

RIGHTS OF ARRESTED AND DETAINED PERSONS



A person may not be arrested unless the police have a reasonable suspicion that a crime was committed or is about to be committed (s16 of Constitution, s22 of Criminal Procedure and Evidence Act).

The police must inform an arrested person of the reason for the arrest and of the right to legal representation. The police must either charge arrested persons with an offence or release them. The police cannot force arrested persons to make any statement which may be used against them in court.

The police cannot use more force than needed during an arrest.



NOTE

Police may only arrest a person to bring them before a court to face charges. They cannot arrest a person to punish, frighten or humiliate them.

If a woman is arrested, she may only be searched by another woman, in a dignified manner (s40 of Criminal Procedure and Evidence Act). The police may not remove someone's clothes during a search. All property (other than clothes worn), must be placed in safe custody at the police station.

Arrested persons have the right to ask that their family be told of their arrest and place of detention. During detention, police must allow reasonable access to medical treatment and allow arrested persons to call someone to bring the medication to them. During detention arrested persons must be kept apart from convicted persons and in conditions consistent with human dignity.

Arrested persons must be brought before a court without undue delay. If this is not complied with, the police must release them or explain why they are continuing to detain them after 48 hours of detention. It is a disciplinary offence if a police officer:

- Makes an unlawful or unnecessary arrest;
- Is involved in corrupt practices, including not accounting for money or property received in an official capacity;
- Is bad-mannered or discourteous to a member of the public.
- Uses violence or unnecessary force or intimidates any person;
- Inflicts or tolerates any act of torture or other cruel, inhuman or degrading treatment or punishment (s10 of the Police Service Act of 2018).

Any person has the right to open a criminal case, or to lodge a complaint against a police officer who treated them badly (s24 of Police Service Act of 2018). The complaint must first be raised with the National Commissioner, who must immediately attend to the complaint. If the complaint is not resolved, it can be taken to the Police Service Commission.

RIGHTS IN COURT



Magistrates' courts and traditional courts must protect accused persons' constitutional rights. The Constitution provides that every person is entitled to a fair and speedy hearing within a reasonable time (s21). Any person charged with a criminal offence has the right:

- To be presumed to be innocent until proven to be guilty;
- To be informed as soon as reasonably practicable, in a language they understand and in sufficient detail, of the nature of the offence or charge;
- Not to give evidence in court;
- To be provided with a court interpreter; and
- To appeal their case to a higher court.

RIGHTS WHEN ACCESSING HEALTH SERVICES



Every person has the right to access health services. Health care workers may not treat a person unfairly, or discriminate against a person for being a sex worker.

The 2013 National Policy on Sexual and Reproductive Health states that all persons, including sex workers, are entitled to adequate contraceptives. These should be equally available and accessible to all persons regardless of sex, gender, age, status, sexual orientation or religion. Any victim of rape is entitled to undergo an abortion and to post-abortion care.

A person who medically examines a victim of a sexual offence must do so in a manner that does not cause secondary trauma to the victim (s76 of SODV Act).

CONTACT DETAILS

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Know your rights SEX WORK AND THE LAW IN ESWATINI



WHAT IS SEX WORK AND WHO IS A SEX WORKER?

Sex work refers to sexual activities taking place between consenting adults in exchange for money.

Sex workers include female, male and transgender adults who receive money or goods in exchange for sexual services, either regularly or occasionally.

Sex work is not a crime and sex workers are not criminals.



The term "prostitution" is often stigmatised within society so here the term "sex work" is used.

WHAT DOES THE LAW SAY ABOUT SEX WORK IN ESWATINI?

LAW

Is sex work illegal?

The act of exchanging sex for money is not a criminal offence.

An outdated piece of law, the Crimes Act of 1889 is often used against sex workers. This law does not criminalise sex workers, but criminalises the act of loitering in public for the purpose of prostitution (s49). This offence violates sex workers' rights because it places the responsibility of a person accused of loitering to explain what they are doing. This is against the constitutional right to be presumed innocent. The offence is also problematic because it allows traditional courts to deal with the offence, which often means that the accused person's right to a fair hearing is not respected and the person is denied a lawyer. The offence may not be used as an excuse for police to abuse sex workers' rights.

The Sexual Offences and Domestic Violence Act (SODV Act) creates some offences relating to sex work, but does not criminalise sex workers or clients. The Act instead focuses on third parties who seek to benefit from the exchange of sexual acts between a sex worker and client:

- **Commercial sexual exploitation:** It is also an offence to, in exchange for financial or other reward, coerce a person (B) to engage in sexual acts with another person (C). In this case, the accused person (A) earns a benefit from arranging sexual acts between the victim (B) and another person (C) (s13 of SODV Act). It is further an offence to

promote commercial sexual exploitation (s14 of SODV Act).

- **Procuring prostitution:** It is an offence to procure a person to become a sex worker (s15 of SODV Act). This refers to a person who deliberately identifies persons, often based on their vulnerability, and manipulates them into becoming sex workers.
- **Benefitting from prostitution:** Where the accused person (A) did not arrange the sexual acts between two persons, or procure sex workers, but still financially benefitted from it, A is guilty of benefitting from prostitution (s16 of SODV Act).
- **Living from the earnings of prostitution:** Where the accused person (A) earns a living from controlling the work of a sex worker, A is guilty of living from the earnings of prostitution (s17 of SODV Act). E.g. pimps.

Keeping a brothel: It is an offence to own, control or manage a brothel (s18 of SODV Act). Persons found in the brothel can only be arrested for being "deemed to keep a brothel", if they refuse to disclose their identity and the identity of the owner or manager (s19 of the SODV Act).



The aim of these offences is to protect people from being forced into sex work, and to prevent sex workers from being exploited. THESE OFFENCES DO NOT APPLY TO SEX WORKERS THEMSELVES OR THEIR DEPENDENTS.

WHAT RIGHTS DO SEX WORKERS HAVE?

The Constitution says that all government officials, including police and health workers, must recognise and protect the human rights of all people. The Constitution specifically states that "all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law" (s20). The Constitution states that no person may be discriminated against or treated differently on the grounds of social standing (s20).

Constitutional rights apply to everyone, including sex workers.

Sex workers have the right to:

- Personal liberty (s16)
- Dignity (s18)
- Freedom from torture, inhuman or degrading treatment (s18)
- Equality (s20)
- Fair hearing (s21)
- Protection from arbitrary search (s22)
- Freedom of expression (s24)
- Freedom of association (s25)
- Privacy (s22)
- Freedom of movement (s26)

This means that:

- The police cannot arrest someone simply for being a sex worker or being associated with sex workers.
- The police cannot treat sex workers in an inhuman or degrading way.
- The police cannot search sex workers without a valid reason.
- The police cannot arrest sex workers for being in or moving through a certain area.
- The police cannot arrest sex workers without a reason or detain them without trial.
- The police cannot treat sex workers in a disrespectful, undignified or cruel manner.

RIGHTS OF VICTIMS OF VIOLENCE

Nobody may force a person to engage in a sexual act through coercive means, such as violence or threats of violence or through any other form of physical or psychological manipulation.

A victim of physical or sexual violence, has the right to complain to the police. Police cannot dismiss the allegation or blame or threaten to arrest a sex worker who is a victim of violence. The new Sexual Offences and Domestic Violence Act (SODV Act) specifically states that victims of sexual violence must be attended to properly:

- All sexual offence cases must be prioritised by the police (s192 of SODV Act).
- Police officers must inform victims of the availability of counselling and other support services, including Post-Exposure Prophylaxis (s73 of SODV Act).
- No person may force someone not to report a sexual offence or to withdraw a charge (s71 of SODV Act).
- The court cannot make a judgment about the credibility of a witness based on her sexual history (s51 of SODV Act).
- The court must take measures to protect victims' safety, physical and psychological well-being, dignity and privacy.