



# LESOTHO

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## ACT NO. 5 OF 2021

**Witness Protection Act, 2021**

An act to make provision for the establishment of a witness protection program to provide for the protection, safety and welfare of witnesses in certain criminal proceedings who, unless protected, may not give evidence for fear of death, violence or serious injury by criminal interests likely to be affected by the proceedings, and for related matters.

Enacted by the Parliament of Lesotho.

**Short title and commencement**

1. This Act may be cited as the Witness Protection Act, 2021<sup>1</sup> and shall come into operation on the date of its publication in the Gazette.

**Interpretation**

2. In this Act unless the context otherwise requires -

“agreement” means a witness protection agreement entered into under section 7;

“Director of Public Prosecutions” means a person appointed as such under section 141 of the Constitution;

“member of staff” means a member of staff of the Director of the Public Prosecutions;

“Minister” means Minister responsible for law;

“police” means the Lesotho Mounted Police Service;

“protected identity” means any identity of a protected person or former protected person that is different from the identity under which he is known in or in connection with the proceedings concerned;

“protected person” means a person who has signed a witness protection agreement and is receiving protection under the Program;

“Program” means the Witness Protection Program established under section 3;

“protection” includes relocation, accommodation, change of identity, counseling and financial support for the purpose of ensuring the security of a person or facilitation of the person’s re-establishment or self-sufficiency;

“substantial harm” means any injury, whether physical or psychological, that interferes in a substantial way with a person’s health or well-being;

“witness” means a person who -

- (a) has given or has agreed to give information or evidence, or participates or has agreed to participate in a matter, relating to an inquiry or the investigation or prosecution of an offence and who may require protection because of risk to the security of the person arising in relation to the inquiry, investigation or prosecution;
- (b) has assisted or has agreed to assist the Police or the prosecuting authority and who may require protection because of a risk to his security arising in relation to the assistance; or
- (c) because of their relationship to or association with a person referred to in paragraph (a) or (b), may also require protection for the reasons referred to in that paragraph; and

“witness protection agreement” means an agreement in respect of a protected person.

### **Establishment of Program**

3. There is an established program to facilitate the protection of witnesses called the Witness Protection Program, which shall be administered by the Director of Public Prosecutions, under the general direction of the Minister only in respect of matters of policy.

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**Powers of the Director of Public Prosecutions regarding admission**

4. (1) Subject to this Act, the Director of Public Prosecutions may determine whether a witness should be admitted to the Program and the type of protection the witness should be given.

(2) The Director of Public Prosecutions shall take such action as may be necessary and reasonable to protect the safety and welfare of a protected person.

(3) Without prejudice to the generality of subsection (1), the action taken under subsection (2) may include -

- (a) physical and armed protection;
- (b) change of identity; or
- (c) any other measure necessary to ensure the safety and welfare of the protected person.

(4) The Director of Public Prosecutions may request the courts, in support of the Program, to implement protection measures during the court proceedings which measures may include -

- (a) holding proceedings in camera;
- (b) use of fictitious name;
- (c) reduction of identity information;
- (d) use of video link;
- (e) employing any other measures to obscure or distort the identity of the witness.

(5) The Director of Public Prosecutions shall put in place support measures to facilitate the integration of the protected person.

(6) The Director of Public Prosecutions may, in writing, designate an officer who is a member of his staff to be responsible for the program;

**Admission into Program**

5. (1) A witness shall not be admitted into the Program unless -
- (a) a recommendation for the admission has been made by the police, law enforcement agency, National Security Service, Lesotho Defence Force, Directorate on Corruption and Economic Offences, Correctional Service or an International Criminal Court or international tribunal;
  - (b) the Director of Public Prosecutions has been provided by the witness with such information, in accordance with any regulations made for the purpose, concerning the personal history of the witness as will enable the Director of Public Prosecutions to consider the factors referred to in this Act in respect of the witness;
  - (c) a witness agrees to be included;
  - (d) a witness protection agreement has been entered into by or on behalf of the witness with the Director of the Public Prosecutions in accordance with section 7 setting out the obligations of both parties and is signed by the witness or by -
    - (i) a parent or guardian of the person, if the witness is under the age of 18 years, but the Director of Public Prosecutions may require that witness to sign the memorandum when that person turns eighteen; or
    - (ii) a guardian or other person who is usually responsible for the care and control of the person, if the person otherwise lacks legal capacity to sign it.
- (2) Where a person has not been offered protection under the Program, the person may make a written request for admission in the Program to the Director of Public Prosecutions.

(3) Notwithstanding subsection (1)(d), the Director of Public Prosecutions may, in a case of emergency, and for a period of not more than 90 days, provide protection to a person who has not entered into a memorandum of witness protection on witness protection.

(4) The Director of Public Prosecutions may, if the emergency persists, provide protection for one additional period of not more than 90 days.

(5) The Director of Public Prosecutions shall process a request under subsection (1) or (2) without undue delay.

(6) The admission of a witness or protected person into the Program shall not be treated as a reward or means of persuading or encouraging the witness to give evidence or to make a statement.

### **Factors to be considered before admission into Program**

6. (1) The Director of Public Prosecutions shall consider the following factors in determining whether a witness should be admitted to the Program -

- (a) the seriousness of the offence to which any relevant evidence or statement relates;
- (b) the nature of the -
  - (i) perceived danger to the witness;
  - (ii) risk to the security of the witness;
  - (iii) inquiry, investigation or prosecution involving the witness;
  - (iv) assistance given or agreed to be given by the witness to the police, National Security Service, investigating authority, Director of Public Prosecutions, Lesotho Defence Force and the importance of the witness in the matter;
- (c) the danger to the community if the witness is admitted to the Program;

- (d) the nature and value of the participation of the witness or of the information, evidence or assistance given or agreed to be given by the witness;
- (e) the likelihood of the witness being able to adjust to the Program, having regard to the witness's maturity, judgment and other personal characteristics and his relationship with his family;
- (f) the cost of maintaining the witness in the Program;
- (g) alternate methods of protecting the witness without admitting the witness to the Program; and
- (h) such other factors as the Director of Public Prosecutions considers relevant.

(2) The Director of Public Prosecutions shall not admit a witness in the Program if, in his opinion, there is not enough information to assess the matters referred to in this section in relation to the witness.

(3) Where a decision is taken by the Director of Public Prosecutions to refuse to admit a witness to the Program, the Director of Public Prosecutions shall provide the institution or organisation that recommended the admission of a person or the witness with reasons, in writing, to enable the institution, organisation or witness to understand the basis for the decision.

### **Witness protection agreement**

7. (1) A person to be admitted into a witness protection program shall enter into a witness protection agreement, with the Director of Public Prosecutions before entering into the program setting out -

- (a) the basis on which a person is admitted in the Program;
- (b) the details of the protection and assistance which are to be provided; and
- (c) all other terms and conditions under which he is granted protection.



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(2) A witness protection agreement shall be signed by or on behalf of the witness in the presence of the Director of Public Prosecution or a member of staff designated by the Director of Public Prosecutions for the purposes of this Act, and may be varied with the consent of the witness, protected person or his legal guardian and the Director of Public Prosecutions.

(3) A witness becomes included in the program when the Director of Public Prosecutions or a member of staff designated by him signs the witness protection agreement.

(4) The Director of Public Prosecutions shall, as soon as practicable after the witness protection agreement is duly signed, notify the relevant protected person that it has been signed.

(5) A witness protection agreement shall contain -

- (a) a provision to the effect that protection and assistance under the program may be terminated if the protected person deliberately breaches any term of the witness protection agreement or a requirement or undertaking relating to the program;
- (b) a statement advising the protected person of his right to complain to the Director of Public Prosecutions about the conduct of any member of staff in relation to the matters dealt with in the agreement, including any one or more of the following -
  - (i) any outstanding legal obligations of the protected person and how they are to be dealt with;
  - (ii) any legal obligations which the protected person may or may not enter into;
  - (iii) the surrender and issue of passports and other identification documents;
  - (iv) the taking, provision and retention of photographs of the protected person;

- (v) issue of any documents relating to the new identity of the protected person;
- (vi) the prohibition of the protected person from engaging in specified activities;
- (vii) marriage, family maintenance, taxation, welfare or other social or domestic obligations or relationships;
- (viii) any other obligations on the part of the protected person;
- (ix) consequences of the protected person's failure to comply with the provisions of the witness protection agreement; and
- (x) any other matter for which it may be necessary or expedient to make provision in the circumstances of the case.

### **Obligations of The Director of Public Prosecutions under witness protection agreement**

8. A witness protection agreement shall contain an obligation on the part of the Director of Public Prosecutions, to -

- (a) take such reasonable steps as are necessary to provide the protection referred to in the witness protection agreement to the protected person;
- (b) meet all legal and financial obligations incurred by the protected person, including any obligations regarding the custody and maintenance of his children; and
- (c) refrain from activities that constitute an offence under any law or that might compromise the security of the protected person, another protected person or the Program.

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**Obligations of witness or protected person under witness protection agreement**

9. A witness protection agreement shall include an obligation on the part of the witness or protected person, to -

- (a) give the information or evidence or participate as required in relation to the inquiry, investigation or prosecution or to give to the police, National Security Service or Lesotho Defence Force the assistance in respect of which protection is provided under the agreement;
- (b) meet all financial obligations incurred by the protected person at law that are not by the terms of the agreement payable by the Director of Public Prosecutions; and
- (c) accept and give effect to reasonable requests and directions made by the Director of Public Prosecutions in relation to the protection provided to the protected person and the obligations of the protected person.

**Suspension of protection**

10. The Director of Public Prosecutions may, for a reasonable period, suspend protection and assistance given to a witness or protected person provided under the Program, if he is satisfied that the witness or protected person has done or intends to do something which limits the ability of the Director of Public Prosecutions to provide adequate protection to the witness or protected person, until such time when he may be able to provide the necessary protection.

**Termination of protection at request of witness or protected person**

11. (1) A witness or protected person may request the Director of Public Prosecutions to terminate the protection provided to the protected person.

(2) Where a request has been made under subsection (1), the Director of Public Prosecutions shall meet in person with the witness or protected person to discuss the request and shall terminate the protection provided, if either at the meeting or afterwards, they confirm his request in the form and manner that the Director of Public Prosecutions considers appropriate in the circumstances.

(3) The termination shall take effect on the day on which the request is confirmed or on a later date that the witness or protected person may specify.

### **Termination of protection at instance of Director of Public Prosecutions**

12. (1) The Director of Public Prosecutions may terminate the protection provided to a witness or protected person, if the Director of Public Prosecutions has evidence that -

- (a) there is a material misrepresentation or a failure to disclose information relevant to the admission of the witness or protected person to the Program; or
- (b) there is a deliberate and material breach of the obligations of or undertaking by the witness or protected person under the memorandum of witness protection or a requirement relating to the Program;
- (c) anything done or intended to be done by the witness or protected person is, in the opinion of the Director of Public Prosecutions, likely to threaten or the security or compromise the integrity of the Program; or
- (d) circumstances which gave rise to the need for protection and assistance for the participation have ceased to exist.

(2) The Director of Public Prosecutions shall, before terminating the protection provided to a witness or protected person, notify the witness or protected person and allow him to make representations concerning the matter.

(3) Where a decision is taken by the Director of Public Prosecutions to terminate the protection without the consent of a witness or protected person, the Director of Public Prosecutions shall provide the witness or protected person with written reasons to enable him to understand the basis for the decision.

### **Notice of termination or suspension**

13. If protection or assistance provided under the Program to a witness or protected person is suspended or terminated under sections 10, 11 or 12, the Director of Public Prosecutions shall notify any law enforcement agency which

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may be affected by the decision.

### **Identification documents**

14. Without limiting the powers of the Director of Public Prosecutions under section 4, the Director of Public Prosecutions may apply for any documents necessary to -

- (a) protect the witness;
- (b) allow a witness to establish a new identity; or
- (c) restore a former protected person's former identity.

### **Application for court order**

15. (1) The Director of Public Prosecutions may, in a manner to be prescribed by rules of court, apply to the High Court for an order authorising the Director of Civil Registry to -

- (a) make a new entry in a register of births or a register of marriages in respect of a witness;
- (b) make a new entry in a register of deaths in respect of a witness or a relative, by blood or marriage, of a witness; or
- (c) issue the witness a new identity document.

(2) The Director of Public Prosecutions shall provide such evidence as the High Court may require to satisfy itself as to the matters specified in section 16.

### **Powers of High Court to make order**

16. The High Court may make a witness protection order if it is satisfied that -

- (a) the person named in the application as a witness -
  - (i) was a witness to or has knowledge of an offence

and is or has been a witness in criminal proceedings relating to the offence; or

- (ii) is a person who, because of his relationship to or association with a person to whom subparagraph (i) applies, may require protection or other assistance under this Act;
- (b) the life or safety of the person may be endangered as a result of being a witness;
- (c) an agreement has been entered into by the witness in accordance with section 7; and
- (d) the person is likely to comply with the agreement.

### **Effect of witness protection order**

17. On the making of an order of the kind referred to in section 15(1)(a) or (b) -

- (a) a person authorised to do so by the order may make such entries in a register of births, deaths or marriages as are necessary to give effect to the order;
- (b) the appropriate registrar having charge of the register of births, deaths or marriages shall afford the person so authorised full access to the relevant register and give him such assistance as he may require; and
- (c) the Director of Public Prosecutions shall maintain records showing details of the original birth, death or marriage of each person in respect of whom an entry is made under paragraph (a).

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**Effect of entries made under this Act**

18. (1) An entry made under this Act in a register of births, deaths or marriages -
- (a) has effect as if it were a valid entry made in accordance with the law governing the register; and
  - (b) can only be cancelled by the Registrar-General or an appropriate registrar if the High Court, after being satisfied that the witness is no longer included in the relevant Program, has made an order on the application of the Director of Public Prosecutions directing that entry be cancelled.

**Special provision in case of marriage of protected person**

19. (1) A witness or protected person who has been provided with a new identity under the Program shall not marry unless he has given to the Director of Public Prosecutions -
- (a) evidence which establishes the identity of the witness or protected person and shows that he is of marriageable age;
  - (b) a statutory declaration to the effect that there is no legal impediment to the marriage and the Director of Public Prosecutions is not aware of any such impediment.

(2) A person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding 50,000.00 Maloti or imprisonment for a term not exceeding 6 months, or both.

**Restoration of former identity**

20. (1) Where -
- (a) a witness or protected person has been provided with a new identity under the Program; and

- (b) protection and assistance afforded to him under the program have been terminated,

the Director of Public Prosecutions may, if he considers it appropriate to do so, take such action as is necessary to restore the former witness or protected person's former identity.

(2) The Director of Public Prosecutions shall notify the former witness or protected person of a decision under subsection (1).

(3) If the Director of Public Prosecutions -

- (a) takes action under this section to restore the former identity of a person who was a witness or protected person; and
- (b) notifies the former witness or protected person in writing, that he is required to return to the Director of Public Prosecutions, all documents provided to the former witness or protected person that relate to the new identity provided under the Program,

the former witness or protected person shall not without reasonable excuse, refuse or fail to return those documents to the Director of Public Prosecutions within 14 days after receiving the notice.

(4) A person who contravenes subsection (3) commits an offence and is liable on conviction to a fine not exceeding 50,000.00 Maloti or imprisonment for a term not exceeding 6 months, or both.

### **Offences in relation to documents**

21. While an entry made under this Act in a register of births, deaths or marriages continues in force, a person in respect of whom the entry is made who uses or obtains any document issued by a registrar having charge of a register of births, deaths or marriages which is based on the previous entry commits an offence and is liable on conviction to a fine not exceeding 50,000.00 Maloti or imprisonment for a term not exceeding 6 months, or both.



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**Identity of witness or protected person not to be disclosed in legal proceedings**

22. (1) If, in any proceedings before a court, tribunal or commission of inquiry, the identity of a witness or protected person is in issue or may be disclosed, the court, tribunal or commission shall, unless it considers that the interests of justice require otherwise -

- (a) hold that part of the proceedings which relates to the identity of the witness or protected person in camera; and
- (b) make such order relating to the suppression of publication of evidence given before the court, tribunal or commission as, in its opinion, will ensure that the identity of the witness or protected person is not disclosed.

(2) If in any proceedings before a court, tribunal or commission of inquiry, a witness or protected person or former witness or protected person who has been provided with a new identity under the Program is giving evidence, the court, tribunal or commission may hold that part of the proceedings in camera.

(3) The court, tribunal or commission before which any proceedings referred to in subsection (1) or (2) are conducted may, if it considers fit, by order direct that -

- (a) no question shall be asked during the proceedings;
- (b) no witness in the proceedings, including a protected person or former witness or protected person, can be required to answer a question, give any evidence, or provide any information; and
- (c) no statement shall be made during the proceedings which discloses or which may lead to the disclosure of a protected identity of a witness or protected person or former witness or protected person or of his place of abode.

**Documentation restrictions**

23. The Director of Public Prosecutions shall not obtain documentation for a witness or protected person which represents that a witness or protected person -

- (a) has a qualification which he does not have; or
- (b) is entitled to a benefit to which he is not entitled.

**Special commercial arrangements by Director of Public Prosecutions**

24. The Director of Public Prosecutions may make commercial arrangements with a person under which a witness or protected person is able to obtain a benefit under a contract or arrangement without revealing his former identity.

**Dealing with rights and obligations of witness or protected person**

25. If a witness or protected person has any outstanding rights or is subject to any restrictions, the Director of Public Prosecutions shall take such steps as are reasonably practicable to -

- (a) ensure that those rights or obligations are dealt with according to law; or
- (b) notify a party or possible party to legal proceedings that the Director of Public Prosecutions will, on behalf of the witness or protected person, accept process issued by a court, a tribunal or a commission of inquiry and nominate an officer for the purpose.

**Avoidance of obligations by witness or protected person**

26. (1) If the Director of Public Prosecutions is satisfied that a witness or protected person who has been provided with a new identity under the Program is using the new identity to avoid -

- (a) obligations which were incurred before the new identity was provided; or

- (b) complying with restrictions which were imposed on the person before the new identity was provided,

the Director of Public Prosecutions shall give notice in writing, to the witness or protected person stating that he is so satisfied.

(2) The notice shall also state that, unless the witness or protected person satisfies the Director of Public Prosecutions that the obligations will be dealt with according to law or the restrictions will be complied with, the Director of Public Prosecutions will take such action as he considers reasonably necessary to ensure that they are dealt with according to law or complied with.

(3) Such action may include informing a person who is seeking to enforce rights against the witness or protected person of the details of any property, whether real or personal, owned by the witness or protected person under his former identity.

### **Payment under the Program**

27. (1) The Director of Public Prosecutions may, at his discretion, certify in writing that the whole or part of an amount held by a witness or protected person represents payments made to the witness or protected person under the Program.

(2) An amount so certified cannot be confiscated or restrained, and cannot be applied in payment of pecuniary penalties, under any law.

### **Disclosures concerning a protected person**

28. A person who, without lawful excuse, discloses information -

- (a) about the identity or location of the person who is or has been a witness or protected person; or
- (b) which compromises the security of another person, commits an offence and is liable on conviction to imprisonment for a term not exceeding 7 years.

**Prohibition of false representation**

29. A person who, without prior written approval of the Director of Public Prosecutions, in connection with an activity carried on by him takes, assumes, uses or in any manner publishes a name, description, title or symbol conveying or purporting to indicate or convey or which is calculated or is likely to lead other persons to believe or infer that the activity is carried out under or by virtue of the provisions of this Act or on behalf of the Director of Public Prosecutions, commits an offence and is liable on conviction to a fine not exceeding 500,000.00 Maloti or imprisonment for a term not exceeding 3 years or both.

**Offences in connection with member of staff of the Director of Public Prosecutions**

30. A person, who -

- (a) not being the Director of Public Prosecutions or a member of staff of the Director of Public Prosecutions, by words, conduct or demeanor falsely represents himself to be the Director of Public Prosecutions or member of staff of the Director of Public Prosecutions;
- (b) exercises or attempts to exercise undue influence over the Director of Public Prosecutions or a member of his staff which is calculated to prevent the Director of Public Prosecutions or a member of his staff from carrying out their duties or encouraging them to perform an act which is in conflict with their duties; or
- (c) is an accomplice to the commission of an act where a - lawful order given to a member of staff or a regulation or directive or other rule may be evaded, commits an offence and is liable on conviction to a fine not exceeding 500,000.00 Maloti or imprisonment for a term not exceeding 3 years or both.

**Obstruction of member of staff of the Director of Public Prosecutions**

31. A person who assaults, resists or willfully obstructs a member of staff of the Director of Public Prosecutions or a person acting under the direction of

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that member of staff in the due execution of his duties under this Act, commits an offence and is liable on conviction -

- (a) for a first offence, to a fine not exceeding 1,000,000.00 Maloti or imprisonment for a term not exceeding 2 years; and
- (b) for a second or subsequent offence, to imprisonment for a term not exceeding 5 years.

### **Prohibition of access to premises under the control of the Director of Public Prosecutions**

32. (1) The Minister responsible for internal security may, on the request of the Director of Public Prosecutions, by notice in the Gazette or in any other manner as he may be necessary in the circumstances, prohibit or restrict access to land or premises under the control of the Director of Public Prosecutions.

(2) The Director of Public Prosecutions may take or cause to be taken measures as he may consider necessary for the security, or the application of, a prohibition of or a restriction on access to land or premises referred to in subsection (1), and may in connection with measures taken cause notices to be published or warning notices to be erected as he may, in each particular case, consider necessary.

(3) A person who enters upon or is on land or premises in contravention of a prohibition or restriction under subsection (1) commits an offence and is liable on conviction to a fine of not less than 500,000.00 Maloti, or imprisonment for a term not exceeding three years or both.

### **Prohibition on disclosure without consent**

33. (1) A person shall not, without the written consent given by or on behalf of the Director of Public Prosecutions, publish or disclose to another person the contents of a document, communication or information which the Director of Public Prosecutions has not made public and which has come to the persons knowledge in the course of his duty or association with the Director of Public Prosecutions under this Act, or, having information which has been published or disclosed without the authority, publish or communicate that information to another person.

(2) The limitation on disclosure in this section shall not be construed to prevent the disclosure of a criminal activity by the Director of Public Prosecution or member of his staff.

(3) A person who contravenes the provisions of subsection (1) commits an offence and is liable on conviction to imprisonment for a term not exceeding ten years.

### **Disclosure by witness or protected persons and others**

34. (1) A person who is or was a witness or protected person or a witness considered for inclusion in the Program and who directly or indirectly discloses or communicates to another person -

- (a) the fact that he or a member of his family has entered into a witness protection agreement under section 7;
- (b) details of the witness protection agreement;
- (c) information relating to anything done by the Director of Public Prosecutions or a member of his staff under this Act; or
- (d) information about any member of staff gained by the person as a result of anything done under this Act,

commits an offence and is liable on conviction to imprisonment for a term not exceeding 10 years.

(2) This section shall not apply to a disclosure or communication which -

- (a) has been authorised by the Director of Public Prosecutions;
- (b) has been determined by the Director of Public Prosecutions for purposes of investigation; or
- (c) is necessary to comply with an order of the High Court.

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(3) For the purposes of subsection (1), a person is a witness considered for inclusion in the Program if -

- (a) the person is the subject of consideration under section 5 for inclusion in the Program, even if the Director of Public Prosecutions subsequently decides not to include that person; or
- (b) the person is a witness included in the Program temporarily under section 5.

### **Non-compellability of witness**

35. Except as otherwise provided by an order of the High Court, the Director of Public Prosecutions or a person who acquires knowledge or information as a result of an association or connection, duty or service with the Program, shall not be compellable, in proceeding in a court, tribunal or commission of inquiry, to produce any document or to divulge or communicate a matter or a thing related to the exercise of functions under this Act or the protection of witness included in the Program.

### **Protection of witnesses**

36. (1) No action or proceeding, including a disciplinary action, may be instituted or maintained against a witness in respect of -

- (a) any assistance given by the witness to the court, law enforcement agency or Director of Public Prosecutions;
- (b) a disclosure of information made by the witness to the court or to a law enforcement agency or Director of Public Prosecutions.

(2) Subsection (1) does not apply with respect to a statement made by a witness who did not believe it to be true.

(3) No person shall be required to identify or provide information that may lead to the identification of a witness who assisted or disclosed information to the court, law enforcement agency or the Director of Public Prosecutions.

(4) In any proceedings before a court, the court shall ensure that information that identifies or may lead to the identification of a person who assisted or disclosed information to the court, law enforcement agency or the Director of Public Prosecutions is removed or concealed from any documents to be produced or inspected in connection with the proceedings.

(5) Subsections (3) and (4) shall not apply to the extent determined by the court to be necessary to ensure that justice is fully done.

### **Immunity from legal proceedings**

37. No person shall be liable to any action, claim, suit or demand whether criminal or civil in respect of anything done or omitted to be done by him in good faith in the exercise or purported exercise of a function conferred by or under this Act.

### **Delegation**

38. The Director of Public Prosecutions may delegate all or any of his functions under this Act, other than his power of delegation, to a member of his staff.

### **Non-disclosure of information**

39. (1) Except where authorised under this Act, a person shall not directly or indirectly disclose any information -

- (a) that reveals, or from which may be inferred, the location or a change of identity of a person that they know is a witness or protected person;
- (b) about the means and methods by which a witness or protected persons are protected, knowing that or being reckless as to whether the disclosure could result in substantial harm to any protected person; or
- (c) about the identity and role of a person who provides protection or directly or indirectly assists in providing protection, knowing that or being reckless as to whether the disclosure could result in substantial harm to that person, a member of that person's family, or a protected person.



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(2) For the purpose of subsection (1)(b), information about the means and methods by which a witness or protected persons are protected includes information about -

- (a) covert operational methods used to provide protection;
- (b) covert administrative methods used to support the provision of protection;
- (c) any means used to record or exchange confidential information relating to protection or used to gain access to that information; and
- (d) the location of facilities used to provide protection.

(3) Subsection (1)(a) does not apply to a -

- (a) a witness or protected person who discloses information about himself; or
- (b) person who discloses information that was disclosed to them by a witness or protected person,

if the disclosure could not result in substantial harm to any other protected person.

(4) A person who contravenes subsection (1) commits an offence and is liable -

- (a) on conviction on indictment, to a fine not exceeding 50,000 Maloti or to imprisonment for a term not exceeding 5 years or to both; or
- (b) on summary conviction, to a fine not exceeding 5,000 Maloti or to imprisonment for a term not exceeding 2 years, or both.

**Establishment of designated program**

40. There shall be a designated program, to be administered by an official designated by the Director of Public Prosecutions, to protect a person who may provide material information or evidence relating to the commission of an offence.

**Disclosure of information by Director of Public Prosecutions**

41. (1) The Director of Public Prosecutions may disclose information to the relevant authority that relates to a witness or protected person for the purpose of providing protection to him or of facilitating a change of identity for him, if -

- (a) the protected person consents to the disclosure or has previously made such a disclosure or acted in a manner that results in such a disclosure;
- (b) the Director of Public Prosecutions has reasonable grounds to believe that the disclosure is essential for the purposes of the administration of justice, national security, national defence or public safety, including -
  - (i) investigating a serious offence if there is reason to believe that the protected person can provide material information or evidence in relation to, or has been involved in the commission of the offence;
  - (ii) preventing the commission of a serious offence;
  - (iii) establishing the innocence of a person in criminal proceedings; or
- (c) the disclosure is made in accordance with an agreement or arrangement entered into in terms of this Act.

(2) The Director of Public Prosecutions shall only make a disclosure under subsection (1) that relates to a current or former witness or protected person if, in the opinion of the Director of Public Prosecutions, the urgency of the

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situation requires the disclosure.

(3) The Director of Public Prosecutions may make a disclosure described in subsection (1) that relates to the Program or a person associated with the Program if the Director of Public Prosecutions has reasonable grounds to believe that the disclosure is essential for the purposes of administration of justice, national security, national defence or public safety.

(4) The Director of Public Prosecutions shall, before making a disclosure under subsection (1) notify the witness or protected person and allow him to make representations concerning the matter.

(5) Subsection (4) does not apply if, in the opinion of the Director of Public Prosecutions, the notification will impede the investigation of an offence, could compromise national security, national defence or public safety or can result in substantial harm to any other witness or protected person or to any person providing protection or directly or indirectly assisting in providing protection.

(6) The Director of Public Prosecutions shall notify the designated official of a disclosure -

- (a) under subsection (1) that relates to a current or former designated program witness or protected person before the disclosure is made; or
- (b) referred to in subsection (2) as soon as is feasible after making it, if it was made on the basis of the urgency of the situation.

### **Disclosure of information by designated official**

42. (1) A designated official may make a disclosure described in section 41(1) and (2) that relates to a designated program witness or protected person for the purposes of providing protection to him if -

- (a) the current or former designated program witness or protected person consents to the disclosure or has previously made such a disclosure or acted in a manner that results in such disclosure;

- (b) the designated official has reasonable grounds to believe that the disclosure is essential for the purpose of the administration of justice, national security, national defence or public safety, including -
  - (i) investigating a serious offence if there is a reason to believe that the current or former designated program protected person can provide material information or evidence in relation to, or has been involved in the commission of the offence;
  - (ii) preventing the commission of a serious offence; or
  - (iii) establishing the innocence of a person in criminal proceedings; or
- (c) the disclosure is made in accordance with an agreement or arrangement entered into in terms of this Act.

(2) A designated official may make a disclosure described in subsection (1) that relates to the designated program or to a person associated with it if the official has reasonable grounds to believe that disclosure is essential for the purpose of the administration of justice, national security, national defence or public safety.

(3) The designated official shall, before making a disclosure notify the current or former designated program witness or protected person and allow him to make representation concerning the disclosure.

(4) Subsection (3) does not apply if, in the opinion of the designated official, the notification will impede the investigation of an offence, compromise national security, national defence or public safety, or will result in substantial harm to any other protected person or to any person providing protection or directly or indirectly assisting in providing protection.

### **Disclosure of information by other parties**

43. A party, other than the Director of Public Prosecution or a designated official, who has entered into an agreement or arrangement in terms of this Act

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may make a disclosure in accordance with the agreement or arrangement.

### **Factors to be considered in determining whether to make a disclosure**

44. The following factors shall be considered in determining whether to make a disclosure -

- (a) the reasons for the disclosure;
- (b) the danger or adverse consequences of the disclosure in relation to a person and the integrity of the Program or designated program;
- (c) the likelihood that the information will be used solely for the purpose for which the disclosure is made;
- (d) whether the need for the disclosure can be effectively met by another means; and
- (e) whether there are effective means available to prevent further disclosure of the information.

### **Prohibited disclosures**

45. (1) A person to whom information is disclosed in terms of this Act shall not disclose that information to anyone else.

(2) A person may, for the purpose of providing protection to a witness or protected person or of changing an identity of a designated program witness or protected person, disclose that information to the extent that is necessary to give effect to request of the Director of Public Prosecutions that is made for that purpose.

(3) A person may, for the purpose of providing protection to a designated program witness or protected person, disclose that information to the extent that is necessary to give effect to a request of a designated official that is made for that purpose.

(4) Where a disclosure described in subsections (2) and (3) is made to a court, the court shall take any measures that it considers necessary to ensure

that the information remains confidential.

(5) A court may make a disclosure described in subsection (4) for the purpose of preventing a miscarriage of justice, but in doing so it shall disclose only the information that it considers necessary for that purpose and shall disclose the information only to persons who require it for that purpose.

### **Informer privilege**

46. Informer privilege under the common law shall prevail over any authority to disclose information provided under this Act and shall be governed, among others, by the following principles, namely, that -

- (a) the informer privilege prohibits the disclosure of the identity of an informer;
- (b) the informer privilege is a class privilege and presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation;
- (c) the protection is almost absolute and cannot be balanced against other interests of justice;
- (d) the protection must take the form of blanket confidentiality;
- (e) the informer privilege applies to oral and documentary evidence in both criminal and civil proceedings;
- (f) the judge has no discretion on the application of the privilege but only has discretion on the measures of how it is protected;
- (g) the privilege is jointly shared between the source and Crown and consent is required from both parties before waiver can be effected;
- (h) the informer privilege protects names and information that tend to reveal the identity of the informer;

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- (i) the informer privilege includes any information that narrows the pool of those who have the same characteristics as the informer;
  - (j) where the status of privilege is uncertain, the presumption must always be that it applies;
  - (k) where a judge finds that privilege exists, the protection becomes absolute and no disclosure of identity is permitted; and
  - (l) the informer may be granted any other privilege which the Court, the Director of Public Prosecutions or law enforcement agency considers necessary.

### **Claim relating to new identity**

47. A person shall not be liable or otherwise be punished for making a claim that the new identity of a witness or protected person, whose identity has been changed as a consequence of the protection provided under the Program or under a designated program, is and has been the only identity of a witness or protected person.

### **Claim relating to providing protection**

48. A person who provides protection or directly or indirectly assists in providing protection under the Program shall not be liable or otherwise punished for making a claim that they do not -

- (a) provide or assist in providing protection; or
- (b) know a witness or protected person or know that a person is a protected person.

**Agreements and arrangements with other parties relating to admission into the program**

49. (1) The Director of Public Prosecutions may enter into an agreement with -

- (a) a law enforcement agency to enable a witness who is involved in activities of the law enforcement agency to be admitted to the Program; and
- (b) any appropriate authority in order to obtain documents and other information that may be required for the protection of a protected person.

(2) The Minister responsible for foreign affairs and international relations may, with the consent of the Minister, enter into a -

- (a) reciprocal arrangement with the government of a foreign jurisdiction to enable a witness who is involved in activities of a law enforcement agency in that jurisdiction; or
- (b) an arrangement with an International Criminal Court or international tribunal to enable a witness who is involved in activities of that court or tribunal,

to be admitted to the Program, but no such person may be admitted to Lesotho pursuant to any such arrangement without the consent of the Minister responsible for immigration.

**Agreements or arrangements with Government ministries and agencies**

50. (1) The Director of Public Prosecutions may enter into an agreement or arrangement with one or more Government ministries or agencies regarding a disclosure that relates to a current or former witness or protected person.

(2) A designated official may enter into an agreement or arrangement with a government ministry or agency regarding disclosures described in subsection (1) that relate to a current or former designated program witness or protected person or designated program.



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(3) The Director of Public Prosecutions or designated official shall consider the factors set out in section 44 in determining whether to enter into an agreement or arrangement and in establishing its terms, the terms of which shall include the following terms -

- (a) a party is not permitted to make a disclosure unless, it is for a purpose that is essential for the administration of justice, national security, national defence or public safety and that is specified in the agreement or arrangement; and
- (b) the parties shall take whatever steps are necessary, including any steps specified in the agreement or arrangement, to protect information that is disclosed from being disclosed beyond what is strictly necessary in the circumstances.

(4) More than one government ministry or agency may be a party to a single agreement or arrangement entered into in term of this Act.

### **Delegation and designation by Director of Public Prosecutions**

51. The Director of Public Prosecutions may, either in general or in a case of a particular nature, delegate, in writing, any of his functions under this Act to the Commissioner of Police, a member of his staff within his administration or the Director General in the Directorate on Corruption and Economic Offences, other than his power of delegation and the power to -

- (a) determine whether to disclose information;
- (b) enter into an agreement or arrangement in terms of this Act;
- (c) determine whether to admit a witness to the program,
- (d) to change the identity of a witness or protected person; and
- (e) to terminate the protection provided to a witness or protected person,

and may at any time, in writing, withdraw that delegation.

### **Cooperation of Government ministries and agencies**

52. Subject to the confidentiality requirements imposed by this Act or any other law, Government ministries and agencies shall, to the extent possible cooperate or render such assistance as may be reasonably required, to the Director of Public Prosecutions and persons acting on his behalf in the administration of the program and of activities under this Act.

### **Existing agreements**

53. Every agreement in existence on the day on which this Act comes into force which was entered into by or on behalf of the Director of Public Prosecutions to provide protection to a person or entered into on behalf of the Government of Lesotho relating to the protection of persons shall, to the extent that it is consistent with this Act, be deemed to have been entered into under the relevant provisions of this Act and shall be governed by this Act.

### **Establishment of the Witness Protection Fund and finances of the Program**

54. (1) The expenditure of the program shall be charged on and issued out of the Consolidated Fund or paid out of the Fund in terms of subsection (2) or any other Act.

(2) Without prejudice to subsection (1), the Minister may, in consultation with the Minister responsible for finance, establish a fund which shall consist of -

- (a) funds appropriated by Parliament under subsection (1);
- (b) such grants, gifts, donations and bequests from such a lawful source as the Minister may approve, where the grants, gifts or donations are not made on condition that the Director of Public Prosecutions perform a function or discharge an obligation other than that specified under this Act.

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## **Accounts of the Fund**

55. The Director of Public Prosecutions shall keep and maintain proper books of accounts in respect of the Fund.

## **Records**

56. The Director of Public Prosecutions shall establish an accurate, efficient and effective system of records concerning any criminal history of persons provided protection in order to provide information under this Act.

## **Annual report**

57. (1) The Director of Public Prosecutions shall, not later than June each year, prepare and submit an annual report to the Minister on the operation and expenditure of the program during the previous fiscal year without compromising the confidentiality of the Program.

(2) The Minister shall cause a copy of the Report to be laid before both Houses of Parliament within two months after receipt of the report.

## **General offence and penalty**

58. A person who contravenes a provision of this Act where no penalty is set out commits an offence, and is liable on conviction to a fine of 50,000.00 Maloti or imprisonment for a term of 2 years or both.

## **Regulations**

59. (1) The Minister may, in consultation with the Director of Public Prosecutions, make regulations for the purpose of giving effect to provisions of this Act.

(2) Without limiting the generality of the regulations referred to in subsection (1), the Minister may make regulations -

- (a) specifying the types of information to be provided in respect of a witness who is being considered for admission to the Program;

- (b) in respect of the terms that shall be included in protection agreements or in any agreement or arrangements entered into in terms of this Act;
- (c) governing the procedures to be followed in order to involve a witness or protected person in legal proceedings; and
- (d) exempting the procurement for services, materials, supplies, and the renovation and construction of safe sites within existing buildings as may be required to maintain the security of a witness or protected persons and the integrity of the Program.

## GOVERNMENT NOTICE NO. 15 OF 2021

**Witness Protection Act, 2021****Statement of Objects and Reasons of the Witness Protection Act, 2021**

**(Circulated by the Authority of Minister responsible for justice and law  
Honourable Profesor Nqosa Mahao)**

The main object to this Bill is to make provision for the establishment of a witness protection program which is to be administered by the Director of Public Prosecutions or an official designated by him. The purpose of the Programs is to provide the protection, safety and welfare to witnesses in certain criminal proceedings who, unless protected, may not give evidence for fear of death, violence or serious injury by criminal interests likely to be affected by the proceedings. The Bill proposes terms of the agreement to be entered into between the Director of Public Prosecutions and witnesses or protected persons, government Ministries and law enforcement agencies. It empowers the parties to terminate the agreement in the event of a breach. The Bill proposes heavy penalties for the violations of its provisions.





