation that severed its political bonds with the English crown which violated the self-evident truth that all men and women are created equal.

2. The unwarranted use of masculine pronouns.

STOP using singular masculine pronouns unless the antecedent is unequivocally male.

START using plural nouns to avoid using third person singular pronouns.

Examples:

A lawyer shall avoid testifying in behalf of his client.[12]

Lawyers shall avoid testifying in behalf of their clients.

In protecting his home, the poorest and most humble citizen or subject may bid defiance to all the powers of the State.[13]

In protecting their homes, the poorest and most humble citizens or subjects may bid defiance to all the powers of the State.

The judge, *motu proprio* or upon motion of the accused, is entitled to make his own assessment of the evidence on record to determine whether there is probable cause.[14]

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[11] Estrada v. Escritor, A.M. No. P-02-1651, 4 August 2003, 455 Phil. 411.
[12] RULES OF COURT, rule 40, sec. 7(b).
[13] City Engineer of Baguio and Hon. Domogan v. Baniqued, G.R. No. 150270, 26 November 2008, 592 Phil. 348.
[14] Reyes v. Ombudsman, G.R. Nos. 212593-94, 15 Mach 2016, 783 Phil. 304.

Judges, *motu proprio* or upon motion of the accused, are entitled to make their own assessment of the evidence on record to determine whether there is probable cause.

START using articles (a, an, the) as substitute for pronouns.

Examples:

Within 15 days from receipt of the appellant's memorandum, the appellee may file his memorandum.[15]

Within 15 days from receipt of the appellant's memorandum, the appellee may file a memorandum.

Merely testifying does not render the witness immune from prosecution notwithstanding his invocation of the right against self-incrimination.[16]

Merely testifying does not render the witness immune from prosecution notwithstanding an invocation of the right against self-incrimination.

3. The use of masculine terms for professions, occupations and roles.

STOP using terms ending in "*-man*" to refer to functions that may be performed by individuals of either sex.

START using widely-used gender-neutral forms of professions, occupations and roles.

Examples:

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[15] CODE OF PROFESSIONAL RESPONSIBILITY, rule 12.08.
[16] Galman and Galman v. Hon. Pamaran et al., G.R. Nos. 71208-09, 30 August 1985, 222 Phil. 588.

Respondent is Chairman of the Philippine National Red Cross Board of Governors.[17]

Respondent is Chairperson of the Philippine National Red Cross Board of Governors.

The concept of piercing the veil of corporate fiction is a mystique to many people, especially the layman.[18]

The concept of piercing the veil of corporate fiction is a mystique to many people, especially the layperson.

Petitioners being of age and businessmen of experience, it must be presumed that they acted with due care.[19]

Petitioners being of age and business owners of experience, it must be presumed that they acted with due care.

CONTINUE using gender-neutral terms that the law employs.

Examples:

Complainant assumed office as Barangay Chairman in hold-over capacity by operation of law.[20]

Complainant assumed office as *Punong Barangay* in hold-over capacity by operation of law.

The pork barrel process commenced with local government councils, civil groups, and individuals appealing to Congressmen or Senators for projects.[21]

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[17] Liban et al. v. Gordon, G.R. No. 175352, 18 January 2011.
[18] Philippine Veterans Investment Development Corp. v. Court of Appeals and Borres, G.R. No. 85266, 30 January 1990, 260 Phil. 724.
[19] Spouses Rigor v. Consolidated Orix Leasing and Finance Corp., G.R. No. 136423, 20 August 2002.
[20] Bogabong v. Hon. Balindong, A.M. No. RTJ-18-2537, 14 August 2019.
[21] Belgica et al. v. Ochoa, G.R. No. 208566, 19 November 2013, 721 Phil. 416.

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The pork barrel process commenced with local government councils, civil groups, and individuals appealing to Members of the House of Representatives or Senators for projects.

Considering that Ester was only fourteen-years old and a newly employed housemaid, while Reylan Gimena a seventeen-year old houseboy, they were easily intimidated and cowed into submission by accused-appellant.[22]

Considering that Ester was only fourteen-years old and a newly employed *kasambahay*, while Reylan Gimena a seventeen-year old *kasambahay*, they were easily intimidated and cowed into submission by accused-appellant.

4. The use of sex-appropriated terms.

STOP using terms as though they apply to adult males only, or are appropriated to a particular sex.

START using "spouses" for "wives," "family" for "wife and child," and similar terms.

Examples:

No judge or judicial officer shall sit in any case in which he, or his wife or child, is pecuniarily interested as heir, legatee, creditor or otherwise.[23]

No judge or judicial officer shall sit in any case in which such judge, or his or her spouse or child, is pecuniarily interested as heir, legatee, creditor or otherwise.

[22] People v. Siao, G.R. Nos. 126021, 3 March 2000.
[23] Balleza v. Judge Astorga, A.M. No. 202-MJ, 30 April 1976, 162 Phil. 575.

It is not at all unnatural for a murderer, caught in the act of killing his wife and child, to fly into a passion and strike promiscuously at those who attempt to capture him.[24]

It is not at all unnatural for a murderer, caught in the act of killing his or her family, to fly into a passion and strike promiscuously at those who attempt to capture him.

II. ELIMINATE language that trivializes or diminishes the stature of persons of another gender and/or people with diverse SOGIESC.[25]

1. The use of diminutive feminine suffixes.

STOP using feminine suffixes such as *-ess*, *-ette*, *-trix*, or *-enne*, which make unnecessary reference to the person's sex and suggest triviality, unimportance, or inferiority of women occupying such a position.

START using gender-neutral terms.

Examples:

There, they saw Annie Ferrer, a popular movie starlet.[26]

There, they saw Annie Ferrer, a popular movie actor.

Said items refer to certain expenses for transportation and subsistence incurred by the executrix.[27]

Said items refer to certain expenses for transportation and subsistence incurred by the executor.

[24] U.S. v. Vaquilar, G.R. Nos. 9741 and 9742, 13 March 1914, 27 Phil. 88.
[25] See KINTANAR, *supra* note 1, at 10.
[26] Sison et al. v. People and Court of Appeals, G.R. Nos. 108280-83, 16 November 1995.
[27] In Re: Estate of Reyes v. Reyes de Ilano, G.R. No. 42092, 28 October 1936, 63 Phil. 629.

She would have dressed herself up as she was in a smart usherette uniform to avoid any suspicion that she was the victim of a forced copulation.[28]

She would have dressed herself up as she was in a smart usher's uniform to avoid any suspicion that she was the victim of a forced copulation.

2. The use of sex-linked modifiers.

STOP using gratuitous and patronizing sex-linked adjectives and modifiers.

START using gender-neutral forms of occupations and/or common nouns.

Examples:

Appellant pleaded to the lady doctor to do all she can to save the child.[29]

Appellant pleaded to the physician to do all she can to save the child.

The respondent female lawyer actually cohabited with, bore the children of, and contracted a foreign marriage with a man whose previous marriage was still subsisting.[30]

The respondent lawyer actually cohabited with, bore the children of, and contracted a foreign marriage with a man whose previous marriage was still subsisting.

[28] People v. Talaro, G.R. No. L-40436, 25 May 1984, 214 Phil. 371.
[29] People v. Tayag, G.R. No. 134362, 27 February 2002.
[30] Concerned Employee v. Mayor, A.M. No. P-02-1564, 23 November 2004, 486 Phil. 51.

Accused-appellant told her male secretary to prepare and sign a receipt for them.[31]

Accused-appellant told her secretary to prepare and sign a receipt for them.

3. The use of gender-linked modifiers.

STOP using gender-linked adjectives and modifiers that carry disrespectful, if not pejorative, connotations.

START removing references to gender identity and/or expression when irrelevant.

Examples:

Complainant often traveled to and from Japan as a gay entertainer in said country.[32]

Complainant often traveled to and from Japan as an entertainer in said country.

His family watched the amateur singing contest and the gay beauty pageant at the fiesta in their barangay.[33]

His family watched the amateur singing contest and the local beauty pageant at the fiesta in their barangay.

Appellant asserts that the hymenal laceration could have been caused by complainant's lesbian lover prior to the medical examination.[34]

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[31] People v. Coral, G.R. Nos. 97849-54, 1 March 1994, 300 Phil. 527.
[32] Philippine National Bank v. Pike, G.R. No. 157845, 20 September 2005, 507 Phil. 322.
[33] People v. Gregorio and Osorio, G.R. No. 153781, 24 September 2003, 458 Phil. 687.
[34] People v. XXX, G.R. No. 236562, 22 September 2020.

Appellant asserts that the hymenal laceration could have been caused by complainant's lover prior to the medical examination.

4. The use of outdated honorifics and forms of address.

STOP using honorifics that obscure women, trivialize their achievements, etc.

START using Ms. instead of Mrs. when the woman's marital status is irrelevant to the issues, or the woman's preferred form of address is unknown.

Example:

Mrs. dela Cruz	Ms. Dela Cruz

START using a married woman's name instead of her husband's.

Example:

Mrs. Juan dela Cruz	Ms. Maria Santos-dela Cruz

START using gender-neutral honorifics or terms.

Dra. Concepcion Reyes	Dr. Concepcion Reyes
Dear Sir	Dear Editor, Dear Manager, Dear Colleague

III. ELIMINATE language which disparages and marginalizes persons of another gender and/or persons of diverse SOGIESC.[35]

1. The use of disparaging language.

[35] KINTANAR, *supra* note 1, at 11.

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STOP perpetuating unfounded generalizations.

Examples:

She belongs to the weaker sex and any effort on her part to help would amount to nothing but raw and reckless courage.[36]

It is obvious the witness' curiosity and inquisitiveness as to what was happening, the Filipino "*usisero*" trait, overcame the natural timidity of the woman.[37]

Until the time comes when *Ladlad* is able to justify that having mixed sexual orientations and transgender identities is beneficial to the nation, its application for accreditation under the party-list system will remain just that.[38]

STOP using antiquated terms.

START using non-oppressive, modern terms.

Examples:

Carmen, a spinster, a retired pharmacist, and former professor, was declared incompetent by judgment.[39]

Carmen, unmarried, a retired pharmacist, and former professor, was declared incompetent by judgment.

It attacked Fat's testimony as full of motherhood statements.[40]

It attacked Fat's testimony as full of vague platitudes.

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[36] People v. Danque, G.R. No. 107978, 19 November 1993, 298-A Phil. 23.
[37] People v. Acob et al., G.R. No. 114382, 20 July 1995.
[38] Ang Ladlad LGBT Party v. COMELEC, G.R. No. 190582, 8 April 2010, 632 Phil. 32, quoting Separate Op. of public respondent COMELEC.
[39] Cañiza v. Court of Appeals et al., G.R. No. 110427, 24 February 1997, 335 Phil. 1107.
[40] Republic v. Ng, G.R. No. 182449, 6 March 2013, 705 Phil. 556.

The negligence of petitioner's salesgirl is not excusable.[41]

The negligence of petitioner's sales employee is not excusable.

START using the term "woman" instead of unnecessary metaphors.

Examples:

Nor does it prove that it was preceded by an unlawful aggression attributed to a person of the weaker sex.[42]

Nor does it prove that it was preceded by an unlawful aggression by the woman.

2. Gender stereotypes.

STOP using terms with sexist assumptions that the occupant has a particular sex or are demonstrable only by a certain sex.

START using gender-fair terms.

Examples:

The rules of sports do not consider exceptions; it exacts obedience to the rules to promote and develop a keen sense of fairness in the field of competition and in the spirit of sportsmanship.[43]

The rules of sports do not consider exceptions; it exacts obedience to the rules to promote and develop a keen sense of fairness in the field of competition and in the spirit of fair play.

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[41] Cruz v. Ernest Oppen, Inc. et al., G.R. No. L-23861, 17 February 1968, 130 Phil. 600.
[42] U.S. v. Idon, G.R. No. 4519, 7 August 1908, 11 Phil. 64.
[43] Philippine Soap Box Derby, Inc. v. Court of Appeals et al., G.R. No. 108115, 27 October 1995.

The policeman did not see the appellant knock the priest down.[44]

The police officer did not see the appellant knock the priest down.

Petitioner was employed as a flight stewardess of the respondent company since 1947.[45]

Petitioner was employed as a flight attendant of the respondent company since 1947.

Soon after, male nurse Armando came to render assistance.[46]

Soon after, nurse Armando came to render assistance.

Defendants have impliedly admitted the truth of plaintiff's allegations relative to the unwritten 'gentleman's agreement' which the former had failed to observe.[47]

Defendants have impliedly admitted the truth of plaintiff's allegations relative to the unwritten agreement which the former had failed to observe.

STOP using imprecise terms to identify non-binary SOGIESC.

START conscientiously using language and terms commonly used to describe specific SOGIESC.[48]

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[44] U.S. v. Samonte, G.R. No. 5649, 6 September 1910, 16 Phil. 516.
[45] Northwest Airlines Employees Ass'n and Matue v. Northwest Airlines, Inc. and Court of Industrial Relations, G.R. No. L-24592, 29 May 1970, 144 Phil. 243.
[46] Spouses Ong v. Metropolitan Water District, G.R. No. L-7664, 29 August 1958, 104 Phil. 397.
[47] Arrieta v. Malayan Sawmill Co. et al., G.R. No. L-24140, 31 July 1968.
[48] *See* United Nations International Organization for Migration, SOGIESC Full Glossary of Terms (as of Nov 2020), at https://www.iom.int/sites/g/files/tmzbdl486/files/documents/IOM-SOGIESC-Glossary-of-Terms.pdf.

Instead of discussing the problem (of not feeling any sexual excitement and attraction toward her) with him candidly, she accused him of being gay.[49]

Instead of discussing the problem (of not feeling any sexual excitement and attraction toward her) with him candidly, she accused him of being a homosexual.

If immoral thoughts could be penalized, COMELEC would have its hands full of disqualification cases against both the "straights" and the "gays."[50]

If immoral thoughts could be penalized, COMELEC would have its hands full of disqualification cases against all sexual orientations.

IV. ELIMINATE language that fosters unequal gender relations.[51]

1. Words and phrases which lack parallelism.

STOP treating the sexes with lack of parallelism.

START adopting parallelism in word choices.

Examples:

They were married in the City of Manila and lived together as man and wife.[52]

They were married in the City of Manila and lived together as husband and wife.

[49] Lontoc-Cruz v. Cruz, G.R. No. 201988, 11 October 2017, 820 Phil. 62.
[50] Ang Ladlad LGBT Party v. Comm'n on Elections, G.R. No. 190582, 8 April 2010, 632 Phil. 32.
[51] KINTANAR, *supra* note 1, at 12.
[52] Barreto Gonzalez v. Gonzalez, G.R. No. 37048, 7 March 1933, 58 Phil. 67.

For this failure he had to withdraw from the dance, unable to endure his shame before the crowd of young men and girls.[53]

For this failure he had to withdraw from the dance, unable to endure his shame before the crowd of young men and women.

2. Calling attention to a person's sex.

STOP using terms that call attention to a person's sex when not relevant for communication.

START using gender-neutral terms.

Example:

Appellant, aged 20, was employed as a delivery boy.[54]

Appellant, aged 20, was employed as a deliverer.

It was done through her insistent request by reason of the fact that she was on her way to motherhood.[55]

It was done through her insistent request by reason of the fact that she was on her way to parenthood.

Their high regard for their chastity and womanly virtues, would not permit complainant to accept the offer of love, much less allow it to be the cause of her defilement.[56]

Their high regard for their chastity and virtues, would not permit complainant to accept the offer of love, much less allow it to be the cause of her defilement.

[53] People v. Dedal et al., G.R. No. L-1687, 2 December 1948, 82 Phil. 203.
[54] People v. Cando et al., G.R. No. 128114, 25 October 2000, 398 Phil. 225.
[55] People v. Pineda et al., G.R. No. 35753, 26 March 1932, 56 Phil. 688.
[56] People v. Beso, Jr., G.R. No. 44033, 30 September 1982, 202 Phil. 618.

V. ELIMINATE sexist language in quoted material.[57]

1. Sexist language in quoted material.

STOP quoting unfair conclusions about the sexes and retaining sexist language.

Example:

"We cannot but express the considered view of this Court that the fair sex is as much entitled to this grant of benefits not alone by reason of the frailty and fragility of their bodies and faculties but also, if not more, because in the fullness of their endowments and physical qualities which must be protected and preserved in fact and in law, they hold the survival of mankind and the continuity of all human endeavors and institutions."[58]

START paraphrasing the quote using non-sexist language.

Example:

"The law considers what would be reckless, blameworthy, or negligent in the man of ordinary intelligence and prudence and determines liability by that."[59]

In *Picart v. Smith, Jr.*, the Supreme Court ruled that liability for negligence is anchored on the standard of diligence observed by a person of ordinary intelligence and prudence.

"Indeed, a man is king in his own house."[60]

Indeed, it has been said, that a person is the ruler of one's own home. [*City Engineer of Baguio and Hon. Domogan v.*

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[57] KINTANAR, *supra* note 1, at 22.
[58] Almaiz v. Workmen's Compensation Comm'n and Province of Negros Occidental, G.R. No. L-42794, 31 August 1978, 174 Phil. 394.
[59] Picart v. Smith, Jr., G.R. No. L-12219, 15 March 1918
[60] City Engineer of Baguio and Hon. Domogan v. Baniqued, G.R. No. 150270, 26 November 2008, 592 Phil. 348.

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Baniqued, G.R. No. 150270, 26 November 2008, 592 Phil. 348.]

START adding *sic* in a direct quotation.

Example:

"Despite the egalitarian commitment in the Declaration of Independence that 'all men are created equal,' the framers of the original Constitution of the United States omitted any constitutional rule of equal protection."[62]

"Despite the egalitarian commitment in the Declaration of Independence that 'all men are created equal' [*sic*], the framers of the original Constitution of the United States omitted any constitutional rule of equal protection."

START partially quoting the material and rephrasing the sexist part.

Example:

"The law considers what would be reckless, blameworthy, or negligent in the man of ordinary intelligence and prudence and determines liability by that." [*Picart v. Smith, Jr.*, G.R. No. L-12219, 15 March 1918]

"The law considers what would be reckless, blameworthy, or negligent in the [person] of ordinary intelligence and prudence and determines liability by that." [*Picart v. Smith, Jr.*, G.R. No. L-12219, 15 March 1918]

CONTINUE attributing the material to the original author or source.

2. Distracting, pointless and gratuitous language which perpetuate stereotypes and double-meanings.

[62] Central Bank Employees Ass'n. v. Bangko Sentral ng Pilipinas and Executive Secretary, G.R. No. 148208, 15 December 2004.

STOP using gratuitous metaphors that distract, trivialize, and demean.

Example:

"In a manner of speaking, bombardment of the drawbridge is invasion enough even if the troops do not succeed in entering the castle."[63]

CONTINUE adhering to the abandonment of stereotypes in jurisprudence.

Example:

In *People v. Amarela and Racho*,[64] the Supreme Court noted:

> "[T]oday, we simply cannot be stuck to the Maria Clara stereotype of a demure and reserved Filipino woman. We, should stay away from such mindset and accept the realities of a woman's dynamic role in society today; she who has over the years transformed into a strong and confidently intelligent and beautiful person, willing to fight for her rights.
>
> In this way, we can evaluate the testimony of a private complainant of rape without gender bias or cultural misconception. It is important to weed out these unnecessary notions because an accused may be convicted solely on the testimony of the victim, provided of course, that the testimony is credible, natural, convincing, and consistent with human nature and the normal course of things. Thus, in order for us to affirm a conviction for rape, we must believe beyond reasonable doubt the version of events narrated by the victim."

In *Falcis III v. Civil Registrar General*,[65] the Supreme Court observed:

> "In the realm of the social sciences, a great number of 20th-century psychoanalysts **unfortunately** viewed homosexuality as something pathological. This influenced the field of American psychiatry in the mid-

[63] People v. Salinas, G.R. No. 107204, 6 May 1994.
[64] G.R. No. 225642-43, 17 January 2018. (citation omitted)
[65] G.R. No. 217910, 3 September 2019.

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20th century that when the American Psychological Association published the first edition of the Diagnostic and Statistical Manual in 1952, 'it listed all the conditions psychiatrists then considered to be a mental disorder. DSM-I classified 'homosexuality' as a 'sociopathic personality disturbance.''

It was not until the research of biologist Alfred Kinsey and other scientists challenged the orthodoxy that homosexuality was delisted as a mental disorder in the next iteration of the Diagnostic and Statistical Manual x x x.

However, the official removal of homosexuality from the Diagnostic and Statistical Manual as a mental disorder was not the last word on the subject. Homosexuality was still considered a 'disorder,' and it was not until several years later that all traces of what was mistakenly thought to be a 'disease' would be completely removed from the manual x x x.

Homosexuality was officially removed from the Diagnostic and Statistical Manual in 1986. x x x.

The American Psychological Association's revision marked the 'beginning of the end of organized medicine's official participation in the social stigmatization of homosexuality' as similar movements also followed. In 1990, the World Health Organization removed homosexuality *per se* from the International Classification of Diseases."

- next page -

LIST OF GENDER-FAIR TERMS[66]

Outdated terms	*Gender-fair/Gender-neutral*
man	human being, human
mankind, men	humanity, humankind, people, men and women
forefather	ancestor
layman	layperson, non-professional
manhood	adulthood, maturity
manning	staffing, working, operating,
one-man show	one-person show, solo exhibition
founding fathers	founders
manpower	human resources, staff, personnel, labor force
statesmanship	diplomacy
man-made	handmade, manufactured, artificial, synthetic, of human construction, of human origin
anchorman	anchor
businessman, businesswoman	business executive, manager, business owner, retailer
cameraman	camera operator, cinematographer
congressman, congresswoman	Representative, Member of the House of Representative, legislator
craftsman	artisan, craftspersons
firemen	fire fighters
fishermen	fisher, fisherfolk
foremen	supervisors
lineman	line installer, line repairer
pressmen	members of the press
policemen, policewomen	police officers
repairmen	repairers

[66] Substantially culled from Thelma B. Kintanar, ed., GENDER-FAIR LANGUAGE: A PRIMER, University Center for Women's Studies, University of the Philippines (1998); and United Nations Economic and Social Commission for Western Asia, Gender-Sensitive Language Guidelines, at https://www.unescwa.org/sites/default/files/services/doc/guidelines_gender-sensitive_language_e-a.pdf.

Outdated terms	*Gender-fair/Gender-neutral*
salesman, saleslady, salesgirl	salesperson, sales representative, sales employee
spokesman, spokeswoman	spokesperson
statesmen	diplomats, political leaders
watchmen	guards
weathermen	weather reporter, weather anchor, meteorologist
actress	actor
comedienne	comedian
executrix	executor
heroine	hero
hostess	host
proprietess	proprietor
usherette	usher
career woman	professional
house husband, housewife	homemaker
maid	household helper, kasambahay
busboy	waiters' assistant
chambermaids	hotel staff
fatherhood, motherhood	parenthood

Outdated terms	*Gender-fair/Gender-neutral*
cowboy, cowgirl	ranch hand
bellman	bellboy
clergyman	member of the clergy, minister, rabbi, priest, pastor, etc.
mailman, postman	mail carrier, letter carrier
fathers (religious)	priests
cleaning woman, cleaning lady	cleaner
stewardess, steward	flight attendant, cabin attendant
waiter, waitress	waitstaff
brotherhood	solidarity, human fellowship, human kinship
fraternal twins	non-identical twins
gentleman's agreement	honorable agreement, unwritten agreement
landlord, landlady	owner, proprietor, lessor
to man	to staff, to operate, to run
manholes	utility holes, sewer holes
manpower	workforce, employees,

Outdated terms	*Gender-fair/Gender-neutral*
	personnel, human resources
man-made disaster	human-induced disaster
man-made climate change	anthropogenic climate crisis
Mother Nature	nature
Mother Earth	earth, planet earth
motherland, fatherland	country of origin, domicile
mother tongue	native language
mothering	parenting, child-rearing, childcare
noblemen	nobility, aristocrats
no-man's land	uninhabited land, *terra nullius*, neutral zone
caveman	cave dweller
prehistoric man	prehistoric human being
workmen's compensation	worker's compensation
yes-man	supporter, avid follower
young man, young woman	youth, adolescent, teenager

GENDER-FAIR COURTROOM ETIQUETTE

1. Address all lawyers neutrally as "counsel" or "attorney."

   Refrain from referring to female lawyers as "lady" or "female" counsel or male lawyers as "gentleman" or "male" counsel. Instead, use their surnames after the word "Atty." (ex., Atty. Santos) or just use "Counsel."

   Refer to the Public Prosecutor and Public Attorney by name (ex., Prosecutor Paz, Public Attorney Ramos). Refrain from referring to the Public Prosecutor or Public Attorney as "Madam Fiscal" or "Mister Fiscal," or "the Lady Public Attorney" or "the Gentleman Public Attorney."

   In making inquiries, use a question that applies to everyone, such as, "Will all attorneys please identify themselves to the court?"

2. Address all non-lawyer litigants, witnesses, and other court users as "Mister," "Mrs.," or "Miss," "Sir" or "Ma'am" as appropriate.

   Refrain from referring to litigants as "Madam Plaintiff" or "Mister Plaintiff," but just "Plaintiff" or just refer to them by name (ex., Mr. Santos, Miss Dantes).

   Refrain from referring to witnesses as "Mister Witness" or "Madam Witness." Instead, use their name (ex., Mr. Cruz, Mrs. De Leon).

3. When addressing minors, refrain from using words like "little boy," "little girl," "*hijo/iho*," "*hija/iha*." Instead, use their first names or nicknames, if known, to put them at ease and to avoid the diminutive references.

4. Refrain from any act or proceeding that will demean, embarrass, humiliate, or degrade any party by reason of gender.

   For example, in conducting arraignment in criminal cases, if the Information contains allegations that would expose either the offended party or the accused to ridicule or debasement related to their gender, the public should be excluded and the reading of the Information should be done only in the presence of the parties and their respective counsel, unless the reading of the Information is waived.

   Similarly, reception of testimonial evidence that might invite gender-revilement or gender-bias, or has a tendency of exposing any party to embarrassment or degradation by reason of gender, should be restricted to the parties and their counsel.

5. Refrain from perpetuating gender stereotypes.

For example, do not make one counsel go first with her cross-examination because she is female, saying "ladies first." Or do not make a male court attendee stand up to give up his seat for a female court attendee by saying *"lalaki ka naman."*

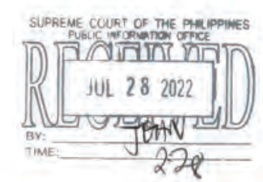
Comments, jokes, and remarks with sexual content, or jokes and remarks that insinuate gender stereotypes, should not be tolerated in the courtroom setting. For example, remarking that a lawyer appears to be more organized because she is a woman is unacceptable.

6. Avoid comments on or insinuations related to physical appearance that may draw unwanted attention to one's gender.

   For example, calling attention to a lawyer's pregnancy while she is conducting business may affect how others perceive her.

7. Justices, judges, court personnel, and litigants are all responsible in observing gender-fair language and etiquette in the courts. Gender insensitive acts or omissions committed in one's presence should be courteously but discreetly corrected in the most respectful manner.

vi. Anacleto Ballaho Alanis III v. Court of Appeals, et al. (Supreme Court of the Philippines, 11 November 2020)



Republic of the Philippines
Supreme Court
Manila

THIRD DIVISION

ANACLETO BALLAHO ALANIS III, Petitioner,	**G.R. No. 216425** Present:
-versus-	LEONEN, *J., Chairperson,* HERNANDO, INTING*, DELOS SANTOS, and ROSARIO, *JJ.*
COURT OF APPEALS, Cagayan de Oro City, and HON. GREGORIO V. DE LA PEÑA III, Presiding Judge, Br. 12, Regional Trial Court of Zamboanga City, Respondents.	**Promulgated:** November 11, 2020

x---x

DECISION

LEONEN, *J.*:

Reading Article 364 of the Civil Code together with the State's declared policy to ensure the fundamental equality of women and men before the law,[1] a legitimate child is entitled to use the surname of either parent as a last name.

This Court resolves the Petition for Certiorari[2] assailing the Decision[3] and Resolution[4] of the Court of Appeals, which affirmed the Regional Trial

* On official leave.

[1] Section 2, Republic Act No. 7192 (1992). Women in Development and Nation Building Act.

[2] *Rollo*, pp. 11–20.

Court Orders[5] denying Anacleto Ballaho Alanis III's appeal to change his name to Abdulhamid Ballaho.

Petitioner filed a Petition before the Regional Trial Court of Zamboanga City, Branch 12, to change his name.[6] He alleged that he was born to Mario Alanis y Cimafranca and Jarmila Imelda Ballaho y Al-Raschid,[7] and that the name on his birth certificate was "Anacleto Ballaho Alanis III."[8] However, he wished to remove his father's surname "Alanis III," and instead use his mother's maiden name "Ballaho," as it was what he has been using since childhood and indicated in his school records.[9] He likewise wished to change his first name from "Anacleto" to "Abdulhamid" for the same reasons.[10]

During trial, petitioner testified that his parents separated when he was five years old. His father was based in Maguindanao while his mother was based in Basilan. His mother testified that she single-handedly raised him and his siblings.[11]

As summarized by the Regional Trial Court, petitioner presented the following in evidence to support his claim that the requested change would avoid confusion:

> . . . a.) petitioner's photograph in what appears to be a page of a yearbook; b.) another photograph of the petitioner appearing in the editorial staff of ND Beacon where he appears to be the assistant editor-in-chief; c.) the high school diploma of the petitioner certifying that he finished his high school education at Notre Dame of Parang in Parang, Maguindanao; d.) another copy of the editorial of the ND Beacon where petitioner's name appears as one of its editorial staff; e.) another copy of the editorial of ND Beacon where the name of the petitioner appears as the editor-in-chief; f.) a certificate of participation issued to the petitioner by the Department of [E]ducation, Culture and Sports; g.) a CAP College Foundation, Inc., diploma issued in the name of petitioner; h.) another CAP College Foundation, Inc., diploma issued in the name of petitioner; i.) a [W]estern Mindanao State University student identification card in the name of

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[3] Id. at 22–30. The May 26, 2014 Decision in CA-G.R. SP No. 02619-MIN was penned by Associate Justice Romulo V. Borja and concurred in by Associate Justices Oscar V. Badelles and Edward B. Contreras of the Special Twenty-First Division of the Court of Appeals, Cagayan de Oro City.

[4] Id. at 32–33. The December 15, 2014 Resolution in CA-G.R. SP No. 02619-MIN was penned by Associate Justice Romulo V. Borja and concurred in by Associate Justices Oscar V. Badelles and Edward B. Contreras of the Former Special Twenty-First Division of the Court of Appeals, Cagayan de Oro City.

[5] Id. at 34–41. The April 9, 2008 Order in Special Proceeding No. 5528 was penned by Presiding Judge Gregorio V. Dela Peña, III of the Regional Trial Court of Zamboanga City, Branch 12. The Regional Trial Court also issued a June 2, 2008 Order.

[6] Id. at 12.

[7] Id. at 43.

[8] Id. at 35.

[9] Id. at 12.

[10] Id. at 35.

[11] Id. at 36.

> petitioner; j.) a non-professional driver[']s license issued in the name of petitioner; k.) the Community Tax Certificate of petitioner[.][12]

In its April 9, 2008 Order,[13] the Regional Trial Court denied the Petition, holding that petitioner failed to prove any of the grounds to warrant a change of name.[14] It noted that the mere fact that petitioner has been using a different name and has become known by it is not a valid ground for change of name. It also held that to allow him to drop his last name was to disregard the surname of his natural and legitimate father,[15] in violation of the Family Code and Civil Code, which provide that legitimate children shall principally use their fathers' surnames.[16]

The Regional Trial Court acknowledged that confusion could exist here, but found that granting his petition would create more confusion:

> Although it may appear that confusion may indeed arise as to the identity of the petitioner herein who has accordingly used the name Abdulhamid Ballaho in all his records and is known to the community as such person and not Anacleto Ballaho Alanis III, his registered full name is his Certificate of Live Birth, this Court believes that the very change of name sought by the petitioner in this petition would even create more confusion since if so granted by this Court, such change sought after could trigger much deeper inquiries regarding her parentage and/or paternity, bearing in mind that he is the legitimate eldest child of the spouses Mario Alanis y Cimafranca and Jarmila Imelda Ballaho y Al-Raschid[.][17]

Thus, the trial court concluded that, instead of seeking to change his name in his birth certificate, petitioner should have had the other private and public records corrected to conform to his true and correct name:

> Time and again, this Court has consistently ruled that, in similar circumstances, the proper remedy for the petitioner is to instead cause the proper correction of his private and public records to conform to his true and correct first name and surname, which in this case is Anacleto Ballaho Alanis, III and not to change his said official, true and correct name as appearing in his Certificate of Live Birth simply because either he erroneously and inadvertently or even purposely or deliberately used an incorrect first name and surname in his private and public records.[18]

The dispositive portion of the Order reads:

> WHEREFORE, in view of the foregoing, and finding no legal, proper, justified and reasonable grounds to allow the change of name of

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[12] Id.
[13] Id. at 34–41.
[14] Id. at 40.
[15] Id. at 39.
[16] Id.
[17] Id. at 39–40.
[18] Id. at 40.

> the herein petitioner from Anacleto Ballaho Alanis III as appearing in his Certificate of Live Birth to Abdulhamid Ballaho as prayed for by the petitioner in his petition dated February 1, 2007 the above-entitled petition is hereby DENIED and ordered DISMISSED for lack of merit. No cost.
>
> SO ORDERED.[19]

Petitioner moved for reconsideration, but the Regional Trial Court denied this in a June 2, 2008 Order.[20]

It appears that on May 2, 2008, a month before the trial court rendered this Order, petitioner's counsel, Atty. Johny Boy Dialo (Atty. Dialo), had figured in a shooting incident and failed to report for work. Thus, petitioner was only able to file a notice of appeal on September 2, 2008—months after Atty. Dialo's law office had received the Order, beyond the filing period. He invoked his counsel's excusable neglect for a belated appeal, alleging the shooting incident.[21]

Thereafter, with a new counsel, petitioner filed a Record on Appeal and Notice of Appeal on September 3, 2008,[22] reiterating his counsel's excusable negligence.[23] He added that he was set to take the Bar Examinations and had to come home from his review, only to find out after checking with Atty. Dialo's law office that he had lost the case and the appeal period had lapsed.[24] However, the Record and Notice of Appeal were denied in the Regional Trial Court's September 16, 2008 Order for having been filed out of time.[25]

Thus, petitioner filed a Petition for Certiorari[26] before the Court of Appeals, providing the same reason to explain his failure to timely appeal.

In its May 26, 2014 Decision,[27] the Court of Appeals denied the Petition, holding that petitioner failed to show any reason to relax or disregard the technical rules of procedure.[28] It noted that the trial court did not gravely err in denying petitioner's Record on Appeal for having been filed out of time.[29]

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19 Id.
20 Id. at 13.
21 Id. at 61.
22 Id. at 63.
23 Id. at 64.
24 Id. at 59.
25 Id. at 63–64.
26 Id. at 68–75.
27 Id. at 22–30.
28 Id. at 26.
29 Id. at 29.

Petitioner moved for reconsideration, which was also denied in the Court of Appeals' December 15, 2014 Resolution.[30] Thus, he filed this Petition for Certiorari.[31]

Petitioner insists that the serious indisposition of his counsel after being shot and receiving death threats is excusable negligence for a belated appeal, it not being attended by any carelessness or inattention.[32] Delving on the substantive issue, petitioner maintains that he has the right to use his mother's surname despite his legitimate status, as recognized in *Alfon v. Republic*.[33]

In its Comment,[34] the Office of the Solicitor General argued that this Petition should be dismissed outright for being the wrong remedy, and that the proper course was to file a petition for review on certiorari.[35] Further, it argues that the Court of Appeals did not gravely abuse its discretion in upholding the trial court's ruling.[36] It points out that since Atty. Dialo's law office has more than one lawyer, and it had admittedly received the Order,[37] the belated appeal was unjustified. Further, petitioner was already a law graduate when he filed the first Petition, and was expected to be more vigilant of his case's progress.[38] Thus, the Office of the Solicitor General finds no "exceptionally meritorious" reason to warrant a liberal interpretation of technical rules. In any case, petitioner's reason is not among the grounds to warrant a change in name.[39]

In his Reply,[40] petitioner failed to address the argument that a petition for certiorari is the wrong remedy to assail the Court of Appeals' dismissal of his Petition for Certiorari. He only reiterated the Court of Appeals should have discarded technicalities, because jurisprudence on Article 364 of the Civil Code is settled in his favor.[41]

After this Court had given due course to the Petition, the parties filed their respective memoranda.[42]

The issues for this Court's resolution are:

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[30] Id. at 14.
[31] Id. at 11. Filed under Rule 65 of the Rules of Court.
[32] Id. at 15–16.
[33] Id. at 17 citing 186 Phil. 600 (1980) [Per J. Abad Santos, Second Division].
[34] Id. at 99–117.
[35] Id. at 102–105.
[36] Id. at 105–109.
[37] Id. at 107.
[38] Id. at 108.
[39] Id. at 109.
[40] Id. at 119–121.
[41] Id. at 120.
[42] Id. at 133–141 and 143–166.

First, whether or not the Petition should be dismissed for petitioner's failure to show grave abuse of discretion on the part of the Court of Appeals;

Second, whether or not legitimate children have the right to use their mothers' surnames as their surnames; and

Finally, whether or not petitioner has established a recognized ground for changing his name.

This Court grants the Petition.

I

The Petition was filed under Rule 65 of the Rules of Court, but petitioner did not even attempt to show any grave abuse of discretion on the part of the Court of Appeals. On this ground alone, the Petition may be dismissed.

It is not disputed that the Record on Appeal was filed out of time. The Court of Appeals could have relaxed the rules for perfecting an appeal, but was not required, by law, to review it.

The Court of Appeals found no reason to warrant any relaxation of the rules, after appreciating the following circumstances: (1) petitioner did not adduce evidence to prove the alleged shooting of his former counsel;[43] (2) petitioner was represented by counsel belonging to a law office which had more than one associate;[44] and (3) petitioner was a law graduate and should have been more vigilant.[45]

This Court cannot sidestep the rule on reglementary periods for appealing decisions, except in the most meritorious cases.[46]

Petitioner claims that the circumstances surrounding the failure to file the appeal are bereft of carelessness or inattention on the part of counsel, and thus, constitute excusable negligence.

This is unconvincing. In *Sublay v. National Labor Relations Commission*,[47] the petitioner filed an appeal out of time because the counsel on record did not inform her or her other counsel that a decision had been

[43] Id. at 27.
[44] Id. at 28.
[45] Id. at 27.
[46] *Sublay v. National Labor Relations Commission*, 381 Phil. 198, 204 (2000) [Per J. Bellosillo, Second Division].
[47] 381 Phil. 198 (2000) [Per J. Bellosillo, Second Division].

rendered in her case. This Court affirmed the denial of her appeal for having been filed out of time, explaining that:

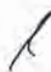
> The unbroken stream of judicial *dicta* is that clients are bound by the action of their counsel in the conduct of their case. Otherwise, if the lawyer's mistake or negligence was admitted as a reason for the opening of a case, there would be no end to litigation so long as counsel had not been sufficiently diligent or experienced or learned.[48] (Citation omitted)

This Court noted in *Sublay* that the petitioner was represented by more than one lawyer. The decision she wished to appeal had been duly served on one of her lawyers on record, who failed to inform the more active counsel. This Court ruled that the petitioner was bound by the negligence of her counsel:

> Lastly, petitioner's claim for judicial relief in view of her counsel's alleged negligence is incongruous, to say the least, considering that she was represented by more than one (1) lawyer. Although working merely as a collaborating counsel who entered his appearance for petitioner as early as May 1996, *i.e.*, more or less six (6) months before the termination of the proceedings *a quo*, Atty. Alikpala had the bounden duty to monitor the progress of the case. A lawyer has the responsibility of monitoring and keeping track of the period of time left to file an appeal. He cannot rely on the courts to appraise him of the developments in his case and warn him against any possible procedural blunder. Knowing that the lead counsel was no longer participating actively in the trial of the case several months before its resolution, Atty. Alikpala who alone was left to defend petitioner should have put himself on guard and thus anticipated the release of the Labor Arbiter's decision. Petitioner's lead counsel might have been negligent but she was never really deprived of proper representation. This fact alone militates against the grant of this petition.[49]

Here, petitioner failed to respond to the assertion that Atty. Dialo's law office, Dialo Darunday & Associates Law Office, is a law firm with more than one lawyer, as well as legal staff, who must have been aware that Atty. Dialo was not reporting to office or receiving his mail sent there. Moreover, Atty. Dialo stopped reporting to office on May 2, 2008, whereas the law firm received the June 2, 2008 Order more than a month later, on June 12, 2008. Without any response to this point, this Court cannot automatically excuse the law office and assume that it could not adjust to Atty. Dialo's absence.

The law firm was certainly negligent in how it dealt with the Order. Given the other circumstances of this case, petitioner would ordinarily be bound by this negligence. Consequently, petitioner had the burden to sufficiently establish, by alleging and arguing, that this case is so meritorious



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48 Id. at 205.
49 Id. at 206.

that it warrants the relaxation of the procedural rules. This, petitioner did not bother to do.

Nonetheless, in the exercise of its equity jurisdiction,[50] this Court may choose to apply procedural rules more liberally to promote substantial justice. Thus, we delve into the substantial issues raised by petitioner.

II

The fundamental equality of women and men before the law shall be ensured by the State. This is guaranteed by no less than the Constitution,[51] a statute,[52] and an international convention to which the Philippines is a party.

In 1980, the Philippines became a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women, and is thus now part of the Philippine legal system. As a state party to the Convention, the Philippines bound itself to the following:

> *Article 2*
>
> . . . .
>
> (f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
>
> . . . .
>
> *Article 5*
>
> . . . .
>
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women[.][53]

Non-discrimination against women is also an emerging customary norm. Thus, the State has the duty to actively modify what is in its power to modify, to ensure that women are not discriminated.

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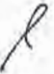
[50] *See Durban Apartments Corp. v. Catacutan*, 514 Phil. 187 (2005) [Per J. Ynares-Santiago, First Division].

[51] CONST., art. I, sec. 14 states:
SECTION 14. The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men.

[52] Republic Act No. 7192 (1992). Women in Development and Nation Building Act.

[53] Convention on the Elimination of All Forms of Discrimination against Women (1979), secs. 2 and 5.



Accordingly, Article II, Section 14 of the 1987 Constitution reiterated the State's commitment to ensure gender equality:

> SECTION 14. The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men.

In keeping with the Convention, Article II, Section 14 of the Constitution requires that the State be active in ensuring gender equality. This provision is even more noticeably proactive than the more widely-invoked equal protection and due process clauses under the Bill of Rights. In *Racho v. Tanaka*,[54] this Court observed:

> This constitutional provision provides a more active application than the passive orientation of Article III, Section 1 of the Constitution does, which simply states that no person shall "be denied the equal protection of the laws." Equal protection, within the context of Article III, Section 1 only provides that any legal burden or benefit that is given to men must also be given to women. It does not require the State to actively pursue "affirmative ways and means to battle the patriarchy — that complex of political, cultural, and economic factors that ensure women's disempowerment."[55] (Citation omitted)

Article II, Section 14 implies the State's positive duty to actively dismantle the existing patriarchy by addressing the culture that supports it.

With the Philippines as a state party to the Convention, the emerging customary norm, and not least of all in accordance with its constitutional duty, Congress enacted Republic Act No. 7192, or the Women in Development and Nation Building Act. Reiterating Article II, Section 14, the law lays down the steps the government would take to attain this policy:

> SECTION 2. *Declaration of Policy.* — The State recognizes the role of women in nation building and shall ensure the fundamental equality before the law of women and men. The State shall provide women rights and opportunities equal to that of men.
>
> To attain the foregoing policy:
>
> (1) A substantial portion of official development assistance funds received from foreign governments and multilateral agencies and organizations shall be set aside and utilized by the agencies concerned to support programs and activities for women;
>
> (2) All government departments shall ensure that women benefit equally and participate directly in the development programs and projects of said department, specifically those funded

[54] G.R. No. 199515, June 25, 2018, 868 SCRA 25 [Per J. Leonen, Third Division].
[55] Id. at 44.

under official foreign development assistance, to ensure the full participation and involvement of women in the development process; and

(3) All government departments and agencies shall review and revise all their regulations, circulars, issuances and procedures to remove gender bias therein.[56]

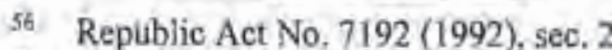
Courts, like all other government departments and agencies, must ensure the fundamental equality of women and men before the law. Accordingly, where the text of a law allows for an interpretation that treats women and men more equally, that is the correct interpretation.

Thus, the Regional Trial Court gravely erred when it held that legitimate children cannot use their mothers' surnames. Contrary to the State policy, the trial court treated the surnames of petitioner's mother and father unequally when it said:

> In the case at bar, what the petitioner wishes is for this Court to allow him to legally change is [sic] his given and registered first name from Anacleto III to Abdulhamid and to altogether disregard or drop his registered surname, Alanis, the surname of his natural and legitimate father, and for him to use as his family name the maiden surname of his mother Ballaho, which is his registered middle name, which petitioner claims and in fact presented evidence to be the name that he has been using and is known to be in all his records.
>
> In denying the herein petition, this Court brings to the attention of the petitioner that, our laws on the use of surnames state that legitimate and legitimated children shall principally use the surname of the father. The Family Code gives legitimate children the right to bear the surnames of the father and the mother, while illegitimate children shall use the surname of their mother, unless their father recognizes their filiation, in which case they may bear the father's surname. Legitimate children, such as the petitioner in this case, has [sic] the right to bear the surnames of the father and the mother, in conformity with the provisions of the Civil Code on Surnames, and it is so provided by law that legitimate and legitimated children shall principally use the surname of the father.[57] (Citations omitted)

This treatment by the Regional Trial Court was based on Article 174 of the Family Code, which provides:

> ARTICLE 174. Legitimate children shall have the right:
>
> (1) To bear the surnames of the father and the mother, in conformity with the provisions of the Civil Code on Surnames[.]



[56] Republic Act No. 7192 (1992), sec. 2.
[57] *Rollo*, pp. 39-40.

In turn, Article 364 of the Civil Code provides:

> ARTICLE 364. Legitimate and legitimated children shall principally use the surname of the father.

The Regional Trial Court's application of Article 364 of the Civil Code is incorrect. Indeed, the provision states that legitimate children shall "principally" use the surname of the father, but "principally" does not mean "exclusively." This gives ample room to incorporate into Article 364 the State policy of ensuring the fundamental equality of women and men before the law, and no discernible reason to ignore it. This Court has explicitly recognized such interpretation in *Alfon v. Republic*:[58]

> The only reason why the lower court denied the petitioner's prayer to change her surname is that as legitimate child of Filomeno Duterte and Estrella Alfon she should principally use the surname of her father invoking Art. 364 of the Civil Code. But the word "principally" as used in the codal-provision is not equivalent to "exclusively" so that there is no legal obstacle if a legitimate or legitimated child should choose to use the surname of its mother to which it is equally entitled. Moreover, this Court in *Haw Liong vs. Republic*, G.R. No. L-21194, April 29, 1966, 16 SCRA 677, 679, said:
>
> > "The following may be considered, among others, as proper or reasonable causes that may warrant the grant of a petitioner for change of name; (1) when the name is ridiculous, tainted with dishonor, or is extremely difficult to write or pronounce; (2) when the request for change is a consequence of a change of status, such as when a natural child is acknowledged or legitimated; and (3) when the change is necessary to avoid confusion (Tolentino, Civil Code of the Philippines, 1953 ed., Vol. 1, p. 660)."[59]

Given these irrefutable premises, the Regional Trial Court patently erred in denying petitioner's prayer to use his mother's surname, based solely on the word "principally" in Article 364 of the Civil Code.

III

Having resolved the question of whether a legitimate child is entitled to use their mother's surname as their own, this Court proceeds to the question of changing petitioner's first name from "Anacleto" to "Abdulhamid."

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[58] 186 Phil. 600 [Per J. Abad Santos, Second Division].
[59] Id. at 603.

Whether grounds exist to change one's name is a matter generally left to the trial court's discretion.[60] Notably, the Petition is devoid of any legal arguments to persuade this Court that the Regional Trial Court erred in denying him this change. Nonetheless, we revisit the ruling, and petitioner's arguments as stated in his appeal.

The Regional Trial Court correctly cited the instances recognized under jurisprudence as sufficient to warrant a change of name, namely:

> . . . (a) when the name is ridiculous, dishonorable or extremely difficult to write or pronounce; (b) when the change results as a legal consequence of legitimation or adoption; (c) when the change will avoid confusion; (d) when one has continuously used and been known since childhood by a Filipino name and was unaware of alien parentage; (e) when the change is based on a sincere desire to adopt a Filipino name to erase signs of former alienage, all in good faith and without prejudice to anybody; and (f) when the surname causes embarrassment and there is no showing that the desired change of name was for a fraudulent purpose or that the change of name would prejudice public interest.[61] (Citation omitted)

As summarized in the Record on Appeal, the petition to change name was filed to avoid confusion:

> Petitioner has been using the name Abdulhamid Ballaho in all his records and transactions. He is also known to and called by his family and friends by such name. He has never used the name Anacleto Ballaho Alanis III even once in his life. To have the petitioner suddenly use the name Anacleto Ballaho Alanis III would cause undue embarrassment to the petitioner since he has never been known by such name. Petitioner has shown not only some proper or compelling reason but also that he will be prejudiced by the use of his true and official name. A mere correction of his private and public records to conform to the name stated in his Certificate of Live Birth would create more confusion because petitioner has been using the name Abdulhamid Ballaho since enrollment in grade school until finishing his law degree. The purpose of the law in allowing change of name as contemplated by the provisions of Rule 103 of the Rules of Court is to give a person an opportunity to improve his personality and to provide his best interest[.] There is therefore ample justification to grant fully his petition, which is not whimsical but on the contrary is based on a solid and reasonable ground, i.e. to avoid confusion[.][62] (Citations omitted)

These arguments are well taken. That confusion could arise is evident. In *Republic v. Bolante*,[63] where the respondent had been known as "Maria Eloisa" her whole life, as evidenced by scholastic records,

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[60] *Republic v. Bolante*, 528 Phil. 328 (2006) [Per J. Garcia, Second Division].
[61] *Republic v. Hernandez*, 323 Phil. 606, 637–638 (1996) [Per J. Regalado, Second Division].
[62] *Rollo*, p. 54.
[63] 528 Phil. 328 (2006) [Per J. Garcia, Second Division].

employment records, and licenses, this Court found it obvious that changing the name written on her birth certificate would avoid confusion:

> The matter of granting or denying petitions for change of name and the corollary issue of what is a proper and reasonable cause therefor rests on the sound discretion of the court. The evidence presented need only be satisfactory to the court; it need not be the best evidence available. What is involved in special proceedings for change of name is, to borrow from *Republic v. Court of Appeals*, . . . *"not a mere matter of allowance or disallowance of the petition, but a judicious evaluation of the sufficiency and propriety of the justifications advanced in support thereof, mindful of the consequent results in the event of its grant and with the sole prerogative for making such determination being lodged in the courts."*
>
> With the view we take of the case, respondent's submission for a change of name is with proper and reasonable reason. As it were, she has, since she started schooling, used the given name and has been known as *Maria Eloisa*, albeit the name *Roselie Eloisa* is written on her birth record. Her scholastic records, as well as records in government offices, including that of her driver's license, professional license as a certified public accountant issued by the Professional Regulation Commission, and the "Quick Count" document of the COMELEC, all attest to her having used practically all her life the name *Maria Eloisa Bringas Bolante*.
>
> The imperatives of avoiding confusion dictate that the instant petition is granted. But beyond practicalities, simple justice dictates that every person shall be allowed to avail himself of any opportunity to improve his social standing, provided he does so without causing prejudice or injury to the interests of the State or of other people.[64] (Emphasis in the original, citations omitted)

This Court made a similar conclusion in *Chua v. Republic*:[65]

> The same circumstances are attendant in the case at bar. As Eric has established, he is known in his community as "Eric Chua," rather than "Eric Kiat." Moreover, all of his credentials exhibited before the Court, other than his Certificate of Live Birth, bear the name "Eric Chua." Guilty of reiteration, Eric's Certificate of Baptism, Voter Certification, Police Clearance, National Bureau of Investigation Clearance, Passport, and High School Diploma all reflect his surname to be "Chua." Thus, to compel him to use the name "Eric Kiat" at this point would inevitably lead to confusion. It would result in an alteration of all of his official documents, save for his Certificate of Live Birth. His children, too, will correspondingly be compelled to have their records changed. For even their own Certificates of Live Birth state that their father's surname is "Chua." To deny this petition would then have ramifications not only to Eric's identity in his community, but also to that of his children.[66]

[64] Id. at 339–340.
[65] 820 Phil. 1257 (2017) [Per J. Velasco, Third Division].
[66] Id. at 1263.

Similarly, in this case, this Court sees fit to grant the requested change to avoid confusion.

The Regional Trial Court itself also recognized the confusion that may arise here. Despite this, it did not delve into the issue of changing "Anacleto" to "Abdulhamid," but instead concluded that granting the petition would create even more confusion, because it "could trigger much deeper inquiries regarding [his] parentage and/or paternity[.]"[67]

This Court fails to see how the change of name would create more confusion. Whether people inquire deeper into petitioner's parentage or paternity because of a name is inconsequential here, and seems to be more a matter of intrigue and gossip than an issue for courts to consider. Regardless of which name petitioner uses, his father's identity still appears in his birth certificate, where it will always be written, and which can be referred to in cases where paternity is relevant.

Aside from being unduly restrictive and highly speculative, the trial court's reasoning is also contrary to the spirit and mandate of the Convention, the Constitution, and Republic Act No. 7192, which all require that the State take the appropriate measures to ensure the fundamental equality of women and men before the law.

Patriarchy becomes encoded in our culture when it is normalized. The more it pervades our culture, the more its chances to infect this and future generations.[68]

The trial court's reasoning further encoded patriarchy into our system. If a surname is significant for identifying a person's ancestry, interpreting the laws to mean that a marital child's surname must identify only the paternal line renders the mother and her family invisible. This, in turn, entrenches the patriarchy and with it, antiquated gender roles: the father, as dominant, in public; and the mother, as a supporter, in private.[69]

WHEREFORE, the Petition is **GRANTED**. The May 26, 2014 Decision and December 15, 2014 Resolution of the Court of Appeals in CA-G.R. SP No. 02619-MIN, as well as the April 9, 2008 and June 2, 2008 Orders of the Regional Trial Court of Zamboanga City, Branch 12 in Special Proceeding No. 5528, are **REVERSED and SET ASIDE**.

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[67] *Rollo*, p. 40.

[68] J. Leonen, Concurring Opinion in *Re: Untian, Jr*, A.C. No. 5900 (Resolution), April 10, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65162> [Per J. A. Reyes, Jr, En Banc].

[69] *Garcia* v. *Drilon*, 712 Phil. 44 (2013) [Per J. Perlas-Bernabe, En Banc].

As prayed for in his Petition for Change of Name, petitioner's name is declared to be **ABDULHAMID BALLAHO**. Accordingly, the Civil Registrar of Cebu City is **DIRECTED** to make the corresponding corrections to petitioner's name, from ANACLETO BALLAHO ALANIS III to ABDULHAMID BALLAHO.

SO ORDERED.

MARVIC M.V.F. LEONEN
Associate Justice

WE CONCUR:

RAMON PAUL L. HERNANDO
Associate Justice

On official leave
HENRI JEAN PAUL B. INTING
Associate Justice

EDGARDO L. DELOS SANTOS
Associate Justice

RICARDO R. ROSARIO
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

DIOSDADO M. PERALTA
Chief Justice

CERTIFIED TRUE COPY
Division Clerk of Court
Third Division
FEB 18 2021

I. Samoa

i. Family Safety Act 2013

SAMOA

Arrangement of Provisions

PART I
PRELIMINARY

1. Short title and commencement
2. Interpretation
3. Act to bind the Government

PART II
PROTECTION ORDERS

4. Application for protection order
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2013, No. 8

AN ACT to provide for greater protection of families and the handling of domestic violence and related matters.

[5th April 2013]

BE IT ENACTED by the Legislative Assembly of Samoa in Parliament assembled as follows:

PART I
PRELIMINARY

1. Short title and commencement-(1) This Act may be cited as the Family Safety Act 2013.

(2) This Act commences in whole or in part on a date or dates nominated by the Minister.

2. Interpretation - In this Act unless the contrary intention appears:

"authorised counselling agency" means any organisation, association, incorporated body, person or group of persons or agency with qualified counsellors providing counselling to victims and perpetrators of domestic violence approved by the Minister of Justice and Courts Administration;

"arms" means a gun, pistol, rifle or any firearm, whether lawful or unlawful as are regulated under the Arms Ordinance 1960;

"child" means any person under the age of 18 years;

"Child Welfare Officer" means any person appointed as a child welfare officer under section 15 of the Infants Ordinance 1961;

"Commissioner" means the Commissioner of the Samoa Police Service;

"complainant" means any person without distinction of any kind such as race, sex, language, religion, political or other opinion, national or social origin, property, birth,

disability or other status 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 includes any child in the care of the complainant;

"Court" means the District Court of Samoa;

"dependants" includes children and other members of the complainant's family dependant on the complainant in any way;

"domestic relationship" means a relationship between a complainant and a respondent in any of the following ways:

(a) they are or were married to each other, whether in accordance to law, custom or religion;

(b) they live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other;

(c) they are the parents of a child or are persons who have or had parental responsibility for that child;

(d) they are family members related by blood or marriage;

(e) they are family members related by legal or customary adoption;

(f) they are or were in an engagement, courtship or customary relationship, including an actual or perceived intimate or sexual relationship of any duration; or

(g) they share or recently shared the same residence.

"domestic violence" means,:

(a) physical abuse;

(b) sexual abuse;

(c) emotional, verbal and psychological abuse;

(d) intimidation;

(e) harassment;

(f) stalking;

(g) any other controlling or abusive behaviour towards a complainant where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.

"earliest opportunity" means, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, but not later than 12 hours after the reporting of the incident to any Police Officer;

"emergency monetary relief" means compensation for monetary losses suffered by a complainant at the time of the issue of a protection order as a result of the domestic violence, including:

(a) loss of earnings;
(b) medical and dental expenses;
(c) relocation and accommodation expenses;
(d) household necessities; or
(e) transportation costs.

"emotional, verbal and psychological abuse" means a pattern of degrading or humiliating conduct towards a complainant, including:

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

"harassment" means engaging in a pattern of conduct that induces the fear of harm to a complainant including:

(a) repeatedly watching or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
(b) repeatedly making calls or texts by telephone, mobile phone, internet (skype) or by any other technological means, or inducing another person to make calls or texts by telephone or mobile phone to the complainant, whether or not conversation ensues;
(c) repeatedly sending, delivering or causing the delivery of radio messages, letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant.

"intimidation" means uttering or conveying a threat, or causing a complainant to receive a threat, which induces fear;

"interim protection order" means an Order of the Court issued under section 5;

"media" means any person or body of persons responsible for the operation of a newspaper, magazine, public website or broadcasting station, and includes any radio or television station;

"Minister" means the Minister of Justice and Courts Administration;

"Ministry" means the Ministry of Justice and Courts Administration;

"physical abuse" means any act or threatened act of physical violence, injury, torture, or inhumane punishment towards a complainant;

"Police Officer" means any sworn member of the Samoa Police Service;

"protection order" means an order issued under sections 6 or 7;

"qualified counsellor" means any person:

(a) providing counselling services and has undertaken specific and recognized training in counselling approved by the Minister; or

(b) who has obtained a recognized qualification in providing counselling services from any institution or training service provider approved by the Minister.

"Registrar" means a Registrar and/or Deputy Registrar of the District Court or the Supreme Court;

"respondent" means any person who is or has been in a domestic relationship with a complainant and who has committed or allegedly committed an act of domestic violence against the complainant;

"relevant Police station" means the Domestic Violence Unit of the Samoa Police Service or such station, unit or division of the Samoa Police Service as may be nominated by the Minister of Police in writing from time to time;

"sexual abuse" means any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity and privacy of the complainant without his or her free will or consent;

"social worker" means any person holding a minimum qualification of a bachelor's degree in Social Work or its equivalent and has undertaken relevant social work for a term of not less than two (2) years;

"stalking" means repeatedly following, pursuing, or accosting the complainant;

"Village Representative" means any Sui o le Nu'u, Sui Tamaitai o le Nu'u, or a Minister of Religion living within the relevant village.

3. Act to bind the Government - This Act binds the Government.

PART II
PROTECTION ORDERS

4. Application for protection order-(1) Any complainant or any person acting on behalf of a complainant under subsection (3) may apply to the Court for a protection order under the provisions of this Act.

(2) Where a complainant is not represented by a legal counsel, the Registrar shall promptly inform, whether orally or in writing, or both, the complainant and any person acting on behalf of a complainant under subsection (3), of the following matters:

(a) the procedures required to be followed by the complainant in order to obtain remedies under this Act;

(b) the remedies available to the complainant under this Act; and

(c) the complainant's right to lodge a criminal complaint against the respondent, where a criminal offence has been allegedly committed by the respondent.

(3) Subject to subsection (4), and despite the provisions of any other law, an application made under this section may be brought on behalf of the complainant by any other person acting on behalf of the complainant and may include a legal counsel, Village Representative, Child Welfare Officer, counsellor, health service provider, social worker or teacher or any other person approved by the Court.

(4) Where a person other than the complainant makes an application for an order under this section, such application shall be brought with the written consent of the complainant, except in circumstances where the complainant is:

(a) a child;

(b) suffering from a mental illness;

(c) in a coma and has been unconscious for a period exceeding six (6) hours; or

(d) is a person whom the Court reasonably considers unable to provide the required consent.

(5) Despite 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 a parent, legal guardian or any other person.

(6) Despite any other law, an application made under this section may be brought outside ordinary Court hours or on a day which is not an ordinary court day, where, in the opinion of the Court, the complainant is likely to be either physically or sexually harmed by the Respondent if the application is not dealt with as a matter of urgency.

(7) Any application made under this section shall be lodged with the Court through a Registrar who shall without undue delay and at an early available opportunity, submit the application to any Judge of the Court at any time or place.

5. Interim protection orders-(1) The Court shall as soon as is reasonably possible consider an application made under section 4.

(2) Where the Court is satisfied that there is sufficient, evidence that:

(a) the respondent is committing, or has committed an act of domestic violence; and

(b) the complainant is likely to be either physically or sexually assaulted as a result of such domestic violence if a protection order is not issued immediately,

the Court shall issue an interim protection order against the respondent.

(3) An interim protection order, upon being issued by the Court, shall:

(a) be served on the respondent;

(b) call upon the respondent to show cause on the return date specified in the order why a protection order should not be issued;

(c) attach a copy of the application referred to in section 4 and the record of any evidence considered by the Judge in issuing an interim order under this section.

(4) Where the Court does not issue an interim protection order under this section, the Court shall direct the Registrar or the complainant's legal counsel, to cause certified copies of the application concerned and any supporting affidavits to be served on the respondent with a notice calling on the respondent to show cause on the return date specified in the notice as to why a protection order should not be issued.

(5) The return dates referred to in this section must not be less than 10 days after service has been effected upon the respondent.

(6) An interim protection order shall have no force and effect until it has been served on the respondent.

(7) Upon service or upon receipt of a return of service of an interim protection order, the Registrar or the Complainant's legal counsel shall forthwith cause a certified copy of the interim protection order to be served on the complainant.

6. Protection orders where respondent does not appear on due date - Where a respondent does not appear on a return date as required under section 5(3)(b) and upon the application by a complainant or a person acting on behalf of a complainant, the Court shall issue a protection Order where the Court is satisfied that:

(a) proper service has been effected on the respondent; and

(b) the application contains, sufficient evidence that the respondent has committed or is committing an act of domestic violence.

7. Protection orders where respondent appears on due date-(1) Where the respondent appears on the return date required under section 5(3)(b), in order to oppose the issuing of a protection order, the Court shall:

(a) proceed to hear the matter and consider any evidence previously received in relation to the application made under section 4; and

(b) consider further evidence as it may direct to any party of the proceedings.

(2) The Court shall after hearing all the evidence regarding an application under this Act issue a protection order, if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence.

(3) Upon the issuing of a protection order under this section, the Registrar or the Complainant's legal counsel shall cause:

(a) the original of such order to be served on the respondent; and

(b) provide a certified copy of the protection order to the relevant Police station.

(4) A protection order issued in terms of this section remains in force until it is set aside, and the execution of such order shall not be automatically suspended upon the noting of an appeal.

(5) In issuing an order under this section, the Court may issue any direction to ensure that the complainant's physical address is not disclosed in any manner which may endanger the safety, health or wellbeing of the complainant.

8. Court procedures for protection of complainant-(1) The Court may, if the Court is of the opinion that it is just or desirable to do so during the hearing of an application under sections 6 or 7, order that in the examination of witnesses, a

respondent who is not represented by a legal representative shall not be entitled to directly cross-examine a witness being a person who is in a domestic relationship with the respondent.

(2) Where the Court makes an order under subsection (1), the Court shall direct the respondent to provide the Court with the questions which the respondent would like to ask the witness, and the Court shall ask the questions, instead of the respondent, to the witness.

(3) Where the Court considers it appropriate the Court may:

(a) permit a screen to be placed between the complainant and the respondent during cross examination; or

(b) order that video conferencing, video recordings or audio recordings be provided where the complainant or a witness so requests it provided that the witness giving evidence through such mediums shall still be required to be personally examined by the respondent and the provisions of subsection (2) may apply where the witness so chooses.

9. Protection Orders available to the Court - The Court may, in issuing a protection order under sections 5, 6 or 7 prohibit the respondent from:

(a) committing any act of domestic violence or enlisting the help of another person to commit such act;

(b) entering a residence, or part of such residence, shared by the complainant and the respondent;

(c) entering the complainant's place of employment, or part of such place;

(d) preventing the complainant who ordinarily lives or lived in a shared residence from entering or remaining in the shared residence; or

(e) committing any other act, which the Court considers appropriate in the circumstances, in order to protect the complainant.

10. Court's power to impose conditions on protection order-(1) The Court may impose any additional conditions which it deems reasonably necessary to protect and provide for

the safety, health or wellbeing of the complainant, including an order:

(a) to seize any arm or dangerous weapon in the possession or under the control of the respondent; and

(b) that a Police Officer shall accompany the complainant to a specified place to assist with arrangements regarding the collection of personal property and, where applicable, for the service of any protection orders made under this Act upon the relevant respondent;

(c) that the respondent continues to make payments towards rent of shared accommodation or vehicle, or to make mortgage payments having regard to the financial needs and resources of the complainant and the respondent;

(d) for the custody and maintenance of dependent children of both the complainant and the respondent pursuant to the provisions of the Infants Ordinance 1961 and the Maintenance and Affiliation Act 1967 respectively; or

(e) that the respondent pay emergency monetary relief having regard to the financial needs and resources of the complainant and the respondent.

(2) Where the Court orders a condition under subsections (1)(d) and (e), such order shall have the effect of a civil judgment of a District court.

(3) Subject to subsection (4), where the court is satisfied that it is in the best interests of any child, it may:

(a) refuse the respondent contact with such child; or

(b) order contact with such child on such conditions as it may consider appropriate.

(4) Despite subsection (3), the Court must award interim custody of a child to the complainant where it is shown on the evidence before it that physical violence was applied, used or inflicted by the respondent upon the complainant or to any child involved in the domestic relationship between the complainant and the respondent.

(5) 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 under this section,

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

11. Breach of protection order-(1) Any respondent who breaches a protection order issued under the provisions of this Act shall:

(a) where the breach involves the further physical or sexual abuse of the complainant, be imprisoned for a term not exceeding six (6) months;

(b) where the breach involves any other act of violence not mentioned in paragraph (a), such person shall be subject to such punishment as the Court deems appropriate including sanctions available under the Community Justice Act 2008.

(2) Where a breach of a protection Order is reported to any Police Officer, such Police Officer shall have the matter referred to the relevant Police Station.

(3) Despite any other law, where the relevant Police Station is referred a reported breach of a protection Order under subsection (2), any Police Officer of that Police Station attending to the matter shall:

(a) cause the respondent to be held in custody;

(b) cause the respondent to be brought before the Court at the earliest possible opportunity, and not longer than 24 hours from the time that the respondent is brought under Police custody.

(4) Where a respondent is brought before the Court under this section, the Court may immediately, and without further delay, hear such evidence as the Court considers necessary in the circumstances to make a determination as to whether the respondent has breached a protection order, and upon finding:

(a) that there was a breach, shall proceed to sentence the respondent in accordance with subsection (1); or

(b) that there was no breach, shall order the release of the respondent from custody.

(5) Despite any other law, in making a determination under subsection (4), the Court shall only be required to decide questions of fact on the balance of probabilities.

(6) Nothing in this section shall be construed to:

(a) prohibit the further laying of any relevant criminal charges against the respondent for the action or omission giving rise to the breach of a protection order; or

(b) override a sanction imposed against the respondent by the Court which is higher than that provided for under subsection (1) following a trial arising from the action or omission giving rise to the breach of a protection order.

12. Variation or setting aside of protection order-(1) A complainant or a respondent may, upon written notice to the other party, apply to the Court for the variation or setting aside of a protection order issued under the provisions of this Act.

(2) Where the Court is satisfied that good cause has been shown for the variation or setting aside of the protection order, it may issue an order to that effect provided that the Court shall not grant such an application to the complainant unless it is satisfied that the application is made voluntarily.

13. Seizure of arms and dangerous weapons - The Court shall, at any time during any proceedings brought under this Act, order a Police Officer to seize any arm or dangerous weapon in the possession or under the control of a respondent, if the Court is satisfied on the evidence placed before it that:

(a) the respondent has threatened or expressed the intention to kill or injure himself or herself, or any person in a domestic relationship, whether or not by means of such arm or dangerous weapon; or

(b) possession of such arm 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 respondent's -

(i) state of mind or mental condition;

(ii) inclination to violence; or

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

14. Attendance of proceedings and prohibition of publication of certain information-(1) No person may be present during any proceedings in terms of this Act except:

(a) officers of the Court;
(b) the parties to the proceedings;
(c) any person bringing an application on behalf of the complainant;
(d) any legal representative representing any party to the proceedings;
(e) witnesses;
(f) any other person whom the court permits to be present,

provided that 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 section limits any other power of the Court to hear proceedings in chambers or to exclude any person from attending such proceedings.

(3) No person or the media, shall publish in any manner any information which might, directly or indirectly, reveal the identity of any party to the proceedings unless allowed by the Court.

(4) The Court may direct that any other information relating to proceedings held in terms of this Act shall not be published by any person or the media if it is satisfied that it is in the best interest of justice.

PART III
DUTIES OF POLICE OFFICERS

15. Duty to assist and inform complainant of rights-(1) Subject to subsection (3), and in addition to other duties of a Police Officer, every Police Officer who receives a report of domestic violence by any person shall at the earliest

opportunity render such assistance to the complainant without any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status and guarantee to all persons equal and effective protection as may be required in the circumstances.

(2) In providing assistance under subsection (1), a Police Officer shall:

(a) where necessary, make arrangements for the complainant and the complainant's dependants to find a suitable shelter, to obtain medical treatment or counselling service where needed; and

(b) provide information, whether written or oral, or both explaining to the complainant in a language that he or she understands, the remedies at his or her disposal in terms of this Act and the right to lodge a criminal complaint where applicable; or

(c) where the complainant is a person under 18 years of age, to refer such person to a Child Welfare Officer.

16. Duty to Prosecute-(1) Subject to subsection (2), where a report of domestic violence involves any form of physical or sexual abuse, and provided that there is sufficient evidence for doing so, every Police Officer handling the matter shall:

(a) ensure and undertake to do all things necessary in order that a charge or information is laid with the Court in order to commence prosecution of the matter in Court; and

(b) not endeavour to withdraw a charge or information laid under paragraph (a).

(2) Where a report of domestic violence involves any other form not being physical or sexual, the Police Officer may where the Police Officer considers it appropriate to do so and in accordance with applicable guidelines:

(a) have the matter referred to an authorised counselling agency and from there monitor progress of such an arrangement; or

(b) lay a charge or information to commence prosecution, particularly in cases of repeated offending of a similar nature.

(3) Failure by a Police Officer to comply with an obligation imposed in terms of this Act constitutes misconduct for the purposes of the Police Service Act 2009.

(4) Unless the Commissioner directs otherwise in any specific case for good cause, disciplinary proceedings must be issued against any Police Officer who allegedly failed to comply with an obligation referred to in subsection (1).

PART IV
MISCELLANEOUS

17. Sentencing-(1) Where an offence took place within the context of a domestic relationship, the Court shall consider that fact as an aggravating factor against the offender when considering sentence.

(2) In sentencing offenders for an offence involving domestic violence, a court must also have regard to:

(a) any special considerations relating to the physical, psychological or other characteristics of a complainant or victim of the offence, including -

(i) the age of the complainant or victim;

(ii) whether the complainant or victim was pregnant; and

(iii) whether the complainant or victim suffered any disability;

(b) whether a child was present when the offence was committed, or was otherwise affected by it;

(c) the effect of the violence on the emotional, psychological and physical well being of a victim;

(d) the effect of the offence in terms of hardship, dislocation or other difficulties experienced by a complainant or victim;

(e) the conduct of the offender towards the complainant or victim since the offence, and any matter which indicates whether the offender -

(i) accepts responsibility for the offence and its consequences;

(ii) has taken steps to make amends to a complainant or victim, including action to minimise or address the negative impacts of the offence on a complainant or victim; or

(iii) may pose any further threat to a complainant or victim;

(f) evidence revealing the offender's -

(i) attitude to the offence;

(ii) intention to address the offending behaviour; and

(iii) likelihood of continuing to pose a threat to a complainant or victim; and

(g) whether the offender has sought and received counselling or other assistance to address the offending behaviour, or is willing to undertake such counselling or seek such assistance.

18. Offences and Penalties - Notwithstanding the provisions of any other law, any person who:

(a) contravenes any prohibition, condition, obligation or order imposed under this Act;

(b) fails to comply with any direction under section 7(5); or

(c) in an affidavit required to be provided under any provision of this Act, wilfully makes a false statement in a material respect,

is guilty of an offence and shall, upon conviction, be liable to a fine not exceeding 20 penalty units or imprisonment not exceeding two (2) years, or both.

19. Evidence and Procedure-(1) Despite any other law, the Court may receive any evidence which the Court considers necessary for it to make a decision, determination or direction for the granting or refusal of a protection order under the provisions of this Act whether the evidence is admissible or not by law.

(2) The Court, in making a decision, determination or direction for the granting or refusal of a protection order, in cases where no procedure is specifically provided for, shall apply such procedure which the Court deems best calculated to promote the ends of justice.

20. Police Officers to assist Registrar-(1) All Police Officers enlisted in the relevant Police Station shall cooperate with the Registrar and shall assist at no cost with any task required by the Registrar in order to serve or have served any application or order made by the Court under this Act.

(2) This section applies notwithstanding any provision of any law to the contrary.

21. Application for Restraining Orders under the Divorce and Matrimonial Causes Ordinance 1961 - To avoid duplication, if a restraining order is issued under Part IIIA of the Divorce and Matrimonial Causes Ordinance 1961, that restraining order is taken as a protection order issued under this Act.

22. Forms - The Minister may approve, amend, or replace the form for any application, certificate, warrant or any other document required under this Act.

23. Fees - The Minister may determine and publish by Notice in the Savali, the following in respect of any matter under this Act:

(a) the types of fees payable;
(b) the rate at which such fees are to be calculated; or
(c) the amounts of such fees.

24. Protection from liability - No action shall lie against the Government, the Minister, the Ministry, the Chief Executive Officer of the Ministry, the Registrar or any member, employee or agent of the Ministry or the Police Service or any person acting pursuant to any authority conferred by the Minister, Ministry, Chief Executive Officer of the Ministry, or the

Registrar, as the case may be, in respect of any act or matter done or omitted to be done in good faith in the exercise or purported exercise of their respective functions conferred by or under this Act .

25. Regulations-(1) The Head of State acting on the advice of Cabinet may make regulations as may be necessary for the effective administration of this Act.

(2) Without limiting the generality of subsection (1), regulations made under this Act may make provision for:

(a) any forms or fees required under this Act;

(b) any matter required to be prescribed in terms of this Act.

(3) Any regulations made under this Act may provide that any person in contravention of such regulations shall be guilty of an offence and upon conviction be liable to a fine not exceeding 10 penalty units or to imprisonment for a period not exceeding three (3) months, or both.

26. Consequential Amendments-(1) Section 77(1) of the Crimes Ordinance 1961 is amended by substituting "16" with "18".

(2) Section 26A of the Divorce and Matrimonial Causes Ordinance 1961 is amended by substituting the definition of "domestic violence" with the following:

> "has the same meaning ascribed to it under the Family Safety Act 2013.".

(3) Section 12 of the Infants Ordinance 1961 is amended by substituting "14" with "18" where it appears.

The Family Safety Act 2013 is administered by the Ministry of Justice and Courts Administration.

Printed by the Clerk of the Legislative Assembly, by authority of the Legislative Assembly.

ii. Sex Offenders Registration Act 2017

2017 *Sex Offenders Registration* No. 24

SAMOA

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2017, No. 24

AN ACT to provide the registration of sex offenders and to prescribe requirements and controls applicable to registered sex offenders, and for related purposes.

[21st December 2017]

BE IT ENACTED by the Legislative Assembly of Samoa in Parliament assembled as follows:

PART 1
PRELIMINARY

1. Short title and commencement:

(1) This Act may be cited as the Sex Offenders Registration Act 2017.

(2) This Act commences on the date of assent of the Head of State.

2. Purpose of this Act:

(1) The purposes of this Act are:

(a) to require certain offenders who commit sexual offences to keep the police informed of their whereabouts and of other personal details for a period of time so as to reduce the likelihood that they will re-offend, and to facilitate the investigation and prosecution of any future offences that they may commit and any additional purposes;

(b) to prevent registered sex offenders working in child-related employment;

(c) to facilitate the monitoring of compliance with this Act.

(2) To achieve the purposes stated in subsection (1), this Act does all of the following:

(a) provides for the establishment of a register of sex offenders;

(b) requires certain offenders who are sentenced for registrable offences to provide specified personal details for inclusion in the register, and to keep the required details up to date;

(c) enables the court to order offenders who commit registrable offences to comply with the reporting obligations of the Act;

(d) imposes those reporting obligations for a period, based upon the number, severity and timing of the offences committed, and the age of the offender at the time an offence was committed;

(e) allows for the recognition of reporting obligations imposed under laws of foreign jurisdictions;

(f) makes it an offence for registered sex offenders to work in child-related employment;

(g) facilitates the monitoring of compliance with this Act.

3. Interpretation:

(1) In this Act, unless the contrary intention appears:

"child" means any person who is under the age of 18 years, and "children" has the corresponding meaning;

"Class 1 offence" means an offence listed in Schedule 1;

"Class 2 offence" means an offence listed in Schedule 2;

"Class 3 offence" means an offence listed in Schedule 3;

"contact" in relation to a child, has the meaning given in section 4;

"corresponding Act" means a law of a foreign jurisdiction that provides for people who have committed a corresponding registrable offence, to report in that jurisdiction information about themselves and to keep that information current for a specified period;

"corresponding registrable offence" means an offence that is a registrable offence for the purposes of a corresponding Act;

"corresponding registrable offender" has the meaning given to it in section 9;

"corresponding registrar" means the person whose duties and functions under a corresponding Act most closely corresponds to the duties and functions of the Police Commissioner under this Act;

"disability" means a congenital or permanent physical or mental impairment, including a sensory impairment, or intellectual or developmental disability, or loss or abnormality of physiological or anatomical structure or function;

"fingerscan" means fingerprints taken by means of a device to obtain a record of the fingerprints;

"foreign jurisdiction" means a jurisdiction other than Samoa;

"government custody" means:

(a) custody in any prison or corrections facility operated by the government under the Prisons and Corrections Act 2013 or any other law;

(b) custody under a law of a foreign jurisdiction in the nature of custody referred to in paragraph (a).

"Minister" means the Minister responsible for the Police Service;

"personal details" means the information listed in section 12(1);

"personal information" means information about an individual whose identity is apparent or can reasonably be ascertained from the information;

"Register" means the Register of sex offenders established, or arranged to be established, under section 38;

"registrable offence" has the meaning set out in section 7;

"registrable offender" has the meaning set out in section 6;

"reporting obligations", in relation to a registrable offender, means the obligations imposed on him or her by Part 3;

"reporting period" means the period, as determined under Division 5 of Part 3, during which a registrable offender must comply with his or her reporting obligations;

"sex offender registration order" means an order made under section 10.

(2) Where reference is made in this Act to an offence under the Crimes Act 2013, the definitions under the Crimes Act 2013 apply to those references in this Act.

4. Meaning of "contact":

For the purposes of this Act, a registrable offender has contact with a child if the offender:

(a) resides with the child; or

(b) stays overnight at a place of residence where the child resides or is staying overnight; or

(c) cares for, or supervises, the child; or

(d) provides the offender's contact details to the child or receives the child's contact details from the child; or

(e) engages in any of the following with the child for the purpose of forming a personal relationship with the child -

(i) any form of actual physical contact;

(ii) any form of oral communication (whether face to face, by telephone or by use of the internet);

(iii) any form of written communication (whether electronic or otherwise).

5. Other reference provisions:

(1) For the purposes of this Act, offences arise from the same incident only if they are committed within a single period of 24 hours and are committed against the same person.

(2) A reference to doing a thing "in person" in this Act is a reference to doing the thing by personal attendance at a place.

PART 2
OFFENDERS TO WHOM THIS ACT APPLIES

6. Registrable offenders:

(1) Subject to subsections (2) and (3), a registrable offender includes all of the following:

(a) a person convicted of a registrable offence after the commencement of this Act; or

(b) a person convicted of a registrable offence before the commencement of this Act, and the person is in government custody; or

(c) a person whom a court has ordered to be a registrable offender under section 10;

(d) a corresponding registrable offender who enters Samoa.

(2) Subsection (1)(a), (b) and (d) do not apply to an offender who is a child at the time of the commission of the registrable offence unless otherwise ordered by the Court.

(3) A person ceases to be a registrable offender if:

(a) the registrable offence for which he or she was convicted is quashed or set aside by a court; or

(b) the sex offender registration order relating to he or she is quashed on appeal;

(c) the sex offender registration order to which he or she is subject expires.

7. Registrable offences:

(1) A registrable offence is:

(a) a Class 1 offence; or

(b) a Class 2 offence; or

(c) a Class 3 offence.

(2) Schedule 1 lists the offences that are Class 1 offences for the purposes of this Act.

(3) Schedule 2 lists the offences that are Class 2 offences for the purposes of this Act.

(4) Schedule 3 lists the offences that are Class 3 offences for the purposes of this Act.

8. Amendments to the Schedules:

Regulations made under this Act may add offences to any Schedule, and may re-classify any offence in a Schedule.

9. Corresponding registrable offenders:

(1) A corresponding registrable offender is a person who:

(a) has been required to report to the corresponding registrar in that jurisdiction; and

(b) would, if he or she were currently in that jurisdiction, still be required to report to that corresponding registrar.

(2) A person referred to in subsection (1) is a corresponding registrable offender even if the offence in respect of which he or she is required to report in the foreign jurisdiction is not a registrable offence for the purposes of this Act.

10. Sex offender registration orders:

(1) If a court convicts a child of a registrable offence and regards the child as being at a high risk of sexual offending, it may order the child to be deemed to be a registrable offender.

(2) An order under subsection (1), for any period during which the person is a child, may:

(a) exempt the person from any particular reporting obligation; or

(b) modify any particular reporting obligation.

(3) A court may only make an order under subsection (1) if, after taking into account any matter that it considers appropriate, it is satisfied, beyond reasonable doubt, that the child poses a risk to the sexual safety of one or more persons or of the community.

(4) For the purposes of subsection (3), it is not necessary that the court be able to identify a risk to particular people, or a particular class of people.

(5) The Police Commissioner may make application to a court for a person in Samoa to be deemed to be a registrable offender under this Act if the person was convicted of an offence outside

Samoa, the elements of which constitute a registrable offence under this Act.

PART 3
REPORTING OBLIGATIONS

Division 1 - Initial report

11. Time for reporting:

A registrable offender or corresponding registrable offender of a kind referred to in column 1 of the Table must report his or her personal details to the Police Commissioner within the period specified in relation to him or her in column 2 of the Table:

Column 1 *Registrable Offender*	*Column 2* *Period for Initial Report*
A registrable offender in government custody in Samoa as a consequence of a registrable offence.	Within seven (7) days before he or she ceases to be in government custody.
A person who is convicted of an offence before the commencement of this Act and such offence is a registrable offence under this Act and who is in government custody in Samoa for that offence.	Within seven (7) days before he or she ceases to be in government custody.
A corresponding registrable offender who is in Samoa, and who is in government custody	Within seven (7) days before he or she ceases to be in government

(whether or not the offence was committed before or after commencement of this Act).	custody.
A corresponding registrable offender who is in Samoa, and who is not in government custody (whether or not the offence was committed before or after commencement of this Act).	Within 45 days after the commencement of this Act if the conviction was before the commencement of this Act, or within seven (7) days of entering Samoa if the offence was committed at any other time.
A person who is convicted of an offence in a foreign jurisdiction (before or after the commencement of this Act) and was not required to report in that jurisdiction, but such offence is equivalent to a registrable offence under this Act and he or she is in government custody in Samoa.	Within seven (7) days before he or she ceases to be in government custody.
A person who is convicted of an offence in a foreign jurisdiction (before or after the commencement of this Act) and was not required to report in that jurisdiction, but such offence is equivalent to a registrable	Within 45 days after the commencement of this Act if the conviction was before the commencement of this Act, or within seven (7) days of entering Samoa if

offence under this Act and he or she is not in government custody.	the offence was committed at any other time.

12. Initial report by registrable offender of personal details:

(1) A registrable offender must provide information in relation to all matters specified in the form approved for this purpose by the Police Commissioner, which may require information in relation to all or any of the following matters:

(a) details of the offender's identity, including date and place of birth, passport details, any names by which the offender has ever been known, and details of tattoos or distinguishing marks or features;

(b) places at which the offender generally resides;

(c) contact details, including telephone numbers, email addresses, internet service providers;

(d) details of any children with whom the offender has contact, and details of where, when and how such contact occurs;

(e) employment details, including places where the offender is generally employed;

(f) details of previous convictions and of terms spent in government custody;

(g) details of motor vehicles owned or used by the offender;

(h) details of clubs or associations of which the offender is a member;

(i) any other details required by the Police Commissioner to achieve the purposes of this Act.

(2) For the purposes of this section:

(a) a registrable offender does not generally reside at any particular premises unless he or she resides at those premises for at least seven (7) days (whether consecutive or not) in any period of 12 months; and

(b) a registrable offender is not generally employed at any particular premises unless he or she is employed at those premises for at least 14 days (whether consecutive or not) in any period of 12 months.

(3) For the purposes of this section, a person is employed if he or she:

(a) carries out work under a contract of employment; or

(b) carries out work as a self-employed person or as a sub-contractor; or

(c) carries out work as a volunteer for an organisation; or

(d) undertakes practical training as part of an educational or vocational course; or

(e) carries out work in any capacity for a religious organisation.

13. Persons required to report under corresponding Act:

(1) A corresponding registrable offender must provide all information which is required to be provided by a registrable offender under section 12, and the Police Commissioner may require that any additional information relevant to the corresponding registrable offender, or to the reporting requirements under the corresponding Act, be provided.

(2) Regulations made under this Act may provide for requirements and processes applicable to persons who have been required to report to a corresponding registrar, irrespective of whether he or she is a registrable offender for the purposes of this Act.

Division 2 - Ongoing reporting obligations

14. Registrable offender must report annually:

(1) A registrable offender must report his or her personal details to the Police Commissioner each year.

(2) The registrable offender must make the report by the end of the calendar month in which the anniversary of the date on which he or she first reported in accordance with this Act.

(3) If the registrable offender has been in government custody since the time of the last report under this section, the offender must report details of when and where that custody occurred, and the relevant offence.

15. Registrable offender must report changes to relevant personal details:

A registrable offender must report to the Police Commissioner any change in his or her personal details within seven (7) days after that change occurs.

16. Intended absence from Samoa to be reported:

(1) This section applies if a registrable offender intends to leave Samoa to travel to any other country.

(2) At least seven (7) days before leaving Samoa, the registrable offender must report the intended travel to the Police Commissioner, and must provide details of all of the following:

(a) each country to which he or she intends to go while out of Samoa;

(b) the approximate dates during which he or she intends to be in each of those countries;

(c) each address or location within each country at which he or she intends to reside (to the extent that they are known) and the approximate dates during which he or she intends to reside at those addresses or locations;

(d) if he or she intends to return to Samoa, the approximate date on which he or she intends to return;

(e) if he or she does not intend to return to Samoa, a statement of that intention.

(3) If circumstances arise making it impracticable for a registrable offender to make the report seven (7) days before the date of departure, it is sufficient compliance with subsection (2) if the registrable offender reports the required information to the Police Commissioner at least 24 hours before leaving Samoa.

(4) A registrable offender who is out of Samoa and who decides to change any details given to the Police Commissioner under this section must report the changed details to the Police Commissioner as soon as practicable, and must make the report:

(a) by writing sent by post or transmitted electronically to the Police Commissioner; or

(b) in any other prescribed manner.

(5) A registrable offender to whom this section applies must report his or her return to Samoa to the Police Commissioner as soon as practicable.

(6) If the registrable offender decides not to leave Samoa, he or she must report his or her change of intention to the Police Commissioner within seven (7) days after deciding not to leave.

17. Passport and other documents to be produced: When making a report under section 16, a registrable offender must produce to the Police Commissioner:

(a) the registrable offender's passport; and

(b) any other documents required by the Police Commissioner to verify or support the details in the report.

Division 3 - Provisions applying to all reporting obligations

18. Report is to be made to approved police stations:

A report under this Part must be made at a police station or other place approved by the Police Commissioner.

19. Reports to be made in person:

(1) Subject to subsection (4), a registrable offender must make all reports under this Part in person.

(2) Only a police officer approved for this purpose by the Police Commissioner may receive a report.

(3) A police officer may arrange for an interpreter to be present when a person is making a report under this Part, and may otherwise make arrangements which are necessary for a registrable offender to make a report as required by this Part.

(4) If a registrable offender attending in person is a child or has a disability that renders it impossible or impracticable for the report to be made in person, then the report may be made by a person approved for that purpose by the Police Commissioner.

20. Receipt of information to be acknowledged:

(1) As soon as is practicable after receiving a report under this Part, the police officer must acknowledge the making of the report.

(2) The acknowledgment must be in writing and must be given to the person who made the report, and must include all of the following:

(a) the name and signature of the police officer or other person who received the report;

(b) the date and time when, and the place where, the report was received;

(c) a copy of the information that was reported.

(3) The Police Commissioner must ensure that a copy of every acknowledgment is retained.

21. Verification of identity to be provided:

When a report is made under this Part, the person making the report must provide verification of the person's identity in a form required by the police officer to whom the report is made.

22. Power to establish identity of person making a report:

(1) A police officer receiving a report under this Part may take, or arrange to have taken, the fingerprints or a fingerscan of the registrable offender if the police officer is not satisfied as to the identity of the registrable offender.

(2) A police officer may only require the fingerprints or a fingerscan of a child to be taken under subsection (1) if the child is accompanied by his or her parent or guardian or, if neither a parent or guardian is available, by an independent person.

(3) A police officer receiving a report made under this Part may also require the registrable offender:

(a) to be photographed; and

(b) to show any tattoos or permanent distinguishing marks.

23. Retention of material for certain purposes:

The Police Commissioner may retain for law enforcement, crime prevention or child protection purposes any, of the following taken under this Division from, or in relation to, a registrable offender:

(a) copies of any documents;

(b) any fingerprints or fingerscans;

(c) any photographs.

Division 4 - Suspension and extension of reporting obligations

24. Suspension and extension of reporting obligations:

(1) Any obligation imposed on a registrable offender by this Part is suspended for any period during which he or she:

(a) is in government custody; or

(b) is outside Samoa, unless the obligation is under section 16; or

(c) is the subject of an order under Division 6 (or an equivalent order made under the laws of a foreign jurisdiction).

(2) The period for which a registrable offender's reporting obligations continue is extended by any length of time for which those obligations are suspended under subsection (1)(a).

Division 5 - Reporting period

25. When reporting obligations begin:

For the purposes of this Division, a registrable offender's reporting obligations in respect of a registrable offence begin:

(a) when the registrable offender is sentenced for the offence; or

(b) when the registrable offender ceases to be in government custody in relation to the offence,

whichever is the later.

26. Length of reporting period:

(1) A registrable offender must continue to comply with the reporting obligations imposed by this Part for:

(a) 15 years, if he or she -

(i) has been found guilty of a single Class 1 offence; or

(ii) has ever been found guilty of two Class 2 offences; or

(iii) has ever been found guilty of one Class 2 offence and one or more Class 3 offences; or

(b) 10 years, if he or she has only ever been found guilty of a single Class 2 offence, or has ever only been found guilty of two Class 3 offences; or

(c) five (5) years, if he or she has only ever been found guilty of a single Class 3 offence; or

(d) the remainder of his or her life, if he or she -

(i) has ever been found guilty of two or more Class 1 offences; or

(ii) has ever been found guilty of a Class 1 offence and one or more Class 2 or Class 3 offences; or

(iii) has ever been found guilty of three or more Class 2 offences or Class 3 offences.

(2) A reference in subsection (1) to an offence extends to an offence committed before the commencement of this Act.

(3) For the purposes of this section:

(a) two (2) or more offences arising from the same incident within a 24 hour period are to be treated as a single offence; and

(b) two (2) or more offences arising from the same incident within a 24 hour period are to be treated as a single Class 1 offence if at least one of those offences is a Class 1 offence.

27. Reporting period for corresponding registrable offenders:

(1) A corresponding registrable offender must continue to comply with the reporting obligations imposed by this Part until he or she would not be required, if he or she were in a foreign jurisdiction, to report to the corresponding registrar of that foreign jurisdiction.

(2) For the purposes of this section, if a corresponding registrable offender is a corresponding registrable offender under the laws of more than one jurisdiction, the period for which he or she must continue to comply with the reporting obligations imposed by this Part is the longest period for which he or she would be required to report to the corresponding registrar of a foreign jurisdiction.

Division 6 - Suspension from reporting obligations

28. Supreme Court may suspend lifetime reporting obligations:

(1) This section applies to a registrable offender who is required to continue to comply with the reporting obligations imposed by this Part for the remainder of his or her life.

(2) A registrable offender may apply to the Supreme Court using an approved form for an order suspending his or her reporting obligations if a period of 15 years has passed

(ignoring any period during which the registrable offender was in government custody) since he or she was last sentenced or released from government custody in respect of a registrable offence or a corresponding registrable offence.

(3) On the application under subsection (2), the Supreme Court may make an order suspending the registrable offender's reporting obligations.

29. Matters to be considered by the Supreme Court:

(1) The Supreme Court must not make an order under sections 28 unless it is satisfied that the registrable offender does not pose a risk to the sexual safety of one or more persons or of the community.

(2) In deciding whether to make an order under this section, the Supreme Court must take all of the following into account:

(a) the seriousness of the registrable offender's registrable offences and corresponding registrable offences;

(b) the period of time since those offences were committed;

(c) the age of the registrable offender, the age of the victims of those offences and the difference in age between the registrable offender and the victims of those offences, as at the time those offences were committed;

(d) the registrable offender's present age;

(e) the registrable offender's total criminal record;

(f) any other matter the Court considers appropriate.

(3) In deciding whether to make an order under sections 28, the Court must also take into account any submissions made by the Police Commissioner, and any evidence presented by the Police Commissioner as to the risk that the registrable offender presents to the safety of one or more persons or the community.

30. Police Commissioner is party to application:

The Police Commissioner is a party to an application under section 28(2).

31. Restriction on right of unsuccessful applicant to re-apply for order:

A registrable offender in respect of whom the Supreme Court refuses to make an order under section 28(3) is not entitled to make a further application to the Court until five (5) years have elapsed from the date of the refusal, unless the Court otherwise orders at the time of the refusal.

32. Cessation of suspension order:

An order made under this Division ceases to have effect if, at any time after the making of the order, the registrable offender:

(a) is made subject to a sex offender registration order; or

(b) is found guilty of a registrable offence; or

(c) becomes a corresponding registrable offender who must under section 27 continue to comply with the reporting obligations imposed by this Part for any period.

Division 7 - Offences

33. Offence of failing to comply with reporting obligations:

(1) A registrable offender who without reasonable excuse fails to comply with any of the registrable offender's reporting obligations commits an offence and is liable upon conviction to a fine not exceeding 100 penalty units or to a term of imprisonment for up to five (5) years, or both.

(2) In determining whether a person had a reasonable excuse for failing to comply with his or her reporting obligations, the court is to have regard to all of the following matters:

(a) the person's age;

(b) whether the person has a disability that affects the person's ability to understand, or to comply with, those obligations;

(c) whether the form of notification given to the registrable offender as to his or her obligations was adequate to inform him or her of those obligations, having regard to the offender's circumstances;

(d) any other matter the court considers appropriate.

(3) It is a defence to proceedings for an offence of failing to comply with a reporting obligation if it is established by or on behalf of the person charged with the offence that, at the time the offence is alleged to have occurred, the person had not received notice under section 35, and was otherwise unaware of the obligation.

34. Offence to provide false or misleading information:

A registrable offender who in purported compliance with this Part provides details that the registrable offender knows to be false or misleading in a material particular commits an offence and is liable upon conviction to a fine not exceeding 100 penalty units or to a term of imprisonment for up to five (5) years, or both.

Division 8 - Notification of reporting obligations

35. Notice to be given to registrable offender:

(1) The Police Commissioner must give to a registrable offender written notice of:

(a) his or her reporting obligations; and

(b) the consequences that may arise if he or she fails to comply with those obligations.

(2) A registrable offender is to be given a notice under this section as soon as practicable after any of the following events happens:

(a) he or she is sentenced for a registrable offence;

(b) he or she is released from government custody (whether in government custody for a registrable offence or not);

(c) he or she enters Samoa if he or she has not previously been given notice of his or her reporting obligations in Samoa;

(d) he or she becomes a corresponding registrable offender, if he or she is in Samoa at that time.

(3) Where a court in Samoa:

(a) makes any order that has the effect of making a person a registrable offender for the purposes of this Act; or

(b) convicts a person of a registrable offence,

the Police Commissioner must ensure that the person is, at the time the order is made or person is convicted, given a written notice specifying the reporting period that applies to him or her.

(4) In addition to subsection (2), the Police Commissioner may at any other time, cause written notice to be given to a registrable offender of:

(a) his or her reporting obligations; and

(b) the consequences that may arise if he or she fails to comply with those obligations.

36. Courts to provide information to Police Commissioner:

(1) This section applies if a court in Samoa:

(a) makes any order that has the effect of making a person a registrable offender for the purposes of this Act; or

(b) convicts a person of a registrable offence; or

(c) determines an appeal made to it by a registrable offender in respect of a registrable offence or against the making of a sex offender registration order in respect of an offence; or

(d) makes any order in relation to a registrable offender that has the effect of removing the person from the ambit of this Act.

(2) The court must ensure that details of the order, conviction or determination of appeal are provided to the Police Commissioner as soon as is practicable after the making or imposition of the order or conviction or the determination of the appeal (as the case requires).

37. Failure to comply with procedural requirements does not affect registrable offender's obligations:

A failure by any person other than a registrable offender to comply with any procedural requirement imposed on the person by this Part or Regulations made under this Act does not, of itself, affect a registrable offender's reporting obligations.

PART 4
THE SEX OFFENDERS REGISTER

38. Register of sex offenders:

(1) The Police Commissioner is responsible for establishing and maintaining the Register of Sex Offenders, and has all necessary authority in relation to matters associated with the establishment and management of the Register in accordance with this Part.

(2) The Register must contain all of the following information in respect of each registrable offender (to the extent that it is known by the Police Commissioner):

(a) the registrable offender's name and other identifying particulars;

(b) details of each registrable offence of which the registrable offender has been found guilty, or with which he or she has been charged;

(c) the date on which the registrable offender was sentenced for any registrable offence;

(d) the date on which the registrable offender ceased to be in government custody in respect of a registrable offence, or entered or ceased to be in government custody in respect of any offence during his or her reporting period;

(e) any information reported in respect of the registrable offender under Part 3;

(f) any other information that the Police Commissioner considers appropriate to include in the Register.

39. Restricted access to the Register:

(1) Nothing in this Part prevents:

(a) a court from ordering that any information relating to a registrable offender is to be published or otherwise made available to the public; or

(b) Regulations made under this Act from authorising the publication of information held on the Register, and the processes for such publication to be made.

(2) Subject to subsection (1), the Police Commissioner must ensure:

(a) that the Register, or any part of the Register, is only accessed by a person, or a class of persons, who is authorised to do so by the Police Commissioner, or by this Act or Regulations made under this Act; and

(b) that personal information in the Register is only disclosed in accordance with this Act or Regulations made under this Act.

(3) The Police Commissioner must develop guidelines in relation to the accessing and disclosure of personal information in the

Register that ensure that access to the personal information in the Register is restricted to the greatest extent that is possible without interfering with the purpose of this Act.

(4) This section has effect despite any other Act or law to the contrary.

40. Persons with access to Register not to disclose personal information from it:

(1) A person who is authorised to have access to the Register or any part of the Register and who discloses any information in the Register to any person without lawful authority, commits an offence and is liable upon conviction to a fine not exceeding 50 penalty units or to a term of imprisonment of up to three (3) months, or both.

(2) Despite subsection (1), the Police Commissioner or a person authorised to have access to the Register or any part of the Register may disclose information in the Register to a government department, public statutory authority, foreign law enforcement or supervisory authority or court:

(a) for the purpose of law enforcement or judicial functions or activities; or

(b) as authorised or required by or under any Act or law; or

(c) if the Police Commissioner or a person authorised to have access to the Register believes on reasonable grounds that to do so is necessary to enable the proper administration of this Act.

41. Disclosure of modified information:

(1) The Police Commissioner may provide to any person information in the Register about an individual whose identity cannot reasonably be ascertained from the information provided.

(2) The Police Commissioner may impose any restriction or condition that the Police Commissioner thinks fit on the use of the information disclosed under subsection (1).

(3) A person to whom information is disclosed under subsection (1) and who fails to comply with any restriction or condition on its use that is imposed by the Police Commissioner, commits an offence and is liable upon conviction to a fine not exceeding 50 penalty units or to a term of imprisonment of up to three (3) months, or both.

42. Registrable offender's rights in relation to Register:

(1) A registrable offender may make a written request to the Police Commissioner for a copy of all the reportable information that is held in the Register in relation to the registrable offender.

(2) A registrable offender may ask the Police Commissioner to amend any reportable information held in the Register in relation to the registrable offender that is incorrect.

(3) In this section, reportable information means any information supplied to the Police Commissioner by, or on behalf of, the registrable

offender that the registrable offender is required to report to the Police Commissioner and that is still held in the Register.

43. Ombudsman to monitor compliance:

(1) The Ombudsman has authority to monitor compliance with this Part by the Police Commissioner and other persons authorised by the Police Commissioner to have access to the Register or any part of the Register.

(2) The Police Commissioner must ensure that police officers and other persons authorised to have access to the Register or any part of that Register, provides assistance to the Ombudsman to facilitate the performance of the Ombudsman's functions and powers under this section.

(3) The Ombudsman may at any time give the Minister a written report on compliance with this Part by the Police Commissioner and other persons authorised by the Police Commissioner to have access to the Register.

PART 5
REGISTERED SEX OFFENDERS PROHIBITED FROM CHILD-RELATED EMPLOYMENT

44. Interpretation in this Part:

(1) In this Part:

"child-related employment" means employment involving contact with a child in connection with:

(a) child protection, child care and other support services for children;

(b) education, counselling services, coaching or private tuition services for children;

(c) paediatric wards of hospitals;

(d) clubs or associations directed at, children or whose membership is mainly comprised of children;

(e) providing, on a commercial or voluntary basis, a transport service specifically for children;

(f) providing, on a commercial basis and not merely incidentally to or in support of other business activities services specifically for children.

"education services" does not include a university or an adult education institution even if that university, college or institution has a student under 18 years of age;

"employment" includes:

(a) performance of work -

(i) under a contract of employment or a contract for services (whether written or unwritten); or

(ii) for gain or reward other than under a contract of employment or contract for services; or

(iii) as part of the duties of a religious vocation; or

(b) undertaking practical training as part of an educational or vocational course associated with a person's employment; or

(c) performance of work as a volunteer.

"registered sex offender" means a registrable offender or a person subject to a sex offender registration order.

(2) For the purposes of this Act, a person is engaged in child-related employment if he or she is:

(a) an officer of a body corporate that is engaged in child-related employment; or

(b) a member of the committee of management of an unincorporated body or association that is engaged in child-related employment; or

(c) a member of a partnership that is engaged in child-related employment.

45. Registered sex offender excluded from child-related employment:

A registered sex offender who applies for, or who is in any way engaged in, employment that is child-related employment, commits an offence and is liable upon conviction to a fine not exceeding 100 penalty units or to a term of imprisonment of up to two (2) years, or both.

46. Offence to fail to disclose charges:

(1) A person engaged in child-related employment who is charged with a registrable offence and

who fails to disclose the charge to his or her employer within seven (7) days after the commencement of the proceedings commits an offence and is liable upon conviction to a fine not exceeding 50 penalty units.

(2) A person who applies for child-related employment and who fails to disclose the fact of a pending charge of a registrable offence to his or her prospective employer at the time of making the application, commits an offence and is liable upon conviction to a fine not exceeding 50 penalty units.

(3) A person who has (whether before or after the commencement of this subsection) applied for child-related employment and who:

(a) while the application is still current, is charged with a registrable offence; and

(b) fails to disclose the charge to his or her prospective employer within seven (7) days after the commencement of the proceedings,

commits an offence and is liable upon conviction to a fine not exceeding 50 penalty units.

PART 6
CHANGE OF NAME

47. Application of this Part:

This Part applies despite anything to the contrary in the Births, Deaths and Marriages Registration Act 2002.

48. Interpretation in this Part:

In this Part:

"change of name application" means an application by or on behalf of a registrable offender for registration of a change of the offender's name for which approval is required under section 50;

"Registrar" means the Registrar of Births, Deaths and Marriages under the Births, Deaths and Marriages Registration Act 2002.

49. Applications for change of name by or on behalf of a registrable offender:

(1) A registrable offender must not apply to the Registrar to register a change of his or her name under the Births, Deaths and Marriages Registration Act 2002 without having first obtained the written approval of the Police Commissioner.

(2) A person must not, on behalf of a registrable offender apply to the Registrar to register a change of his or her name under the Births, Deaths and Marriages Registration Act 2002 without having first obtained the written approval of the Police Commissioner.

(3) A registrable offender who makes an application to change his or her name under the Births, Deaths and Marriages Registration Act 2002, or a person who makes such an application on behalf of a registrable offender, must inform the Registrar that the application is being made by or on behalf of a registrable offender.

(4) A registrable offender or other person who breaches this section commits an offence and is liable upon conviction to a fine not exceeding 20 penalty units.

50. Approval by Police Commissioner:

(1) Subject to subsection (2), the Police Commissioner may only approve a change of name application if the Police Commissioner is satisfied that the change of name is in all the circumstances necessary or reasonable.

(2) The Police Commissioner must not approve a change of name application if the Police Commissioner is satisfied that the change of name would, if registered, be reasonably likely to frustrate the administration of this Act in respect of the registrable offender.

51. Approval to be notified in writing:

If the Police Commissioner approves a change of name application, the Police Commissioner must:

(a) as soon as practicable, give written notice of the approval to the person who made the application; and

(b) if the registrable offender consents, give a copy of the written notice of approval to the Registrar.

52. Registration of change of name:

(1) The Registrar must not register a change of name under the Births, Deaths and Marriages

Registration Act 2002 if the Registrar has not received a copy of the notice of approval of the Police Commissioner under section 51.

(2) If the Registrar does not register a change of name because of subsection (1), the Registrar must give written notice of the application to the Police Commissioner.

(3) A registrable offender who registers a change of name under the Births, Deaths and Marriages Registration Act 2002, without the approval of the Police Commissioner under section 50, commits an offence and is liable upon conviction to a fine not exceeding 50 penalty units.

53. Registrar may correct Register:

The Registrar may correct the Register if:

(a) the name of a registrable offender on the Register has been changed; and

(b) the Police Commissioner has approved that change under this Part.

PART 7
MISCELLANEOUS

54. Offence to breach confidentiality:

(1) A person who gives information acquired under this Act to any person who is not authorised to receive such information, commits an offence and is liable upon conviction to a fine not exceeding 50 penalty units.

(2) Subsection (1) does not apply to the giving of information:

(a) to a court or tribunal in the course of legal proceedings; or

(b) pursuant to an order of a court or tribunal; or

(c) to the extent reasonably required to enable the investigation or the enforcement of a law; or

(d) to a legal practitioner for the purpose of obtaining legal advice or representation relating to a matter under this Act; or

(e) in good faith for the purposes of this Act; or

(f) as required or authorised by or under any other Act.

55. Other offences against this Act:

A person who breaches a requirement applying to that person under this Act, for which no other offence or penalty is prescribed, commits an offence and is liable upon conviction to a fine not exceeding 100 penalty units.

56. Protection from liability:

An act or omission that a person does or omits to do in good faith in the administration or execution of this Act does not subject the person personally to any action, liability, claim or demand.

57. Certificate concerning evidence:

(1) In proceedings under this Act, a certificate signed by the Police Commissioner, or a police officer holding a position designated in writing by the Police Commissioner for the purposes of this section, certifying that the Register:

(a) at any particular date contained information specified in the certificate; or

(b) indicated that, during any particular period, a specified person failed to notify information as required by this Act,

is evidence, and in the absence of evidence to the contrary is proof, of the details specified in the certificate.

(2) For the purposes of this Act, a certificate that would be evidence under a corresponding Act that at a specified time, or during a specified period, a person was required to report to a corresponding registrar under that Act is evidence, and in the absence of evidence to the contrary is proof, of the facts stated in the certificate.

58. Regulations:

(1) The Head of State, acting on the advice of the Cabinet, may make regulations for all or any of the following purposes:

(a) matters incidental to the making of reports under Part 3 including -

(i) the manner and form in which a report must be made; and

(ii) the nature of any verifying documentation or evidence to be produced in support of a report; and

(iii) requiring that a report contain additional information to that required by that Part;

(b) the form of, or the information to be included in, any notice or other document that is required by this Act to be given to registrable offenders;

(c) the manner and form in which the Register is to be established and maintained, including the manner and form in which information is to be entered in the Register;

(d) requiring or permitting the Police Commissioner to remove specified information, or information of a specified class, from the Register;

(e) the notification of reporting obligations to registrable offenders, including -

(i) the manner and form in which the information is to be given to registrable offenders;

(ii) permitting the person notifying a registrable offender to ask the registrable offender to acknowledge being given the notice;

(iii) making special provision for the notification of registrable offenders who are children or who have disabilities or other special needs;

(iv) permitting or requiring a person or body to be notified of a registrable offender's status as a child or person who has a disability or other special need to facilitate notification and reporting;

(v) providing for the notification to be given to a carer of, or a person nominated by, a registrable offender who may be unable to understand his or her reporting obligations or the consequences of failing to comply with those obligations;

(vi) requiring that a registrable offender be given additional information to that required by this Act;

(vii) requiring a person or body to provide specified information to registrable offenders concerning their reporting obligations;

(viii) requiring a person or body to give the Police Commissioner any acknowledgment by a registrable offender of the receipt of a notice

or any other specified information that is held by the person or body;

(f) empowering the Police Commissioner to give directions as to which police stations are to be used as a venue for the making of reports;

(g) requiring a person or body to create records for the purposes of this Act and to retain those records for a specified period or an unlimited period;

(h) prescribing a person included in a specified class of persons as a corresponding registrable offender for the purposes of this Act;

(i) stating that a specified class of order made under a specified corresponding Act is a corresponding sex offender registration order for the purposes of this Act;

(j) prescribing arrangements, requirements or exemptions for registrable offenders in witness protection programs approved by the Police Commissioner;

(k) prescribing any other matter required or permitted by this Act to be prescribed or that it is necessary or convenient to give effect to this Act, or to facilitate its implementation or enforcement.

(2) Regulations made under this Act:

(a) may be of general or of specially limited application; and

(b) may differ according to differences in time, place or circumstance; and

(c) may require a matter affected by Regulations made under this Act to be -

(i) in accordance with a specified standard or specified requirement; or

(ii) approved by or to the satisfaction of a specified person or a specified class of person; or

(iii) as specified in both subparagraphs (i) and (ii); and

(d) may confer a discretionary authority or impose a duty on a specified person or a specified class of person; and

(e) may provide in a specified case or class of case for the exemption of persons or things from any of the provisions of Regulations made under this Act, whether unconditionally or on specified conditions, and either wholly or to such an extent as is specified; and

(f) may impose a penalty not exceeding 100 penalty units or imprisonment of up to three (3) months for a breach of the Regulations.

SCHEDULES

SCHEDULE 1
CLASS 1 OFFENCES

1. Any offender who has committed any of the following offences under the Crimes Act 2013 is deemed to have committed a Class 1 offence:
   (a) section 52(1) - Sexual violation;
   (b) section 55 – Incest;
   (c) section 58(1) - Sexual connection with a child under 12.
2. Any repeat offender who is convicted of a Class 2 or Class 3 offence against a child or a severely intellectually disabled person is deemed to have committed a Class 1 offence.

SCHEDULE 2
CLASS 2 OFFENCES

Any offender who has committed any of the following offences under the Crimes Act 2013 is deemed to have committed a Class 2 offence:

(a) section 52(2) - Unlawful sexual connection;
(b) section 53(1) - Attempted sexual violation;
(c) section 53(2) - Assault with intent to commit sexual violation;
(d) section 54(1) - Sexual connection with consent induced by threats;

(e) section 56(1) - Sexual connection with a dependent family member under 21 years;

(f) section 56(2) - Attempted sexual connection with a dependent family member under 21 years;

(g) section 56(3) - Commits indecent act with or on a person who is a dependent family member under 21 years;

(h) section 58(2) - Attempted sexual connection with a child;

(i) section 58(3) - Commits indecent act with or on a child;

(j) section 59(1) - Sexual conduct with person under 16;

(k) section 59(2) - Attempts to have sexual connection with a young person;

(l) section 131 - Abduction of a child under 16 with intent to have sexual connection;

(m) section 157 - Dealing in people under 18 for sexual exploitation.

SCHEDULE 3
CLASS 3 OFFENCES

Any offender who has committed any of the following offences under the Crimes Act 2013 is deemed to have committed a Class 3 offence:

(a) section 54(2) - Indecent acts on another person with consent induced by threats;

(b) section 59(3) - Commits an indecent act with or on a young person;

(c) section 60 - Indecent Assault;

(d) section 62(1) - Using threats of intimidation for the purpose of sexual conduct;

(e) section 63(1) - Commits or attempts to have sexual connection with severely intellectually disabled person;

(f) section 63(2) - Indecently assaults or attempts to indecently assault a severally intellectually disabled person;

(g) section 73 - Solicitation (if the victim is a child);

(h) section 82(1) - Publication, distribution or exhibition of indecent material on child;

(i) section 218 - Solicitation of children.

The Sex Offenders Registration Act 2017
is administered by the Ministry of Police.

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PROTECTION OF WITNESSES

Faced with the need to safeguard the rights, freedom and guarantees of citizens in the exercise of the most elementary of civil rights, and given the need to ensure social peace in an unsettled period for the Nation, the political leaders of Timor-Leste have set out the establishment of measures for the protection of witnesses as one of the priorities in the ongoing drafting of legislation.

It should be noted that the normative solutions established, in addition to respecting the specific socio-cultural reality of Timorese society, shall receive contributions from different judiciaries operating in Timor-Leste and lessons drawn from comparative Law.

This is an exceptional mechanism which can only be applied, in concrete terms, if the need for such mechanism proves to be necessary and it proves to be appropriate for the protection of the persons and the

* Source: International Labour Organization. NATLEX (accessed on 23 July 2022).

purposes of the proceedings, in the pursuance of Justice as an inalienable value.

Thus, the National Parliament decrees that the following shall be considered law under the terms and conditions set out in No. 1 of article 95 of the Constitution of the Republic:

CHAPTER 1
General Provisions

Article 1
Object

1. This law regulates the application of measures for the protection of witnesses, in civil or criminal proceedings, when their lives, physical or psychological integrity, freedom or assets of considerable value are jeopardised due to their contributing to ascertaining the proof of facts or to the discovery of the truth which constitute the object of the proceedings.

2. The measures paragraph 1 above refers to may cover the spouse, the relatives in the ascending line, the children or the siblings of the witnesses and other persons close to them.

3. The measures set out in this law are of an exceptional nature and may only be applied if such measures prove to be necessary and appropriate for the protection of the persons and the accomplishment of the purposes of the proceedings.

4. The cross-examination in the proceedings shall be guaranteed to ensure a fair balance between the parties, the right of the defence and the discovery of the truth.

Article 2

Definitions

For the purposes of this law:

a) “*Witness*” means any person who, notwithstanding his/her status towards procedural law, is in possession of information or knowledge necessary to the disclosure, apprehension or evaluation of facts subject to investigation and which are likely to present a danger to himself or to spouse, relatives in the ascending line, children or siblings and other persons close to the witness, under the terms set out in paragraphs 1 and 2 of article 1 above;

b) “*Intimidation*” means any kind of pressure or threat, direct, indirect or potential exercised by any person over a witness with a view to influence his/her testimony or statement;

c) “*Teleconference*” means any kind of testimony or statement taken in the witnesses' physical absence by using technical means of transmission, at long distance and in actual time, either of sound or animated images;

d) “*Identification feature”* means any features which, separately or jointly, enable a person's individualisation, thus distinguishing him from any other person;

e) “*Residence*” means the place the witness lives or where he can be contacted;

f) “*Of considerable value*”, a sum exceeding USD50,000.

Article 3

Appeals

1. The delay for any appeal from the decisions set out in this law is reduced to half its usual duration. The appeal shall be immediately and separately committed to the competent court.

2. The appeal from the decisions to apply protective measures for witnesses shall not have suspensory effect.

3. The fact the appeal from the decisions to apply protective measures for witnesses shall render the testimony invalid and shall require that the act be repeated.

CHAPTER II

Concealment and teleconference

Article 4

Witnesses' concealment

1. The court may decide, either unofficially, upon the request of the Public Prosecutor, or upon the demand of the defendant or of the witness, that the testimony or the statement must be taken by means of either concealing the witness's image or distorting his voice, or both, instead of taking the form of a public procedural act or of a cross-examination, in order to avoid the witness's recognition.

2. The decision must be based upon facts or circumstances which reveal intimidation, or a high risk of intimidation of the witness, and it shall also refer to the degree of concealment of image or distortion of voice.

3. In the event the measure to conceal the witness is applied there can be no confrontation.

Article 5

Teleconference

1. The court may decide, either unofficially, upon the request of the Public Prosecutor, or upon the demand of the defendant or of the witness, that the testimony or the statement must be taken by means of teleconference, instead of taking the form of a public procedural act or of a cross-examination, in order to avoid the witness's recognition

2. Teleconference can include the resort to concealment of image or distortion either of image or voice, or of both, with a view to avoid the witness's recognition.

Article 6

Location

The long-distance testimony or statement shall be taken in a public building, whenever possible in the Courts, or in the Police or prison premises which offer the appropriate conditions to the installation of the necessary technical devices.

Article 7

Access to the Location

The court may restrict the access to the place where the testimony or the statement shall be taken, allowance being granted to the technical staff, the officials or the security personnel deemed strictly indispensable.

Article 8

Commitment

Whenever the witness's recognition by image or voice is to be avoided or his identity is to be kept concealed, the technical staff intervening in the teleconference shall render a commitment not to disclose the location or the witness's identification features. Should the technical staff fail to do so, the punishment for aggravated disobedience shall apply.

Article 9

Escorting Judge

The judge presiding to the act shall guarantee the presence of a judge at the location where the testimony or the statement shall be taken, on whom shall be incumbent namely:

a) To identify and take the oath to the witness whose identity is to remain concealed or whose recognition is to be avoided;

b) To receive the commitment mentioned in the previous article;

c) To ensure that the witness will make a free and spontaneous testimony or statement;

d) To provide for the clear understanding of the questions by the witness and for the transmission of the answers in actual time;

e) To act as interlocutor of the judge presiding to the act, by calling his attention to any incident occurring during the testimony or statement;

f) To guarantee the authenticity of the video recording to be enclosed to the proceedings;

g) To take all the preventive, disciplinary and restraining measures legally admissible, which prove adequate to enforce the access restrictions to the location and, in general, to guarantee the security of all persons present.

Article 10

Questions

The questions to which the witness is required to answer during the collection of evidence are made through the judge presiding to the act, and they shall observe the terms of the procedural law.

Article 11

Recognition

If, during the testimony or the statement, any recognition of persons, documents or objects becomes necessary, the witness shall be allowed the respective visualization.

Article 12

Non-disclosure of Identity

Where the witness's identity is to remain concealed, it is particularly incumbent of the judge presiding to the act to avoid asking any question likely to induce the witness to the indirect disclosure of his identity.

Article 13

Access to Sound and Image

1 - In case of the concealment of the witness's image and voice, the access to the undistorted sound and image is to be allowed in exclusive to the judge presiding to the act or the court, should the technical means available enable it.

2 - The autonomous and direct communication between both the judge presiding to the act and the escorting magistrate, as well as between the defendant and his counsel, shall be guaranteed in any circumstance.

Article 14

Proximity

The testimonies and statements made through teleconference, according to this Diploma, are deemed, for all purposes, as having been made in the presence of the judge or of the court.

CHAPTER III

RESTRICTION REGARDING THE DISCLOSURE OF THE WITNESS'S IDENTIFICATION FEATURES

Article 15

Prerequisites

1. The non-disclosure of the witness's identity may cover one or all the phases of the proceedings provided the following conditions occur concurrently:

a) The witness, spouse, relatives in ascending line, children, siblings or other persons in close contact with him face a serious danger of attempt against their lives, physical or psychological integrity, freedom or property of considerable value;

b) The witness's credibility is beyond reasonable doubt;

c) The testimony or the statement constitutes a relevant probative contribution.

2. Besides having met all the conditions set out in the

paragraph above, the application of the measure not to disclose the witness's identity shall only take place when:

a) The proceedings relate to a crime, the maximum penalty of which corresponds to more than five years imprisonment;

b) The guardianship of minors is at stake;

c) Assets of a considerable value are at stake.

Article 16

Jurisdiction

1. The non-disclosure of the witness's identity is decided by the Examining Magistrate, ex oficio or upon request.

2. The measure taken not to disclose the witness's identity may be requested by the Public Prosecutor during the inquiry.

3. The measure taken not to disclose the witness's identity may be requested by any of the parties, by the Public Prosecutor, by the defendant or by the injured party during the proceedings.

4. The request contains the grounds for the non-disclosure of the identity in casu, as well as the reference to the evidence that must be offered thereto.

Article 17

Supplementary proceedings of non-disclosure of identity

1. For purposes of decision on a request for non-disclosure of identity a supplementary proceeding of a confidential and urgent nature shall be separately prepared, to which only the Examining Magistrate and whoever he appoints for that purpose shall have access.

2. Unofficially or upon request the Examining Magistrate makes the investigation he deems indispensable to meet the requirements needed for the granting of such a measure.

3. Once the investigation has been concluded, the Examining Magistrate notifies the parties of the grounds for the request so they can, should they so wish, within five days, express their opinion in writing and within this time limit request that further measures be taken.

4. The Examining Magistrate is responsible for the supplementary proceedings and corresponding confidentiality and therefore the notification referred to in paragraph 3 above may not contain elements which may point to the disclosure of the identity of the witness to be covered by the measure on protection.

5. The possibility of carrying out further investigations is taken by the Examining Magistrate.

6. The decision allowing the requested measure confers the witness a codified reference, by which he shall be referred afterwards in the proceeding. The reference is transmitted to the judicial authority with jurisdiction over the proceedings.

7. As soon as it is deemed unnecessary, the measure is revoked by the Examining Magistrate upon the request of the Public Prosecutor or upon the demand of the interested party or upon the witness's demand, the proper procedural acts having been carried out and the Public Prosecutor having been heard, in case he is not the requesting party.

8. The decision taken by an Examining Magistrate on the request not to disclose the identity of a witness prevents him from subsequently taking part in the main proceedings.

Article 18

Witnesses' s testimony or statements and respective probative value

1. The witness to whom it has been granted the measure of non-disclosure of identity may make his testimony or statement either by concealing his image or distorting his voice, or through teleconference, pursuant to articles 4 and 5 hereabove.

2. No condemning decision can be based, exclusively or significantly, upon the testimony or the statement made by one or more witnesses whose identity has not been disclosed.

CHAPTER IV

SECURITY AND SPECIAL MEASURES AND PROGRAMMES

Article 19

Sporadic Measures of Security

1. Where significant grounds for security so justify and where the criminal offence may result in a maximum penalty of over five years imprisonment, entails the guardianship of minors or assets of a considerable value, without prejudice to other measures of protection set out in this law, the witness may benefit from sporadic measures of security, namely:

a) Mention in the proceedings of an address different from the one he uses or which does not coincide with the domicile locations provided by the civil law;

b) Being granted immediate reimbursement of the expenses incurred with his displacement to testify or give statements;

c) Being granted a room, eventually put under surveillance and security, located in the Court or the Police premises, to which he must displace himself and inside which he may stay without the presence of other intervening parties in the proceedings;

d) Benefiting from police protection extended to his spouse, relatives in ascending line, children, siblings or other persons in close contact with him;

2. The measures laid down in the previous paragraph are ordered by the Public Prosecutor during the enquiry, either unofficially, upon the demand of the witness or his legal representative or upon proposal of the criminal police authorities. Subsequent to the

enquiry the said measures are ordered by the Judge presiding to the current phase of the proceeding, ex oficio or upon the request of the Public Prosecutor.

3. In civil proceedings, the measures set out in paragraph 1 are ordered by the Examining Magistrate, unofficially or upon request by the Public Prosecutor, the witness or his legal representative.

4. The judicial authority undertakes the necessary procedures to assess in casu the need and the suitability of the measures.

5. Every third month the judicial authority re-appreciates the decision, either maintaining or modifying it, or revoking the applied measures

6. The police protection stated in paragraph 1, sub-paragraph d) hereabove shall generally be at the charge of a police entity.

Article 20

Special Security Programme

Any witness, the respective spouse, relatives in ascending line, children, siblings or any other persons in close contact with him, may benefit from a special programme of security during the running of the proceedings or even after its closure, provided the following concurrent conditions occur:

a) The testimony or statement concern the criminal offences which may result in maximum penalties of imprisonment of over five years;

b) There is a serious danger to their lives, physical or psychological integrity or freedom;

c) The testimony or statements constitute a contribution which is deemed, or has proved to be, essential to the ascertainment of the truth.

Article 21

Contents of Special Security Programme

1. The special security programme includes the enforcement of one or several administrative measures of police protection and support, eventually supplemented by duly combined rules of behaviour to be complied with by the beneficiary.

2. For the purposes of the previous paragraph the following measures are regarded, among others, as measures of protection and support:

a) Granting of police protection, within the scope and for the time to be determined;

b) Delivery of documents officially issued, including identification features different from those previously inserted or that should be inserted in the replaced documents;

c) Granting of a new place to live in the country or abroad, for a period to be determined;

d) Free transportation of the beneficiary, his close relatives and the respective property, to the new place of living;

e) Implementation of conditions for the obtaining of means of subsistence;

f) Granting of a survival allowance for a specific period of time;

g) Changes in the physiognomy or the body of the beneficiary.

3. Where the special security programme includes rules of behaviour, their intentional non-compliance entails the exclusion from the programme.

Article 22

The Special Security Programmes Committee

1. A Special Security Programmes Committee is hereby established under the direct supervision of the Minister of Justice, on whom the definition and the implementation of special security programmes shall be incumbent.

2. The Special Security Programmes Committee consists of a president and a secretary - both appointed by the Minister of Justice -, a judge and a public prosecutor indicated by the Supreme Judicial Council and the Public Prosecutor's Supreme Council respectively, by a representative appointed by the Secretary of State for Security's Office indicated by the respective Secretary of State and by a representative of the Human Rights and Justice Ombudsman appointed by such Ombudsman.

3.The decisions of the Committee shall be taken by a simple majority of votes, and the president shall have the casting vote.

4.The members of the Committee are nominated for a renewable three-year period, which may be renewed for a similar period of time for a maximum of two times.

Article 23

Procedure

1. Whenever possible, a unique confidential proceeding covering the witness and the persons mentioned in article 20 shall be organised for each special programme of protection.

2. With a view to the establishment and enforcement of the programme the Committee shall be given the most effective and prompt cooperation by all public authorities.

3. The enforcement of the programme is subject to the beneficiary's agreement, who shall sign the declaration agreeing thereto and shall commit to respect the programme.

4. The special programme of protection can be modified whenever necessary. It shall be obligatorily reviewed from time to time as specified therein.

Article 24

Impeachments

The personal intervention in specific criminal

proceedings constitutes an impeachment to become a member of the Special Security Programmes Committee in the field of the definition and the enforcement of the programme.

CHAPTER V

FINAL PROVISIONS

Article 25

Ruling Orders and their Enforcement

1. Within a time limit of ninety days from the date of entry into force of this law, the Government shall take the necessary measures of an organisational and technical nature and shall guarantee the infrastructures and other technological means necessary for the enforcement of this law.

2. The measures set out in the preceding articles may be requested and adopted from the date this law becomes effective and in accordance with the conditions set out in the regulatory legislation of this law.

Article 26

Repeal

The provisions contrary to those set out in this legal diploma shall be repealed.

Article 27

Entry into force

This legal diploma shall enter into force on the sixtieth day subsequent to its publication.

Approved on 17th February, 2009

Vice-president of the National Assembly

Vicente da Silva Guterres

Promulgated on 30th April, 2009

To be published

The President of the Republic

Dr. José Ramos Horta

ii. Law against Domestic Violence (Law No. 7/2010)

LAW NO. 7/2010

of 7 of July

Law Against Domestic Violence

(SEPI Official English Translation)

Preamble

Domestic violence is a long standing problem and perhaps one of the most complex social problems of our time.

In the last three decades, several guidelines arising from international legal instruments have revealed the necessity of preventing and investigating crimes of domestic violence and establishing appropriate remedial measures for victims, particularly in relation to equality and discrimination as in the International Convention on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women ratified by the Timorese State.

The principles of international legal instruments on human rights ratified by Timor-Leste, including the Convention on the Rights of the Child, are reflected in this law that has been approved.

Similarly, in accordance with the Constitution of the Democratic Republic of Timor-Leste, the measures set forth in this law are designed to ensure respect for human rights and integrity of the family as a fundamental social and cultural unit in Timor-Leste and recognize that it is the family that is primarily bound to a special duty of protection and defense of especially vulnerable groups such as women, children, the elderly and disabled from all forms of violence, exploitation, discrimination, neglect, oppression, sexual abuse and other ill treatment.

It is not, however, only within the family that the protection of the most vulnerable must exist, but it is an obligation of all citizens to prevent domestic violence and facilitate assistance to its victims.

Finally, the State also cannot fail to provide protection to its citizens, as it is its role to coordinate all public, private and community leaders in implementing the policies on prevention of domestic violence and victim support.

The National Parliament enacts, in accordance with Article 92 and paragraph 1 of Article 95 of the Constitution of the Republic, as law, the following:

CHAPTER I
GENERAL PROVISIONS

Article 1
Objective

This law establishes the legal regime applicable to the prevention of domestic violence and protection and assistance to victims.

Article 2
Definition of domestic violence

1. For purposes of this law, domestic violence is any act or a result of an act or acts committed in a family context, with or without cohabitation, by a family member against any other family member, where there exists influence, notably physical or economic, of one over another in the family relationship, or by a person against another with whom he or she has an intimate relationship, which results in or may result in harm or physical, sexual or psychological suffering, economic abuse, including threats such as acts of intimidation, insults, bodily assault, coercion, harassment, or deprivation of liberty.

2. The following, among others, are considered forms of domestic violence:

    a) Physical violence is understood as any conduct which offends bodily integrity or physical health;

    b) Sexual violence is understood as any conduct that induces the person to witness, to maintain or participate in unwanted sexual relations, even within a marriage, through intimidation, threats, coercion or use of force, or which limits or nullifies the exercise of sexual and reproductive rights;

    c) Psychological violence is understood as any conduct that causes emotional damage and reduced self-esteem in order to degrade or control the actions, behaviors, beliefs and decisions of others by threat, embarrassment, humiliation, manipulation, isolation, constant vigilance, systematic persecution, insult, blackmail, ridicule, exploitation, limiting the right to travel or otherwise adversely affecting psychological health and self-determination;

    d) Economic violence is understood as any conduct that involves retention, partial subtraction, or total destruction of personal items, working instruments, impeding work inside or outside the home, personal documents, goods, values and rights or economic resources, including those designed to meet the personal needs and the needs of the household.

Article 3
Family

For the purposes of this Act, the following persons shall be considered members of a family:

a) Spouses or former spouses;

b) People who live or have lived in conditions similar to that of spouses, even without cohabitation;

c) Ascendants and descendants of both or only one spouse or whomever is in the situation described in the preceding paragraph, provided they are in the same context of dependency and family economy;

d) Any other person who is in the same context of dependency or family economy, including whoever carries out continuous and subordinate domestic labor activity.

CHAPTER II
FUNDAMENTAL PRINCIPLES

Article 4
Principle of equality

Every individual, regardless of ancestry, nationality, social status, gender, ethnicity, language, age, religion, disability, political or ideological beliefs, cultural and educational level, enjoys the fundamental rights inherent in human dignity and shall be assured equal opportunity to live without violence and the right to preserve his or her physical and mental integrity.

Article 5
Principle of Consent

1. Without prejudice to any other provisions under the criminal law and criminal procedure, any intervention to support the victim should be made after the victim gives his or her informed consent and shall be limited by full respect of the victim's will.

2. Any support intervention, under the present law, to a young victim of domestic violence, aged 16 years or more, shall depend on his/her consent.

3. Any support intervention, under the present law, to a child or young victim of domestic violence under the age of 16 years, requires the consent of a legal representative, or in his/her absence or if he/she is the perpetrator of the crime, of the entity designated by the law and the consent of the child or young person aged over 12 years.

4. The consent of a child or young person aged between 12 and 16 years is enough to justify support intervention under this law if circumstances prevent the timely reception of a declaration of the consent of the legal representative designated by law or in his/her absence or if he/she is the perpetrator of the crime.

5. Depending on his/her age and maturity, a child or young victim of domestic violence under the age of 12 years shall be entitled to decide on the specific support intervention received under this law.

6. The victim may at any time freely withdraw his/her consent by his/herself or through his/her legal representative.

Article 6
Protection of the victim who lacks capacity to give consent

1. Any intervention made outside the scope of the criminal process to support the victims who lack capacity to give consent can only be made for his or her direct benefit.

2. Where, under the law, an adult lacks the capacity to consent to a support intervention because of mental disorder, illness or similar reason, the support intervention cannot be made without the consent of his representative, or in her or his absence or if this is the perpetrator of the crime, an authority or a person or entity designated according to the law.

3. The victim in question shall, to the extent possible, take part in the authorization process.

Article 7
Principle of information

The State, through the police, prosecutor, public defender's office, and medical and social services, shall ensure that the victim is provided with adequate information to protect his or her rights.

Article 8
Professional obligations and rules of conduct

Any intervention of specialized support to victims should be conducted in compliance with professional standards and obligations, applicable codes of conduct, standard operating procedures, universal principles of human rights as well as any rules of conduct applicable to the case.

Article 9
Raising awareness

The Government shall develop campaigns to raise public awareness through the media to promote a culture of nonviolence and combating stereotypes based on gender, encouraging respect for the rights and duties of individuals, in particular, in order to change behaviors that lead to violence against vulnerable groups.

Article 10
Information

1. The Government shall develop information and training materials on prevention and identification as well as factors related to domestic violence, paying particular attention to materials aimed at professionals and transcription, publication and dissemination of international texts on this issue.

2. The Government shall also prepare and distribute, free of charge, throughout the national territory, a guide for victims of domestic violence, which includes practical information about their rights as well as existing materials at their disposal.

3. The Government shall prepare training and information materials specifically for Heads of Suco and Villages, taking into account the privileged position of community leaders in the dissemination of information.

Article 11
Education

1. The Government, as a way of combating violence, shall incorporate into the school curriculum issues related to human rights, particularly issues relating to gender, including good conduct in relationships, sexuality and the principle of negotiated conflict resolution.

2. It is the responsibility of the Government entity responsible for education to develop relevant school curricula for each teaching cycle.

Article 12
Study and research

The State, by itself or in cooperation with other institutions, shall support and encourage the study and research of the factors underlying physical, psychological, sexual and economic forms of domestic violence.

CHAPTER III
INSTITUTIONAL COOPERATION

Article 13
Intervention of the State

1. It is the responsibility of the Government to promote and develop the National Action Plan on prevention and services in the area of domestic violence, in collaboration with the whole of society, and especially family and local authorities, pursuant to this law.

2. The Government shall coordinate and integrate policies, measures and sectoral activities at the national and community level.

3. The programs under this chapter shall be implemented in stages as defined in the National Action Plan against domestic violence.

4. The services providing medical support, legal aid and police assistance shall be made available as from the entry of force of this law.

Article 14
Coordinating Entities

1. The Government shall ensure the existence of a public entity that assists in defining, coordinating and monitoring the National Action Plan referred to in the preceding article.

2. The public entity mentioned above and the member of Government responsible for promoting equality should collaborate with, among others, members of the Government responsible for the areas of security, health, education, justice and social solidarity.

3. The Government shall produce an annual report on the activities undertaken and programs planned for the coming year and submit it to the National Parliament.

CHAPTER IV
SUPPORT AND ASSISTANCE TO VICTIMS

SECTION I
Support to Victims

Article 15
Assistance to victims

1. The Government, through the entity responsible for social solidarity, shall establish, manage and oversee the national network of support centers for victims of domestic violence, which shall be responsible for providing direct assistance, shelter and counseling to victims.

2. The support centers shall include reception centers and shelters which shall work in coordination.

3. In districts where there are no shelters, reception centers shall operate in coordination with the nearest shelter.

4. The Government, through the entity responsible for social solidarity, shall formulate a set of operational guidelines to oversee the creation and management of the support centers mentioned in the preceding paragraphs.

Article 16
Objectives of Shelters

1. The following shall be objectives of the shelters:

    a) Temporarily accommodate victims of domestic violence, with or without minor children, whenever, for security reasons, they cannot remain in their habitual residence;

b) Ensure psychological and/or medical care, social assistance and legal support appropriate to the situation of the victim;

c) Where justified, while they are in the shelter, develop the personal, professional and social skills of the clients which will enable them to avoid possible situations of social exclusion and contribute to effective social reintegration.

2. The Government, through the entity responsible for social solidarity, shall define, through additional legislation, procedures common to all shelters particularly in regards to victims' rights, access to information, admissions, maximum duration of stay and an outpatient regime.

Article 17
Rights and duties

1. Clients and minor children staying in the shelters shall have the following rights:

    a) Accommodation and food in conditions of dignity;

    b) Enjoyment of an area of privacy and a degree of autonomy in the conduct of their private life that is appropriate to their age and situation;

    c) Enjoyment of a safe and healthy space inside the shelter;

    d) Access to the school closest to the shelter.

2. Clients and minor children staying in shelters have a special duty to comply with the rules of operation.

Article 18
Free of Charge

The services provided through the national network of support centers for victims of domestic violence shall be provided free of charge.

Article 19
Participation

For the purposes of criminal proceedings, the reception centers shall communicate to the National Police of Timor-Leste (PNTL) or to the Public Prosecution Services the circumstances of domestic violence victims brought to their attention. They shall do so in keeping with respect for confidentiality and the privileged nature of information shared between the victim and her counselor, analogous to the relationship established between physician and patient.

SECTION II
Assistance to victims

Article 20
Emergency Assistance Services

1. An emergency assistance service shall be established to assist victims of domestic violence with the objective of informing them of the steps that may be taken to address their situation.

2. The emergency assistance service shall provide an emergency telephone hotline which will be anonymous in nature for a period of time and under conditions to be set by ministerial order.

3. In urgent cases, the emergency assistance service will communicate with the competent police authorities the need for immediate intervention and, if appropriate, will refer the victims to shelters.

Article 21
Direct assistance to victims

1. A specialized service shall be established for filing complaints related to crimes of domestic violence and providing assistance and guidance to victims regarding hospital services, the organizations in the referral network of support services and the National Police of Timor-Leste (PNTL).

2. The implementation of the services provided in the preceding paragraph shall be made in a phased manner by joint order of the entities of the Government responsible for domestic violence and for the areas of security, health and social solidarity.

3. The Government, through the entity responsible for social security, shall ensure the availability of information and specialized training of the employees working in the services referred to in paragraph 1.

Article 22
Assistance at hospital services

Whenever a patient reveals her or himself to have been a victim or a clinical diagnosis concludes the patient is a victim of a domestic violence related crime, the specialized hospital services are requested to intervene to:

a) Provide assistance and medical follow-up for victims of domestic violence while taking into account the needs of victims, particularly children;

b) Proceed with the preservation of evidence relating to possible crimes committed, including the completion of examinations or forensic tests or taking other precautionary measures appropriate to the case;

c) Inform the victim of his / her rights and possible remedies and the obligation of the hospital authorities to notify police of the facts of the case;

d) Immediately report the facts of the case to the police or the Public Prosecutor;

e) Prepare a report on the situation and the measures taken and send it to the competent authorities;

f) Refer the victim to a shelter if the situation so warrants and the victim makes such a request.

Article 23
Duties of social assistance services

It is the responsibility of the social assistance services to:

a) Provide services adequate to the needs of victims of domestic violence in accordance with the Code of Professional Ethics and standard operating procedures;

b) Provide special services for child victims of domestic violence;

c) Report cases of domestic violence to law enforcement officers in compliance with the Code of Professional Ethics;

d) Conduct counseling sessions with victims of domestic violence;

e) Facilitate, if necessary, the removal of the victims to a place that suits their needs, particularly for child victims;

f) Prepare reports and other documentation for use in cases by the police, prosecutors and courts;

g) At the request of the victim, provide support and monitor the case in court;

h) Participate in the promotion and creation of safety networks for domestic violence victims at the community level.

Article 24
Police Assistance

1. The specialized police services shall intervene in cases of crimes relating to domestic violence after receiving reports from hospital services and victims support services.

2. The specialized police service located in the PNTL district services have the responsibility to:

a) Provide the victim with all necessary assistance, including informing him or her of his or her rights;

b) Refer the victim, upon request, to a shelter or support center;

c) Whenever necessary, take measures to ensure that the victim receives immediate medical and psychological assistance by specialized staff;

d) In the event of possible mental instability, take measures to ensure that a mental health professional undertakes an evaluation of the victim so that the victim may continue to have the necessary support from relevant institutions;

e) Prepare a summary report of the observations made, the steps taken and evidence collected to be attached to the criminal complaint and provide it to the prosecutor within five days of the facts being reported;

f) If the victim has no financial capacity to retain a lawyer without compromising his/her livelihood, inform the Public Defender through a summary report no later than five days after the facts of the case are reported.

Article 25
Legal Assistance

1. In all legal proceedings, the victim must be accompanied by a lawyer or a public defender, regardless of whether the victim has the financial capacity to retain a lawyer.

2. It is the responsibility of the lawyer or public defender to:

a) Provide legal advice to victims of domestic violence;

b) Report the occurrence of domestic violence to the police and the prosecutor where doing so would not result in a breach of confidentiality;

c) Advise victims, witnesses and family members about the progress of legal proceedings relating to domestic violence cases;

d) Monitor the attention given to the cases by law enforcement officials and judiciary officials, i.e. the police, prosecutors and courts;

e) Contact entities, agencies and community groups regarding domestic violence cases;

f) Advise victims of their entitlement to other necessary services;

g) Facilitate access by the parties to information related to the cases according to this law and other applicable legal provisions.

Article 26
Measures for the rehabilitation of victims

1. It is the responsibility of the Government to promote and support the establishment and operation of support associations or other organizations where it considers existing mechanisms inadequate.

2. The objective of the support associations is to protect victims of domestic violence while prioritizing programs that address victim's support and monitoring and personal and professional development in accordance with their social needs.

Article 27
Measures to support offenders

The Government, through the entity responsible for promoting equality, shall foster the development of projects of public or private initiative directed towards raising awareness of perpetrators and inducing them to adopt nonviolent behavior.

Article 28
Assistance by the Public Prosecutor

In addition to his/her obligations under criminal procedure, in the context of the fight against domestic violence, the prosecutor must:

a) Provide direct assistance to victims who seek services and inform them of their rights and how to exercise them, especially through the services of the Public Defender if they do not have resources to hire a lawyer without compromising their ability to provide for themselves and their family;

b) Refer victims to the hospital or to shelters in cases where referrals have not already been made.

CHAPTER V
MAINTENANCE

Article 29
Right to Maintenance

Where the victim is a spouse or ex-spouse or has lived with the offender in conditions similar to those of spouses, even without co-habitation, or is a descendant or ascendant of the offender, he or she shall be entitled to maintenance as long as he or she proves to be in need of that assistance.

Article 30
Amount of the maintenance

The amount of the maintenance due shall be established by taking into account the capacity of the person responsible to pay and the needs of those entitled to maintenance while taking into consideration the ability of the entitled party to partially provide for his or her own maintenance.

Article 31
Type of obligation

1. The amount of the maintenance due may be defined by written agreement between the person responsible for payment and the entitled party, or their legal representative in the case of a minor or disabled person, or it may be determined by the court.

2. If, having determined the amount by agreement or court order, the circumstances change, the amount of the maintenance may be increased or reduced by agreement or court order.

Article 32
Provisional maintenance

1. The court may at any time, ex officio or upon request of the victim or prosecutor, grant provisional maintenance.

2. Under no circumstance shall there be restitution of provisional maintenance already granted.

3. Where there is economic insufficiency on the part of the defendant, the Services of the Ministry of Social Solidarity shall provide support regarding the maintenance due.

Article 33
Social Reintegration

1. The ministry responsible for social services shall support the victims in the process of social reintegration as well as in the provision of maintenance whenever deemed necessary.

2. The scope and nature of the support to be provided shall be defined by a decree issued by the Government entity responsible for Social Solidarity.

Article 34
Proceeding

1. The request for provision of maintenance may be attached to the corresponding criminal proceeding.

2. In all other cases, the provisions contained in articles 831 and subsequent articles of the Civil Procedure Code shall apply.

CHAPTER VI
CRIMINAL ISSUES

Article 35
Crimes of domestic violence

For the purposes of this law, the following are considered crimes of domestic violence:

a) The types of crime provided for in articles 153, 154, 155 and 156 of the Criminal Code;

b) The types of offenses in articles 138, 141, 145, 146, 167, 171, 172, 175, 177, 178 and 179 are crimes of domestic violence where, in addition to satisfying the typical elements of the crime, the acts also occurred in the circumstances described in Article 2 of this Act.

Article 36
Public nature of the crimes of domestic violence

The domestic violence crimes referred to in Article 35 are all public crimes.

Article 37
Coercive measures

In addition to the coercive measures provided for in the Criminal Procedure Code, in the case of a domestic violence crime, the perpetrator may be subjected, by determination of the trial judge, to the measure of coercive removal from the place of family residence, including prohibition of contact with the complainant, whenever there are signs of violence which are reasonably foreseeable as acts of aggression which may occur again in a manner that creates danger to the life or the physical, psychological or sexual integrity of the victim.

Article 38
Choice and determination of the sentence

1. The court may substitute the penalty of imprisonment with a penalty of a fine provided the prerequisites provided for in article 67 of the Criminal Code have been met, the security of the victim has been guaranteed, the perpetrator agrees to undergo treatment, or follow-up support services for the victim and such a measure would benefit the preservation of the family unit.

2. The defendant may further be sentenced to an additional penalty prohibiting contact with the victim for a maximum period of 3 years whenever it is considered that the application of the principal penalty is insufficient to prevent the repetition of similar acts.

Article 39
Witness Protection

Whenever deemed necessary, the competent court shall apply procedural measures to protect witnesses and victims in domestic violence cases and people with knowledge of the facts constituting the object of the proceeding or of other information deemed relevant for the decision pursuant to the applicable law.

Article 40
Professional Confidentiality

1. The technical and non-technical staff working at reception centers, shelters and specialised assistance services shall be subject to professional confidentiality regarding any facts revealed to them solely by virtue of their professional interaction with the victims under their care.
2. Once the consent of the victim has been requested and the victim has given the consent of his or her free will, the professional confidentiality of the personnel referred to in the preceding paragraph ceases in the event they are called by judicial entities to testify or furnish other information.

CHAPTER VII
FINAL PROVISIONS

Article 41
Regulation

The Government shall adopt the necessary rules for the implementation and development of this law within 180 days.

Article 42
Entry into force

This Act comes into force the day following its publication.

Approved May 3 in 2010.

The president of the National Parliament,

Fernando La Sama de Araújo

Promulgated in 21/6/2010.

Publish.

President of the Republic,

Dr. José Ramos Horta

Girls riding bicycles to school in Ha Thuong Commune, Dai Tu District, Thai Nguyen Province, Viet Nam (photo by Viet Tuan/ADB).

Dancers at a cultural presentation in Rarotonga, Cook Islands (photo by Eric Sales/ADB).

3 REPORTS AND OTHER MATERIALS FROM THE **INTERNATIONAL DEVELOPMENT LAW ORGANIZATION**

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A. Issue Brief: Navigating Complex Pathways to Justice—Women and Customary and Informal Justice Systems (Summary)

The full 50-page publication may be read at this link:
https://www.idlo.int/sites/default/files/pdfs/publications/idlo-issue-brief-women-cij-final-web.pdf.

NAVIGATING COMPLEX PATHWAYS TO JUSTICE

Women and Customary and Informal Justice Systems

While it is important to recognize the complexity of engagement with customary and informal justice (CIJ) systems, there are models, lessons and approaches that can be shared to expand women's access to justice and gender equality.

Image: ©mattiaath_Adobe Stock

Recurring estimates show that globally, disputes are largely resolved outside of the formal courts, through CIJ systems. Issues of significance to women, such as inheritance, family formation, divorce, property rights, control and governance over land and natural resources, and even violence against women and girls, are resolved or adjudicated through informal mechanisms.

Despite their documented advantages, CIJ systems are often skewed against women and girls, favoring male-dominated structures, patriarchal values, and discriminatory and harmful outcomes for women and girls. While it is important to recognize the significant challenges of engagement with CIJ systems, there are also models, lessons and approaches that can be shared to pursue strategic engagement in line with Sustainable Development Goals (SDGs) 5 and 16, with the ultimate aim to expand women's access to justice and gender equality.

POLICY RECOMMENDATIONS ON WOMEN AND CIJ SYSTEMS

1. Ensure that women's human rights are recognized as central and indispensable to engagement with CIJ systems
2. Focus on empowering women to make informed decisions when seeking justice and to participate in and benefit from CIJ decision-making processes
3. Deepen efforts to support CIJ systems that are committed to improving women's rights and their access to justice
4. Facilitate safe environments for women to enjoy their rights and pursue justice
5. Ensure that women's voices at local, national, regional and international levels are heard and constitute a critical part of reform strategies
6. Strengthen investment in participatory and collaborative research that informs policy and programming on CIJ
7. Explore partnerships and strengthen alliances to build momentum for transformative change for justice for women and girls

As the international community strives to achieve Goals 5 and 16 of the 2030 Agenda for Sustainable Development, engaging with CIJ systems becomes increasingly important to realize justice for all and ensure that no one is left behind, especially the most vulnerable and marginalized.

ENTRY POINTS AND MODALITIES FOR ENGAGEMENT WITH CIJ SYSTEMS

EMPOWER WOMEN TO ACHIEVE JUSTICE

- Strengthen women's knowledge of the law and their rights
- Amplify women's voices and provide platforms for expression and action
- Facilitate and build on the work of local women's organizations
- Support women to navigate justice mechanisms, formal and informal

ADOPT AND IMPLEMENT NORMATIVE FRAMEWORKS THAT BENEFIT WOMEN AND PROTECT THEIR RIGHTS

- Address gaps in the legal protection of women's rights
- Advocate for gender-responsive normative reforms
- Address challenges that arise in implementation

PURSUE GENDER-SENSITIVE REFORMS OF CIJ SYSTEMS

- Improve gender sensitivity and responsiveness of CIJ actors
- Strengthen representation and participation of women in CIJ decision-making
- Locate and eliminate processes, procedures and practices that restrict or nullify women's human rights
- Strengthen gender-sensitive accountability and oversight mechanisms

BUILD AND EXPAND ALLIANCES AND PARTNERSHIPS THAT SUPPORT WOMEN'S HUMAN RIGHTS IN CIJ SYSTEMS

STRENGTHEN RESEARCH ON WOMEN'S EXPERIENCES WITH CIJ SYSTEMS

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In a bid to make justice accessible for all, IDLO has conducted a global consultation on CIJ systems. The global dialogue is informed by a series of publications titled *"Navigating Complex Pathways to Justice"* that seeks to advance policy dialogue and distil lessons from programming and research, to help realize Sustainable Development Goal 16.

Women and Customary and Informal Justice Systems is the third publication in the series, focusing on the relationship between women and CIJ systems. It brings together current research, expert perspectives and programmatic experience, addressing:

» the evolution of legal and policy debates on women and CIJ;

» challenges women encounter in accessing justice through CIJ systems;

» gender-focused engagement entry points, modalities, and good practices for CIJ systems; and

» policy recommendations to improve women's rights and access to justice.

Read the full publications here:

B. Accessing Justice: Somalia's Alternative Dispute Resolution Centers (Summary)

The full 74-page publication may be read at this link:
https://www.idlo.int/sites/default/files/pdfs/publications/report-somalia-adr_centers-web.pdf.

ACCESSING JUSTICE: ALTERNATIVE DISPUTE RESOLUTION IN SOMALIA

Globally, alternative dispute resolution (ADR) or informal justice services focus on resolving disputes through means other than litigation or a full-scale formal court process. With ADR, disputes are often handled through mediation or arbitration. Many customary and informal justice mechanisms complement formal justice institutions and support local dispute resolution.

IDLO reviewed structural, procedural and normative dimensions of justice in six ADR Centers in Somalia, documenting insights and contributions to access to justice from ADR Coordinators, Clerks, paralegals and Adjudicators as well as users of the Centers.

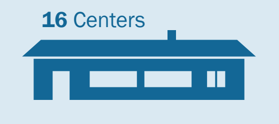
To ensure access to justice for all, justice systems must innovate and meet people's justice needs in appropriate ways to support the development of peaceful and inclusive societies and effective, accountable, and inclusive institutions. An integral part of achieving Sustainable Development Goal 16 is adopting a people-centered approach that ensures inclusive engagement, involving women and marginalized groups.

Findings and recommendations from research in Somalia

In **Somalia**, a pluralistic history draws from four legal traditions—Xeer customary law, religious sharia law, Italian civil law, and British common law. For centuries, people relied on Xeer, a customary code of conduct, to settle disputes and it maintains widespread legitimacy and use within Somalia. However, this is not without concern, particularly in relation to gender equality and human rights.

The Ministry of Justice has established ADR Centers as a unique model of justice delivery, facilitating settlement of disputes through the use of informal dispute resolution, complementing concurrent strengthening of the formal judicial system. The process blends elements of arbitration, mediation and other conventional ADR methods while preserving alignment with Xeer customary norms and emphasizing consensus-building and voluntary agreement by parties. Centers have jurisdiction to hear and issue decisions over civil disputes and non-serious crimes between two or more individuals that can be remedied by awarding monetary damages or restitution. Sharia law and principles and Xeer practices may be applied, provided there is no conflict with relevant human rights standards.

ADR Centers in Somalia
(April 2020)



Structure

> "Previously, we were not able to come to the table even if we were needed. We were asked our thoughts privately and only our thoughts were brought, without giving us the chance to participate at the dispute settlement tables. Now, we have educated girls and women, and we have been given the chance to sit at the table with the men. Even if we are few in number, our thoughts make sense."
> **Female Adjudicator**
>
> "We have two female Adjudicators. They are very good. They are sometimes better than the male Adjudicators."
> **Male Adjudicator**

Adjudicator rosters are composed of Xeer elders from different clans, Sharia sheikhs, and a minimum of two women Adjudicators to ensure representation of constituencies and legal systems, in accordance with Somalia's national ADR policy. The latter emphasizes the participation of marginalized groups and the accountability of ADR Centers, including in relation to the election and gender balance of staff, quality standards, and disciplinary or removal procedures for Adjudicators.

While initially some male Adjudicators demonstrated resistance in accepting women Adjudicators, progress is evident. However, the extent to which women Adjudicators meaningfully participate remains uneven. Gaps and areas for improvement for gender equality in the ADR process and procedural safeguards for gender-based violence and vulnerable groups are apparent, yet Adjudicators recognize the importance of their role and the need to be accountable for legitimacy, including through termination when mandated.

Key findings

» **47 per cent** of cases were initiated by women

» **20 per cent** of Adjudicators and Clerks in six Centers are women

» **83 per cent** of Adjudicators recognized the importance of being held accountable

Procedure

National ADR policy in Somalia recognizes limited jurisdiction and competence for ADR Centers and encourages due process through verifiable evidence and adjudicative impartiality.

Despite certain types of matters falling outside ADR jurisdiction, they are sometimes brought and adjudicated at the Centers, often due to barriers including cost, time, distance, and lack of trust in formal justice institutions which have insufficient capacity and resources. Overall, users were satisfied with evidence gathering and verification in the ADR process, the duration of proceedings, and the objective and unbiased nature of the process. Challenges remain for the collaboration and coordination between Centers and formal justice institutions and referrals to support services for victims of violence, identified unanimously as a gap due to lack of knowledge by ADR actors or availability of legal, social, health or other services.

Key findings

» **81 per cent** of ADR actors perceive the relationship between ADR Centers and formal justice institutions as good or very good

» **61 per cent** of users identified that it took less than one week to resolve their dispute

» **96 per cent** of users felt the process was based on accurate information

» **95 per cent** of users felt their adjudicating panel was impartial and the process objective and unbiased

Norms and protections

Somali national ADR policy recognizes the importance of compliance with the Provisional Constitution and human rights, gender equality, the protection of children's rights and well-being, and clan equity, emphasizing application of law not in contradiction with rights and adherence to national law and human rights standards.

Xeer is the prevalent method used to resolve disputes in the Centers, but Xeer and sharia are applied alternatively or jointly on a case-by-case basis through a flexible approach directed at achieving solutions and satisfying all involved parties. ADR actors attributed low importance to the predictability of an outcome, emphasizing conciliatory approaches. Matters were identified as raising concern for contravention of legal and human rights, especially in relation to gender-based violence against women, protection of children, the right to be heard and give testimony, and the right of women to own property.

Key findings

» **64 per cent** of ADR actors affirmed that they would consider a decision not complying with the Provisional Constitution to be valid

» **73 per cent** of respondents reported having low or very low knowledge of national laws

» **54 per cent** of cases involving a form of gender-based violence against women resulted in a decision to reconcile the victim and the perpetrator

Access to justice for all

The importance of ADR Centers for the communities they serve was recognized unanimously. Valued features include accessibility, alignment with cultural aspects of dispute resolution and a conciliatory approach, timeliness, and the no cost nature of the services. Gaps and challenges were also identified, mainly related to lack of awareness, limited geographic reach of ADR services, insufficient financial incentives to ADR Adjudicators, and capacity development needs, especially in relation to human rights standards and national law. Despite a number of identified issues in operations, users ranked the ADR Centers highly, feeling they had participated meaningfully, received useful resolution, and witnessed an improvement in justice in their community since the opening of the ADR Center.

National ADR policy in Somalia places value on linkages between formal and informal dispute resolution as well as building a base of knowledge for future justice sector reform.

Key findings

» **39 per cent** of ADR actors identified the free nature of the services as a main value of ADR Centers

» **63 per cent** of users felt that they contributed to the outcome or solution

» **78 per cent** of users felt the resolution was very good or good

» **93 per cent** of users indicated feeling that justice had improved in their community since the opening of the ADR Center

"This Center has a significant value to the community. Elders had no Center to solve disputes in the past and used to sit under a tree. Now, elders received stationery and office. This helped elders document disputes they solve."
ADR Actor

"My best experience during the case hearing, which I appreciate to this very day, is the fact that the man used to beat me before, but once I had presented my case at the ADR Center, he never beat me again. I was really relieved."
Female ADR Center user

Conclusions

ADR Centers in Somalia are improving the availability and accessibility of justice across structural, procedural, and normative dimensions, contributing to dispute resolution through cost-effective, context-specific and innovative ways. While barriers to formal justice institutions remain challenging, ADR Centers offer simple, proportionate, and sustainable options that help empower participants. The process and outcomes are seen as fair, efficiently delivered, and instrumental in empowering participants and preventing escalation of conflict.

PROGRESS BUT STILL WORK TO DO

However, important issues that must be addressed remain in the ADR Centers. Inequalities persist and representation of women and minorities must be enhanced. The capacity and skills of ADR actors can be strengthened on jurisdiction, legal and human rights standards, and safeguards for the vulnerable, notably on participation of children and protection of women victims of violence.

Research findings identify the following recommendations and action areas for future ADR policy and programming:

INCREASE
representation, resources, community awareness and training frequency

FOSTER
accountability, collaboration and information sharing

ADVANCING JUSTICE FOR ALL

EXPAND
to wider geographic areas and standardize data collection

STRENGTHEN
capacity, procedural safeguards, referral pathways and coordination mechanisms

This research is a contribution to the growing body of information that aims to help create an enabling environment for access to justice for all in the achievement of Sustainable Development Goal 16.

For more information, please visit:
https://www.idlo.int/what-we-do/access-justice/customary-informal-justice

C. Strengthening Gender Equality in Law: An Analysis of Philippine Legislation (Executive Summary)

The full 125-page publication may be read at this link: https://www.idlo.int/sites/default/files/pdfs/publications/philippines_-_strengthening_gender_equality.pdf.

EXECUTIVE SUMMARY

The International Development Law Organization (IDLO) and UN Women, in partnership with the Philippine Commission on Women, conducted an assessment of Philippine laws to facilitate the elimination or reform of laws that discriminate against women and girls.

This assessment report was prepared through a desk review of the 1987 Philippine Constitution, landmark legislation on women, as well as relevant legislation and case law that may have direct or indirect as well as intersecting or multiple discriminatory provisions. It likewise looked into studies on Philippine laws from various sources as well as reports submitted by the Philippines to the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and other treaty bodies. Challenges and gaps in these laws were also identified with reference to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the CEDAW Committee's General Recommendations and Concluding Comments on the periodic reports of the Philippines, as well as the recommendations of other international human rights treaty bodies on issues relating to gender equality in international human rights law. The report on the Philippines following the third cycle of the Universal Periodic Review in 2017 was also considered.

Online consultations, through key informant interviews and focus group discussions, with government, civil society organizations and academia were undertaken. Among these, the House of Representatives and Senate were consulted for the purposes of reviewing the key laws that were identified for analysis, as well as the initial findings of the research team. A total of 27 respondents were chosen based on their expertise as academics or because of position held, and their exposure to the issue as advocates. The Inception Report was presented to the Philippine Commission on Women to inform the content of the report and its methodology.

The team reviewed and assessed 51 laws. These laws translate international human rights conventions such as CEDAW into domestic law, as in the case of Republic Act No. 9710, known as the Magna Carta of Women, or contain significant provisions of other international treaties pertinent to women's rights. Indeed, the Philippines has an expansive array of laws that seek to promote, protect and fulfill women's human rights. However, many gaps remain in implementation, monitoring and reporting. There is also a need for both houses of Congress and the Commission on Human Rights, as the designated Gender Ombud under the Magna Carta of Women, to exercise their oversight function in the implementation of laws. Using reports on the implementation of the laws could inform legislators on appropriate reforms that not only advance the State's obligation to fulfill the laws but also the achievement of non-discrimination and substantive equality. Most importantly, the repeal, revision or amendment of laws or the issuance of new ones, as well as their application in jurisprudence, are contingent on the mindsets of legislators, prosecutors and the judiciary. Misogyny and prevailing gender stereotypes and biases against women hamper the elimination of discriminatory legal provisions and the political will to ensure gender equality.

Considering that this assessment was conducted during the COVID-19 pandemic, the report includes observations on the limitations of existing laws, especially with regard to protecting women and girls against violence, and takes into consideration the heightened risks faced by women across different sectors. The penultimate draft of the report was presented and validated in an online multi-stakeholder forum in September 2020 under the auspices of the Philippine Commission on Women, IDLO and UN Women. The comments and feedback received during the forum were also integrated into the report.

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An overview of the report's key findings and recommended legislative actions are given below.

Protection from discrimination

The Magna Carta of Women is a source of enforceable women's rights, but it is also a policy document from where many other laws may be derived. Since its passage in 2009, only one out of the six stipulated discriminatory laws has been repealed. While the Magna Carta of Women is the framework law on women's human rights in the Philippines, there are specific provisions that need to be amended, such as the need to specify a timeframe for completion of repeal and amendment of discriminatory laws or a quota in relation to women's representation and participation in all spheres of society, particularly in the decision-making and policymaking processes in government and private entities. There is likewise a need to propose a new law protecting against violence and discrimination based on sexual orientation and gender identity.

Guarantee of basic human rights and fundamental freedoms

The laws reviewed under this thematic area covered the rights of witnesses, persons arrested, detained or under custodial investigation as well as victims of human rights violations. These laws, however, do not have specific considerations for women such as care responsibilities; health (including mental and reproductive health) and hygiene needs; legal aid; interpretation and translation; and protection from all forms of harassment, exploitation, abuse and violence, among others. Bills are pending, based on proposals for a new law to be passed covering not just reparations, but in consideration of the larger transitional justice responses to all types of atrocities and systemic abuses against women and the marginalized (indigenous peoples, indigenous cultural communities, internally displaced populations, etc.).

Protection from violence

Most of the laws reviewed under this section are part of the affirmative action to protect women from abuse, harassment and violence. While this is so, some laws need to be amended, such as the Anti-Rape Law, which does not include the lack of consent as a necessary element in the definition of the crime of rape. Current laws are more on the palliative side, i.e., they address violence against women after the crime has been committed, rather than address its root causes through education, elimination of gender biases and stereotypes in education, instruction, media and social media, and engaging with men and boys, among others. Emerging issues such as online violence and exploitation and harassment in public spaces have been addressed; however, violence in the context of natural and human-induced disasters such as armed conflict needs further legislative response. Several laws need to be revised or amended to ensure that cases relating to violence against women and girls are not settled outside the criminal justice system, to increase penalties for sexual harassment, and to harmonize sexual harassment laws, whether the harassment takes place online or offline, among others. The "forgiveness" clause under the Anti-Rape Law of 1997, which permits impunity for rapists, must also be repealed. Another aspect of rape law that requires amendment is raising the age of consent for sexual contact from 12 to 16 years.

Representation in political and public life

The laws in this section provide for specific seats for women's representation in the public sector or consultative bodies at the local level. Recommendations call for, among others, the harmonization of provisions regarding women's participation and representation as specified in Section 11 of the Magna Carta of Women. Women's leadership in political parties and in the private sector still needs to be addressed. While there are indeed allocated seats for women in the public sector, it is important to use the oversight provisions of these laws to assess the extent to which women's representation has changed legislation and policies and transformed power and decision-making processes and structures to give space and voice to poor and marginalized women.

Nationality

There were two laws reviewed in this section pertaining to naturalization of aliens to Filipino citizenship. These laws, however, do not provide the same rights to foreign spouses, nor the same effects once naturalization is granted. It is recommended that these laws be amended to allow qualified aliens—whether male or female—to file for naturalization and contribute to the benefit of the entire family unit.

Education

Empowering communities to create better learning environments in the earliest stages of education is the core of the Early Years Act, or the Early Childhood Care and Development Act, a law that seeks to provide guidance on early education. While unequal access between the sexes to education is not an issue in the Philippines, the access to quality education for those on the margins—such as those living in poverty, those affected by armed conflict or those in rural areas—is an area of concern. The Early Years Act addresses this gap by strengthening local government units through promoting convergence initiatives on health, nutrition and early education.

Employment

Labor and employment laws reviewed in this section ensure equal pay for work of equal value. However, the Labor Code still contains discriminatory provisions that reinforce the burden of care work on women alongside paid work. Much of the support in the workplace is related to women's maternity, hence the inclusion of measures and facilities that enable women to perform their paid work, but without reference to men's equal or shared responsibility for care work. Stereotyped views about certain occupations being "for women", as in the case of those working in nightclubs, are present in the Labor Code as well. The impact of violence against women in the workplace needs to be understood, and laws enabling the provision of support to address this violence should be created. There are laws addressing the situation of women domestic workers and migrant workers, however, concrete measures are still needed to protect women from abuse, harassment and violence in their workplaces.

Health

The laws reviewed in this section focused on women's reproductive health. These laws fall short on recognizing the issues and realities faced by of a broad spectrum of women—adolescents, older women, women with disabilities, rural women, Muslim and indigenous women, and lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI), among others—who face discrimination and difficulties in accessing health services, including sexual and reproductive health services. Also, there is a need to enact a new law to specifically address the reproductive health concerns of vulnerable groups such as adolescents.

Economic and social benefits

The majority of the economic and social benefits in the laws reviewed focused on women in the formal economy, maternity leave and pay, and childcare. As is the case with laws related to healthcare, laws on economic and social benefits fall short on recognizing the issues and realities of a broad spectrum of women who face discrimination and difficulties in accessing economic and social benefits. More importantly, the issue of economic violence against women is not recognized in these laws, and neither is the gender dynamics in the household that may impede women in accessing economic and social benefits.

Marriage and family

The majority of discriminatory legal provisions against women are in the area of marriage and family. These laws are anchored in patriarchy and prevailing gender stereotypes, such as Articles 96 and 124 of the Family Code, which give preference to the husband's decision when it comes to community and conjugal properties, and Article 211, which gives preference to the husband's decision in cases of disagreement over common children. It is necessary to link these laws with protection from violence, especially in the domestic sphere. It is also important to examine how laws relating to marriage and family affect women's ability to work and participate in public or political life, and reform these laws accordingly.

Intersectional discrimination affecting particular groups of women and girls

Existing laws recognize the specific experiences of Moro and indigenous women. Although there are laws on senior citizens and women with disabilities, these laws focus on providing benefits and fail to recognize the vulnerabilities of women in these groups to abuse, harassment, neglect and violence. Thus, the laws provide no support programs or mechanism to address these vulnerabilities. There are also no laws to address discrimination against LGBTQI people. There is also a lack of recognition of harmful practices that violate the human rights of women and girls such as early and forced marriages, polygamy, etc., which are justified by reference to ideas of "tradition" or "culture".

IN SUMMARY, BASED ON THE ASSESSMENT OF PHILIPPINE LAWS, THE FOLLOWING RECOMMENDATIONS ARE MADE:

- Four laws include legal provisions that are recommended for repeal due to their discriminatory nature:
  1. Presidential Decree No. 1083 or the Code of Muslim Personal Laws on marriage, rights over inheritance and divorce, and marriage after death of the husband.
  2. Republic Act No. 8353 on the forgiveness clause in cases of rape.
  3. Executive Order No. 209 or the Family Code of the Philippines: (a) Article 14 on the provision on giving preference to the father's consent to the marriage of children between the ages of 18 and 21; (b) Articles 96 and 124 on the provision on giving preference to the husband's decision, in case of disagreement with the wife, on the administration and enjoyment of community and conjugal properties; (c) Article 211 on the provision on giving preference to the husband's decision, in case of disagreement with the wife, over the persons of their common children; (d) Article 225 on the provision on giving preference to the husband's decision, in case of disagreement with the wife, on the exercise of legal guardianship over the property of unemancipated common child; (e) Article 55, No.1 on the requirement for repeated physical abuse and grossly abusive conduct as a ground for legal separation.
  4. Act No. 3815 or the Revised Penal Code: (a) Articles 333 and 334 on adultery and concubinage; (b) Article 202 on the definition of vagrants and prostitution; (c) Article 351 on premature marriages; and (d) Article 247 on death inflicted under exceptional circumstances.
- Thirty-nine laws are recommended for revision or amendments due to gaps in implementing various CEDAW General Recommendations, Concluding Observations of the CEDAW Committee to the Philippines, and the recommendations of other treaty bodies overseeing the implementation of international human rights treaties ratified by the Philippines; while the rest of the laws are requested to be harmonized with the provisions of the Magna Carta of Women, or through the use of the oversight functions of both houses of Congress.
- Seven new laws are recommended to address issues relating to the rights of women and girls that are not yet addressed in existing laws:
  1. A law establishing a national preventive mechanism against torture and cruel, inhuman or degrading treatment or punishment. A law should be drafted that is consistent with the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). This mechanism should, at the minimum: a) regularly examine the treatment of persons held in places of detention, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment; b) make recommendations to the relevant authorities to improve the treatment and conditions of persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations; and c) submit proposals and observations concerning existing or draft legislation.
  2. A law on transitional justice. A new law should be drafted and passed that covers not just reparations but also addresses the larger transitional justice responses to all types of crimes recognized in international human rights law, and the systemic abuse of women and others who are marginalized because of their identity (indigenous peoples, indigenous cultural communities, internally displaced populations, etc.). Such a law should recognize their dignity and establish full reparation for human rights violations. This is necessary to prevent the recurrence of similar violations by making institutions accountable and making women's access to justice a reality in the aftermath of these violations.
  3. A law to protect the rights of internally displaced populations. While the Magna Carta of Women has provisions for the protection of women and girls in conflict-affected communities as well as provisions for a special development fund for internally displaced populations under the Bangsamoro Organic Law, there is a need to draft and pass a national legal framework, consistent with the Guiding Principles on Internal Displacement. The adoption of this law will certainly impact women internally displaced populations and

their families especially those still in internally displaced populations or evacuation camps, or those who are unable to return or reunite with their families, by providing them with rights and remedies specific to their circumstances. The bill on the rights of internally displaced populations was part of the common legislative agenda of the Legislature and the Executive branch in the 16th Congress but was not passed. It was filed again in the 18th Congress, but was still pending as of February 2021.

4. A law protecting against violence and discrimination based on sexual orientation and gender identity. While the Magna Carta of Women clearly defines non-discrimination, there is a need for a law to protect LGBTQI individuals against abuse, violence and discrimination in all spheres of life. The law must uphold the UN Human Rights Council Resolution 32/2 (2016) on the protection against violence and discrimination based on sexual orientation and gender identity. A bill on this was filed in the 18th Congress but was still pending as of February 2021.
5. A law to eliminate online sexual exploitation of children. A new law should include measures such as prosecution of live-streaming content, which is absent in current anti-child pornography laws. This kind of exploitation affects both girls and boys but has different effects according to gender. Therefore, the respective experiences of girls and boys should be reflected in any new law in order to recognize the harm done to them through these crimes.
6. A law to address reproductive health concerns of vulnerable groups such as adolescents. A new law should specifically address access of adolescents to reproductive healthcare services and commodities without parental consent and should specify that adolescents should be provided with comprehensive information on sexual and reproductive health and rights, responsible sexual behavior, prevention of early pregnancies and prevention of sexually transmitted infections/diseases, including HIV and AIDS.
7. A law to recognize and address the issues of women in the informal economy. In line with International Labour Organization (ILO) Recommendation 204, a new law should be enacted that provides for a conceptual and operational definition of the informal economy based on the international definition, which recognizes the roles and contributions of informal workers, particularly women in the care economy. A new law should ensure their visibility in data, as well as recognize their rights such as the right to self-organize, the right to decent work, and the right to just and humane working conditions, including protection from all forms of abuse, exploitation, harassment and violence. It should also ensure that women in the informal economy have access to social and economic protection and benefits.

- Relevant international conventions should be ratified, such as:
  - The Convention for the Protection of All Persons from Enforced Disappearance. Enforced disappearance has particular impacts on women and girls who are victims as well as on those who are family members of victims.
  - 45 ILO conventions including Night Work Convention (No. 171) and its Protocol, Home Work Convention (No. 177), Maternity Protection Convention (No. 183) and Violence and Harassment Convention (No. 190).

D. News Highlights: 16 Days of Activism against Gender-Based Violence–2021

16 DAYS OF ACTIVISM AGAINST GENDER-BASED VIOLENCE - 2021

Violence against women and girls remains devastatingly pervasive. Across their lifetime, some 736 million women worldwide – approximately 1 in 3 – are subjected to physical or sexual violence by an intimate partner or sexual violence from a non-partner. During the COVID-19 pandemic, cases of gender-based violence (GBV) saw a sharp rise, with the global economic downturn, school closures and national lockdowns triggering a "shadow pandemic" of increased reported violence against women and girls. In 2020, IDLO together with partners documented major challenges to women's access to justice in light of the COVID-19 pandemic, including intimate partner violence and other forms of GBV.

Combatting gender-based violence is a key objective under IDLO's Strategic Plan 2021-2024. IDLO has been working around the world in countries such as Honduras, Mali, Mexico, Myanmar, Somalia, and Tunisia to combat gender-based violence, focusing on strengthening the capacity of justice sector institutions, formal or informal, to respond to GBV; increasing women's legal empowerment to access justice and claim their rights; and combatting discriminatory laws and ensuring the emergence of gender-responsive legal and institutional frameworks to address GBV.

Recognizing the urgency to combat gender-based violence, IDLO joined the Generation Equality Forum, in particular the Action Coalition on Gender-based Violence to help catalyze tangible results in the next five years. As a Commitment Maker, we pledged to adopt an integrated approach to addressing GBV against women and girls focused on strengthening gender-responsive justice. IDLO also joined UN Women, UNODC and other partners in two collective commitments on increasing access to essential services for survivors of gender-based violence and implementing and scaling up gender-responsive policing.

Our response: How we address GBV in various countries around the world

In **Tunisia**, IDLO has supported the establishment of a support network to facilitate the economic participation of GBV survivors. Initially designed to reach about 160 women beneficiaries from the governorates of Kef and Grand Tunis, the network is expanding through the creation of a mobile app launched by IDLO in cooperation with the Ministry of Women, Family

and Children. Responding to the increase in domestic violence in the context of COVID-19, IDLO also supported a newly created dedicated helpline to provide legal information and advice on gender-based violence. See also: Manual for women's shelters in Tunisia becomes law | IDLO - International Development Law Organization

In **Mongolia**, IDLO launched a law clinic for survivors of sexual and gender-based violence (SGBV) and has supported the development and operation of a CSO referral network for survivors. Moreover, expanding its work on child rights, IDLO is supporting specialized children's rights committees to provide legal and other services to child victims and witnesses in the context of the COVID-19 pandemic, and is developing children's workbooks on child rights and reference material for parents of children with disabilities. See also: Mongolia: Combating domestic violence with civil society and students | IDLO - International Development Law Organization

In **Mali**, as part of our multi-country program in the Sahel region, IDLO is strengthening the capacity of criminal justice actors to respond to gender-based violence and working to improve the quality of justice services to make them more efficient, transparent, and accessible to citizens. As part of these efforts, IDLO supported the establishment and operation of Consultation and Coordination Groups (Cadres de Concertation, or CdCs), informal committees coordinating localized solutions among state criminal justice chain actors, civil society organizations, and local and traditional authorities. Due to the work of the CdCs in Mali, nearly 3,000 female victims of GBV were able to access information, professional advice, or services, including in the justice system. See also: Integrated support to criminal justice systems in the Sahel: Mali, Burkina Faso, Niger | IDLO - International Development Law Organization

In **Somalia**, IDLO is supporting the formalization and standardization of alternative dispute resolution (ADR) processes based on local traditional justice mechanisms (Xeer), including for handling and/or referring cases of GBV and the protection of survivors, to promote fair and equitable access to justice, particularly for women and marginalized groups. IDLO's research, Accessing Justice: Somalia's Alternative Dispute Resolution Centers, identified gaps and areas for improvement on gender equality in the ADR processes and provided recommendations and action areas for future ADR policies and programming. See also: Empowering Women in Somalia's Alternative Disputes Resolution Centers | IDLO - International Development Law Organization

In **Uganda**, as part of its Community Justice Programme (CJP), IDLO is providing technical support to formal institutions, such as the Judiciary, Office of the Director of Public Prosecutions, Uganda Police Force and Uganda Prison Service through capacity building in of GBV case management. IDLO also supports CSO partners in conducting research on specific forms of GBV; providing gender-responsive legal aid services to GBV survivors; and strengthening referrals and accountability mechanisms.

In **Kenya**, IDLO has been working with key institutions such as the Judiciary, State Department of Gender Affairs, and National Gender Equality Commission to strengthen legal and policy frameworks for combatting GBV at both national and county levels. Examples of policy frameworks developed in partnership with IDLO include: (i) the National Policy on the Prevention and Protection from Unlawful Sexual Acts and the Administration of Justice in Sexual Offences Matters; (ii) the National Policy on the Eradication of Female Genital Mutilation; (iii) the Meru Sexual and Gender-Based Violence Policy, based on a model law and policy on SGBV for County Governments; and (iv) Guidelines for the Establishment of GBV Recovery Centres in all health facilities in Kenya. IDLO is also working with county-level governments to improve access to justice in GBV cases. In addition, IDLO is engaging with the National Council on the Administration of Justice on the development of a centralized system for criminal justice actors to facilitate data collection and documentation of GBV cases.

This year's UNiTE campaign in support of 16 Days of Activism against Gender-Based Violence aims to mobilize all stakeholders to advocate for inclusive, comprehensive and long-term strategies, programmes and resources to prevent and eliminate violence against women and girls wherever it occurs, prioritizing those most marginalized, under the theme "Orange the World: END VIOLENCE AGAINST WOMEN NOW!".

IDLO supports the UNiTE campaign and reaffirms our Generation Equality Commitments to combat violence against women and girls.

E. Monitoring Report: Mongolian Domestic Violence Trials 2020 (Executive Summary)

The full 185-page publication may be read at this link: https://familycenter.mn/img/files/brochure/005bbe5e56c1f6aa68c489ccbb7bb0f6.pdf.

Executive Summary

Throughout 2020, IDLO monitored domestic violence trials in Mongolian courts as part of its *Strengthening the Response to Gender-Based Violence Project* with support from the Government of Canada. The activity's design, implementation, findings, and recommendations are detailed in this report.

I. Design and Implementation

Section 1 introduces the activity, while its role within the broader project is detailed in **Section 2**. The activity's objectives are set out in **Section 3** and its conceptual framework, including its core, monitoring, and assessment principles, briefly described in **Section 4**. **Section 5** introduces the activity's trial monitoring program type and geographic and subject matter scopes.

For this activity, a detailed, customized Trial Monitoring Tool featuring a Victim Safety Assessment and Justice Sector Service Delivery Scorecard, together with a Companion Handbook and a Google Form, were created between February and May. These tools and their underlying methodologies are explained in **Section 6**. All these components were designed and implemented by two activity leads, as **Section 7** explains, with the guidance and support of a wide range of overall human resources. Above all, this included a nationwide trial monitoring team comprising 34 civil society representatives, lawyers, and law graduates.

Once the tools and methodology were finalized, the activity was piloted from June to July 2020, enabling testing and refinement of the tools and methodology in the monitoring of ultimately 10 cases. The pilot phase and its outcomes are briefly described in **Section 8**. With tools and methodology finalized, the activity was officially launched and the trial monitors trained, as **Annex G** details. Monitoring then ran from late August to November 2020, with the trial monitoring and review processes ultimately adopted in the final activity design described in **Section 9**.

II. Findings

A total of 57 (39 infringement and 18 criminal) cases were monitored during the pilot and official trial monitoring periods. They were heard at nine courts in districts of the capital, Ulaanbaatar, and in five *aimags* (provinces).

Data Limitations

While the methodology developed and refined through the pilot phase enabled the collection of data that was broadly valid, reliable, timely, precise, and possessing integrity, a small number of data limitations should nevertheless be noted prior to a discussion of the principal findings. As described in **Section 10**, these limitations involved sampling techniques, the cooperation model of this trial monitoring program, monitors' subjective assessments, the challenges posed by the COVID-19 pandemic which emerged after this activity was already underway, and case accessibility issues.

Case Profiles

Data gathered through the Trial Monitoring Tool with respect to the 57 monitored cases are analyzed in **Sections 11** to **15**.

Section 11 profiles the monitored cases. It details how cases were evenly distributed between Ulaanbaatar and *aimags*. Two-thirds involved infringements, the rest crimes, and all were first instance trials. They primarily involved only one charge, usually physical DV and especially the infringement of beating a person with family relationship or the crime of intentional minor harm/injury. Three victims died. Most cases were resolved in only one hearing at which victims attended infrequently and both accused but particularly victims were usually unrepresented.

Most victims were women, accused overwhelmingly men, and DV was likeliest to occur between people living together, often in a *ger*, and mostly in a spousal relationship. Victims and accused alike were likely to have a higher secondary school education, although accused charged with crimes were likelier to have only a middle school education. Two-thirds of employable accused and half of employable victims were indeed employed, while a slim majority of accused had no prior criminal record, including most of those facing a criminal charge.

Overall Justice Sector Service Delivery Scorecard Performance

Section 12 briefly overviews the monitored cases' overall Justice Sector Service Delivery performance. As it explains, the cases achieved a median scorecard grade of Very Good both for victims' and accused's rights overall and for each individual right examined.

Notwithstanding these strong overall results, however, concerns arose in several areas. These are hidden if the data is considered only in terms of overall Scorecard results, for three reasons. First, each component of an evaluated right was weighted equally whereas in reality, they are not all equally important. Second, Scorecard grades represented a range of scores, and cases frequently scored at the bottom of the range. Third, this report cited median grades and scores since dataset distributions were skewed, but as there were frequently large clusters of high or perfect scores, these masked the presence of small but significant populations of lower scores.

Ultimately therefore, it is important to consider Scorecard results alongside detailed analysis (in Sections **13**-**15**) that can identify and explain nuances in the data.

Victims' Rights

Victim safety was the lowest scoring of the various victims' rights examined though still achieving a median of Very Good. As **Section 13.1** details, while police risk assessments were completed in virtually all cases, social workers' situational assessments were carried out in only a third of cases. Safety measures were occasionally imposed, usually at the alleged victim's request, but pre-trial psychological care was rare. Significantly, alleged victims were assessed as being safest when they did not attend court; the scorecard outcome for those that did fell to a Good grade. In court, separate entrances, security checks, and security escorts were rare, although security personnel were generally sufficient. Almost all victims shared the same waiting area as the accused. However, most victims were aware of security/support measures available, and in courtrooms, were seated separately from the accused. Even then, a quarter of victims were nevertheless subjected to retraumatizing treatment

including victim-blaming and reliance on gender stereotypes, even by some judges. Most victims and accused left simultaneously, with staggered departures rare, and no victims had a security escort when leaving.

Results for victims' right to relevant information concerning violations and reparation mechanisms were analyzed in **Section 13.2**. Despite a median Very Good grade, over a third of cases scored between Good and Poor. This seems to be because while most alleged victims received both information and an explanation of their rights and duties, several victims received information but no accompanying explanations. Overall, victims were best informed about their right to legal assistance and worst informed about their right to have a copy of the court decree on acquittal or sentencing.

Alleged victims appeared to enjoy a robust right to equal and effective access justice, and this was the strongest performing of all victims' rights, with all cases scoring Very Good. As **Section 13.3** explains, victims generally appeared to know hearing dates; to have had adequate opportunity to make requests and complaints; and to have avoided pressure about their testimony/statements. Most judgments adequately analyzed victims' arguments/evidence (although few victims presented any), and none contained harmful attitudes towards the victim. However, some victims were subject to inappropriate attitudes in court, such as victim-blaming and gender stereotypes.

Cases achieved a median grade of Very Good for victims' right to adequate, effective, and prompt reparation for harm despite few victims requesting reparations, as detailed in **Section 13.4**. In nearly a quarter of all cases without a victim's request for compensation, the victim appeared unaware of both compensable harms and available compensation. However, victims who requested compensation tended to cite physical injuries and economic loss, and most were compensated in full or even beyond, although 30 percent received no compensation despite the accused's conviction.

Accused's Rights at Trial

The accused's right to be tried by a competent, independent, and impartial tribunal established by law set out in **Section 14.1** was the third highest result among accused's rights at trial, with a median of Very Good. Almost all accused were informed of their procedural rights and few judges behaved intimidatingly towards them. Only once did an official (justifiably) leave during proceedings, although mobile phones were used in some courts, mostly by prosecutors and judges. Finally, monitors felt that certain deliberations were disproportionately short considering the severity of the charges.

In contrast, the accused's right to a public hearing analyzed in **Section 14.2** was the equal worst performing of all accused's rights at trial examined, while still achieving a median of Very Good. The poor performance owed to the fact that a slim majority of hearing dates/times were not publicly available – a problem that occurred in all nine monitored courts. Nevertheless, most cases were publicly accessible, with most visitors facing at least one form of security verification and monitors observing cases with express permission from court officials. Most cases took place in an adequately sized courtroom.

The other equal worst performer of the accused's rights at trial was the right to be presumed innocent and not to be compelled to testify or confess guilt detailed in **Section 14.3**, which still also achieved a median of Very Good. Notably, a few accused appeared in court handcuffed or shackled, which could have created a perception of their guilt. Accused were frequently informed of the component rights within this right but did not receive a tailored explanation. However, most exercised at least one of

these rights anyway. No prosecutors or judges appeared to draw negative conclusions where accused remained silent, although twice, court officials made a statement prior to delivery of the verdict that already suggested that the accused was guilty.

The accused's right to an objective and comprehensive evaluation of evidence, presented in **Section 14.4**, was the median performer among the seven accused's rights at trial, again with a median of Very Good. Most cases described case file contents and referred to accused's pre-trial statements, with seven accused contradicting those statements in court. No accused appeared disadvantaged in terms of evidence submitted, and most had a fair opportunity to present a defense. Testifying victims/witnesses mostly received information about and an explanation of their relevant rights and remained generally consistent in their account. One expert testified, who was properly informed of their rights and duties and testified within their scope of expertise.

The accused's right to equality of arms analyzed in **Section 14.5** – i.e., to the same procedural rights as all parties – achieved the highest results among the rights at trial, with a median of Very Good. Procedural irregularities vis-à-vis equality of arms were exceedingly rare and were limited to the fact that in two criminal cases (in different courts), the prosecution was situated closer to the judge inside the courtroom than the defense. Likewise, the defense was almost never denied their right to have the last word at trial.

Next best performing among the accused's rights at trial was the right to defend themselves in person or through counsel, overviewed in **Section 14.6**. Overall, monitors identified few obstacles to the accused's right to a defense, with irregularities in only three cases. Three accused were removed from courtrooms during hearings but for valid protection reasons, although only one could follow and participate in the proceedings for which he was absent. Nearly three-quarters of accused were unrepresented. Where there were defense lawyers, most were situated close to the accused in court; had few communication issues with their clients; and appeared to adequately explain issues or speak to the accused.

Finally, despite achieving a median of Very Good, the accused's right to a public judgment and a reasoned judgment detailed in **Section 14.7** was the second-worst performing of all accused's rights at trial. Nearly all cases made an official record of proceedings, with audio-video recordings occasionally omitted, although few courts explained parties' right to familiarize themselves with that record. Most of the citizens' representatives (quasi jurors) who participated in hearings were able to give an opinion proposing a verdict. The one acquitted accused was not informed of their right to compensation for the authorities' unlawful acts during proceedings, if any. The full judgment was read in court in only a third of cases. Written judgments fared considerably better and ultimately, monitors assessed virtually all judgments as sufficiently clear, understandable, and without confusion. However, full judgments were rarely made public and in nearly half the cases, no judgment or summary was available whatsoever. A wide range of additional (non-scoring) data on judgments is also discussed in this section.

Accused's Rights Pre-Trial and at All Stages

The accused's pre-trial right to liberty, to independence and impartiality, and to challenge the lawfulness of detention assessed in **Section 15.1** was the median performance among the accused's rights examined at the pre-trial stage or at all stages, achieving a median Very Good grade. Most accused were lawfully arrested and, where applicable, notified of decisions to investigate and

prosecute their cases. Where pre-trial measures of restraint were imposed, only a slim majority of accused were able to participate in the process of determining those measures.

With most of the monitored cases achieving a perfect score for the accused's pre-trial right to information and to access the outside world as **Section 15.2** describes, this right was the best performing of all accused's pre-trial rights monitored. Most accused arrested pre-trial were immediately given written notice and an explanation of their rights following their arrest and had their arrest notified in a timely manner to a family member. One accused was provided medical assistance at his request.

The accused's pre-trial right to legal counsel and to adequate time and facilities to prepare a defense analyzed in **Section 15.3** was the second-worst scoring of all rights monitored at this procedural stage, despite the monitored cases achieving a median grade of Very Good. While most accused were informed of relevant legal representation and defense rights immediately upon arrest and had sufficient pre-trial access to the case file, in a quarter of cases, accused either did not have such access or this information was unknown as it was not documented or discussed. Some accused also appeared to have insufficient time or facilities pre-trial to prepare a defense. Most accused declined their right to request a lawyer, although none appeared to be a category of defendant for whom legal representation was mandatory. However, among accused with lawyers, one accused was spoken to about the alleged crime after requesting a lawyer and before their lawyer arrived.

The accused's rights during pre-trial interrogations, set out in **Section 15.4**, were the worst-scoring of all pre-trial rights examined despite achieving a median grade of Very Good, with infringement cases performing considerably worse than criminal ones. While the overwhelming majority of accused had their rights explained to them prior to the interrogation, two accused who needed to have a lawyer present during their interrogation did not. Two accused were not provided with a copy of the interrogation record or had it read to them, and in a quarter of cases, it could not be determined based on the available information whether the accused had been given an opportunity to make corrections and include additional information in the interrogation record.

The best performing of all rights examined in this section was the one applicable at all stages – i.e., the right to humane conditions and freedom from torture, as **Section 15.5** shows. The median grade was Very Good and 52 cases achieved a perfect score – unsurprisingly, given that there was nothing in any monitored case to suggest that the accused may have been subject to inhumane conditions or torture.

III. Recommendations and Capacity-Building Outcomes

Based on the trial monitoring findings, the report presents a list of detailed data-driven recommendations for justice sector stakeholders on ways to improve justice outcomes in relation to DV cases in Mongolia. **Section 16.a** addresses victims' rights, while **Sections 16.b** and **16.c** address accused's rights at trial, and pre-trial and at all stages, respectively. These recommendations integrate relevant third cycle Universal Periodic Review (UPR) recommendations Mongolia has recently supported. Recommendations are also presented by stakeholder in **Annex A** to this report.

Finally, the report concludes with an overview of capacity-building outcomes achieved through the activity. As it notes, all monitors reported improving capacity through participation in the activity, noting

specific knowledge areas improved as set out in **Section 17.a** and professional skills deepened as described in **Section 17.b**. Monitors' own recommendations are also set out in the report's **Annex B**.

F. Survivor-Centered Justice for Gender-Based Violence in Complex Situatuons (Summary)

Publication of the full report will be in September 2022.

The Global Women's Institute
THE GEORGE WASHINGTON UNIVERSITY

SURVIVOR-CENTRED JUSTICE FOR GENDER-BASED VIOLENCE IN COMPLEX SITUATIONS

Gender-based violence (GBV) against women is a human rights violation and is both a cause and consequence of gender inequality. GBV is globally prevalent, takes multiple forms, and affects women throughout their life cycle, irrespective of income levels or social status. In turn, gender inequality, as well as intersecting forms of discrimination—based on age, sexual orientation, gender identity, health, ethnicity, migrant, refugee or IDP status—have a negative impact on women's ability to report violence and access justice.

Specific forms of GBV include:

- Intimate partner violence (IPV), including physical, sexual or psychological harm
- Non-partner sexual violence, including rape
- Femicide
- 'Honour' killings
- Conflict-related sexual violence
- Child sexual abuse
- Child marriage
- Sorcery accusation related violence
- Organized crime related violence
- Trafficking in persons
- Digital forms of violence against women
- Gender-based political violence

Women and girls' vulnerability to violence is exacerbated in complex contexts, such as conflict, organized crime, health emergencies and the climate crisis, where GBV is more common and more severe. In complex situations, women face heightened difficulties in accessing justice and protection due to weakened justice systems or disrupted justice and service delivery, as well as low levels of trust in state institutions. Other challenges include the inability or unwillingness of states to address GBV, particularly in conflict situations, or the de-prioritization of GBV responses, as evidenced during the COVID-19 pandemic. **In situations of crisis, women are more likely to experience violence and less likely to receive justice.**

IDLO, in partnership with the Global Women's Institute at George Washington University, conducted research in six countries across the globe with the aim to identify survivor-centred approaches to addressing GBV in complex situations.[1] This summary draws on research findings which will be published as a full report later in 2022. Country case studies in **Afghanistan,**[2] **Honduras, Papua New Guinea, the Philippines, South Sudan, and Tunisia** were selected to provide different perspectives of complexity in accessing justice and an analysis of diverse justice mechanisms dealing with GBV in situations of conflict, organized crime, climate disasters, and health emergencies, often intersecting with contexts of legal pluralism and political transition. Research findings show that, in order to be effective, measures and programmes aimed at ensuring access to justice for GBV survivors, need to be responsive to women's specific needs and vulnerabilities, as well as relevant to contextual challenges.

[1] The term "complex situations" is used to describe complicated contemporary contexts in which the humanitarian-development-peace nexus (or "triple nexus") is relevant.

[2] All data on Afghanistan was collected prior to 15 August 2021 and the Taliban takeover of the country.

JUSTICE MECHANISMS ADDRESSING GBV ACROSS COMPLEX SITUATIONS: CASE STUDIES

1 Afghanistan

Data collected before August 2021 showed that **women in Afghanistan experienced various forms of violence, the majority of which occurred in domestic settings and was connected to traditional practices** such as forced and child marriages, honour killings, and customary giving away of girls as a method of dispute settlement *(baad)*. Insecurity and protracted conflict had seriously reduced the capacity of the justice sector to resolve legal disputes and deliver justice outcomes, resulting in the majority of **the population seeking justice through informal and customary mechanisms.**

Despite significant improvements in women's participation in the political, economic, cultural, and social life of the country over two decades, **multiple challenges remained to be addressed, including security concerns, inadequate implementation of laws, and limited funding and capacity across governmental institutions to tackle GBV**. The state of uncertainty in the country after 15 August 2021 has exposed progress towards gender equality and reducing GBV as particularly fragile.

2 Honduras

Honduras is a complex and unstable context, marked by organized crime, corruption, and some of the highest levels of violence globally. This has resulted in an erosion of the rule of law, high rates of forced displacement, and increased vulnerability of women and girls. **Honduras has the highest femicide rate in the world.** In 2019, a majority of reported femicides were linked to organized crime.

Despite promising innovation in the legal framing of GBV linked to organized crime, important barriers to access to justice remain related to inadequate penalties, widespread impunity, limited transparency and public participation in the legal reform process, insufficient state funding to civil society actors defending women's rights, and lack of trust in the formal justice system.

3 Papua New Guinea

Papua New Guinea is one of the most culturally, geographically, and linguistically diverse countries in the world. Women are largely absent from political and customary decision-making, and **levels of GBV are among the highest globally**, particularly with regards to sorcery accusation-related violence and IPV. GBV is fuelled by **social norms around communal rather than individual accountability alongside a culture of retribution between different tribal groups, resulting in discriminatory and harmful practices**, such as bride price and polygamy.

Emerging evidence shows that justice and support services for women are increasing in Papua New Guinea, but significant barriers to accessing justice for survivors persist. A key challenge is the perception of GBV as a family matter to be resolved within the accepted customary system.

4 Philippines

The Philippines is an archipelago on the frontlines of global climate change. **On average, the country is struck by 20 typhoons annually, and it is prone to earthquakes and volcanic eruptions.** Typically high rates of GBV against women, particularly IPV, sexual exploitation, rape, physical injuries, and trafficking in persons, tend to increase in the wake of disasters, as in these situations sex becomes a means of exchange for food, water and other goods. Gaps in referral systems to police, courts and relevant services hinder access to justice for GBV survivors in the country.

In addressing issues around GBV in the wake of disasters—likely to worsen due to the effects of climate change—government action plans have integrated considerations around human rights, gender mainstreaming, and women's participation. But as **disasters and the adverse effects of climate change are not gender-neutral**, there is need for furthering mainstreaming of a gendered and intersectional approach in disaster risk reduction and management policy and programming.

5 South Sudan

Since gaining independence in 2011, South Sudan has been marked by ongoing conflicts organized around political and ethnic divisions and a deteriorating economy. Rates of GBV against women, of which IPV is the most common form, are very high. **Conflict-related sexual violence by armed actors has increased, with women and girls' vulnerability compounded by intercommunal conflicts over livestock**, which are often resolved through bride prices or violent revenge attacks. Other harmful, patriarchal practices like child and forced marriage, wife inheritance and polygamy, aggravate discriminatory conditions for women and girls.

Justice for GBV survivors is most frequently accessed at the local level through the customary justice system. This system is dominated by male chiefs and tends to focus on restoring and maintaining peace within a community, rather than ensuring accountability of perpetrators or protecting victims. The weakening of formal justice institutions and the rule of law, the lack of a dedicated law on GBV, and a culture of impunity, have made it less likely that perpetrators are held accountable through formal justice, thus discouraging survivors to report.

6 Tunisia

Tunisia underwent a democratic transition following the 2011 Jasmine Revolution and adoption of a **new Constitution in 2014 which enshrines equality between men and women and commits to taking the necessary measures to eradicate violence against women**. In 2018, Tunisia promulgated a special law on violence against women, which was widely viewed as an essential step in advancing justice for survivors, as part of a comprehensive response to GBV.

Despite progress towards respect for fundamental rights and freedoms, the country still experiences high rates of GBV, particularly domestic violence and abuse, and sexual harassment in public spaces. **Persistent patriarchal attitudes and practices limit women's participation in public life and decision-making, and constrain their access to socio-economic rights** such as education, property, and equal work opportunities. Access to justice for GBV survivors is further challenged by women's lack of awareness of their own rights, entrenched gender bias of many justice actors, and the justice sector's basic infrastructure and lengthy processes.

JUSTICE GAPS AND CHALLENGES FOR GBV SURVIVORS IN COMPLEX SITUATIONS

Legal frameworks

While all countries reviewed in this report have adopted special laws to address GBV (except for South Sudan), inadequate criminal law provisions on GBV persist, including procedural rules, and lack of recognition of emerging forms of violence. Other legal obstacles include discriminatory standards deeply entrenched in broader legal frameworks, including family and personal status laws.

A survivor-centred approach is key to fulfilling the promise of justice in response to GBV, in all circumstances, including complex situations.

Social and cultural barriers

Patriarchal social norms and structural gender inequalities, such as the normalization of many forms of GBV against women, and pressure on victims not to report, permeate families and communities and impede GBV survivors' access to justice. Economic barriers often prevent survivors from accessing formal justice. Low awareness among survivors of laws available to protect them, where and how to report crimes, and of available support services creates additional obstacles.

Gaps in essential services provision

Gaps in provision of essential support services for survivors accessing justice are wide. There is a lack of a multi-sectoral coordination framework for survivor-centred services and of a state authority responsible for its implementation. Functional, easily accessible referral pathways are absent, creating a gap in linking state services, humanitarian actors, and local organizations, and in delineating respective responsibilities in handling GBV cases and referral procedures.

Institutional challenges

The integrity of formal justice actors and their lack of capacity to handle GBV cases fuels distrust in the formal justice system. Major challenges include corruption and lack of judicial independence; lack of gender sensitivity and mistreatment of survivors by the police; limited financial resources and forensic specialist capacity, and poor information systems; lack of data collection to track national trends and respond to GBV; procedural barriers, including evidentiary challenges and lack of adequate procedural safeguards for victims; and low penalties and impunity.

Primary prevention

The countries examined in the report lack comprehensive, context-responsive, long-term national prevention strategies and frameworks, encompassing primary prevention, and addressing gender inequality, harmful social and gender norms, power imbalances, and the culture of acceptance of GBV. At the local and community levels, there are insufficient GBV awareness raising activities and efforts to promote positive social norms, through a whole-of-community approach, and empower survivors to seek support and access justice.

APPROACHES AND PRACTICES TO INCREASE ACCESS TO **JUSTICE FOR GBV SURVIVORS IN COMPLEX SITUATIONS**

Justice systems are often ill-prepared to perform in situations of conflict, pandemics, or climate emergencies. The IDLO and GWI research report highlights some promising pathways to justice for GBV survivors.

Law reform to address GBV

- Revising criminal law to include offenses related to GBV
- Reforming existing civil and family laws to reduce discrimination against women and girls and strengthen women's rights within the family
- Enacting special laws on violence against women
- Strategic litigation to set precedent on GBV

Primary prevention

- Increased attention on developing prevention models appropriate for humanitarian settings
- A gradual shift from focusing on awareness generation programmes to community-based prevention and economic empowerment programmes for women and girls
- Building upon evidence-based prevention programmes that have been implemented in contexts of protracted conflicts

Services for GBV survivors in complex situations

Quality essential services to address the short-, medium- and long-term needs of survivors in accessing and navigating justice should include:

- specialized women's organizations and civil society actors
- legal aid, including case management and legal accompaniment
- psychosocial counseling
- one-stop centres
- shelters
- health services
- multi-sectoral coordination
- referral pathways

Measures to increase access to justice

- Specialized police and prosecution units
- Specialized GBV Courts
- Humanitarian sector approaches to addressing justice for GBV, such as including rule of law and justice coordination mechanisms in UN peacekeeping missions or in humanitarian assistance through the GBV Sub-cluster
- Legal aid, paralegals and other community-based accompaniment and access to justice support
- Increasing access to protection orders
- Engagement with customary and informal justice
- Training of justice providers
- Specialized mechanisms for data collection and review

KEY RECOMMENDATIONS FOR PROMOTING SURVIVOR-CENTRED JUSTICE FOR GBV IN COMPLEX SITUATIONS:

Develop and implement a comprehensive survivor-centred justice response to GBV
that meets the needs of diverse women through an intersectional approach delivered using effective gender-responsive laws and justice institutions.

Foster integration of services for GBV survivors
in ways that enhance prevention, protection, and access to redress through both formal and informal pathways to justice.

Strengthen legal empowerment of women
by raising awareness of laws and rights and providing legal support services directly to GBV survivors.

Support women's collective action and advocacy
by safeguarding civic space and providing targeted financing for local women's organizations and essential community networks.

Expand GBV monitoring and data collection,
and strengthen research on what works, to ensure that policies and practices are evidence-based and can be measured for accountability.

The International Development Law Organization (IDLO) is the only intergovernmental organization exclusively devoted to promoting the rule of law.

IDLO works to enable governments and empower people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity. Its programs, research and policy advocacy cover the spectrum of rule of law from peace and institution building to social development and economic recovery in countries emerging from conflict and striving towards democracy.

The Global Women's Institute (GWI) is a globally-recognized leader in the field of gender-based violence.

GWI bridges research, education, and action to advance gender equality and reduce violence and discrimination against women and girls. By strengthening the global knowledge base on gender issues, GWI makes a difference by informing programmes and policies that address a variety of issues affecting gender equality, women's empowerment, and gender-based violence in conflict and humanitarian settings. GWI finds interventions that work, explains why they matter, and takes action to bring about change.

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