THE PROTECTION OF CHILD VICTIMS AND WITNESSES IN A POST-CONSTITUTIONAL CRIMINAL JUSTICE SYSTEM WITH SPECIFIC REFERENCE TO THE ROLE OF AN INTERMEDIARY: A COMPARATIVE STUDY

by

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Plagiarism declaration

I declare that “The protection of child victims and witnesses in a post-constitutional South African criminal justice system with specific reference to the role of an intermediary: a comparative study” is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

__________________

Mildred Bekink

Student no: 07922604
Abstract

It is common knowledge that owing to their particular vulnerability children worldwide falls prey to physical and/or sexual violence in the home and/or community or witness criminal acts. Consequently children are called upon to testify in a court of law to cruelties or acts of violence. As a result of their developmental shortcomings and immaturity, children find the criminal justice system extremely intimidating and challenging. The importance of realising a justice system that not only affords an accused person the right to a fair trial but also protects and safeguards the rights of the child victims of and witnesses to the crime is thus indisputable. The purpose of this research was therefore to assist the South African criminal justice system in its on-going challenge to find a balance between the right of the accused person to a fair trial and the protection and safeguarding of the rights of child victims and child witnesses. The protection and safeguarding of the rights of child victims and child witnesses in terms of the South African Constitution, applicable domestic law and international instruments relating thereto were extensively discussed and shortcomings identified. Possible solutions to ensure that child witnesses and child victims are adequately protected and supported during the trial stage of the criminal process were advanced. Particular emphasis was placed on the role of an intermediary in assisting child victims and child witnesses during the court process. Comparative research on the protection of child victims and child witnesses in the criminal justice systems of New Zealand and Namibia were also conducted. Conclusions drawn from comparative studies were used to recommend appropriate changes to the current system. It is submitted that the adequate protection and safeguarding of the rights of child victims and child witnesses are dependent not only on sound legal principles but also on governmental and other involved stakeholders’ commitment toward the realisation of these rights. In order to give proper effect to the protection and safeguarding of child victims’ and child witnesses’ rights, it is proposed that the recommendations made throughout this study should be adopted and implemented. In this regard the role of an intermediary is crucial and the use of intermediaries should be promoted.
Key terms

Protection of child victims and child witnesses; post constitutional South African criminal justice system; accusatorial criminal justice system; inquisitorial criminal justice system; constitutional protection of child victims and child witnesses; children’s rights; protection of child victims and child witnesses in international law; State obligations; section 170A of the Criminal Procedure Act; intermediary; intermediary system; CCTV and other electronic mediums, secondary victimisation.
# List of abbreviations and acronyms

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<tr>
<td>AUT</td>
<td>Auckland University of Technology</td>
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<td>CARSA</td>
<td>Child Abuse Research in South Africa</td>
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<td>CILSA</td>
<td>Comparative and International Law Journal of South Africa</td>
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<td>CLR</td>
<td>Criminal Law Review</td>
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<td>CRC</td>
<td>UN Convention on the Rights of the Child</td>
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<td>GC</td>
<td>General Comment (of the UN Committee on the Rights of the Child)</td>
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<td>Guidelines</td>
<td>UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime</td>
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<td>IYC</td>
<td>International Year of the Child</td>
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<td>LJ</td>
<td>Law Journal</td>
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<td>LR</td>
<td>Law Review</td>
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<td>NGO</td>
<td>Non-governmental Organisation</td>
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<td>NPAC</td>
<td>National Programme of Action for Children</td>
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<td>NZLJ</td>
<td>New Zealand Law Journal</td>
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<td>OAU</td>
<td>Organisation of Africa Unity</td>
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<td>PER</td>
<td>Potchefstroom Electronic Law Journal</td>
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<td>PULP</td>
<td>Pretoria University Law Press</td>
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<td>Acronym</td>
<td>Description</td>
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<td>RSA</td>
<td>Republic of South Africa</td>
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<td>SACJ</td>
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<td>SACC</td>
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<td>SAJHR</td>
<td>South African Journal on Human Rights</td>
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<td>SAPS</td>
<td>South African Police Service</td>
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<td>Stell LR</td>
<td>Stellenbosch Law Review</td>
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<td>THRHR</td>
<td>Journal of Contemporary Roman Dutch Law</td>
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<td>UN</td>
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CHAPTER 1

Introduction

Until recently, the law did not pay much attention to the stress that child complainants ... suffer when they testify in courts. Child complainants ... were required to relive the horror of the crime in open court. The circumstances under which they gave evidence and the mental stress or suffering they went through while giving evidence did not appear to be the concern of the law. And, at times, they were subjected to the most brutal and humiliating treatment by being asked to relate the sordid details of the traumatic experiences that they had gone through. Regrettably, although there were welcome exceptions, the plight of child complainants was seldom the concern of those who required them to testify or those before whom they testified.¹

PROBLEM STATEMENT

1.1 Background

One of the fundamental objectives of an effective justice system is not only to afford an accused person the right to a fair trial, which includes the right to adduce and contest evidence, but also to protect and safeguard the rights of the victims of and witnesses to the crime.² The challenge for any criminal justice system is therefore to enable the accused person to exercise the right to contest evidence while

¹ Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC) at para [1] (hereinafter DPP v Minister of Justice and Constitutional Development).

² In terms of section 35(3)(i) of the Constitution of the Republic of South Africa, 1996 every accused person has the right to a fair trial, which includes the right to adduce and contest evidence.
Introduction

simultaneously protecting the rights of witnesses. Where the victims and witnesses comprise a vulnerable group, namely children, it is imperative that their rights be zealously protected and that they should not be exposed to the negative effects of such a criminal justice system or further victimised by the very system put in place to protect them. It is however common knowledge that the rights of children have not been adequately recognised in the past and that many legal systems have failed to fulfil this objective. Prior to the 1980s very few countries in the world recognised children’s unique characteristics, such as their innocence, naivety, lack of maturity, language and cognitive development, in relation to those of adults. The need for an individualised approach when dealing with child victims and child witnesses in the criminal justice system was not acknowledged. Instead, the focus was mainly on whether children were competent to give evidence and whether they were reliable and credible witnesses. Even though children between the ages of seven and fourteen were deemed fit to give evidence, they were not afforded special protection nor were they specifically accommodated when interfacing with the justice system. Instead, they had to face endless delays, multiple interviews, formal procedures, evidentiary difficulties and an adult orientated system. The emphasis was placed

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3 Department of Justice and Constitutional Development: The South African Service Charter for Victims of Crime (2004) (hereinafter referred to as the Victims’ Charter) defines a “victim” as a person who has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights through acts or omissions that are in violation of our criminal law. “Victims” include, where appropriate, the immediate family or dependants of the direct victim. A person may be considered a victim regardless of whether the perpetrator has been identified, apprehended, prosecuted or convicted and regardless of the familial relationship between perpetrator and victim. “Victim” includes everyone, without prejudice of any kind on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. For the purposes of this study the concept of victim/complainant encompasses the term witness and the terms will be used interchangeably. It is however acknowledged that not all witnesses are direct victims of crime, but may be defined in terms of the above-mentioned definition as such, owing to the fact that they were witnesses to a crime and thus suffered emotional or mental harm. This definition is in line with the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985. It is of significant importance to understand who would be regarded as a victim as this informs who has standing to seek protection, support and redress.


on the child’s responsibility as victim and/or witness to assist the criminal judicial system, with little attention being afforded to children’s needs.\textsuperscript{6}

This is also true of the child witness in the South African criminal justice system. In the case of \textit{DPP v Minister of Justice and Constitutional Development},\textsuperscript{7} dealing with the rights of child victims and child witnesses, the Constitutional Court acknowledged that in the past South African law did not pay much attention to the anxiety and stress that child victims and child witnesses suffer when entering the criminal justice system, especially while testifying. Children were required to relive the horror of the crime in open court, were subjected to brutal and humiliating treatment when asked to relate the (often embarrassing and intimate) details of the traumatic experience and suffered severe mental stress.\textsuperscript{8} Children had to suffer the additional ordeal of having to present their evidence in the presence of the accused. The adversarial nature of the South African court procedure, with its confrontation and cross-examination of witnesses, did little to improve the plight of these children.\textsuperscript{9} Add to this the fact that the courtroom is an alien environment with an extremely intimidating atmosphere, where the key figures (often only men) wear black gowns, it can come as no surprise that children were simply terrified into silence.\textsuperscript{10}

In the last twenty years, however, South Africa has transformed itself into a fully democratic and egalitarian state. The constitutional system that was established with the enactment of first the interim Constitution in 1993\textsuperscript{11} and thereafter the final Constitution in 1996,\textsuperscript{12} has transformed the legal order in South Africa to a large extent. The Constitution has also changed the plight of children. The Constitution

\textsuperscript{6} Bala “Double victims: child sexual abuse and the Canadian criminal justice system” 1990 \textit{Queen LJ} 3; Van der Merwe “Children as victims and witnesses” in Boezaart (ed) \textit{Child Law in South Africa} (2009) 563.

\textsuperscript{7} 2009 (2) SACR 130 (CC) at para [1].

\textsuperscript{8} \textit{DPP v Minister of Justice and Constitutional Development} 2009 (2) SACR 130 (CC) at para [1].

\textsuperscript{9} Müller & Tait “Little witnesses: a suggestion for improving the lot of children in court” 1999 \textit{THRHR} 241 at 242.

\textsuperscript{10} Department of Justice and Constitutional Development \textit{Draft Discussion Document on Intermediaries} (2008).

\textsuperscript{11} Constitution of the Republic of South Africa 200 of 1993.

\textsuperscript{12} Constitution of the Republic of South Africa, 1996.
specifically recognises that children are a vulnerable group within society, have specific and unique needs and deserve special individualised protection. Their rights are recognised as a separate group in the Constitution. In accordance with these interests, section 28(2) of the Constitution requires that in all matters concerning the child, a child’s best interests are of paramount importance. Apart from the protection afforded to children in section 28 of the Constitution, children are also entitled to all the rights incorporated in the Bill of Rights such as the right to human dignity, equality and freedom.

Any judicial system involving children should accordingly, as a primary objective, strive to strike a balance between the protection of the rights of child victims and child witnesses, without compromising the constitutional rights of the accused. A central question/theme presented in this study is therefore whether the provisions of the applicable law, the judicial process and the support systems that relate to the protection afforded to child victims and child witnesses while testifying in criminal proceedings are constitutionally sound and in line with developments in international law.

This is of significant importance as contemporary research studies conducted on the victimisation of children in South Africa show that South African children in particular experience and witness exceptionally high levels of crime. The incidence of child rape and sexual assault upon minors, for example, has reached horrific proportions. Alarmingly, these studies also indicate a trend towards a decrease in

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13 In terms of s 28(3) of the Constitution, 1996 a child means a person under the age of 18 years. Any reference hereinafter to the Constitution will be to the 1996 Constitution.
14 See s 28 of the Constitution.
15 With the exception of those rights that are expressly restricted to adults, eg the right to vote and to seek public office (s 19(3) of the Constitution).
17 The role of intermediaries in particular, which is central to the theme of this thesis, is emphasised.
18 Conradie & Tafana “Adjudication of child victims of rape and indecent assault in Gauteng” 2005 CARSA 3. A study in the World Health Organization Bulletin released in August 2013 indicated that the rate of child homicide in South Africa is more than double the global average. The study “The epidemiology of child homicides in South Africa” was based on 2009 statistics.
the age of these victims while the use of brute force directed against them is escalating.\textsuperscript{19} Population-based prevalence studies show that the most common forms of violence against children reported in South Africa are physical and sexual violence in the home and community.\textsuperscript{20} The reality is that at a time when children should be carefree and their days should be filled with play and fun in a secure and nurturing environment, in many areas children are even at risk when walking to school. These children have to be transported to school in order to protect them from criminal elements.\textsuperscript{21} In this regard black and coloured South African children in the townships and young women in particular are predominately the victims of such events.\textsuperscript{22}

Although the underlying causes of violence are complex, it is thought to be rooted in the colonial past and is part of the legacy of apartheid, which normalised the social acceptance of violence. In addition, widespread poverty, inequality and high levels of unemployment combined with rapid urbanisation, inadequate housing and poor education outcomes all contribute to the social dynamics that encourage violence.
Further, apartheid has had a profound effect on family life in that the migrant labour system created an environment where large numbers of fathers were largely absent from the lives of their children.\textsuperscript{23} This is compounded by patriarchal notions of masculinity that support the use of violence and risk taking, all of which contribute to the high levels of violence in South Africa.\textsuperscript{24}

If the offenders are apprehended, these child victims and witnesses have to appear in court to face the perpetrator(s) – a daunting experience. It therefore comes as no surprise that statistics indicate that children with increasing frequency represent a significant portion of the victims and witnesses that have to appear in court to testify about these crimes.\textsuperscript{25} Despite this, existing evidence suggests that the conviction of perpetrators in matters of this nature remains problematic.\textsuperscript{26}

This can be attributed inter alia to the complexity of dealing with child witnesses in the criminal justice system. Child victims and child witnesses find the criminal justice process very difficult because of their developmental shortcomings and lack of maturity. They experience extreme apprehension while waiting for the trial and more often than not the process of testifying about the alleged criminal events in adversarial courts results in significant mental stress and suffering.\textsuperscript{27} Children are

\begin{itemize}
  \item Sadan & Mathews “Adopting a violence prevention approach: Shifting from policies and plans to implementation” in Mathews \textit{South African Child Gauge 2014} (2014) 1 at 80.
  \item Recent crime statistics indicate the extent of violence in South Africa. Unfortunately, although certain categories such as homicide and sexual assault are routinely reported, the statistics were not disaggregated for children in 2012/2013 and 2013/2014 as was the case in 2011/201. South Africa thus lacks national empirical data on the extent and range of the problem. A study conducted by the Centre for Justice and Crime Prevention at the University of Cape Town’s Department of Psychology and its Gender, Health and Justice Research Unit provides some estimates on the prevalence of violence against children. This study was conducted by way of interviews with 9730 adolescents between the ages of fifteen and seventeen years and revealed that one in five of the adolescents has experienced some form of sexual abuse while one in three reported experiencing physical abuse. With regard to other forms of violence, 21% reported exposure to family violence, 44.5% had experienced theft, 26.2% had been robbed, 21.4% had been threatened with violence and 15.9% had been attacked with a weapon. See Burton et al \textit{Research Bulletin: Optimus Study on Child Abuse, Violence and Neglect in South Africa} (2015).
  \item Conradie & Tafana 2005 \textit{CARSA} 3-18; Iyer & Ndlovu “Protecting the child victim in sexual offences: is there a need for separate legal presentation?” 2012 \textit{Obiter} 72 at 73-75.
  \item Centre for Child Law \textit{Justice for Child Victims and Witnesses of Crime} 3-5.
\end{itemize}
by their very nature ill-equipped to deal with this confrontational and adversarial setting and often suffer additional hardship or secondary victimisation\(^{28}\) when interfacing with the judicial process. Secondary victimisation or re-victimisation occurs not as a direct result of criminal acts, but through the responses of institutions and individuals to the victim.\(^{29}\) Secondary victimisation is the result of “unsympathetic, disbelieving and inappropriate responses that victims … experience at the hands of society in general and at each stage of the criminal justice process”.\(^{30}\) The devastating effect of, for instance, being a victim of abuse or sexual violation or witnessing such an act is sometimes exacerbated by the experience of the court procedure. This has been described by the Constitutional Court as follows:\(^{31}\)

A child complainant who relates in open court in graphic detail the abusive acts perpetrated upon him or her and in the presence of the alleged perpetrator, will in most cases experience undue stress or suffering. This experience will be exasperated when the child is subjected to intensive and at times protracted and aggressive cross-examination by the alleged perpetrator or legal representative. Cumulatively, these experiences will often be as traumatic and as damaging to the emotional and psychological well-being of the child complainant as the original abusive acts was.

\(^{28}\) Secondary victimisation has been defined by the United Nations in its United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse, 1985 (GA/RES/40/30) as “the victimisation that occurs not as a direct result of a criminal act, but through responses of institutions and individuals to the victim”. The guide also distinguishes two forms of secondary victimisation, namely institutional victimisation (through the policies and procedures of bodies such as government departments, community structures and the media that may fail, for example, to take into account the perspectives of the victim) and individual (through attitudes that inform the response and treatment of victims and may include disbelief of the victim’s account, blaming the victim and a lack of support services to assist the victim at the interpersonal, institutional and social levels.)

\(^{29}\) Ibid.


\(^{31}\) DPP v Minister of Justice and Constitutional Development at para [108].
The court-induced trauma suffered by child victims and witnesses has been described as the “second wound”. Some authorities believe that secondary victimisation by the criminal justice system may prove to be more traumatic to the child than the crime itself. In one instance, in a case concerning the rape of a fifteen-year-old girl, the girl burst into tears when forced to come face-to-face with her two alleged rapists in the courtroom. Her trauma was so extreme that she was not even able to answer the first question put to her. The anxiety experienced by children leads to their becoming uncooperative or unmotivated about testifying as to what took place or giving effective testimony; for example they may “forget” essential information or confuse events and details. This affects their credibility dramatically and sometimes leads to the misconception that children are not reliable witnesses. In addition, endless delays, inadequate court preparation, the lack of a recognised support person, independent representation or a guarantee of personal safety add to the problems experienced. The mere existence of these problems is indicative of the fact that current levels of protection do not adequately comply with section 28(2) of the Constitution, which provides that in all matters concerning the child, the child’s best interests are of paramount importance.

Without the necessary protection and support the whole experience of criminal proceedings will leave a permanent scar on these children as it impacts negatively on their development, behaviour and perception of their environment and their ability to function as individuals. It might even give rise to long-term psychological difficulties. This concern is shared by the judiciary, which has stated as follows:

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32 Clarke, Davis & Boosyen “A silver era for victims of crime: reassessing the role that victim impact statements can play in improving victim involvement in criminal justice procedures” 2003 Acta Criminologica 43.
33 Shiller & Spies “Development of a training programme for state prosecutors to address revictimisation of the sexually abused child during forensic procedures” 2006 CARSA 36.
35 Müller & Tait “A prosecutor is a person who cuts off your head: children’s perceptions of the legal process” 1997 SALJ 593.
36 Müller & Tait 1997 SALJ 593
38 Müller & Van der Merwe “Judicial Management in child abuse cases; empowering judicial officers to be the ‘boss in court’” 2005 SACJ 41.
It is a sad fact that there is much left to be desired in the present state of our criminal justice system and that, in many instances, neither the courts nor their supporting institutions succeed in giving due recognition to the paramountcy of children's interests.\textsuperscript{39}

In recognising child victims' and witnesses' vulnerability and with the aim of improving the experience for these children, several developments have taken place both nationally and internationally.

Developments at the national level include, apart from the advent of the interim and final Constitutions, a Victim's Charter,\textsuperscript{40} a National Programme of Action for Children of South Africa,\textsuperscript{41} amendments to existing national legislation\textsuperscript{42} and constitutional jurisprudence. These developments recognise the seriousness of the impact of crime on child victims and aim to promote equal enjoyment of constitutional rights and freedoms for both the offender and the victim of or witness to crime.

The introduction of the function of an intermediary by the insertion of section 170A(1) into the Criminal Procedure Act is one of the more important interventions in respect of the protection of child witnesses.\textsuperscript{43} The South African Law Commission (as it was then known) conducted an investigation into the effect of testimony by child witnesses in open court in 1989. The Commission came to the conclusion that children were severely traumatised by the adversarial criminal procedures followed. In an attempt to alleviate the effect of the accusatorial system on child witnesses

\textsuperscript{39} S v Mokoena 2008 (2) SACR 216 (T) at para [51].
\textsuperscript{41} National Programme of Action for Children of South Africa: Framework 31 May 1996.
\textsuperscript{43} Act 51 of 1977 ("the Criminal Procedure Act") as amended by the Criminal Law Amendment Act 135 of 1991 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
and to avoid direct confrontation between a child and an accused, the Commission recommended the introduction of the function of an intermediary into the criminal justice system.\textsuperscript{44}

An intermediary is a person specifically qualified to facilitate communication between the court and a child in a manner that is not only age-appropriate but also understandable to a child. The intermediary takes the child’s cognitive and developmental abilities into account when conveying the meaning and contents of the court’s questions to the child and acts as a “barrier or shield” between the formal justice system and the child, thus ensuring that the child’s rights are respected.\textsuperscript{45}

The efficacy of the intermediary system is, however, dependent on factors such as the presence of enabling legislation; the clarity and ease with which such legislation can be interpreted by judicial officers; the sensitisation of the courts to children’s rights and limitations; the acceptance of the importance of the role of an intermediary, and finally government’s commitment towards the proper implementation of enabling legislation. Despite the fact that the higher courts and prosecutors are very supportive of the intermediary system, preliminary indications are that huge systemic challenges exist within our criminal justice system, such as the discretionary threshold for eligibility,\textsuperscript{46} the limited role of intermediaries, the thin legislative criterion for the appointment of intermediaries, and financial and logistical problems that include the very availability of intermediaries.\textsuperscript{47} Although the


\textsuperscript{45} \textit{DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC)} at para [96].

\textsuperscript{46} In terms of s 170A of the Criminal Procedure Act the appointment of an intermediary is subject to the discretion of a judicial officer presiding over a criminal proceeding. The judicial officer has to determine whether the services of an intermediary are required based on an assessment of whether the child will suffer undue mental stress or suffering if the child testifies at such proceeding. This test or threshold for eligibility has been criticised for being too vague, too stringent and excluding many who might benefit, such as a complainant with little stress but serious communication difficulties. See \textit{S v Mokoena 2008 (2) SACR 216 (T)} at para [79]; Muller & Tait 1999 \textit{THRHR} 247-248. Refer also to para 3.1.4 of ch 5 below.

intermediary system has seen much improvement over the past fifteen years, in some instances it is still perceived as one of ad hoc service delivery of widely variable quality which may require serious government investment. An investigation into these factors will also form part of this study.

Internationally, the United Nations Economic and Social Council adopted the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime in 2005. These Guidelines were developed as a useful framework for member states in enhancing the protection of child victims and child witnesses in the criminal justice system, reaffirming the view that every effort must be made to prevent the victimisation of children. The Guidelines set out certain rights for these children, such as the right to be treated with dignity and compassion, to be protected from discrimination, to be informed, to be heard, to express views and concerns, to receive effective assistance, et cetera. The Guidelines also set international standards in order to ensure the recognition of the aforementioned rights and advocate that the criminal justice process should be typified with conduct performed by trained professionals in a child-sensitive manner with sufficient support measures in place. These Guidelines, together with other international and regional instruments that underwrite the importance of the protection of child victims and child witnesses of crime, fall within the ambit of this study.

In addition a comparative legal study will be conducted to determine whether lessons can be learned from other jurisdictions to be implemented in the South African context with a view to enhancing the plight of South Africa child victims and witnesses within the criminal justice system.

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49 Resolution 2005/20, 9 (hereinafter the Guidelines).

50 See paras [10]-[25].

51 Recently, the Constitutional Court in DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC) at paras [77] to [79] endorsed the use of the Guidelines in interpreting sections of the Criminal Procedure Act 51 of 1977 relating to child witnesses.
1.2 Research problem

The Constitution and various other statutes and international instruments stipulate that child witnesses and victims of crime should be protected and supported when entering and assisting with the judicial process. The purpose of this research is to discuss and critically evaluate the applicable law, the judicial process and the support systems that relate to the protection afforded to child victims and child witnesses in order to determine to what extent these provisions comply with constitutional values and the standards required by international instruments.

1.3 Purpose

The purpose of this study is to investigate whether child witnesses and victims of crime are afforded adequate support and protection in the South African criminal justice system when called upon to testify.

The starting point is therefore to investigate and evaluate the success of historical development regarding the introduction of the child witness into the criminal justice system. The positive law regarding child witnesses is discussed and shortcomings identified. Possible solutions to ensure that child witnesses and child victims are adequately protected and supported during the trial stage of the criminal process are advanced. Comparative research on the protection of child victims and child witnesses in the criminal justice system of New Zealand and Namibia is also conducted. Conclusions drawn from comparative studies are used to recommend appropriate changes to the current system.

\[52\] Refer to ch 1 para 2 hereof for an explanation of the relevance of New Zealand and Namibia as a comparative legal resource.
1.4 Significance

The field of study is extremely suitable for research, as it has been both nationally and internationally recognised that children suffer harm as a result of crime and may even suffer additional hardship when assisting with the judicial process and especially when presenting their evidence in an adversarial judicial system characterised by confrontation and cross-examination. It is furthermore common knowledge that tension exists between the rights of a victim and those of an accused and that the position of a victim, and particularly that of a child victim, is very often inferior to that of an accused. While the Constitution guarantees an accused distinctive protection, no such protection, except the general protection set out in section 28, is afforded to child victims and witnesses. The objectives of the study are therefore achievable.

It is envisaged that the position of the child witness and child victim in the criminal justice system will improve once recommendations based on this research have been made. These recommendations should address the various difficulties surrounding the child witness in the criminal justice system.

2 Research Method

54 See s 35 of the Constitution.
The research method that will be applied is an in-depth desktop literature study pertaining to the legal aspects surrounding child victims and witnesses in the South African criminal justice system. Legislation, judicial decisions, textbooks and legal journals will be consulted as well as Law Commission reports and reports on government initiatives.

The legal positivist method will be applied in that knowledge in the field of child victims and witnesses will be gathered through a process of observation and abstract systematisation of information.

The nature of the research problem further necessitates a historical research component. Positive and negative components in the South African legal system will be looked at and the changes over periods of time and the impact of these changes will be emphasised. However, the historical component of this thesis will only consist of a brief historical overview. An in-depth legal-historical approach is not envisaged as the purpose of the historical overview is to provide a context for the focus of the research.

A thorough legal comparison will be undertaken as it is anticipated that this research method will be of significant value. It can assist in providing new insights and knowledge, which may in turn give rise to suggestions for meaningful legal reform. The legal systems of New Zealand and Namibia as well as the principles and methods applicable in these countries will be examined. The comparative research presented belongs to the modernist school of the South African tradition of jurisprudence, which concentrates on Anglo-American legal systems, in contrast to

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55 See para 1 above.
57 Venter et al Regsnavorsing 215-217.
the purist school, which concentrates exclusively on Roman-Dutch and European or Continental legal systems.  

The legal systems of South Africa and New Zealand are very similar. Both countries are characterised by similar socio-economic circumstances and cultural diversity. New Zealand customary law, like that of South Africa, has an important influence on New Zealand positive law. The Children, Young Persons and Their Families Act 24 of 1989, which has incorporated the most far-reaching changes to the protection of children and young persons, provides a culturally sensitive approach to dealing with children, young persons and their families within the judicial process. In addition New Zealand faces similar challenges to those faced in South Africa with regard to child victims and witnesses within their judicial system. Some of the concerns include language barriers, excessive delays and inconsistencies in practice between courts.

The Namibian legal system is, like that of South Africa, characterised by legal pluralism. Its system is an amalgamation of constitutional law, Roman-Dutch common law, customary law and international law. Its legal sources and legal development could therefore provide valuable insights into the South African system. As Namibia is also a signatory to several African treaties, a study of Namibian law also enables legal comparison on a regional level. Both New Zealand law and Namibian law therefore provide a relevant basis for comparative legal research.

58 Ibid 81-83.
In this thesis various research methods are therefore used in order to find appropriate solutions that will ensure that children who are witnesses to and victims of crime are sufficiently protected and supported when presenting testimony within the judicial court process.

3 FRAMEWORK OF THE THESIS

In order to achieve the aim and the envisaged result of this thesis, chapter 2 will consist of a historical overview of the legal nature and development of the role of child victims of and witnesses to crime in Roman, Germanic, Roman-Dutch and South African law. The aim of this investigation is to determine how children were perceived in their role as victims and/or witnesses in each of these periods/systems. Were they regarded as competent witnesses? If so, under what circumstances were they required to give testimony and to what extent were they afforded protection in the respective systems? This conclusion has important implications for the rest of the study. It is especially relevant when the legal nature and the development of the role of child victims of and witnesses to crime in the current South African system are evaluated. The historical overview has the further purpose of clarifying past instances of insufficient protection of such children with a view to suggesting improvements to the current system.

Chapter 3 will consist of an overview of the South African criminal procedure system. South African criminal procedural law is based on the accusatorial system and the effect of this system on child victims and child witnesses will be discussed. The aim of this investigation is to evaluate certain specific elements of the accusatorial system that play an important role when children present their testimony, such as a passive presiding officer, oral evidence, two opposing parties, confrontation and cross-examination, as it is precisely these elements that create difficulties for

62 See ch 1 paras 1 & 2 above.
children. Closely related to these elements are certain rules of evidence which have a pronounced influence on the evidence of children, namely the testimonial competence of children, cautionary rule and hearsay evidence. These elements of the accusatorial system will be evaluated from the perspective of children with a view to highlighting possible shortcomings and suggesting ways to improve the system. Comparisons with the inquisitorial system will also be made to determine whether this system offers alternative routes by which to obtain the best evidence from children.

Children’s rights in South Africa have undergone a significant change since the enactment of a democratic constitutional legal order, as well as South Africa’s ratification and adoption of principal international instruments protecting the rights of children. Chapter 4 consists of an overview of the protection of child victims and child witnesses in terms of the Constitution of South Africa and international instruments. The aim of the chapter is to evaluate the rights of child victims and child witnesses encompassed in the Constitution and international instruments in order to determine whether the current protection afforded to child victims and child witnesses while testifying in criminal proceedings in South Africa is in line with South Africa’s constitutional and international obligations. Emphasis will accordingly be placed on the constitutional and international obligations relating to the protection of child victims and child witnesses while testifying in criminal proceedings. In line with the focus of this study, the role of intermediaries in the realisation of these rights has also received special attention.

Chapter 5 consists of an in-depth discussion of the intermediary system in South Africa. The historical background to the introduction of the persona of an intermediary will be discussed briefly, after which an analysis of the intermediary system will be conducted. Possible measures to enhance the intermediary system will be considered where relevant.
Chapters 6 and 7 consist of an analysis of the intermediary systems in Namibia and New Zealand respectively. Namibia and New Zealand share certain aspects of criminal justice with South Africa, such as an accusatorial criminal justice system and high levels of crime. These two countries are also signatories to key international instruments, for example the Convention on the Rights of the Child (CRC). The chapters are therefore important since they provide a comparative perspective on how Namibia and New Zealand meet their national and international obligations with regard to the protection of the rights of child victims and child witnesses within their respective jurisdictions. Shortcomings and valuable features in the respective jurisdictions are considered with a view to enhancing the South African position.

Chapter 8 presents a conclusion on South Africa’s position in line with the Constitution and international obligations as well as in relation to the position in Namibia and New Zealand. Recommendations on the successful operation of the intermediary system in South Africa are made.
CHAPTER 2

The historical background of the South African criminal justice system and the role of child witnesses and child victims within the system

“I was ... being carried on my father's shoulders and I saw it [the execution by burning]”. His judicial colleagues replied, “You were then a child, and the evidence of a child is inadmissible”.¹

1 INTRODUCTION

Throughout most of legal history very little is known about children's involvement in criminal proceedings. This could possibly be attributed to the fact that until very recently children were not regarded as important or as bearers of their own rights. Quite the contrary, early evidence indicates that children's evidence was inadmissible as they were deemed to be incompetent witnesses. Early canon law prohibited children from giving evidence unless they had reached the age of puberty.² This practice continued throughout most of the Middle Ages,³ with children younger than fourteen years of age being excluded from giving evidence at trials. The practice has its roots in Christian theology, which held that people were born evil and only became civilised through age and instruction by adults. Eventually the common law developed, allowing children of seven or more to testify, provided it

² Collins & Bond “Youth as a bar to testimonial competence” 1953 Arkansas LR 100-107. The average age of puberty was set at 12 years for girls and 14 years of age for boys. See Bullough “Age of consent: a historical overview” 2005 Journal of Psychology and Human Sexuality 25 at 29.
³ AD500-1000.
could be demonstrated that they understood the nature of an oath.\textsuperscript{4} Today a child’s right to testify is no longer subject to a specific fixed age, but is determined on a case-by-case basis subject to the child’s being able to take an oath or make an affirmation or having been admonished to speak the truth.\textsuperscript{5}

In order to form a more extensive picture of the evolution of the child witness’s and child victim’s right to protection in the criminal justice system, it is necessary to undertake a brief examination of the development of South African criminal law from Roman, Roman-Dutch and English law into our present system. This gives us some insight into how crime was dealt with in different periods and what role witnesses and victims played in these periods. Where historical evidence is available, the role of child witnesses and child victims will be discussed. A brief discussion of the relevant periods and the criminal system that prevailed at the respective times is thus presented.

2 \hspace{1cm} \textbf{OVERVIEW}

South African criminal law evolved out of a combination of different legal systems, its oldest source being the classical law of Rome (753 BC-AD 565), followed by the laws and customs of the Germanic people inhabiting Western Europe after the fall of Rome (c AD 600). The system of criminal law that developed during this period (600-1500) was influenced by the Catholic Church’s emphasis on the moral and ethical values of the Judeo-Christian religious beliefs and the rediscovery by certain scholars of Emperor Justinian’s lost compilations of Roman law. The following period (1500-1750) saw the emergence of distinctive systems of criminal law owing to the materialisation of distinct political states. Two of the systems that are of particular importance in this study are the law of England and what is referred to as

\textsuperscript{4} Perry & Wrightsman \textit{The Child Witness} 38.

\textsuperscript{5} See s 164 of the Criminal Procedure Act 51 of 1977. This implies that a child still needs to be able to differentiate between a truth and a falsehood. See also ch 3 para 2.6.1 below.
Roman-Dutch law. Roman-Dutch law was exported to South Africa in the seventeenth century and was later greatly influenced by English law in the nineteenth century. This mixed system came to be recognised as the distinctive South African criminal law system.

2.1 Early origin

Criminal law has its origin in the human instinct to exact vengeance and retaliate against those who have inflicted hurt, pain, suffering or injury on one. In primitive societies, individuals who suffered harm in turn inflicted harm or injury on the original wrongdoer. Private vengeance tended to escalate into a sort of private warfare as families, clans and even tribes were drawn into retaliation and counter-retaliation. In time societies became more civilised and demanded that feuding should no longer be allowed. Private vengeance was replaced with alternative forms of compensation for the victims of harm (such as pecuniary compensation) until a stage of publicly administered punishment prevailed. In short, the history of criminal law systems involves the story of how societies managed to replace systems of private vengeance with state punishment.

2.2 The Roman contribution

According to legend, Rome was founded seven and a half centuries before the birth of Christ, but only three centuries later, in approximately 450 BC, did the first written code of Roman law appear in the form of the “Twelve Tables”. It was a primitive law evolved in a province of the Netherlands known as Holland – hence the name “Romeins-Hollandse reg”.


Ibid.
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codification of the common law for a primitive society. It marked a division between law and religion and most offences (including some which are today regarded as public wrongs) were treated as private wrongs or delicts. Wrongs such as theft or assault led only to private actions to which civil remedies applied.\textsuperscript{10} Although the Twelve Tables was essentially a system of self-redress, it remarkably featured devices for regulating or deflecting simple revenge. Where victims of harm were allowed to take personal revenge against a wrongdoer, the degree of retaliation was determined by the principle of \textit{talisio}, requiring that the vengeance should be proportionate to the harm suffered. In addition the Twelve Tables provided that vengeance could be avoided by making a payment to the victim, the amount of which was specified in the Twelve Tables. In essence Roman “criminal law” at this time was really a law of penal actions.\textsuperscript{11}

Initially “criminal proceedings” were held in public before a magistrate who conducted the whole investigation of the case. It was only during the period of the late Republic (about 149 BC) that criminal courts were established to suppress corruption, extortion and other abuses by provincial magistrates. These courts were termed \textit{questiones perpetuae} and were composed of a magistrate and a jury. They were created by specific statutes for specific offences, for instance the \textit{quaestio de sicariis et veneficis} to try charges of murder by violence or poisoning.\textsuperscript{12} The creation of these courts introduced a distinction between criminal and civil law. Proceedings before the \textit{quaestiones perpetuae} were accusatorial and witnesses were examined and cross-examined in much the same way as today. “Law of evidence” as we understand it today did not exist, however. Decisions were taken by the majority of the jury and no appeals were allowed.\textsuperscript{13}

\textsuperscript{12} Fragments from these penal statutes were collected in the reign of the Emperor Justinian into books 47 and 48 of the \textit{Digesta}. Refer also to para 2.3 of ch 2 for more on the \textit{Digesta}.
\textsuperscript{13} Esmein \textit{A History of Continental Criminal Procedure, with Special reference to France} (1913) 27.
Under the centralised government of the Republic, Rome developed to the fullest extent and covered almost all the then known world.\textsuperscript{14} With the expansion of the Roman Empire and the succession of despotic emperors extraordinary powers of criminal jurisdiction came to be exercised by the emperors and those officials and magistrates appointed as the emperors’ delegates. The accusatorial system largely disappeared and was replaced by an “inquisitorial system”, with the presiding judicial officer again determining the guilt of the accused. This investigation was usually directed at obtaining a confession from the accused and torture was generally used.\textsuperscript{15}

2.3 The Germanic contribution (AD 600-1500)

2.3.1 The Dark Ages (AD 400-800)

At the end of the fourth century the Germans and later the Huns began to invade Rome and this saw the end of the “Roman peace”.\textsuperscript{16} As a result the Roman Empire split into a western and an eastern part, with Rome the capital of the Western Roman Empire and Byzantine (the present-day Istanbul in Turkey) the capital of the Eastern Roman Empire. During this time the centre of the Empire moved to Byzantine, where Roman law survived more successfully than it did in its western counterpart. This was mainly due to the influence of the rule of the last Roman emperor, Emperor Justinian, who ordered a codification of Roman law known as the Corpus Iuris Civilis, which consisted of the Institutiones, Digesta, Codex and Novellae.\textsuperscript{17}

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\textsuperscript{15} Esmein \textit{A History of Continental Criminal Procedure} 28.
\textsuperscript{16} Hosten et al \textit{Introduction to South African Law and Legal Theory} 280.
\end{flushleft}
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The Western Roman Empire entered the so-called “Dark Middle Ages” in which Western Europe was perpetually subjected to hostile attacks. As a result Western Europe became fragmented into small societies and was eventually overrun by Germanic tribes. The law that applied at the time was that of the people known as Germans.\(^{18}\) Like Roman law, Germanic law made no distinction between private and public law. Germanic law was very primitive and unsophisticated and the judicial power vested in and was exercised by the people. An accusatorial system prevailed in its most rudimentary form and a mere accusation by a free man was sufficient grounds for suspicion against an accused. In essence criminal law presented nothing more than a regulated system of private vengeance, where the offender was pursued with arms by the victim or his or her family. This was known as “the feud”\(^{19}\) and the ancient maxim “mort mot ma mit morthe kela” (murder must be cooled with murder) prevailed. Disputes were settled by means of a dual or by retaliation.\(^{20}\) Only persons capable of exercising legal rights could defend themselves. Women and children were regarded as *pars domus* and were represented by the *domus* of the family. If a woman was raped the penalty was not claimed by herself but by her father or tutor.\(^{21}\) The reason for this was that neither women nor children could be challenged to single combat.\(^{22}\) Legal proof was strongly influenced by reliance on the supernatural and a belief in divine intervention rather than human proof. Gods could indicate the truth by signs and could protect the innocent. The outcome of such proofs was the “doom” or judgment of the court. For example, one practice that existed was “the ordeal by fire” in which an accused placed his or her hands in a fire; if he or she was burnt the accused was guilty.\(^{23}\) This primitive accusatorial system proved to be inadequate as it allowed many individuals to suffer and many

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18 Burchell & Milton *Principles of Criminal Law* (1991) 8. The Germans were a group of Teutonic and Scandinavian tribes with a common ethnic and linguistic origin who began to migrate to Western Europe during the fifth century. The Scandinavian tribes were known as Vikings. The Teutonic tribes included the Franks, Burgundians, Angles and Saxons. They mainly occupied Western Europe, the area known today as Germany, Holland and France, while the Goths, Vandals and Lombards settled in the east, in the area today known as Spain and Italy. The Anglo Saxons, Salic Franks and the Lombards allowed boys aged ten to give evidence in criminal proceedings but the Visigoths only regarded a boy of 20 years or older as possessing legal capacity. See Wessels *The History of the Roman-Dutch Law* (1908) 419.


20 Wessels *The History of the Roman-Dutch Law* 703.


22 Wessels *The History of the Roman-Dutch Law* 178.

23 Dugard *South African Criminal Law and Procedure* 3.
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Crimes to go unpunished. It is not surprising that it gave way to the inquisitorial system of canon law.\textsuperscript{24}

\subsection*{2.3.2 The Middle Ages (AD 500-1000)}

Under the Frankish Empire\textsuperscript{25} the Middle Ages represents a serious effort by the kings and governments of the time to suppress private vengeance and to replace it with peace. One such method was the introduction of “the peace” in terms of which a resort to violence was prohibited at a certain time or place.\textsuperscript{26}

During the late eleventh and early twelfth centuries, the law of Western Europe suddenly shed its tribal and informal character and was replaced by a well-defined legal system with professional courts and formal legislation. Trials still had the character of a popular assembly and were carried out exclusively by word of mouth. Criminal law itself was much influenced by the teachings of the Roman Catholic Church and the \textit{Corpus iuris Canonici}, in terms of which sin equated to personal wrongdoing and punishments were personal to the criminal. Punishment no longer resulted in retribution against the entire family, as was the case under Germanic law. The law was applied with great severity with punishments such as the severing of hands, branding, execution by breaking on the wheel and immolation at the stake being administered. The law became an instrument of tyranny and oppression in the hands of corrupt and capricious officials and was in dire need of reform and change. The means of change and reform were established by the rediscovery of Roman law.\textsuperscript{27}

\begin{thebibliography}{00}
\bibitem{24} Dugard \textit{South African Criminal Law and Procedure} 4.
\bibitem{25} The Franks were a group of German tribes who settled in what is now known as France. Between the fourth and sixth centuries the Frankish kings became very powerful and united the Frankish kingdoms into an “empire” which included modern Germany, Austria, parts of France and Northern Italy. Burchell & Milton \textit{Principles of Criminal Law} (1991) 10.
\end{thebibliography}
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2.3.3 The reception of Roman law (AD 1500-1800)

The tenth century saw the rediscovery of copies of Justinian’s *Corpus Juris Civilis* in monasteries in Italy and these texts became the subject of study at the law school of Bologna in northern Italy. This renewed interest in the *Corpus Juris Civilis* was attributable in part to the increase in prosperity in Italy as a result of a vigorous trade revival at the time, as well as to a general economic revival in Europe. The *Corpus Juris Civilis* was made up of thousands of texts and was so exhaustive that it was even said that the original medieval sources of Roman law were “almost buried in a sea of ink”. The scholars at the law school of Bologna known as glossators set out to explain the vast amount of text or to resolve textual anomalies. In order to accomplish this task they used Roman law as embodied in the *Corpus Juris Civilis* as the basis on which to develop their doctrines.

The successors to the glossators, the commentators or post-glossators, in contrast to the glossators, set out to develop a modern-day legal system that was accessible to everyone. Had it not been for this intervention by the glossators, Roman law might well have disappeared from the Western world. They were practical lawyers and wanted to apply the *Corpus Juris Civilis* to the needs of everyday legal practice. In order to accomplish this task, they endeavoured to harmonise the texts of Roman law with those of the statutory, customary and canon law of the time. Borrowing from Roman law, they adopted the idea that, before a punishment could be inflicted for a crime that had been committed, seven aspects had to be considered, namely: the cause, person, place, time, quality, quantity and consequences of the crime. These considerations played an important role in the mitigation or aggravation of the punishment for the crime or could even lead to the acquittal of the accused. The

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29 They did so by writing notes (glosses) between the lines or in the margins of the text, hence the name glossators.
idea of intent (*animus*) was also introduced. For the first time the concept was introduced that a person should not be punished for a crime if he or she did not intend to cause harm to the victim.\(^{31}\)

The works of the commentators inspired further reform in the field of law and spread far and wide over Europe. In Germany the *Carolina\(^ {32}\) was enacted in 1532 and became the general foundation of criminal law until the nineteenth century. The code contained 219 articles which set out definitions of crime, penalties and matters of criminal procedure. The new criminal procedure in particular was of great significance. It replaced the old accusatorial procedure with what was called the “*Inquisition prozess*” or inquisitorial procedure. It differed from the old accusatorial procedure by replacing public and oral testimony with secrecy and writing. It also employed a system that relied upon the charge of a public officer rather than upon the complaint of a victim. It demanded proof of evidence in the form of an eyewitness or a confession from an accused. In the absence of the latter, an accused was subjected to torture until he confessed. The accused was brought to open court, where the charge was read out. No testimony was given by witnesses and no evidence was presented at the trial itself; an orator merely spoke for and against the accused. Sentence followed and was executed immediately. This brutal inquisitorial procedure with its oppressive system of punishment became the standard procedure in most European countries.\(^ {33}\)

### 2.4 The emergence of modern criminal law

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\(^{32}\) In Latin it was known as the *Constitutio Criminalis Carolina*, but came to be called the *Carolina*.

The sixteenth and seventeenth centuries saw the emergence of separate modern nation states, such as France, Germany and Spain, in Western Europe. These countries began to develop their own separate laws and by the end of the eighteenth century a codification of the separate laws had taken place. Of particular importance in this study are Roman-Dutch law and the law of England as the criminal law of the Netherlands and England later played a significant role in the development of South African criminal law.

2.4.1 Criminal law of the Netherlands

By the late Middle Ages Holland, like the rest of Western Europe, no longer had a distinct legal system but also experienced the reception of Roman law. Roman law (as developed by the glossators and commentators) merged with local Germanic customary law and came to be known as “Roman-Dutch” law. The reception differed from province to province, with the law consequently also differing between provinces. However, Roman law served as a unifying factor between the different provinces, ensuring that the law in the Netherlands was largely uniform.

An idea of the system of criminal procedure that existed in the Netherlands during the early fifteenth century can be formed from the works of the jurist Wielant, in his Practijcke Crimineele, which was later unashamedly plagiarised by Damhouder in Praxis Rerum Criminalium. According to Wielant, most prosecutions took the form of an inquisition, with the inquiry being held in secret. The accused was, however, allowed to adduce evidence and to call witnesses in support of his defence. Despite this, torture was still used to extract confessions. Children under the age of fourteen and pregnant women were fortunately exempt from these harsh practices.

36 Dugard South African Criminal Law and Procedure 5.
In 1555 the feudal overlord of the Netherlands, Charles, abdicated and finally relinquished his European patrimony in the Hall of the Golden Fleece in Brussels. Phillip II of Spain acquired the overlordship of the Netherlands – henceforth the Spanish Netherlands. Under his reign the law in the Netherlands took on a statutory form through the promulgation of an Ordinance on Criminal Procedure in 1570. This Ordinance formed the basis of criminal procedure in the Netherlands during the seventeenth and eighteenth centuries despite the Netherlands' struggle for independence. The reason why it was not repealed after the Netherlands obtained independence was that it was very similar to the prevailing system of criminal procedure. This is clearly illustrated by the fact that the Ordinance allowed only an inquisitorial procedure with a public official (known as the fiscal) as prosecutor and the judge having absolute discretion to prescribe the modes of punishment. The substantive law was characterised by cruelty and punishments such as execution by hanging, drowning and burning. Only the province of Holland allowed for imprisonment as a punishment. Torture to exact evidence where there was none was a standard feature and remained an indispensable part of the process until it was abolished in Holland in 1798.\(^{37}\)

The seventeenth century was marked by the publication of the works of famous Dutch authors. The most famous treatise of the time was that of Antonius Matthaeus II (1601-1654), known as the *De Criminibus*. This treatise included a detailed commentary on books 47 and 48 of the *Digesta* and expounded Romanist criminal law free of elements of Italian, canon and Germanic law. Other leading Dutch advocates of the day were Pieter Bort (1615-1674), who wrote the *Tractaet van Crimineele Saecken* which was concerned with criminal procedure; Johan Moorman (1696-1743), who wrote the *Verhandelinge over de Misdaden* and DG van der Keessel (1738-1816), who was responsible for the *Dicta ad Jus Criminale Libri 47 et 48 Digestorum*.\(^{38}\)

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\(^{37}\) Dugard *South African Criminal Law and Procedure* 6-7.

The eighteenth century saw a further change in the Netherlands in that the Netherlands was also affected by the fervour of the French revolution and the armies of Napoleon Bonaparte. Louis Bonaparte, the brother of Napoleon, became the Emperor of the Netherlands in 1806. In 1811 the harsh Roman-Dutch legal system of the previous centuries was finally replaced by the French Criminal Code of 1808 and in 1838 a Wetboek van Strafvordering modelled on French law was enacted.\(^{39}\) Despite this codification, classical Roman-Dutch law did not become obsolete because of the influence of the works of the old authors on classical law.\(^{40}\)

2.4.2 English criminal law

Early English law followed the same pattern as Germanic law with an accusatorial system in the same primitive form as in the rest of Europe. The guilt of an accused was determined by *compurgation* or ordeal. *Compurgation* allowed an accused to call a number of oath helpers (*compurgators*) to swear to the accused’s innocence by testifying to his credibility and not to the facts of the case itself. If such *compurgators* were not available the accused had to establish his innocence by ordeal or by an appeal to God to work a miracle to show his innocence. Fortunately in the Fourth Latin Council in 1215 Pope Innocent II forbade the performing of any religious ceremonies in connection with ordeals, which led to the abolition of the trial by ordeal.\(^{41}\) This abolition would undoubtedly have resulted in the introduction of canon law and the inquisitorial procedure had it not been for the Normans, who conquered England in 1066. The Normans introduced an alternative procedure, namely “trial by jury”, which preserved the accusatorial system. The jury consisted of twelve men from the local community who swore to speak the truth. The “jury” had the task of collecting information on the crime and presenting the charges against the accused to the court. Initially this jury presented the matter and tried the

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\(^{39}\) Dugard *South African Criminal Law and Procedure* 10.

\(^{40}\) Hosten et al *Introduction to South African Law and Legal Theory* 337.

\(^{41}\) Dugard *South African Criminal Law and Procedure* 11.
The historical background of the South African criminal justice system and the role of child witnesses and child victims within the system

case. These jurors, chosen from the neighbourhood, acted as both jurors and witnesses and decided questions of fact by their own knowledge or by relying on hearsay. Later a second jury known as the "petty" jury was introduced. The jury of presentment (known as the grand jury) presented the indictment to the second jury, who heard the case against the accused and determined his or her guilt or innocence.\(^{42}\) This introduced a separation between the role of the jury and that of a witness in that a witness henceforth:

\[
\text{swears but to what he has heard or seen ... to what has fallen under his senses.}
\]
\[
\text{But a jury-man swears to what he can infer and conclude from the testimony of such witness ...}^{43}\]

Typically, a trial commenced with an indictment being read to the accused, who then pleaded to the charge. This was followed by jury selection; the accused had a right to reject members of the jury. The case against the accused was then presented by the prosecutor (usually the victim of the crime) and witnesses for the prosecutor were called. Thereafter, the accused was allowed to present his or her case. The jury were then free to reach a verdict, but only if it reflected their unanimous view. A verdict followed the judgment. Death was the punishment for felonies, while misdemeanours were punished by corporal punishment, restraint of person or a fine.\(^{44}\)

Unlike the position in modern English criminal law, an accused was presumed guilty and was not entitled to any legal representation or allowed to call any witnesses. No rules of evidence prevailed and hearsay was freely allowed. Statements by the accused were not made on oath. The accused could be asked incriminating questions and was not allowed to remain silent. Despite these shortcomings the

\(^{42}\) Dugard *South African Criminal Law and Procedure* 12.
\(^{43}\) Buchell’s Case 124 ER 1006 at 1009.
English trial was more favourable to an accused than its Continental counterpart where the inquisitorial procedure prevailed. An English trial was at least public; the accused was allowed to speak in his or her defence; was not tortured and was judged by the accused neighbours upon their conscientious assessment of his or her guilt or innocence.45

Even though, as stated above, witnesses were called for the prosecutor to testify to the jury, this only became common practice in the sixteenth century. This can perhaps be attributed to the fact that jurors drew on their own knowledge to reach a decision on guilt or innocence. No law existed to compel a witness to testify. This approach was only changed by the Acts of 1554 and 1555, which empowered coroners and magistrates to compel witnesses for the Crown to testify at the trials of persons accused of serious offences. Despite this empowerment by the court, the true function of witnesses was not recognised as the court preferred to rely on written statements instead of calling a witness. When a witness was compelled to testify before the court the question of perjury received scant attention. The accused was still not usually permitted to call evidence on his or her own behalf. Even after witnesses for the defence were generally allowed in the seventeenth century, witnesses still presented their testimony without taking the oath except in cases of serious misdemeanour or by special statutory provision.46

2.4.3 South African criminal law

2.4.3.1 1652-1806

In April 1652 Jan van Riebeeck, a Dutch official in the service of the Dutch East India Company (VOC), established a refreshment station at the Cape of Good Hope. The settlement at the Cape was initially intended to be a halfway house for merchant ships of the Dutch East India Company on the route from the Netherlands to Dutch East India, but in time it developed into a permanent colony. When the Dutch arrived, the Cape was sparsely inhabited by a native population known as the Koi. They were pre-literate and their laws were based on oral tradition. The Dutch brought with them the law of the Netherlands and maintained law and order in the areas under their control in terms of the Octrooi (Charter) of 20 March 1602. This resulted in the entrenchment of the Dutch legal system, including the Roman-Dutch system of criminal law, at the Cape. This system of criminal law consisted mainly of Roman law modified by ancient customs and statutes and it remained in force at the Cape until 1806, although in a slightly modified form. The Dutch settlers established a criminal court known as the Raad van Justisie (the Raad). The Raad had its seat in the Cape; it dealt with both civil and criminal matters and was composed of a Commander, seven officials and two burgher councillors. It proceeded behind closed doors and no reasons for its judgments were made public or recorded. The officials and burghers of the Court were not required to have any legal qualifications and in fact very seldom had any such qualifications. The public prosecutor before the court was the fiscal, who was obliged to investigate all offences and decide whether a prosecution should take place or not. The fiscal received a share of all fines and confiscations imposed (usually a third), which led to his prosecuting offences zealously. No wonder he was the most hated official at the Cape. When a matter before the Raad was decided, a great deal was left to the discretion of the judges, but in reaching their decisions the Raad often referred to the works of jurists such as Damhouder, Moorman, Bort and Matthaeus. Even the general works of Voet, Groenewegen and Huber were consulted. In addition the Court followed

47 Dugard *South African Criminal Law and Procedure* 18.
Phillip II’s Criminal Procedure Ordinance of 1507, which was inquisitorial in nature. Torture was widely used, and punishments were equally savage. The death penalty was carried out by way of hanging, strangling, burning or drowning, among others. The use of these brutal practices from Roman-Dutch criminal procedure was further aggravated by the presence of slaves at the Cape.\(^{50}\) In brief, as no judgments of the Raad were either recorded or reported, Roman-Dutch law showed almost no development at the hands of the Raad from 1652 to 1795.\(^ {51}\)

2.4.3.2 1806-1832

In 1775, except for a brief period of Batavian rule from February 1803 to January 1806, and again in 1806, Great Britain occupied the Cape. The Raad van Justitie was now called the Court of Justice. The Court of Justice was empowered under the Articles of Capitulation and a Proclamation of 24 July 1795 to administer Roman-Dutch law in both criminal and civil matters in accordance with the existing laws, statutes and ordinances, thus ensuring that Roman-Dutch criminal law remained in force. Regardless of this the English disliked the inquisitorial form of procedure practiced and initiated a process to replace this system with the English accusatorial form of procedure. Further changes to the present system were made in 1796 with the abolition of barbaric modes of execution such as breaking on the wheel and the prohibition of the use of torture in 1797.

Adherence to Roman-Dutch law in terms of the Capitulation while criminal law was modelled on English criminal procedure caused problems, however. In 1808, for instance, the Governor discovered that no court of appeal existed and after consultation with the British government a High Court of Appeals for criminal cases was instituted. In 1813 a proclamation by Sir John Cradock directed that all criminal trials were to be conducted in open court. In 1819 the Chief Justice and members

\(^{50}\) Dugard *South African Criminal Law and Procedure* 19.  
of the Court of Justice issued a criminal procedure code, the “Crown Trial”. This code departed from the old procedure in some ways. When an offence was committed an inspection *in loco* was held by the court accompanied by the prosecutor. Preliminary statements were taken under oath from the witnesses. Witnesses had no right of refusal to testify and recalcitrant witnesses were subject to both imprisonment and a fine. On the strength of this evidence a trial would then commence in the open with the reading of an indictment. The accused’s answers were not taken under oath and the accused only received the right to counsel after being interrogated. Counsel could then assist with the examination and cross-examination of witnesses on all points of law that followed. As counsel for the accused only obtained access to the accused on the day of the trial, they were frequently ill-prepared, which led to a poor defence for the accused.\(^{52}\)

Although the Crown Trial added an English flavour to criminal procedure, reports to Earl Bathurst and Commissioners Bigge and Colebrook recommended that the system of criminal procedure could be still more closely aligned with that of England. These recommendations were accepted. In 1825 English replaced Dutch as the official language of the courts and in 1827 provision was made in the First Charter of Justice for the establishment of a Supreme Court. This Supreme Court was modelled on the English accusatorial system and consisted of a Chief Justice and three *Puisne* judges,\(^{53}\) a Circuit Court and a jury. Advocates and judges were to be drawn from the English, Irish or Scottish Bars and had to be doctors of law. The First Charter of Justice was replaced by a Second Charter in 1832, which confirmed its provisions. The Crown Trial of 1819 was replaced by a Criminal Procedure Ordinance of 1828, which led to the assimilation of the accusatorial form practised in England into the criminal procedure in the courts.\(^{54}\)

\(^{52}\) Dugard *South African Criminal Law and Procedure* 22-23.

\(^{53}\) A “Puisne judge” is the title of a regular member of a court, almost exclusively used in common law jurisdictions, and is used to distinguish the member from the Chief Justice.

\(^{54}\) Dugard *South African Criminal Law and Procedure* 26.
When a precedent for some change was required, jurists turned to English law as they saw no advantage in going to Holland where a system of law foreign to both the English and the South African Dutch was in force. This, together with the fact that judges and advocates were trained in England, detailed reports of English decisions were freely available and Roman-Dutch law books were sometimes silent, vague or contradictory on a subject, enhanced the practice and strength of English law even further.\textsuperscript{55}

A welcome innovation was that an accused was now entitled to remain silent and a confession was only admissible if made voluntarily. The following additional changes were introduced: prosecution by way of grand jury indictment, the replacement of the hated Fiscaal with an Attorney-General and the adoption of the English law of evidence through Ordinance 72 of 1830. Since English procedure and the English law of evidence were being followed lawyers naturally looked towards English law for guidance. The reforms introduced in the Cape between 1827 and 1832 effectively put an end to the inquisitorial system. Criminal trials now followed the English accusatorial procedure, with open confrontation between prosecutor and accused and the court acting as arbiter. Notwithstanding this change the Roman-Dutch law of criminal procedure somewhat precariously prevailed as the South African common law of criminal procedure.\textsuperscript{56}

2.4.3.3 1832-1910


\textsuperscript{56} Dugard \textit{South African Criminal Law and Procedure} 26. For an interesting discussion on the factors contributing towards the unexpected survival of Roman-Dutch law at the time, refer to Van den Berg "The remarkable survival of Roman-Dutch law in nineteenth-century South Africa" 2012 \textit{Fundamina} 71 at 85 ff.
Few changes were made to the criminal law system that prevailed at the Cape between 1832 and 1910. The only aspects of significance were the introduction of the procedure for automatic review in 1856 and the introduction of an evidentiary innovation in 1886 which declared that an accused was to be regarded in future as a competent but not compellable witness. In addition, in 1869 it was provided that the death penalty was no longer to be carried out in public but within the confines of the gaol.57

In 1886 a special criminal code for the Transkeian Territories known as the Native Territories Penal Code was enacted. Although enacted for the Transkei, the Code’s influence ranged beyond the borders of the Transkei as some of its definitions, general principles of criminal liability and elements of some of the other particular crimes came to be adopted by the South African courts.58

Natal

The Dutch settlers or Boers at the Cape were dissatisfied with British rule and furthermore farming in the eastern frontier districts had become increasingly dangerous owing to attacks from surrounding indigenous tribes. They therefore set out to trek northwards. Approximately twelve thousand Dutch settlers, known as “Voortrekkers”, left the Cape between 1835 and 1843. One such group under the leadership of Retief initially settled in Natal in 1838 and declared that the

57 Dugard South African Criminal Law and Procedure 27.  
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Hollandsche Rechtspleging should serve as the basis for the law to be administered.  

In 1844 Natal was reincorporated into the Cape as a “District or Colony” of the Cape. The system of criminal law of the Colony of Natal was brought into line with the laws of the Cape legislature by the introduction of the Charter of Justice of 1832, the Criminal Procedure Ordinance of 1828 and the Evidence Ordinance of 1830. Procedure was governed by Ordinance No 18 of 1845. Although this resulted in Roman-Dutch law as modified by English procedural statutes being applied in Natal, the Natal judges, being even more prone than their Cape counterparts to look to English law for guidance in deciding questions on Natal common law, effectively anglicised criminal law in the administration of justice in Natal.  

Transvaal

Following the English annexation of Natal in 1843, many of the Voortrekkers moved on to settle in the Transvaal and Free State. In 1844 the Transvaal settlers founded what was known as the Potchefstroom-Winburg Republic and adopted the Thirty-Three Articles as its constitution. The Articles stated that the Hollandsche Wet would form the basis of the legal system in this state and marked a move towards legal independence. This did not, however, result in the introduction of a Dutch law of criminal procedure as sources suggest that a system that varied between the accusatorial procedure and a moderate type of inquisitorial procedure was applied.

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60 Burchell et al South African Criminal Law and Procedure 40.
61 Dugard South African Criminal Law and Procedure 32.
63 Dugard South African Criminal Law and Procedure 32.
In 1852, following the first Anglo-Boer war, the Sand River Convention was signed between the Boers and the British Government. It granted the Boers the right to govern themselves in accordance with their own laws. In 1858 the newly formed South African Republic adopted a *Grondwet* which enacted the separation of the powers of the legislature, executive and judiciary. The judicial powers vested in landdrosts, heemraden and jurors and all judgments were to be pronounced in open court. In 1859 Addendum 1 was added to the *Grondwet*; it provided that Van der Linden’s *Koopmanshandboek* should be the statute of the state. If the answer to a problem could not be found in Van der Linden, the *Wetboek* of Simon van Leeuwen and Hugo de Groot’s *Inleidinge tot de Hollandsche Rechtsgeleerdheid* were to be consulted as subsidiary sources of law. However, three days later Addendum 3 was enacted. It contained a code of criminal procedure which followed both the English-law trial by jury and the accusatorial system. This procedure was elaborated on by Cape Ordinance 5 of 1864, which virtually amounted to the adoption of the criminal procedure and evidence system applicable in the Cape. The use of this Ordinance also reflected the significant English influence on the classification and nomenclature used with regard to specific crimes.\(^{64}\)

After a brief interval of British rule from 1877 to 1881 following the British annexation, the South African Republic regained its independence with the signing of the Pretoria Convention in 1881. Few changes were made to criminal procedure in the Transvaal during this time, with the exception of the establishment of a High Court of Justice in 1877.\(^{65}\) In 1902 the Transvaal Supreme Court and the Witwatersrand High Court were established. The judges of the respective courts frequently relied on judgments of the Cape Supreme Court as persuasive authority, resulting in a “mixed system” similar to that of the Cape being introduced into the Republic. In 1903 Ordinance No 1 of 1903, the most comprehensive code of criminal procedure in South Africa, was enacted in the Transvaal. It was largely based on the 1828 Cape Ordinance, as amended, but unlike the Cape Ordinance it regulated the course of the trial itself. All Supreme Court criminal cases were to be tried before a

\(^{64}\) Dugard *South African Criminal Law and Procedure* 32.

\(^{65}\) Burchell et al *South African Criminal Law and Procedure* 42.
judge and jury consisting of nine men. Originally a unanimous verdict was required but in 1909 the requirement was replaced with a majority of seven men. Punishment, the attendance of witnesses and certain evidentiary rules were also regulated in the Ordinance. Such was the importance of the code that it was substantially re-enacted after unification as the Criminal Procedure and Evidence Act of 1917.\textsuperscript{66}

\textit{Orange Free State}

The Orange Free State obtained independence in 1854 at the Bloemfontein Convention, and enacted its own \textit{Grondwet}. In terms of the Constitution of the Orange Free State Roman-Dutch law became the principal legal system of the Republic. However, soon afterwards the Cape rules of criminal procedure and evidence were assimilated into the Republic when two ordinances\textsuperscript{67} based on the Cape Criminal Procedure Ordinance of 1828 and the Cape Evidence Ordinance of 1830 were enacted.\textsuperscript{68} Although the Evidence Ordinance of the Orange Free State directed the courts to follow Roman-Dutch law instead of English law, when the Ordinance proved inadequate the courts followed English law in practice.\textsuperscript{69}

After the annexation of the Orange Free State in 1900, the British Government maintained Roman-Dutch law as the law of application in terms of the Laws Settlement and Interpretation Ordinance of 1902 which determined that “the Roman-Dutch law shall be the common law of the Colony”. Criminal procedure was governed by the Ordinance of 1902, which followed the law of the Cape Colony and fell far short of the detailed 1903 Criminal Procedure Ordinance of the Transvaal. As regards substantive law, the judges of the High Court of the Orange River

\textsuperscript{66} Act 31 of 1917. Dugard \textit{Introduction to Criminal Law and Procedure} 32.
\textsuperscript{67} Ord No 4 of 1856 which regulated criminal procedure up to the stage of committal for trial & Ord No 6 of 1856 which dealt with the law of evidence.
\textsuperscript{68} Burchell et al \textit{South African Criminal Law and Procedure} 42.
\textsuperscript{69} Dugard \textit{South African Criminal Law and Procedure} 33.
Colony, like those of the Cape, Natal and the Transvaal, applied a mixed system of common law.\textsuperscript{70}

2.4.3.4 1910-1977

Following a national convention in 1806, the four colonies, namely the Cape, Natal, the Transvaal and the Orange Free State, were unified into one nation on 31 May 1910. At the time all four colonies followed statutory systems of criminal procedure and evidence that were based on the Cape Criminal Procedure Ordinance of 1828 and the Evidence Ordinance of 1830. The Supreme Court of South Africa was created in terms of the Union of South Africa Act of 1909. It consisted of an Appellate Division, four provincial divisions, several local divisions and circuit courts and all superior criminal court cases were conducted before a judge and jury. With the establishment of the Appellate Division the question was raised whether the judges would seek to purify Roman-Dutch law of its English influence or continue with the growth of South African law as a mixed system. The Appellate Division chose the latter course by using Roman-Dutch law, as modified by English law, as the basis of its legal system while adapting it to South African social conditions.\textsuperscript{71}

The period between 1910 and 1977 brought various statutory changes to the criminal law system of South Africa, of which merely a few will be highlighted.\textsuperscript{72} In 1914 a vital change to the jury system was affected by the Riotous Assemblies and Criminal Law Amendment Act.\textsuperscript{73} This Act empowered an Attorney-General to establish special criminal courts consisting of two or three judges without a jury for

\textsuperscript{70} Dugard \textit{South African Criminal Law and Procedure} 33. For an interesting discussion on the tension between Roman-Dutch law and English law at the time, refer to Van den Berg 2012 \textit{Fundamina} 71 at 81 ff.
\textsuperscript{71} Burchell et al \textit{South African Criminal Law and Procedure} 43.
\textsuperscript{72} It must be stressed that the information outlined above is only a brief summary of a vast amount of information on the development of criminal law in South Africa. For a more detailed discussion, refer to Dugard \textit{South African Criminal Law and Procedure} 33-56.
\textsuperscript{73} Act 17 of 1914.
the purpose of hearing serious political offences. In 1917 the pre-Union statutes regulating criminal procedure and evidence were consolidated into a single Act, the Criminal Procedure and Evidence Act. This Act was described by Gardiner and Lansdown in their first book, South African Law and Procedure, which appeared in 1919, as “the most ambitious attempt at consolidation hitherto known in South Africa”. This Act brought about several changes to the criminal law system of which the jury system was undoubtedly the most significant. The provisions of the Riotous Assemblies and Criminal Law Amendment Act, allowing the Attorney-General to request a special court, were also extended in terms of the Act to cover offences against the law for the prevention of illicit dealings in precious metals and the supply of intoxicating liquor to coloured persons. Furthermore, of even greater importance, this Act allowed an accused to elect to be tried by a judge without a jury. In 1954, on the recommendation of the Lansdown Commission of 1947, trial by jury became the exception and non-jury trial the rule.

In terms of the 1917 Criminal Procedure Act a court was entitled to subpoena a witness for examination or re-examination at any time, and had to do so where in terms of the evidence it appeared to be essential to the just decision of a case. Such a witness not only had to be in attendance when his name was called but, unless excused, had to remain in attendance throughout the trial. Only after judgment had been pronounced was the witness entitled to depart. The Act furthermore provided that every person not expressly excluded by the Act from giving evidence was deemed to be a competent and compellable witness. In this regard the Act

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74 Act 31 of 1917.
75 Gardiner & Lansdown South African Criminal Law and Procedure: Being a Treatise upon the Law and Practice of Criminal Matters in the Union of South Africa 2 ed Vol 1 (1924) 34.
76 These changes included provisions that the powers of arrest, search and seizure had to be exercised only under a warrant duly authorised by a judicial officer; that a detained person had to be released within 48 hours or brought before a judicial officer for a committal order and the right of an accused to legal representation. For a more detailed description of the changes, see Dugard South African Criminal Law and Procedure 33 ff.
77 Dugard South African Criminal Law and Procedure 37. Note that a judge may, however, summon two assessors to assist him in the case. The main advantage of this change was that it allowed black persons who might have little faith in an all-white jury to avoid such a court.
78 See s 1 of the Criminal Procedure and Jurors Amendment Act 33 of 1952.
79 Dugard South African Criminal Law and Procedure 40. Trial by jury was finally abolished in 1969 by the Abolition of Juries Act 34 of 1969.
80 S 246 of Act 31 of 1917.
distinguished between persons absolutely excluded from giving evidence and those excluded from giving testimony in particular proceedings. The former included persons afflicted with “idiocy, lunacy or insanity” while the latter included “the husband or wife of an accused”. The authority to decide on the compellability or competency of a witness to give evidence resided with the court.\footnote{81}

A child of very tender years, who showed immaturity of intellect and was unable to give an intelligible account of what he or she had seen or heard, or to appreciate the obligation to tell the truth, or to understand the distinction between a truth and a falsehood, was regarded as falling into the first class of absolutely incompetent witnesses.\footnote{82} All testimony had to be given under oath, unless the witnesses were unable on account of ignorance arising from youth, defective education or any other cause to understand the nature of an oath. Testimony could be presented after an admonition by the judge or magistrate to speak the truth, the whole truth and nothing but the truth, had been administered.\footnote{83}

In the event that a child was thus deemed to be competent to give evidence at a trial, such evidence had to be given in the presence of an accused, before an all-male European jury,\footnote{84} and the child was obliged to remain in attendance throughout the trial unless excused by the court. Notwithstanding the fact that no statutory provision dealing with the corroboration of a child’s evidence existed, it was an established practice in the Union not to convict upon the single and unconfirmed evidence of a child of tender years.\footnote{85} In R v George,\footnote{86} Wessels JP held that:

\footnotesize
\begin{itemize}
  \item \footnote{81} Ss 260, 261, 262 & 263 of Act 31 of 1917.
  \item \footnote{82} R v Sideropoulos 1910 CPD 15; R v De Beer 1933 NPD 30 & R v R 1935 NPD 582.
  \item \footnote{83} S 267 of Act 31 of 1917.
  \item \footnote{84} S 167 of Act 31 of 1917; s 2 of Act 21 of 1954 and s 114 of Act 56 of 1955. The only concession to women was that since 1931 it was possible to call for an all-female jury in terms of the Female Jurors Act 20 of 1931. This proved to be impossible to implement, however, because there were insufficient names on the jury list. See Hahlo & Kahn South Africa: The Development of its Law and Constitution (1960) 261.
  \item \footnote{85} Gardner & Lansdown South African Criminal Law and Procedure (1946) 401.
  \item \footnote{86} 1922 TPD 11.
\end{itemize}
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[t]o convict upon the uncorroborated testimony of a child of three years is such a dangerous thing that I cannot imagine any magistrate doing it under any circumstances.

The learned judge furthermore held that the mere fact that a child had repeated his or her story to someone on a previous occasion did not amount to corroboration. Similar views were held in *R v Sideropoulos*,87 *R v De Beer*88 and *R v R*89 in respect of the testimony of children of ages ranging between four-and-a-half years and eight years. It therefore comes as no surprise that children were very apprehensive of the “male” criminal justice system and when “persuaded” to testify, as single witnesses, were faced with a system that did not convict on their evidence unless corroborative evidence was available. To say that they suffered while acting as witnesses under the then criminal justice system is putting it mildly.90

Between 1917 and 1955, the consolidated Criminal Procedure Act of 1917 was amended by seventeen separate statutes and coupled with the fact that the text was in Dutch and English only, with no official Afrikaans translation, a new intervention to consolidate the Act was called for. This was effected by the Criminal Procedure Act of 1955.91 This Act was also extensively amended by thirty statutes, however. Many of these amendments served to tighten up or clarify the Act but other radical changes were introduced to cope with matters affecting the security of the State. Many changes were also introduced in the field of punishment to address these security issues. In 1955 only three offences, namely murder, treason and rape, were punishable by death; discretionary capital offences were created for inter alia robbery and housebreaking, sabotage, the encouragement by a South African

87 1910 CPD 15.
88 1933 NPD 30.
89 1935 NPD 582.
91 Act 56 of 1955.
resident abroad of acts furthering the achievement of any of the objects of communism or of any unlawful organisation, kidnapping and participation in any terrorist activities. During this time capital punishment was carried out at an alarming rate and it was estimated that South Africa accounted for about 47 per cent of the world’s executions at the time.\textsuperscript{92} It was only in 1995 under the new constitutional dispensation that the Constitutional Court in \textit{S v Makwanyane}\textsuperscript{93} declared the use of capital punishment unconstitutional.

In 1976, a Commission of Inquiry into the Penal System of the Republic of South Africa, the Viljoen Commission, recommended the abolition of the punishment of imprisonment with solitary confinement, spare diet and hard labour and set the scene for the reintroduction of the Criminal Procedure Bill of 1973. The 1973 Bill was subsequently amended to give effect to the recommendations of the Viljoen Commission passed by Parliament in 1977 and became the Criminal Procedure Act of 1977.\textsuperscript{94}

The position of child witnesses improved slightly with the enactment of the Criminal Procedure Act of 1977. Section 153(5) thereof provided that “where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness or his parent or guardian or a person \textit{in loco parentis}, shall be present at such proceedings”. Child witnesses were thus allowed to give evidence “in camera”, but were still obliged to do so in the presence of the accused.

It was only after an investigation by the South African Law Commission in 1989 into the giving of evidence by child witnesses in open court that the position of child witnesses improved.

\textsuperscript{92} Dugard \textit{South African Criminal Law and Procedure} 47.
\textsuperscript{93} 1995 (3) SA 391 (CC).
\textsuperscript{94} Act 51 of 1977 (hereinafter the Criminal Procedure Act). The Act came into effect on 22 July 1977.
witnesses changed somewhat for the better. In acknowledgement of the fact that children suffer severe mental stress when giving evidence in the presence of an accused, the South African Law Commission recommended the concession that children be allowed to testify in a special room via an intermediary. This proposal gave rise to the introduction of the function of an intermediary with the enactment of section 3 of the Criminal Law Amendment Act and later the insertion of section 170A(1) into the Criminal Procedure Act of 1977. Section 170A(1) of the Act provides as follows:

Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of 18 years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

The legislature recognised the context within which child witnesses and complainants find themselves when testifying in court, and attempted to alleviate some of the problems faced by child victims and witnesses through the said amendments.

2.4.3.5 The pre-1994 apartheid era

97 This section should be read together with sections 161 and 165 of the Criminal Procedure Act. As amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
98 Bekink “Section 170A(1) of the Criminal Procedure Act of 1977: Do intermediaries need to be sworn in or not? S v QN 2012 1 SACR 380 (KZP)” 2013 *THRHR* 285. Refer also to ch 5 below for a full discussion of section 170(A) of the Criminal Procedure Act of 1977.
The apartheid policy of the National Party, which came to power in 1948, brought a barrage of legislation to bear upon South Africans that, firstly, categorised them by race and then controlled their freedom according to their race group.\textsuperscript{100}

Apartheid was a system of racial segregation that was enforced through the ruling party, the National Party (NP), from 1948 to 1994. Under this policy the rights of the black majority inhabitants of South Africa were curtailed in order to maintain white Afrikaner minority rule. This policy was not a new invention by the NP but had its roots in colonial times under Dutch and British rule. Prior to Union in 1910, the Cape, Natal, Orange Free State and the Transvaal each had their own policies on the franchise rights of non-whites. In the Cape the franchise qualifications were low and non-whites were not excluded. Natal experienced a shortage of skilled workers, which led to an influx of Indian immigrants. This in turn gave rise to the problem of the Indian vote. Despite a protest led by Mahatma Gandhi, in 1896 the British refused to approve the disenfranchisement of Indians, but instead promulgated a law excluding all non-whites from voting. The Republic of the Orange Free State was free from political and constitutional conflict and franchise rights were extremely liberal. After the Jameson Raid in the Transvaal the authorities in the Transvaal alerted the Orange Free State to the “dangers” of an influx of immigrants. In contrast to the Orange Free State, the Transvaal applied a system of disenfranchisement of non-whites. Despite many African communities expecting that the Cape’s non-racial franchise would be extended to the other colonies after unification in 1910, the contrary position was experienced. The Treaty of Vereeniging made the enfranchisement of non-whites subject to the consent of white people, which led to their disenfranchisement. Shortly afterwards in reaction to this position the African National Congress (ANC) was formed in 1912.\textsuperscript{101}

\textsuperscript{100} “Cape Town’s History and Heritage” available at http://www.capetown.at/heritage/ history/apartheid.htm (accessed 06/07/2013).

\textsuperscript{101} Bekink Principles of South African Constitutional Law (2012) 91-95.
In 1931 the South African Parliament became sovereign with the passing of the Statute of Westminster. This did not change the prevailing situation but in fact promoted the disenfranchisement of people of colour as an official policy of racial segregation (apartheid) was embarked on by the NP following the general election in 1948. Legislation was enacted classifying South Africans into four racial groups, namely native, white, coloured and Indians. Residential areas were segregated according to these racial groups as was education, medical care, parks and other public facilities.¹⁰²

There were numerous calls for the establishment of a non-racial convention, of which the Freedom Charter of the ANC was arguably one of the most famous. Nevertheless in 1961, when South Africa became a republic, it maintained its policy of racial segregation. In 1964 the Rivonia treason trial began in which ten leaders of the ANC, including Nelson Mandela, were tried and sentenced for 221 acts of sabotage designed to overthrow the apartheid system.¹⁰³

During this time South African criminal law played a significant role in the implementation and upholding of the country’s apartheid policy. This was effected by the NP through the employment of the sanctions of imprisonment and fines to enforce their discriminatory laws. Under these draconian laws it became a crime if non-whites were not in possession of identity documents (passes),¹⁰⁴ entered certain urban areas¹⁰⁵ or used certain public facilities,¹⁰⁶ occupied land in certain group areas¹⁰⁷ or married or had a sexual relationship with white persons.¹⁰⁸

¹⁰² Bekink Principles of South African Constitutional Law 95.
¹⁰⁴ See the Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952.
¹⁰⁵ See the Natives (Urban Areas) Consolidation Act 25 of 1945.
¹⁰⁶ See the Reservation of Separate Amenities Act 49 of 1953.
¹⁰⁷ See the Group Areas Act 41 of 1950 and the Group Areas Act 36 of 1966.
¹⁰⁸ See the Immorality Act 5 of 1927 and the Prohibition of Mixed Marriages Act 55 of 1949. It was also a crime for a white person to be involved with a person of colour.
These penal provisions resulted in large numbers of blacks being imprisoned or fined, which in turn led to civil uprisings, protest actions and unrest, such as the Soweto riots of 16 June 1976, which lasted well into the late 1980s. In an attempt to control the uprising, opposition leaders were banned and imprisoned and various security measures were put in place. New security crimes such as sabotage, terrorism and subversion were created and the police and executive authority were granted excessive powers such as the right to an arrest without a warrant, detention without trial, house arrest and banning. Despite these measures the security laws were not successful in suppressing the resistance to apartheid. Civic disorder became endemic in black townships. Children participated alongside their parents and widespread school boycotts took place. In response government declared a state of emergency on 21 July 1985, affording them even wider powers. In terms of these emergency regulations approximately 20 000 persons, including more than 2 000 children under the age of sixteen, were arrested without a warrant and detained for varying periods of time. In some areas, in the absence of a proper police force, vigilante groups emerged whose presence exacerbated violence and disorder within the areas. Violence became a socially sanctioned mechanism for achieving change and resolving conflict. The slogans of the day mobilising violence were “people’s war” and “ungovernable”. During this time children in particular suffered violence, trauma, abuse and other forms of hardship, such as the loss of a parent or parents. It is estimated that between 1991 and 1994 nearly 50 000 children were displaced, 2 000 physically traumatised and more than 7 000 abandoned as a result of intra-community violence.

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With the implementation of a new Constitution in 1993,¹¹² the position of non-whites improved slightly in that parliamentary franchise was extended to Coloured people and Indians. Black people were, however, still excluded.¹¹³

2.4.3.6 The 1994 constitutional era

Under both national and international pressure, success against apartheid was eventually achieved with the release of Nelson Mandela in 1990; the unbanning of the ANC; the adoption of the first democratic constitution, the Interim Constitution in 1993;¹¹⁴ the removal of racially based crimes from the statute book; the first non-racial election on 27 April 1994 and thereafter the Constitution of the Republic of South Africa, 1996.¹¹⁵

The introduction of a new constitutional framework transformed the entire legal order of South Africa and introduced a system in which all laws, including criminal law and procedure, have to pass the test for constitutionality. The Constitution with its comprehensive Bill of Rights, based on the principles of dignity, equality and human rights and freedoms, provides the catalyst for the re-evaluation of the principles of both statutory and common law on crime, including any law that may affect children.¹¹⁶

In this regard, the Constitution explicitly recognises that children are a vulnerable group, have specific and unique needs and must be afforded distinctive protection. In addition to the protection offered by the Bill of Rights to which children are entitled as ordinary inhabitants of South Africa, their interests have been given independent

¹¹³ Bekink Principles of South African Constitutional Law 96.
¹¹⁵ Bekink Principles of South African Constitutional Law 96-97.
¹¹⁶ See s 1 of the Constitution.
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recognition in a “mini-charter created for children only” in section 28 thereof. In furtherance of these interests section 28(2) of the Constitution requires that in every matter concerning a child, a child’s best interests are of paramount importance. It therefore follows that the advent of the Constitution also affects the plight of child victims and child witnesses in that all laws within the criminal justice system affecting children and the way they give evidence will have to pass constitutional scrutiny.

3 CONCLUSION

The present system of criminal law in South Africa is a truly mixed system that combines Roman-Dutch, German, English and unique South African elements. A brief overview of the historical development of South African criminal procedural law illustrates how this evolution materialised and reveals the role each of these systems played in the development of our unique, present-day South African system. It also provides clarity as to why our present system is an accusatorial system and not an inquisitorial one and explains why, unlike the English system, we have done away with the jury system. The effects of the accusatorial system on child witnesses will be discussed in greater detail in chapter 3.

A historical overview of our criminal justice system also illustrates a significant evolution in the role of child witnesses within the criminal justice system from a system such as the Germanic law where the mere accusation by a free man was enough to create a suspicion against an accused (without the involvement of any witnesses) to the present-day system that acknowledges the significance of child witnesses in the criminal justice system.


The Constitution and its influence on other important Acts such as the Criminal Procedure Act of 1977 and the Children’s Act 38 of 2005 will be discussed in detail later. See also paras 2.1 & 2.2 of ch 4 below.

Wessels The History of the Roman-Dutch Law 425.

See for example DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC) at paras [72]-[74].
Regrettably, history shows that the increase in children’s involvement in the judicial system was coupled with some injustices. The competency requirement made it impossible for some, especially young children, to give evidence and the hearsay rule made it impossible for adults to give testimony on their behalf, regarding what the child had said to them. Even if the children were old enough to be deemed competent witnesses they were treated with severe scepticism.\textsuperscript{121} If they were allowed to testify, a collection of sub-rules referred to by Spencer as the “adversarial package”\textsuperscript{122} made it extremely difficult for them to do so. This adversarial package of traditional rules required of them to tell their tale in open court which was an alien environment in which the key figures were often only white men and they were in the physical presence of the accused (of whom they were usually afraid). They were then subjected to an adversarial cross-examination by someone whose agenda was to discredit them by persuading the court that their account was mistaken, incomplete or a lie. Throughout all of this they had to remain in attendance unless excused by the court.\textsuperscript{123}

In this regard the present system is welcomed in that it recognises children’s vulnerabilities and proposes to afford child witnesses and child victims protection. It still has some shortcomings and imperfections, however, and faces huge systemic challenges.\textsuperscript{124} These shortcomings and challenges will be discussed in more detail later in this thesis.

\textsuperscript{121} R v Manda 1951 (3) SA 158 (A) at 163.
\textsuperscript{123} R v Sideropoulos 1910 CPD 15; R v De Beer 1933 NPD 30 & R v R 1935 NPD 582.
CHAPTER 3

The accusatorial system in South Africa and its effect on child witnesses and child victims within the system

It has been suggested that the early roots of the present accusatorial (adversarial) trial system can be traced to trial by battle:¹ physical confrontation gradually developed into verbal confrontation.²

To-day instead of fighting with lethal weapons, we use legal arguments. Where combatants formerly met face to face, they now have surrogates—attorneys who fight for them. The judge acts as referee, theoretically protecting the contenders against foul blows. The jury decides which “side” fought the better fight. But fight it is and the object is to win, not necessarily to reveal the truth.³

1 INTRODUCTION

Most countries in the world primarily use one of the two criminal justice models of procedure: the accusatorial (or adversarial) model or the inquisitorial model. This classification is based on the history and evolution of particular systems.⁴ Traditionally the English and American countries, or common law world, are seen as examples of the former whereas the latter can be found on the European continent (e.g. the French or German systems) or in civil law countries. The South

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² Van der Merwe “Die evolusie van die mondelingse karakter en uitsluitingsreëls van die Engelse gemene bewysreg” 1991 *Stell LR* 281 at 290.
³ Dressler as quoted by Brouwer “Inquisitorial and adversary procedures – a comparative analysis” 1981 *Australian LJ* 207.
⁴ See ch 2 in this regard.
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African system belongs to the Anglo-American or accusatorial “family”. It should, however, be emphasised that no civilised country today follows a purely accusatorial or inquisitorial system, but rather a mixed system with a predisposition towards one of the two systems. Both systems endeavour to discover the truth and to accomplish this ideal in a fair manner. The way in which this is effected differs, however, one of the main differences being the role the judicial officer plays in the proceedings.

In an accusatorial system a criminal trial consists of two opposing parties placing evidence before a judge, who plays a much more neutral or passive role than that of his or her inquisitorial counterpart. While the inquisitorial system has been depicted as judge-centred the accusatorial system has been described as party-driven or party-centred with each party presenting his or her case to the judge. The judge acts as an umpire and, after having heard the examination and cross-examination of the parties to the case, adjudicates upon the matter in the light of the evidence placed before him or her by the parties. Great emphasis is placed on the spoken word and evidence is mainly produced orally.

The accusatorial system requires the accuser to present persuasive evidence of the accused’s guilt beyond reasonable doubt. This is due to the underlying assumption of the accusatorial model, namely the accused’s presumption of innocence. The best way to discover the truth in terms of this model is by allowing the parties themselves to present their evidence in a process which guarantees the use of direct

5 Snyman “The accusatorial and inquisitorial approaches to criminal procedure: some points of comparison between the South African and continental systems” 1975 CILSA 101 at 102; Roodt “A historical perspective on the accusatorial and inquisitorial systems” 2004 Fundamina 137 at 138.
6 Snyman 1975 CILSA 103; Steytler “Making South African criminal procedure more inquisitorial” 2001 Law, Democracy & Development 1 at 2; Roodt 2004 Fundamina 137.
9 Joubert (ed) Criminal Procedure Handbook 11 ed (2014) 298; Goldstein “Reflections on two models: inquisitorial themes in American criminal procedure.” 1974 Stanford LR 1009 at 1017. It should, however, be noted that affidavits or certificates may be submitted as proof of certain facts. See also ss 212-215 of the Criminal Procedure Act 51 of 1977 (hereinafter the Criminal Procedure Act).
confrontation and cross-examination.\textsuperscript{11} This explains both the emphasis on “orality” and the reason why the adversarial trial model can to some extent allow the relative inactivity of the adjudicator.\textsuperscript{12} In sum the foundational assumption of the accusatorial system is the belief that partisan advocacy, coupled with equality of arms, is the best means of placing the neutral adjudicator in a position to determine the truth.\textsuperscript{13}

In contrast, the inquisitorial model is regarded as a quasi-scientific or proactive search for the truth rather than a dispute. The judge is seen as the master of the proceedings and plays a much more active role in collecting and analysing facts.\textsuperscript{14} The judge decides whether there are sufficient grounds for instituting a prosecution, determines which witnesses to call and elicits the evidence by questioning the witnesses. An open system of evidence is followed that places little emphasis on oral presentation of evidence or cross-examination. Written evidence plays an integral part in the trial and all relevant evidence may be considered by the judge. The process becomes an inquest in which the judge attempts to establish the truth by integrating the arguments and evidence of the prosecution and defence. It has therefore been said that “because of his wide powers, the continental judge searches for the material truth, whereas the judge in the accusatorial systems is merely bound to search for the formal truth, because he merely relies upon the information placed before him by the parties”.\textsuperscript{15} The fundamental assumption underlying the inquisitorial system, in contrast to the accusatorial system, is the belief that the State is the powerful guarantor of the public interest and is best

\textsuperscript{11} Department of Justice and Constitutional Development \textit{Simplification of the Criminal Procedure} Project 73 (2001) 9; Van der Merwe in Schwikkard & Van der Merwe \textit{Principles of Evidence} 1 5 2.

\textsuperscript{12} Van der Merwe in Schwikkard & Van der Merwe \textit{Principles of Evidence} 1 5 2; Roodt 2004 \textit{Fundamina} 139.

\textsuperscript{13} Joubert (ed) \textit{Criminal Procedure Handbook} 22; Steytler 2001 \textit{Law, Democracy \& Development} 2; Roodt 2004 \textit{Fundamina} 139.


\textsuperscript{15} Snyman 1975 \textit{CILSA} 103; Steytler 2001 \textit{Law, Democracy \& Development} 3; Roodt 2004 \textit{Fundamina} 140.
equipped to establish the truth and at the same time protect the interests of the accused through a judge-dominated system.\textsuperscript{16}

For an accusatorial system to be effective there has to be “equality of arms” between the parties.\textsuperscript{17} The child’s inability as an equal adversary is most evident/acute in an adversarial truth-finding process and may even lead to the truth simply becoming the view of the most powerful party.\textsuperscript{18} It is precisely the elements of the accusatorial system such as oral presentation of evidence, confrontation and cross-examination that create particular difficulties for children. The essential elements of the accusatorial system from the perspective of child witnesses will thus be investigated in order to understand and evaluate the effectiveness of the model with a view to making recommendations for an improved system. Comparisons with the inquisitorial model will also be made.

2 ESSENTIAL ELEMENTS OF THE ACCUSATORIAL SYSTEM

2.1 Passive presiding officer

The role of a presiding officer in the accusatorial system is essentially passive or neutral.\textsuperscript{19} The presiding officer ensures that the rules of evidence are satisfied by listening to the evidence and arguments presented to him or her by the parties and by ruling on the issues of law and fact. Although the role of a presiding officer is

\textsuperscript{16} Goldstein 1974 Stanford LR 1018-1019; Steytler 2001 Law, Democracy & Development 3; Roodt 2004 Fundamina 140.
\textsuperscript{19} Joubert (ed) Criminal Procedure Handbook 294.
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essentially a passive or neutral one, the present-day presiding officer is not totally inactive.\(^{20}\) In the matter of *Rex v Hepworth* Curlewis J remarked as follows:

A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge’s position in a criminal trial is *not merely that of an umpire* to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but *has to see that justice is done.*\(^{21}\)

South African law provides for judicial involvement in a trial in that the presiding officer may decide on the admissibility of evidence and the propriety of the conduct of the parties. In addition South African law imposes a legal duty on the presiding officer to actively search for the legal truth where it appears essential to the just decision of the case.\(^{22}\) In terms of section 186 of the Criminal Procedure Act the court may:

at any stage of the criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court *shall* so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.\(^{23}\)

The presiding officer may also examine a witness so subpoenaed or recall and re-examine such a witness in terms of section 167 of the Criminal Procedure Act if it


\(^{21}\) 1928 AD 265 at 277. Own emphasis added.

\(^{22}\) See *S v Rall* 1982 (1) SA 828 (A) at 831B-C; *S v Mayiya* 1997 (3) BCLR 386 (C) 395C.

\(^{23}\) Own emphasis added.
appears necessary in order to arrive at a just decision in the case. A presiding officer is thus not only entitled in terms of South African law to call and put questions to witnesses but may be obliged in the interests of justice to act accordingly.\textsuperscript{24} The main purpose of such questioning is to elucidate any points that may still be obscure. Questioning of a witness by the presiding officer may, however, not amount to cross-examination as this would result in an irregularity.\textsuperscript{25}

Conversely in terms of the adversarial system, the presiding officer has a duty to conduct any questioning with open-mindedness, impartiality and objectivity and should refrain from questioning a witness in a way that, by its frequency, length, timing, form, tone, content or otherwise conveys the opposite impression.\textsuperscript{26} Furthermore, a presiding officer should not question a witness in a way that may intimidate or disconcert the witness or unduly influence the quality of the witness’s replies, thereby affecting the witness’s demeanour or impairing the witness’s credibility.\textsuperscript{27} This is of added importance with child witnesses, who require enhanced but also exemplary judicial involvement.

An example of a case where the presiding officer should have intervened by questioning the witness, but failed to do so, was \textit{S v MM}.\textsuperscript{28} In this case the witness was a seven-year-old complainant who had allegedly been raped. She testified with the aid of an interpreter who was not very competent. In her testimony she used words such as rape and penis that were not age-appropriate. No attempt was made to discover what she meant by this. The Supreme Court of Appeal was critical of the trial court’s failure to explore this and Wallis JA pointed out that children do not

\textsuperscript{24} See \textit{S v Rall} 1982 (1) SA 828 (A) at 831B-C; \textit{S v Mayiya} 1997 (3) BCLR 386 (C) 395C. \textit{S v Mathabathe} 2003 (2) SACR 28 (T); \textit{S v Mseleku} 2006 (2) SACR 237 (N); \textit{S v Mafu} 2008 (2) SACR 653 (W); \textit{S v Saule} 2009 (1) SACR 196 (Ck); \textit{S v Du Plessis} 2012 (2) SACR 247 (GJS).

\textsuperscript{25} \textit{S v Rall} 1982 (1) SA 828 (A) at 831H-832H; \textit{S v Maseko} 1990(1) SACR 107 (A); \textit{S v Gerbers} 1997 (2) SACR 601 (SCA); \textit{S v Mosoinyane} 1998 (1) SACR583 (T); \textit{S v Mathabathe} 2003 (2) SACR 28 (T) & \textit{S v Maroeli} (unreported FB review no 338/12, 17/01/2013).

\textsuperscript{26} \textit{S v Rall} 1982 (1) 828 (A) at 831H-832H; \textit{S v Maseko} 1990(1) SACR 107 (A); \textit{S v Gerbers} 1997 (2) SACR 601 (SCA); \textit{S v Mosoinyane} 1998 (1) SACR583 (T); \textit{S v Mathabathe} 2003 (2) SACR 28 (T); \textit{S v Maroeli} (unreported FB review no 338/12, 17/01/2013).

\textsuperscript{27} 2012 (2) SACR 18 (SCA).
usually use language such as “rape” when describing sexual acts or “penis” when referring to private parts. The danger thus exists that the interpreter used technical expressions instead of the actual words used by the seven-year-old witness.29

The witness had furthermore stated that the appellant had placed his penis “on” and not “in” her vagina. This was also not explored.30 Coupled with the fact that the doctor’s report lacked clarity on whether there was penetration and that the doctor was not called to testify, the appeal had to succeed and the conviction of rape was altered to one of indecent assault.31 The Supreme Court of Appeal pointed out that it would have greatly assisted the court in considering the appeal if an attempt had been made to explore the statements and it had been ascertained whether the witness’s statement that the appellant had raped her was compatible with her description of the appellant’s penis being placed “on” her private parts.32

This case clearly illustrates that enhanced judicial involvement is called for in the light of children’s emotional and developmental shortcomings as well as their relative lack of knowledge relating to the judicial system. Aspects such as “in” and “on” are difficult concepts for seven-year-olds, especially when used in relation to their genital area. This is due to the fact that young children do not conceptualise their inner anatomy and consider any contact with their body as taking place “in” them.33 For this reason it is vital to ask further questions such as whether the child was wearing clothing at the time as this will assist in eliminating the possibility of penetration. In this regard the presiding officer can play a very valuable role in monitoring whether there is a common understanding between the child and the court about the questions asked.34 An awareness of these difficulties, combined with an attempt by the presiding officer in S v MM35 to ensure that discrepancies were

29 Para [9].
30 Para [9].
31 Para [22].
32 Paras [9], [22].
34 Müller The Judicial Officer and the Child Witness 85-86.
35 2012 (2) SACR 18 (SCA).
clarified, could have resulted in a more convincing conviction of indecent assault or even in the conviction of rape being upheld. Add to this the fact that generally speaking the accusatorial rules of evidence were not developed to handle the problems presented by child witnesses, an enhanced judicial involvement becomes a given. However, this also places an increased responsibility on the presiding officer to act with due diligence.\(^{36}\)

In addition to the aforementioned discretionary provisions and central to the theme of this thesis, section 170A of the Criminal Procedure Act affords a presiding officer a discretion to appoint an intermediary where there are findings of “undue mental suffering or stress”\(^{37}\) on the part of the child witness. In this regard the presiding officer should exercise his or her discretion in the best interests of the child witness.\(^{38}\) In *S v Stefaans*\(^{39}\) the court stressed the following:

> If the application is opposed, the presiding judicial officer should require that appropriate evidence be adduced to enable him to exercise a *proper discretion* as to whether the section may be invoked or not.

Indications are nonetheless that presiding officers are wary of exercising the discretion available to them under existing law for fear of compromising judicial neutrality or undermining the rights of the accused and because of concern regarding the approach to be followed by courts of appeal.\(^{40}\) It has also been

\(^{36}\) Müller & Van der Merwe “Judicial management in child abuse cases: empowering judicial officers to be the ‘boss in court’” 2005 SACJ 41 at 44.

\(^{37}\) See ch 5 para 3.1.5 below for a discussion of the application and meaning of the phrase.

\(^{38}\) DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC) at para [113].

\(^{39}\) 1999 (1) SACR 182 (CDP) at 188. Own emphasis added.

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suggested that presiding officers shy away from exercising their discretion owing to a lack of knowledge of the possible methods of reducing trauma for children.\textsuperscript{41} I am of the opinion that presiding officers who do not exercise their discretion properly and take up a position of relative detachment or judicial passivism may in fact contribute to the undermining of the rights of the child victim and/or child witness. For children to be able to give effective testimony, they should be able to do so in a way that takes their emotional and developmental shortcomings into consideration. By exercising a proper discretion the presiding officer ensures that the correct balance between the conflicting rights of the child and the accused prevails.\textsuperscript{42} In \textit{S v Thebus}\textsuperscript{43} Yacoob J pointed out the following general rule:

\begin{quotation}
It is fundamental to a fair trial that it be presided over by a judicial officer who respects, protects, promotes and fulfils the rights in the Bill of Rights and who, by his or her conduct, demonstrates adherence to the value of the supremacy of the Constitution and the rule of law, as required by ss1(c) and 7(2) of the Constitution.
\end{quotation}

It is therefore imperative that a presiding officer should preside over a trial in a way that respects, protects, promotes and fulfils the rights in the Bill of Rights of all persons appearing before him, and this is even more vital in the case of children, who are highly vulnerable and in need of special protection.

\textsuperscript{41} See Müller \textit{The Judicial Officer and the Child Witness} 282; Matthias & Zaal 2011 \textit{International Journal of Children's Rights} 251 at 257; Myers 1996 \textit{Pacific LR} 169 at 216; Cossins in Spencer & Lamb \textit{Children and Cross-examination: Time to Change the Rules}? 106.

\textsuperscript{42} See \textit{Nedzamba v S} (911/2012) [2013] SCA (27/05/2013) where the trial judge intervened where he should not have (at paras [27], [30], [31] and [32]) and failed to intervene where he should have (at para [28]). The possibility of an intermediary was not considered either. The Supreme Court of Appeal rightly held at para [34] that the “irregularities render the conviction and sentence liable to be set aside” and that “[e]qually, for the child complainant there has been no closure. In this instance the administration of justice appears to have failed them both.”

\textsuperscript{43} 2003 (2) SACR 319 (CC) at para [109].
Apart from the aforementioned “inquisitorial” powers with which presiding officers are endowed in the accusatorial system, a presiding officer could also reduce the trauma for a child witness by intervening from the bench during the trial in the following ways. The presiding officer should:

- Welcome the child in a tone that is respectful and sensitive to the child’s position. By establishing a rapport with a child the effectiveness of the child as a witness is greatly enhanced.\(^4^4\) Such rapport can reduce the anxiety caused by being in an unfamiliar setting and assures the child that he or she is not on trial but need only tell what he or she saw or what happened.\(^4^5\)

- Dispel any myths or misconceptions that may affect a child’s understanding of the process. Many children have the belief for instance that if they cannot answer a question or if they should make a mistake this will result in their going to prison.\(^4^6\) An example of such a case is that of an eight-year-old boy who witnessed older boys setting fire to a school. He was handed the matches as the older boys fled the scene and found moments later by the school authorities. The boy was charged with the offence. Despite being drilled by his defence attorney on his story, the boy denied on the stand that there had been a fire, believing that if he could convince the judge that a fire had never occurred he could go free. The child’s limited understanding of trial proceedings made him a useless witness in his own defence.\(^4^7\)

- Briefly explain to a child who the different role players are, for example the presiding officer, prosecutor, defence attorney and the intermediary, as well as what their involvement in the trial is.\(^4^8\)

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\(^{4^4}\) Müller The Judicial Officer and the Child Witness 289-296.


\(^{4^6}\) Müller & Van der Merwe 2005 SACJ 41 at 43.


\(^{4^8}\) Thoman 2013 Nevada LJ 236 at 250; Müller The Judicial Officer and the Child Witness 289-296.
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• Give a simple description of the procedure. At each stage the presiding officer should tell the child what will happen next. For example, after examination-in-chief the presiding officer should explain to the child that “further” questions will be put to the child by the defence to ascertain that the court “understands” the answers given by the child and not because the court did not believe the child in the first instance.

• Ensure that a child is not bullied or harassed in court and intervene where it is clear that a child does not understand a question but is confused or traumatised.

• Allow recesses in the court process during a child’s testimony where the child shows signs of fatigue, loss of attention or unmanageable stress.

• Ensure that the language used is in accordance with the child’s developmental abilities. Presiding officers should insist that questions are simple, single-topic questions phrased in the active voice and that specialised terms are not used. It is incumbent upon the presiding officer to intervene if it appears that the child does not understand the questions put to him or her.

• See to it that cases are dealt with expeditiously in time frames appropriate to the victim and the offence.49

In comparison with the accusatorial model, the inquisitorial model is judge-centred and proceeds from the premise that a trial is not a contest between two parties but an inquiry into the facts to ascertain the truth. In accordance with this model the presiding officer plays an active role as he or she calls and interrogates the witnesses and also decides on the order in which the evidence is presented. Cross-examination does not take place but instead the presiding officer tests the reliability and accuracy of the witnesses.50 As the proceedings resemble an inquiry

49 Müller The Judicial Officer and the Child Witness 289-296; Plotnikoff & Woolfson Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses 59-73; Thoman 2013 Nevada LJ 236 at 250-258.
might find this no more traumatic than an interview via a video recording. Furthermore, if this inquiry is conducted by an experienced presiding officer, many of the problems associated with the accusatorial system such as confrontation between the child and the accused and problems arising from cross-examination are eliminated.\footnote{Zieff “The child victim as witness in sexual abuse cases – a comparative analysis of the law of evidence and procedure” 1991 SACJ 21 at 37.} In terms of the German Code of Criminal Procedure,\footnote{S 241a.} for example, only the presiding officer has the right to examine a witness under the age of sixteen years. If the prosecution or the defence wishes to put additional questions to the witness, this may only be done through the presiding officer. This stems from the German legislature’s viewpoint that this procedure protects not only the juvenile but also the fact-finding process against improper questioning.\footnote{Herrmann 1978 SACC 9.}

Whereas under the accusatorial system the purpose of the cross-examination of a witness is to elicit evidence favourable to the party conducting the cross-examination and to challenge the truth of the witness’s version of the disputed events,\footnote{Du Toit et al Commentry on the Criminal Procedure Act (2010) 22-21; Ambos “International criminal procedure: ‘adversarial’, ‘inquisitorial’ or mixed? 2003 International Criminal LR 1 at 4} the notion of an inquisitorial examination is that the questioning is conducted by the presiding officer from a neutral standpoint. In the context of child witnesses, particularly those that are very young or highly vulnerable, the inquisitorial examination is widely thought to be more advantageous than the adversarial system.\footnote{Spencer in Spencer & Lamb (ed) Children and Cross-examination: Time to Change the Rules? 15.}

The inquisitorial system is not immune from criticism, however. The role of the presiding officer is one of the aspects that have come in for criticism. It is argued that the presiding officer has to fulfil two roles in one, in that he or she must be both the detective searching for the material truth and at the same time the arbiter who
must objectively reach a finding on the facts and considerations before him.\textsuperscript{56} It is difficult for the presiding officer to be completely unprejudiced against the accused, since he or she is both judge and prosecutor. It is for this reason that the presiding officer is often regarded by the accused as being biased or even his or her opponent.\textsuperscript{57} Also, the interviewing of children is a highly specialised task and should be conducted by someone with training in developmental psychology, language acquisition and communication with children. It has hence been questioned by some commentators, of whom Müller is one, whether a presiding officer who has not received training in the specific fields will be able to perform these tasks. For this reason, the presiding officer may not be best suited to perform the inquisition.\textsuperscript{58}

In order to address the dilemma of how to reconcile the aforementioned problematic elements of the two models with regard to child witnesses, in 1989 the South African Law Commission (the Commission) proposed the utilisation of an intermediary, which suggestion was later implemented,\textsuperscript{59} as a possible solution to the shortcomings in both these systems.\textsuperscript{60} The Commission contended at the time that the structure of the adversarial trial should be maintained and that the presiding officer should retain the role of arbiter or passive umpire. An intermediary may be appointed, whose actions are controlled by the presiding officer and whose task it is to ensure that the rules of procedure and evidence are observed by the prosecution and defence. An intermediary then becomes an additional participant in the adversarial trial and participates independently from the prosecution and the defence. The use of an intermediary adds a new dimension to and is an enhancement of the ways in which the legitimacy of the system and the fact-finding


\textsuperscript{57} Snyman 1975 \textit{CILSA} 108; Roodt 2004 \textit{Fundamina} 154.

\textsuperscript{58} Müller “An inquisitorial approach to the evidence of children” 2001 \textit{Crime Research in South Africa} 1.

\textsuperscript{59} Refer to para 2 of ch 5 below for a discussion of the introduction of the use of intermediaries into the South African Criminal Procedure Act.

process can be promoted and reinforced. The presiding officer is therefore able to remain objective while mitigating the court experience for the child.\textsuperscript{61}

### 2.2 Oral evidence

The accusatorial model affords specific prominence to the oral presentation of evidence. In accordance with the accusatorial system, as a general rule evidence must be given \textit{viva voce} (orally), in open court by a sworn witness in the presence of the accused.\textsuperscript{62} The rationale for this practice is historically related to the importance attached by common law to the oath, the demeanour of the witness and to cross-examination as guarantees of reliability.\textsuperscript{63} It allows for maximum participation in that parties have the opportunity to confront a witness who has testified against them and are able to challenge the evidence given by such witness in the most direct way possible by cross-examination. The parties and the court are also able to observe the demeanour of the witness in order to assess the witness’s credibility.\textsuperscript{64} This practice furthermore stems from the fundamental assumption that the oral testimony of a witness at trial represents the best way for an adjudicator to deliver judgment on a factual dispute between two opposing parties.\textsuperscript{65}

The exact origin of this assumption is in fact uncertain. Van der Merwe points out, however, that an overview of the English law of evidence\textsuperscript{66} provides us with some guidance as to its origin.\textsuperscript{67} Kötz as quoted by Van der Merwe states the following:

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\textsuperscript{62} Du Toit et al \textit{Commentary on the Criminal Procedure Act} 22-17.

\textsuperscript{63} Joubert (ed) \textit{Criminal Procedure Handbook} 298.

\textsuperscript{64} Joubert (ed) \textit{Criminal Procedure Handbook} 299.

\textsuperscript{65} Van der Merwe in Schwikkard & Van der Merwe \textit{Principles of Evidence} 18 1.

\textsuperscript{66} It should be noted that the English law of evidence serves as the South African common law of evidence and is thus relevant to our understanding of the assumption. See Van der Merwe in Schwikkard & Van der Merwe \textit{Principles of Evidence} 1 1.

\textsuperscript{67} Van der Merwe 1991 \textit{Stell LR} 281 at 298.
I would submit that the common law's emphasis on oral evidence, or oral argumentation, and on the parties' right to present their cases through the oral examination and cross-examination of witnesses can be explained, at least partly by the jury system. If a case is tried by a jury, counsel's position is not unlike that of a playwright. A playwright wishing to convey information to the audience has no alternative but to disclose this information through the spoken word of the actors. Similarly, counsel cannot present his client's case to the jury unless he sues witnesses, and it would make little sense in practice to make the jurors read and evaluate complicated documentary evidence.\footnote{Van der Merwe 1991 \textit{Stell LR} 281 at 298.}

This assumption no longer holds good, however, as the jury system was abolished in South Africa in 1969,\footnote{See the Abolition of Juries Act 34 of 1969.} which theoretically opened the door for a more liberal approach with regard to the admission of evidence normally excluded in a jury trial.\footnote{Van der Merwe in Schwikkard & Van der Merwe \textit{Principles of Evidence} 1 3.}

In addition, it should be remembered that much of the stress experienced by children in court stems from the very insistence that oral evidence needs to be given personally in court at the trial.\footnote{Except as otherwise provided in terms of ss 158 and 170(A). See also Zeiff 1991 \textit{SACJ} 7-38; Iyer & Ndlovu "Protecting the child victim in sexual offences: is there a need for special separate legal representation?" 2012 \textit{Obiter} 72 at 80.}

This insistence has serious implications for child witnesses. Not only must the child testify personally in the courtroom, but there are usually long delays between the actual event that the child experienced or witnessed and the trial at which he or she has to testify about it.\footnote{The existence of court delays is well documented in most countries. In New Zealand children on average wait fifteen months between committal and trial while in England the average period is thirteen months. See Henderson “Alternative routes: other accusatorial jurisdictions on the slow road to best evidence” in Spencer & Lamb (ed) \textit{Children and Cross-examination: Time to Change the Rules?} (2012) 44. In South Africa delays of up to five years can occur. In \textit{Woj v Santam Insurance Co Ltd} 1980 (2) SA 971 (SE) the two witnesses testified five years after the actual occurrence of the event. The waiting period in Namibia ranges between 12 months and eight years. See Theron \textit{The Impact of the Namibian Judiciary System on the Child Witness} (Master dissertation in Diaconology, Unisa 2005) 54.}

These delays before trials create two major issues for children, in terms of both their psychological welfare and the quality of their evidence. The waiting causes stress
and the question that is raised is whether the child should receive therapy in the intervening period. In addition, time erodes children’s memories and this raises the further question of how to preserve the child’s memory of events with the lapse of time.\textsuperscript{73}

Where a child has been either the victim of or a witness to a crime, the child requires some form of therapy to cope with the situation. In the experience of psychologists and social workers, in order to be able to deal with the trauma of the situation a child victim or child witness must be able to deal with the actual experience. This is usually achieved by either talking through the experience or dealing with it through play therapy.\textsuperscript{74} In South Africa no rules exist that prevent a child from receiving therapy before the trial. However, therapy before the trial presents the danger that a child’s evidence may become contaminated by suggestion as interviewing techniques employed by therapists may include leading questions. A leading question is one that implies or suggests an answer or assumes the existence of certain facts which might be in issue.\textsuperscript{75} Because children naturally want to comply with the wishes of adults, a child may find it hard to resist the pressure to give the questioner the answer he or she wants to hear simply to please the adult or because the child may be confused or frightened.\textsuperscript{76} The problem presented by leading questions is that they may result in “new” information being incorporated into the memory of the child which did not form part of the actual event. This happens if an interviewer’s words move the child to imagine events or some details of an event and the child thereafter accepts the fantasy as memory. This could alter the child’s report.\textsuperscript{77}

\textsuperscript{73} Müller \textit{The Judicial Officer and the Child Witness} 9; Zieff 1991 \textit{SACJ} 21 at 36; Simon “Pre-recorded videotaped evidence of child witnesses” 2006 \textit{SACJ} 56 at 60; Thoman 2013 \textit{Nevada LJ} 237 at 243.

\textsuperscript{74} Müller “The effects of the accusatorial system on child victims” 2000 \textit{CARSA} 13 at 18; Narsee “Some magistrates and attorneys believe that abused children should not be given therapy before the trial of the abuser” \textit{Times Live} 15/09/2015 available at \url{http://www.timeslive.co.za/thetomes/2015/09/05/Dont-help-abused-kids} (accessed 16/09/2015). Narsee reported that Shaheda Omar, Director of the Teddy Bear Clinic for abused children, confirmed that it was critical that children get pre-trial therapy.

\textsuperscript{75} Van der Merwe in Schwikkard & Van der Merwe \textit{Principles of Evidence} 18 3 1.


\textsuperscript{77} Stolzenberg & Lyon “How attorneys question children about the dynamics of sexual abuse and disclosure in criminal trials” 2014 \textit{Psychology, Public Policy and Law} 19 at 20;
Conversely, to prevent a child who desperately needs therapy from receiving such therapy (sometimes for five to eight years) just to preserve evidence can be devastating to the child’s wellbeing.\textsuperscript{78} A case study encountered in the course of research on pre-trial therapy conducted by Fouche of North-West University and Le Roux of the University of Pretoria\textsuperscript{79} involving 34 respondents in Gauteng, including social workers, magistrates, prosecutors and attorneys, relates the case of a child who reported to a social worker that she was allowed to see a therapist every week but was not allowed to talk about the sexual abuse. The child stated the following:\textsuperscript{80}

\begin{quote}
I really want to tell that lady [the therapist] that I see every week but I’m not allowed to talk to her about it … And then two years later, when I am trying my best to bury it, now I have to go and tell some strange lady [in court] the things that happened after you have been telling me for two years that we’re not allowed to talk about it.
\end{quote}

Research by Plotnikoff and Woolfson in a 2009 study\textsuperscript{81} based on interviews with 182 young witnesses indicates that adjournments are one of the primary reasons for witnesses becoming frustrated, less cooperative or even hostile towards the criminal justice system. Victims and witnesses want their court cases to be resolved

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\textsuperscript{78} Müller \textit{The Judicial Officer and the Child Witness} 12; Davis & Saffy “Young witnesses: experiences of court support and court preparation” 2004 \textit{Acta Criminologica} 17 at 18.

\textsuperscript{79} Narsee “Some magistrates and attorneys believe that abused children should not be given therapy before the trial of the abuser” \textit{Times Live} 15/09/2015 available at \url{http://www.timeslive.co.za/thetimes/2015/09/05/Dont-help-abused-kids} (accessed 16/09/2015).

\textsuperscript{80} Narsee “Some magistrates and attorneys believe that abused children should not be given therapy before the trial of the abuser” \textit{Times Live} 15/09/2015 available at \url{http://www.timeslive.co.za/thetimes/2015/09/05/Dont-help-abused-kids} (accessed 16/09/2015).

\textsuperscript{81} Plotnikoff & Woolfson “Measuring Up? Evaluating implementation of government commitments to young witnesses in criminal proceedings” available at \url{http://www.nspcc.org.uk/measuringup} (accessed 24/02/2016).
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as quickly as possible in order to “get on with their lives”. Through such delays children are forced to remember events they desperately want to forget.\(^{82}\)

The Commission identified delays as one of the sources of concern regarding child witnesses and suggested that cases involving children should be given priority in the interests of speed.\(^{83}\) In *S v Mokoena; S v Phaswane*\(^{84}\) Bertelsmann J held as follows:

A child may forget facts more readily than an adult, but will not escape the stress that is caused by the uncertainty surrounding the pending trial and the fact that the child victim is often obliged to attend a number of court dates only to have the matter postponed again. This adds to the child’s trauma. There is no justification for this additional burden of heartache and frustration that is routinely heaped upon child victims and witnesses in this fashion … Whenever a child is involved as a victim or witness, such child is by virtue of the clear cut provisions of s 28(2) entitled to have his or her case given priority at every stage of the investigation and of the prosecution.

The reality, however, is that delays are still a part of most present-day systems.\(^{85}\) Henderson points out that one alternative is to pre-record children’s entire evidence

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\(^{84}\) 2008 (2) SACR 216 (T) at paras [158] and [159].

\(^{85}\) A case in point is that of Carl Christiaan Lotter of Nelspruit who sexually molested two girls aged eight and nine for three years between 2006 and 2009. The case involved two different magistrates, four different prosecutors and over twenty-five postponements. Initially one child was forced to testify in the presence of the accused. With all the delays and the re-traumatisation of the two girls, it was decided, in the interests of their emotional health, to drop the rape charges. The State was thus requested to close the case and to find Lotter guilty on his plea of sexual and indecent assault. Sentence was only handed down on 6 August 2013, almost five years later. See [http://carteblanche.dstv.com/story/Sexual-Offences-Courts-2013-09-08](http://carteblanche.dstv.com/story/Sexual-Offences-Courts-2013-09-08) (accessed 27/09/2013). Another case in point is that of the rape of a 9 year old girl in Nkomazi, Mpumalanga. The case has been dragging on for three years and has been postponed 18 times. Outstanding DNA reports, dysfunctional CCTV court cameras and the
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(in chief and upon cross-examination, in other words full pre-recording) at a pre-trial hearing well in advance of the actual hearing. Many countries in the common law world, with the exception of South Africa and the USA, already pre-record children’s evidence-in-chief. This means, however, that children still have to come to court at the actual trial to be cross-examined and must still contend with delays. On the other hand, with full pre-recording the hearing is recorded and played at the trial. The accused and his or her lawyer are entitled to be present at the pre-recording and to view the interview. They are also entitled to request the interviewer to put certain questions to the witness and the interview is governed by the ordinary rules of court. The advantage of this approach is that the child witness need not return to court unless new evidence arises; experience indicates that this happens only in exceptional cases.

The first country with an accusatorial trial system to introduce pre-recording into their system was Israel in 1955. In terms of Israeli law a child under the age of fourteen years who is a complainant or a witness to certain crimes (sex, violence, prostitution, or vice offences and parental abuse or neglect) is interviewed by a trained investigator. The majority of investigators are women and they are either trained psychologists or welfare officers. The child’s evidence is presented at trial

defense lawyer changing five times are some of the reasons cited for the delay. See Pillay “Justice denied for 9-year-old girl raped 18 times” SABC News 31/05/2016 available at http://www.sabc.co.za/news/a/c0eb52804cf75035bee7ff00ab741406/Justice-denied-for-9-year-old-girl-raped-18-times (accessed 01/06/2016).


Countries that successfully use pre-recordings include six states in Australia, New Zealand and Israel (Henderson in Spencer & Lamb (ed) Children and Cross-examination: Time to Change the Rules? 46-55). England introduced a six-month pilot project in April 2014 which allowed the use of pre-recordings for children under the age of sixteen years as well as for vulnerable adults in three Crown Courts with a view to extending the project if it proved to be successful (see BBC News 28/04/2014 “Vulnerable witnesses allowed to give evidence pre-trial” available at http://www.bbc.com/news/uk-27156660 (accessed 25/02/2016)). Although the formal evaluation period ended in October 2014, having involved 200 cases, it continues to be used. The English government has undertaken to complete the national implementation of the project (see Plotnikoff & Woolfson Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses 237). Although the USA has had legislation permitting full pre-recordings for years, this is seldom used because of the emphasis that is placed on the right to confrontation (see for example Maryland v Craig 497 US 836 (1990) at 679).

via video recordings of the interview and the investigators testify as a “surrogate witness” on behalf of the child.\textsuperscript{89}

The approach adopted by the Israelis has, however, been criticised in that it is too prejudicial towards an accused as it does not afford the accused a right to challenge the evidence (see for example McEwan “Child evidence: more proposals for reform” 1988 \textit{CLR} 813). In comparison, systems such as that used by Australia allow the accused to put questions to the witness via the defense team at the pre-recording interview.

The use of pre-recordings was introduced in Western Australia in 1992. It met with such success that five of the other Australian states have since followed suit.\textsuperscript{90} An academic study conducted in 2002 by Eastwood and Patton, comparing the position of Western Australia with that of Queensland and New South Wales, indicated the following:\textsuperscript{91}

All children in Western Australia (except one child who chose not to) gave evidence via CCTV – 70 per cent gave evidence at trial and 30 per cent fully pre-recorded their evidence months prior to the trial. Therefore, complainants gave evidence only once. In Western Australia, the use of CCTV for an “affected child” under the age of 16 years at the time of the complaint is mandatory where it is available, unless the child chooses to give evidence in court ... In practice CCTV facilities in Western Australia are of a very high standard and widely used.

The findings in Western Australia contrasted with the uncertainty and trauma suffered by children in eastern jurisdictions who faced the possibility or the reality [that] they would give evidence in court in the presence of the accused ... In contrast, prosecutors, defence lawyers and judges in Western Australia commented on the effectiveness of the legislation and the mandatory use of CCTV. Prosecutors reported it facilitated the child’s evidence because the child exhibits better concentration, is more attentive and less traumatised by the experience. Defence

\textsuperscript{89} The approach adopted by the Israelis has, however, been criticised in that it is too prejudicial towards an accused as it does not afford the accused a right to challenge the evidence (see for example McEwan “Child evidence: more proposals for reform” 1988 \textit{CLR} 813). In comparison, systems such as that used by Australia allow the accused to put questions to the witness via the defense team at the pre-recording interview.

\textsuperscript{90} These include the states of Victoria, Queensland, South Australia, Australian Capital Territory and the Northern Territory (see Henderson in Spencer & Lamb (ed) \textit{Children and Cross-examination: Time to Change the Rules?} 46-55).

\textsuperscript{91} Jackson “Children’s evidence in legal proceedings – the position in Western Australia” in Spencer & Lamb (ed) \textit{Children and Cross-examination: Time to Change the Rules?} (2012) 75 at 87.
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counsel in Western Australia noted it has not affected the rights of the accused, understood it was designed to prevent further damage to the child and believed its use does not affect conviction rates.

Children in other jurisdictions would benefit from similar legislation which protects them from facing the accused in the courtroom.92

The second danger or issue associated with court delays is the effect they have on a child witness’s memory.93 Research findings show that children, especially young ones, have difficulty in recalling the details of events with accuracy as a result of long delays.94 Memory is not static and may be influenced by thinking about past events. This may result in children being more susceptible to suggestion and coaching.95 It is thus imperative to obtain a factual account of the events as early as possible. The use of pre-recording presents such an opportunity. Not only will the evidence be fresh and untainted but the child will be able to receive counselling afterwards. The court will also be able to hear the child’s own words, accompanied by the child’s non-verbal behaviour.96 Jones illustrates this with reference to a case in which the victim was a three-year-old child. The child’s evidence was video-taped fourteen to seventeen days after the incident. Other interviews followed, with the deposition being taped six months after the interview. The most poignant details of the events were recorded at the initial interview. The later interviews were not as detailed or “realistic”, clearly showing that the best evidence is presented while the

93 Simon 2006 SACJ 56 at 60; Wój v Santam Insurance Company Ltd 1980 (2) SA 972 (E); Damba v AA Mutual Insurance Association Ltd 1981 (3) SA 740 (E).
94 In a study conducted by Theron (The Impact of the Namibian Judiciary System on the Child Witness (Master dissertation in Diaconology, Unisa 2005) at 69), an eighteen-year-old victim indicated during an interview that he could not testify about the events as they had taken place eight years previously and he simply could no longer remember the details well enough to go and give evidence.
96 Müller The Judicial Officer and the Child Witness 15.
memory of the events is still fresh in the child’s mind and the child’s recollection of the events is at its best.\textsuperscript{97}

In \textit{S v Baleka}\textsuperscript{98} the court was asked to consider the admissibility of video-taped recordings of a public meeting as evidence of such meeting. The court came to the conclusion that the video-taped evidence was admissible as real evidence. Van Dijkhorst J pointed out that although there are risks involved in allowing videos as evidence, these risks should not be overemphasised. He held as follows:\textsuperscript{99}

\begin{quote}
I am convinced that the video can be a very helpful tool to arrive at the truth. It does not suffer from fading memory as do witnesses. The camera may be selective, but so is the witness’ recollection, even more so. The best word artist cannot draw his verbal picture as accurately and as clearly as does the cold eye of the camera. Not to mention the faltering witness who has difficulty in expressing himself. The tape records and retains for the benefit of the Court not only the words but also the intimation and emphasis of the speaker and the reaction of the audience. A tape recording can often be more reliable than the recollection of a witness.
\end{quote}

In its 1989 Working Paper on the Protection of Child Witnesses,\textsuperscript{100} the Commission stated that the use of video recordings could be of great practical value to the police and the prosecution, but that according to the rules of evidence a video recording would not carry any weight in view of the fact, inter alia, that a child witness must testify \textit{viva voce} in person in court and the accused must be given the opportunity to cross-examine the maker of the statement. However, after receiving numerous comments on the matter the Commission stated in its 1991 Report on the Protection of Child Witnesses that video recordings could in fact be proven to be admissible evidence.\textsuperscript{101} The Commission was nonetheless of the opinion that this proposal did

\textsuperscript{97} Jones “The evidence of a three-year-old child” 1987 \textit{Criminal LR} 677.
\textsuperscript{98} 1986 (4) 192 (T).
\textsuperscript{99} \textit{S v Baleka} 1986 (4) 192 (T) at 194H-195A.
not warrant any statutory amendments but that the use of video recordings was a matter for the police to decide. The use of pre-recorded interviews for child witnesses was revisited by the Commission in 2001 in respect of Project 107 on Sexual Offences. The Commission again acknowledged the benefits of the use of pre-recorded video testimony as evidence during a trial but refrained from recommending its use. The main reasons for not recommending pre-recordings at trial were a possible lack of resources and the likelihood that children would still have to be cross-examined at trial. The Commission did, however, state in its Sexual Offences Report of December 2002 that the use of videotaped evidence was an intricate issue which warranted more detailed research.

The possible use of pre-recordings warrants further serious consideration by the Commission and/or legislature as this will ensure that the child need not appear in court, eliminates the need for multiple interviews, alleviates problems with delays, guards against a possible later memory lapse on the part of the child, may enhance fair decision-making, allows the child to put the incident behind him or her and may even “prompt” a guilty plea from the accused where the child’s pre-recorded evidence proves strong.

at a trial has been challenged under the rule prohibiting hearsay evidence. Zieff points out that an exception to the hearsay rule in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 or an additional statute regulating the admissibility of extrajudicial declarations could be offered as a possible solution to the objection to the use of pre-recorded videotaped evidence (see Zieff 1991 SACJ 21 at 31-33). The hearsay rule has also been criticised by Spencer as being needlessly complicated in cases where children are concerned and prevents the best available evidence from being presented in court (see Spencer & Flin The Evidence of Children: The Law and the Psychology 2 ed (1993) 159-160). The possible use of pre-recordings warrants further serious consideration by the Commission and/or legislature as this will ensure that the child need not appear in court, eliminates the need for multiple interviews, alleviates problems with delays, guards against a possible later memory lapse on the part of the child, may enhance fair decision-making, allows the child to put the incident behind him or her and may even “prompt” a guilty plea from the accused where the child’s pre-recorded evidence proves strong.


Brannon points out that on average by the time a case reaches trial, a child victim has repeated her or his account of the events as many as fourteen to sixteen times. The more interviews there are the more harm the child will suffer. Decreasing the number of interviews will therefore drastically decrease the trauma suffered by such victims (Brannon “The trauma of testifying in court for child victims of sexual assault v the accused’s right to confrontation” 1994 Law and Psychology Review 439).

In contrast to the accusatorial system, other legal systems following the inquisitorial model, such as the French and German systems, rely heavily on analytical assessment of the content of the evidence. French criminal courts, for example, use written transcripts of pre-trial interviews. These transcripts supplement adult oral evidence and where children are concerned, replace it completely. These legal orders consider the emphasis placed on appearance to be primitive.\textsuperscript{106} According to Van der Merwe there is merit in this view:

The assessment of credibility has to take into account the general context, the probabilities, the witness’s intelligence, level of development and education, memory, power of observation and opportunity, language and ability to express him-or herself, as well as the presence or absence of a motive, the compatibility of the witness’s version with the other evidence, and such like. Of course credibility can be assessed according to demeanour, and it must be so assessed. Fluent and relaxed conduct can indeed indicate reliability, while hesitation, uneasiness or nervousness can point in the opposite direction. But the weight attached to the witness’s demeanour must not be overestimated, and the surrounding factors should not be ignored … It is for that reason that impressions of the appearance of a witness are sometimes described as an unsafe guide.\textsuperscript{107}

It is therefore emphasised that children should be allowed to give evidence in a way that accommodates aspects such as their age, intelligence, level of development and education, memory, power of observation, language and ability to express themselves. This can be achieved by the use of screens, closed circuit television (CCTV), through an intermediary or perhaps even by way of pre-recorded interviews.\textsuperscript{108}

\textsuperscript{106} Kruger et al Hiemstra’s Criminal Procedure Issue 2 (loose-leaf) 24-3.
\textsuperscript{107} Own emphasis added. See also Kruger et al Hiemstra’s Criminal Procedure Issue 2 (loose-leaf) 24-3.
\textsuperscript{108} Refer to ch 5 paras 3.4 and 3.5 for a discussion on intermediaries and intermediary facilities.
It should be noted that with regard to the actual *viva voce* evidence the Criminal Procedure Act has made some allowances in section 161(2) for witnesses who are unable to communicate in the normal way. A witness who is unable to speak, such as a deaf-and-dumb witness, may communicate by sign language, through an interpreter or may write down his or her answers, which are then read out. The law thus does not necessarily require a witness to speak, but requires a witness to communicate with the court. In the case of a witness under the age of eighteen years section 161(2) states that evidence shall be deemed to include “demonstrations, gestures or any other form of non-verbal expression”. The rationale for the qualification of section 161(1) by section 161(2) is to make provision for the fact that children often nod or shake their heads or make gestures when answering questions. Allowance is thus made for children who have insufficient vocabulary to describe certain acts or who are too embarrassed to use words of a sexual nature. Although not specifically stated in the Act, the wording of section 161(2) is wide enough to permit children to point to certain parts of their bodies, imitate actions and use anatomically correct dolls for purposes of demonstration. Hence, the witness must be allowed to give evidence in their own words, in their own way and at their own speed. This is of particular importance where the witness is less knowledgeable or sophisticated or may be a disabled child or have communication difficulties.

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109 Subsection 2 was substituted by section 1 of Act 135 of 1991 and came into force on 30/07/1993.
111 S 161 (2).
112 Songca “The reliability of anatomically correct dolls in child abuse cases” 1993 SACJ 83. See also paras 3.7 and 4.7 of the Department of Justice and Constitutional Development *Report on the Re-Establishment of Sexual Offences Courts* (2013) for respectively a discussion on the use of anatomically correct dolls and the proposed standards for their usage.
113 S v Hendriks 1974 (2) PH H91 (C).
In *S v Roux*\(^{115}\) the court held that it was not the intention of the legislature to set out a *numerus clausus* in section 161(2) of what would constitute *viva voce* evidence, but that the courts have over the years adopted a wide interpretation of the said concept. It was further held that criminal courts should not create obstacles to the giving of evidence by witnesses who could not convey their evidence in the usual manner by narrowly interpreting legislation or legal principles. The purpose of the section is precisely the prevention of the exclusion of evidence simply because it is not understandable to the court, if an alternative method exists to render it comprehensible. In *S v Roux* the complainant in an indecent assault case was a ten-year-old boy with Down’s syndrome. He was able to speak. However, he could not speak in sentences and words comprehensible to the court. A speech therapist was able to interpret his communication and the court subsequently held that there was no reason why the complainant could not testify with the assistance of the speech therapist.\(^{116}\)

If we continue to insist that children present their testimony orally, regardless of whether this is done by way of CCTV, through an intermediary or perhaps even by way of pre-recorded videotaped evidence, allowances should be made for children to do so in terms of the provisions of section 161(2). This will not only accommodate children’s special needs but will also contribute to their successful participation in the process.

### 2.3 Two opposing parties

The accusatorial system is party-centred, with each party having to present its case to the court for adjudication. The two opposing parties are responsible for the collection, selection and submission of evidence in support of their respective cases

\(^{115}\) 2007 (1) SACR 379 (C).

\(^{116}\) *S v Roux* 2007 (1) SACR 379 (C) at 383 *f-j.*
and for deciding on the order of its presentation.\textsuperscript{117} Both the prosecutor and the accused play an aggressive role in their presentation and interrogation of witnesses, while the judge plays a relatively neutral role.\textsuperscript{118} The opposing parties do not, however, have the same responsibility for proving their case. The burden of proof lies with the prosecution, which has to prove its case beyond reasonable doubt while the accused need only cause the court when reaching its decision to have a reasonable doubt concerning his or her guilt. An accused may do this by pointing out the weaknesses in the State’s case.\textsuperscript{119}

The essence of the adversarial system has consequently been described by Herrmann as a “dialectic dispute and challenge”.\textsuperscript{120} Snyman also points out that the adversarial system has been branded as being too \textit{Parteiverhanden} – a contest between two parties, and that these parties can “manipulate” the truth for their own purposes in order to “win the case” regardless of truth and justice.\textsuperscript{121} It is precisely this sparring or aggressive challenge that child witnesses find extremely stressful and difficult to handle.

The inquisitorial model is judge-centred in comparison. The prosecution and defence play a comparatively insignificant role. The judge decides on the order of evidence and on who will be called as witnesses. All questioning is conducted by the judge, who questions both the accused and the witnesses.\textsuperscript{122} The judge furthermore ascertains the relevance of the facts and neither the defence nor the prosecution has any burden of proof.\textsuperscript{123} The essence of the inquisitorial trial has accordingly been described as “a seeking of the truth by interrogation”.\textsuperscript{124} This process has, however, been criticised for the fact that the judge has to fulfil three roles in one. He or she has to conduct the examination-in-chief and the cross-examination and also

\textsuperscript{117} See ss150-151 of the Criminal Procedure Act.
\textsuperscript{118} S 166 of the Criminal Procedure Act.
\textsuperscript{120} Herrmann 1978 \textit{SACC} 6.
\textsuperscript{121} Snyman 1975 \textit{CILSA} 108.
\textsuperscript{122} Herrmann 1978 \textit{SACC} 13; Steytler 2001 \textit{Law, Democracy & Development} 2-3; Roodt 2004 \textit{Fundamina} 140.
\textsuperscript{124} Herrmann 1978 \textit{SACC} 6.
has to access the evidence. As a result the judge may have to decide on the efficacy of his or her own questioning. This is problematic as research has shown that even though an interviewer strives to remain impartial, subconsciously questions are formulated according to the hypothesis that the interviewer has formed regarding the facts.\textsuperscript{125}

Despite the fact that both the accusatorial and the inquisitorial systems have their advantages and disadvantages, in the context of the child witness, especially those who are very young or highly vulnerable, the advantages of the inquisitorial method and particularly those of a neutral inquisitorial examination seem to outweigh its disadvantages.\textsuperscript{126} A possible solution to the adversarial two-party system is to allow the child victim to testify with the help of a “go between” or intermediary. However, the role assigned by law to an intermediary puts a damper on this solution as an intermediary is not allowed to question the witness independently. The power of an intermediary to interfere is curtailed as this can only be exercised in response to questions put by one of the parties. The parties are still in control of the process as they confine the witness and the intermediary to those aspects of the case they wish to investigate.\textsuperscript{127} This raises the question of whether serious consideration should not be given to the role of an intermediary with a view to extending this role. This will be explored in more detail later in this thesis.

\subsection*{2.4 Confrontation}

The right of an accused to confront his or her accuser has a long history and may possibly date back to the historic Roman ordeal of “trial by combat”. In a biblical

\textsuperscript{125} Herrmann 1978 \textit{SACC} 13.
\textsuperscript{126} Spencer in Spencer & Lamb (ed) \textit{Children and Cross-examination: Time to Change the Rules?} 15.
\textsuperscript{127} Van der Merwe “Cross-examination of the (sexually abused) child witness in a constitutionalized adversarial trial system: is the South African intermediary the solution?” 1995 \textit{Obiter} 194 at 199.
passage Festus, the Roman Governor, while discussing the treatment of Paul during his imprisonment, wrote as follows:

It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given the chance to defend himself against the charges.\(^\text{128}\)

This right to confrontation has traditionally been deemed by the accusatorial system to be fundamental to a fair trial and essential to due process.\(^\text{129}\) Under the accusatorial system this is accomplished in the following ways. Firstly, the right reflects a preference for a face-to-face encounter at a trial. Although the witness need not look at the accused (he or she may look elsewhere), witnesses must normally testify in the defendant’s physical presence as it is believed that witnesses are less likely to lie in the presence of an accused.\(^\text{130}\) Secondly, the witness must testify under oath or affirmation, and this impresses the seriousness of the matter on the witness. Thirdly, the accused as well as the court is able to witness, at first hand, not only the content of the witness’s testimony but also the demeanour of the witness while testifying.\(^\text{131}\) Fourthly, the right also includes the right to cross-examine the witness.\(^\text{132}\) This right is considered so fundamental that any violation thereof is regarded as an irregularity and will result in a conviction being overturned.\(^\text{133}\)

\(^{128}\) Thomas “The confrontation clause and New Mexico’s short lived acceptance of surrogate forensic witnesses” 2012 New Mexico LR 266.

\(^{129}\) Van der Merwe 1995 Obiter 195. See Coy v Iowa US, 1012 (1988) 865-866 where it was held that there is “something deep in human nature that regards face-face confrontation between accused and accuser as … essential to a fair trial in a criminal prosecution”.


\(^{131}\) This includes facial expression, body language and vocal inflections.


\(^{133}\) S v Motlata 1975 (1) SA 814 (TPD) at 815.
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Research conducted by Saywitz and Nathanson as well as by Hill and Hill has shown that one of the most traumatic aspects of the legal process for the child victim is having to face his or her assailant.\textsuperscript{134} Consequently the most negative and frightening aspect of testifying in court, as perceived by children, is the face-to-face confrontation with the assailant, especially if that person is a family member. This also influences the quality of their evidence.\textsuperscript{135} Confrontational testimony leads to extreme emotional distress for a child, who may display signs of nervousness, fear and anxiety while testifying. This could be coupled with emotional consequences such as feelings of betrayal, helplessness and powerlessness.\textsuperscript{136} Confronting the accused could also bring the memory back vividly. In addition the child may experience feelings of shame or guilt, particularly if the perpetrator stands in an intra-familiar relationship with the child. This decreases the willingness and ability of a child witness to give an accurate description of the events.\textsuperscript{137} Empirical evidence has in fact shown that this fear and intimidation do not encourage children to tell the truth but make them more likely to say, “I don’t know” or whatever they believe their perceived tormentor wants to hear just to put an end to the ordeal. They may even refrain from answering at all.\textsuperscript{138} The presence of an accused may thus have both traumatic and inhibiting effects on the child who is testifying.

Adler\textsuperscript{139} describes an instance where a little girl of eleven had a complete breakdown in court after being asked to point out the man who had attacked her. She was so disturbed that she was unable to return to court. The following day the court was informed that she was undergoing psychiatric treatment and would not be available for further questioning. Key\textsuperscript{140} likewise described the case of a twelve-

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\textsuperscript{135} Saywitz & Nathanson Child Abuse and Neglect 614; Hill & Hill1987 Michigan LR 809-833.
\textsuperscript{136} Brannon 1994 Law & Psychology Review 439 at 442-443.
\textsuperscript{137} Brannon 1994 Law & Psychology Review 439 at 442-443.
\textsuperscript{138} Schwikkard 1996 Acta Juridica 149 at 158. See also Müller’s reference to a number of studies on the effect of the stress of court appearance on child witnesses (Müller 2000 CARSA 13 at 15-17); Thoman 2013 Nevada LJ 240.
\textsuperscript{139} Adler Rape on Trial (1987) 51-52.
\textsuperscript{140} Key “The child witness: the battle for justice” 1988 (1) De Rebus 54.
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year-old boy who had, over a period of time, been sodomised by his father, as follows:

Throughout the hearing the boy demonstrated signs of severe anxiety. He held his hand against his face to blinker out the sight of his father. When asked why he was so upset he said that his father has, on numerous occasions, produced a knife and threatened to kill him if he ever told anyone about what he had done to him.

Key also questions the wisdom of subjecting children to this confrontation and goes so far as to assert that:

had I known then what I know now, I would have doubted the wisdom of laying charges which would result in this young boy being subjected to the horrendous secondary abuse he received in court.\(^\text{141}\)

Procedures to reduce the stress suffered by child witnesses are therefore essential. This will not only benefit the child, but will also ensure that the truth-seeking process is not impeded as a result of the child’s inability to give effective testimony in the presence of the accused.\(^\text{142}\) This can be achieved by rearranging the courtroom so that a child does not see the accused, by placing a screen between the child and the accused, by having special children’s courtrooms, by allowing the child to give evidence in another room via CCTV, or by allowing a pre-recorded video of the child’s evidence as evidence-in-chief.\(^\text{143}\)

\(^{141}\) Key 1988 (1) *De Rebus* 54

\(^{142}\) Brannon 1994 *Law & Psychology Review* 439 at 446.

\(^{143}\) Refer to the Department of Justice and Constitutional Development *Report on the Re-establishment of Sexual Offences Courts* (2013) at 55 for a description of a best practice model for a child-sensitive court as well as proposed standards for testifying rooms.
This, however, raises the question of whether the rights of the child victim take precedence over the confrontational rights of an accused. Courts in the United States of America (USA) have also wrestled with this issue. The Sixth Amendment to the Constitution of the USA provides inter alia that in all criminal proceedings an accused shall enjoy the right “to be confronted with the witnesses against him” and is generally referred to as the “confrontation clause”.144 This right is firmly rooted in federal jurisprudence and has been the subject of consideration in various court cases. According to the US Supreme Court, this right is not absolute but may give way to certain exceptions. This would be the case where it is justifiable to exclude a witness, and public policy considers it to be necessary to achieve more compelling goals, such as the protection of sexually abused child victims.145

The issue of the rights of a child victim versus the right of an accused to confrontation was specifically addressed in two prominent US cases, namely Coy v Iowa146 and Maryland v Craig.147 In Coy v Iowa the question arose whether a screen placed between the accused and the child witness violated the accused’s right to confrontation and consequently to a fair trial. The court held that the Iowa statutes, allowing the use of a screen in order to avoid trauma for a child victim witness, created a legislatively imposed presumption of trauma, which was not sufficient to create an exception to the confrontation clause. According to the court the exception had to further an important public policy and a finding of trauma to the child had to be case-specific. The court held that in the present case the child witness did not require special protection and that the right of the accused to confrontation had consequently been violated.148 The court stated that:

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144 Brannon 1994 Law & Psychology Review 439 at 446.
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face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.\textsuperscript{149}

Not surprisingly, this decision has been criticised by Watkins and other academics for not being supportive of child abuse victims who are called upon to testify to the event in open court.\textsuperscript{150}

In \textit{Maryland v Craig}\textsuperscript{151} the court came to a contrary conclusion and allowed the child victim to testify by way of one-way CCTV. The court held that the right guaranteed by the confrontation clause was not absolute, but could be satisfied if an alternative procedure advanced a compelling public policy interest (protecting the child victim), and that the state's interest in avoiding emotional trauma to the child outweighed the right of an accused to confront the child witness. The court pointed out, however, that the need for protective measures had to be determined on a case-by-case basis and that a child's general anxiety about the courtroom would not suffice to disallow personal appearance. The court held that in order to make a finding of necessity that would deny an accused the right to confrontation, the emotional distress or trauma to the child witness had to result not from being in the courtroom but from testifying in the presence of the accused and had to be more than \textit{de minimis}, in other words more than mere nervousness or some reluctance to testify.\textsuperscript{152}

The approach followed by the court in \textit{Maryland v Craig} is also not beyond criticism. Bloe\textsuperscript{153} questions the court's constitutional standard for determining the admissibility

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\item \textsuperscript{149} \textit{Maryland v Craig} 497 US 836 (1990) at 1020.
\item \textsuperscript{150} See Watkins "The double victim: the sexually abused child and the judicial system" 1990 \textit{Child and Adolescent Social Work Journal} 29 at 33; Cassim "The right of child witnesses versus the accused’s right to confrontation" 2003 \textit{CILSA} 65 at 74.
\item \textsuperscript{151} 497 US 836(1990).
\item \textsuperscript{152} At 856.
\item \textsuperscript{153} Bloe "Maryland v Craig: the court’s use of videotaped testimony of a child who has been sexually abused is declared not to violate a criminal defendant’s sixth amendment right to confront his accuser" 1991 \textit{Southern Law University LR} 275 at 290-291.
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of CCTV. He contends that “allowing judges to use their personal experience to determine the psychological fitness of a child witness on such a critical issue as a defendant’s constitutional right is unjust”. He furthermore maintains that the constitutional standards of not being able to testify in the “presence of the accused” and suffering emotional stress that exceeds “mere nervousness or excitement or reluctance to testify” are too broad and that the court should have laid down specific guidelines for determining the necessitous circumstances and degree of psychological trauma that would trigger the exception. He also raises the question whether protection of this kind will also be extended to victims of other crimes, such as rape victims, and whether witnesses will likewise be protected.\textsuperscript{154} Henderson,\textsuperscript{155} concurring, points out that although \textit{Maryland v Craig} confirmed that the door remains open to special measures, it sets a high threshold of serious emotional distress for their admission. She also highlights the dangers inherent in the judicial discretion by quoting Hoyana and Keenan, who state that “the necessity for a ‘harm hearing’ [psychological trauma] is a strong disincentive to prosecutors using innovative measures to protect the child whilst testifying”.\textsuperscript{156}

Shortly after \textit{Maryland v Craig} Congress enacted the Child Victim’s and Child Witnesses’ Rights (CVCWR) Statute in a bid to remedy the situation. This statute provides for two-way CCTV and videotaped depositions. Not long after, the protection afforded to child victims was also extended to child witnesses in \textit{Gonzales v State}\textsuperscript{157} where the Texas Court of Criminal Appeals allowed a child witness, who was not the victim, to testify via CCTV. In addition the constitutionality of the CVCWR statute was upheld in \textit{US v Farley}.\textsuperscript{158} This clearly illustrates the significance of public interest in protecting child victims and/or witnesses when they are testifying in open court.

\textsuperscript{154} Bloe 1991 \textit{Southern Law University LR} 275 at 290-291.
\textsuperscript{155} Henderson in Spencer \textit{Children and Cross-examination: Time to Change the Rules}? 53.
\textsuperscript{157} 818 SW 2d 756 757 (Texas Criminal Appeals 1991).
\textsuperscript{158} 992 F2d 1122 (10 cir 1993).
The right to confrontation is presently also a procedural right in terms of the South African adversarial system. It not only entitles an accused to be present at the trial but also to defend himself or herself face-to-face against the charges brought by his or her accusers, except where this has been expressly excluded by any other law.\textsuperscript{159} In *S v Motlatla*\textsuperscript{160} Coleman J remarked that:

> every criminal trial shall take place, and the witness shall give their evidence, *viva voce*, in open court in the presence of the accused. That is a very important provision of our criminal law and it means more than that an accused must know what the State witnesses are saying or have said about him. It means even more than that he shall be able to hear them saying it. There must be a confrontation: he must see them as they depose against him so that he can observe their demeanour. And they for their part must give their evidence in the face of the accused.

This right is also entrenched in the Constitution of South Africa in that section 35(3)(i) provides that “every accused person has a right to a fair trial, which includes the right to adduce and challenge evidence”. The right to challenge evidence includes the right to confront one’s adversary through cross-examination and may thus include the right to confrontation.\textsuperscript{161}

However, as a result of the State’s awareness of the hardship experienced by child victims and witnesses in the South African adversarial court system, the South African legislature on the recommendation of the Commission enacted evidentiary rules designed to reduce the emotional distress experienced by victims of and/or witnesses to crime. This entails the appointment of an intermediary in certain cases

\textsuperscript{159} See ss 158 and 166 of the Criminal Procedure Act.
\textsuperscript{160} 1975 (1) SA 814 (TPD) at 815 E-F.
\textsuperscript{161} See *S v Msimango* 2010 (1) SACR 544 (GSJ) at para [27] and Cassim 2003 *CILSA* fn 5.
and the elimination of face-to-face confrontation by means of CCTV or other electronic devices.\textsuperscript{162}

In terms of section 158(2) and (3) a court may, subject to certain conditions, order that a witness may give evidence by means of CCTV or similar electronic media if it appears to the court that to do so would be in the interests of justice or the public, or if it is likely to prevent prejudice or harm that might result to any person if he or she testifies at the proceedings.\textsuperscript{163} In terms of section 170A(2) of the Criminal Procedure Act no examination, cross-examination or re-examination, except an examination by the court, may take place other than through an intermediary. In such an instance the court may direct that the relevant witness shall give his or her evidence at any place that is informally arranged; that any person whose presence may upset the witness must be outside the sight and hearing of that witness and that any such testimony must proceed through the medium of any electronic device or other devices.\textsuperscript{164} In terms of both the procedure laid down in section 158 and the “intermediary system” a witness can therefore be observed by the accused by means of CCTV aids, but the witness is entitled not to observe the accused. Direct confrontation between the two parties is excluded in this way.

The constitutionality of section 170A of the Criminal Procedure Act was challenged in \textit{K v Regional Court Magistrate}.\textsuperscript{165} The court held inter alia that a child witness may often find it traumatic and stressful to give evidence in the adversarial atmosphere of a courtroom. Sound reasons therefore exist why the procedure contemplated in section 170A might enable a child to participate properly in the judicial system and could lead to a furthering of the truth-seeking function of the

\textsuperscript{162} See ss 158 (2) and 170A of the Criminal Procedure Act 51 of 1977. S 158 was enacted in 1996 by s 7 of the Criminal Procedure Amendment Act 86 of 1996; s 170A was inserted into the Criminal Procedure Act in 1991 by s 3 of the Criminal Law Amendment Act 135 of 1991.
\textsuperscript{163} This may for example be the case where the witness does not necessarily require an intermediary but would suffer prejudice or harm if confronted by the accused. See also \textit{S v F} 1999 (1) SACR 571 (C).
\textsuperscript{164} Own emphasis. See ss 170(A)(2)(a) and (3)(a)-(c) of the Criminal Procedure Act.
\textsuperscript{165} 1996 (1) SACR 434 (E).
The court also held that the constitutional rights of an accused to a fair trial are not infringed if the complainant gives evidence in a separate room. The court referred to the following remarks by O’Conner in *Maryland v Craig* at 683:

We likewise conclude today that a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy.\(^{166}\)

The court also pointed out that as the section does not prevent an accused from challenging the testimony of a child witness the provision does not infringe an accused’s right to a fair trial. The court therefore concluded that section 170A of the Criminal Procedure Act was not unconstitutional, but that a “proper balance between the protection of a child witness and the rights of an accused to a fair trial can … be achieved by permitting the witness to testify in congenial surroundings and out of sight of the accused.”\(^{167}\) Section 170A consequently modifies the established rules of evidence in such a manner that it does not deny an accused the right to question a witness or to observe the demeanour of the witness. One may argue that the accused is still able to “confront” the child witness albeit not in a face-to-face manner. In this respect there has been no real or critical deviation from the adversarial model. What is precluded is the potential harmful effect on the child.

In addition notice should be taken of the fact that although much emphasis is placed on the demeanour of a witness, the demeanour of a witness can in fact be very misleading. In *S v Kelley*\(^{168}\) the Court of Appeal pointed out that:

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\(^{166}\) 1996 (1) SACR 434 (E) at 446.

\(^{167}\) At 448.

\(^{168}\) 1980 (3) SA 301 (A) at 308.
there can be little point in comparing the demeanour only of one witness with that of another seeking the truth. In any event as counsel conceded in a homely metaphor demeanour is, at best, a tricky horse to ride. There is no doubt that demeanour – ‘that vague and indefinable factor in estimating a witness’s credibility’ (per HORWITZ AJ in R v Lekaota 1947 (4) SA 258 (O) at 263) – can be most misleading. The hallmark of a truthful witness is not always a confident and courteous manner or an appearance of frankness and candour … [A]n honest witness may be shy or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding wrongly, that he is not a truthful person.

In S v Vilikazi the Supreme Court of Appeal likewise pointed out that “even honest witnesses have the capacity for error and reconstruction and at times place events in the incorrect sequence”. This may be even truer of child witnesses, especially those that are very young or highly vulnerable.

In comparison with the accusatorial system, in the inquisitorial system the presiding officer elicits the evidence by questioning the child witness. There is no cross-examination and the presiding officer tests the reliability and accuracy of the witness. Direct confrontation between the accused and the child witness is therefore unknown. In terms of the French criminal justice system, for example, child witnesses are questioned in chambers during the pre-trial phase by a specialist interviewer and the investigating judge. Children thus rarely “testify” and are never cross-examined either by the court or by an unrepresented accused. As the proceedings resemble an inquiry children find this process considerably less traumatic than a confrontational “battle” in an accusatorial court system.

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169 2009 (1) SACR 522 (SCA) at para [36].
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It is thus imperative that the accusatorial system be balanced by employing alternative means through the use of technological innovations and child aids such as screens, CCTV and/or the use of intermediaries to alleviate the trauma experienced by children while testifying.

While delivering the Bar Council’s annual law reform lecture, the former Lord Chief Justice of England and Wales, Lord Igor Baron, expressed the opinion that child victims and child witnesses should no longer have to give evidence or be cross-examined in court as the advances in video technology could be exploited to spare victims of sexual offences the ordeal of appearing in a courtroom. He told the legal audience at Inner Temple in central London the following:

[If the criminal justice system cannot adjust to such practices, the UK’s long tradition of adversarial justice needs to be reviewed … [T]he day will surely come and in my view it has already arrived, when the physical presence of a child witness or victim in the court building will be, and should be regarded as an antediluvian hangover from laughable far off days of the quill pen and ink well.

He emphasised that justice can be done by examining the evidence of the child via video recording, and begged the question why the child has to be present in court. He expressed the view that our long-term ambition must be that the impact of the unhappy event of which child victims and witnesses have to speak should not be exacerbated by the process, but should be reduced and kept to an irreducible minimum.


I strongly concur with Lord Baron that child victims and children should no longer have to give evidence or be cross-examined in court in the presence of the accused as the advances in video technology could be exploited to spare victims of sexual offences the ordeal of appearing in a courtroom. The possibility that children may not have to be present in the courtroom or even the court building already exists in the South African context. As was indicated above, in terms of section 170A(3) of the South African Criminal Procedure Act the court may direct that the relevant witness should give his or her evidence at any place that is informally arranged; that any person whose presence could upset the witness should be outside the sight and hearing of that witness and that any such testimony should proceed through the medium of any electronic or other devices. The use of what has been labelled “virtual courtrooms” that enable a child to testify by means of a live video link from any place as an alternative to the present system should therefore receive serious consideration. Such a facility, away from the court building, has the advantage of being more child-friendly and ensures that the child witness will not run the risk of coming face-to-face with the alleged perpetrator.

2.5 Cross-examination

Cross-examination lies at the heart of the accusatorial system and represents the “weapon” in the battle between the two opposing parties. By implication, adversarial examination has been described as “combative or aggressive”. Despite being combative or perhaps because of it, it is regarded by the system as fundamental to the discovery of the truth and the establishment of credibility. Enormous value and

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174 Own emphasis. See ss 170(A)(2)(a) and (3)(a)-(c) of the Criminal Procedure Act.
175 See para 3.5 of ch 5 below for a further discussion on intermediary facilities and virtual courts.
importance is attributed to cross-examination. Wigmore described it as the “greatest legal engine ever invented for the discovering of the truth” while nevertheless conceding that “it might be that in more than one sense it takes the place in our system which torture occupied in the medieval system of the civilians”.\(^{177}\)

In *K v The Regional Court Magistrate*\(^{178}\) the South African judiciary reiterated this importance by stating that “cross-examination is a powerful weapon: it may, and often does play an important part in the decision of a trial court. The effect of a telling and efficient cross-examination should not be underestimated.”

The underlying purpose or object of cross-examination in terms of the accusatorial system is:

\[
\text{to impeach the accuracy, credibility and general value of the evidence in chief; to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party.}^{179}\]

The object of cross-examination is thus two-fold: to elicit information that is favourable to the party on whose behalf the cross-examination is conducted and to cast doubt upon the accuracy of the evidence-in-chief given against such party.\(^{180}\) The essence of any defence is accordingly introduced during cross-examination as it represents the process whereby an opponent’s witness is questioned. Cross-examination differs from examination-in-chief in that the cross-examiner may put leading questions to the witness.\(^{181}\) The questions need not be relevant to the issues

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\(^{178}\) 1996 (1) SACR 434 (E) at 442.

\(^{179}\) *Caroll v Caroll* 1947 (4) SA 37 (D) at 40.

\(^{180}\) *K v Regional Court Magistrate* 1996 (1) SACR 434 (E) at 442.

\(^{181}\) A leading question is one that implies or suggests an answer or assumes the existence of certain facts which might be in issue, eg “You went to his house, didn’t you?” whereas specific non-leading questions ask the child to provide information in a direct manner, eg “What
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raised during the examination-in-chief. The questions may, however, not be completely irrelevant or amount to a “fishing expedition”. The right to cross-examine a witness arises as soon as a witness has been sworn in or has made an affirmation.

This right is provided for in South African Law in section 166 of the Criminal Procedure Act and is entrenched in the Constitution in section 35(3)(i), which guarantees an accused the right to a fair trial and includes the right to adduce and challenge evidence. Section 166 of the Criminal Procedure Act provides as follows:

An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at criminal proceedings or any witness called on behalf of such co-accused at criminal proceedings, and the prosecutor may cross-examine any witness, including an accused, called on behalf of the defence at criminal proceedings, and a witness called at such proceedings on behalf of the prosecution may be re-examined by the prosecutor on any matter raised during the cross-examination of that witness, and any witness called on behalf of the defence at such proceeding may likewise be re-examined by the accused.

The right to cross-examination is, however, not an absolute right. The Criminal Procedure Act limits the right in sections 166(3) and 170A. In addition the courts


183 Joubert et al The Law of South Africa Vol 9 Evidence para 776. It should be noted that the presiding officer has the right to control the proceedings and to limit or curtail cross-examination (K v Regional Court Magistrate 1996 (1) SACR 434 (E) at 445). See for example s 166(3) of the Criminal Procedure Act.

184 R v Ndawo 1961 (1) SA 16 (N).

Section 166(3) provides that if it appears to a court that any cross-examination is being protracted unreasonably and is thereby causing the proceedings to be delayed unreasonably, the court may request the cross-examiner to disclose the relevancy of any particular line of examination and may impose reasonable limits on the examination. The authority of a presiding officer to control cross-examination will be further strengthened once section 342A
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have a discretion to disallow questioning that is irrelevant, unduly repetitive, oppressive or otherwise improper.\textsuperscript{185} Furthermore, the right to “challenge evidence” does not guarantee an entitlement to subject \textit{all evidence} to cross-examination.\textsuperscript{186}

In addition the judiciary has provided some guidance on what constitutes proper cross-examination. In \textit{S v Gidi} the court held the following:\textsuperscript{187}

A proper cross-examination does not permit the gratuitous intimidation of an accused. A prosecutor should not bully an accused by insulting him, brow-beating him or adopting an overbearing attitude … A prosecutor should not unnecessarily ridicule an accused or taunt him or offend his sensibilities or provoke him to anger, or play upon his emotions in order to place him at an unfair disadvantage and incapacitate him from answering questions to the best of his ability. In the case of many a witness it calls for no skill to intimidate or confuse or distress a witness who does not have the resources of intellect, language or personality to defend himself against a bullying prosecutor. Conduct of this kind offends against good manners, politeness and humanity.

In this regard it should be remembered that the witness is assisting the court in its search for justice. The following sentiments of Snyman J in \textit{S v Azov} remind us of the duty to bear this in mind:\textsuperscript{188}

\begin{quote}
I think it must be made clear to him, and perhaps to others, that the witnesses who come into court, be they police witnesses or any other kind of witness, are entitled to the ordinary courtesy one extends to decent people. Witnesses who give...
\end{quote}

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\textsuperscript{185} \textit{K v Regional Court Magistrate} 1996 (1) SACR 434 (E) at 442.
\textsuperscript{186} \textit{S v Ndhlovu} 2002 (2) SACR 325 (SCA) at 340.
\textsuperscript{187} 1984 (4) SA 537 (C) at 539I-540B.
\textsuperscript{188} 1974 (1) SA 808 (T) at 810.
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evidence are assisting the court at arriving at the truth and in carrying out the administration of justice. No cross-examiner is entitled to insult a witness or to treat him in the manner in which these witnesses are treated, without there being a very good reason. Witnesses must be treated with courtesy and respect.

Cross-examination need not amount to bullying and insulting behaviour, however. The case of \( S \vee M \)\(^{189} \) represents an excellent example of proper cross-examination:

[The] complainant at the time of testifying was some 13 years old. I endeavoured to make [the] complainant feel at ease whilst testifying, conveying to her the significance of the oath and the telling of the truth. Her mother was present and the court was cleared. She appeared to me to be at ease although she was tearful from time to time...She was given the assurance that should she in any way feel uncomfortable the court would adjourn so as to enable her to compose herself should the need arise. Bearing in mind her youthfulness, the examination of the complainant, albeit at times of a searching nature, was generally conducted in a gentle manner and both counsel are to be complimented in this regard in that the questioning, albeit searching, was gentle in nature. There was no raising of voices and every effort was made to put the complainant at ease. The court at all times bore in mind that she was a young girl and that a court appearance is indeed a daunting experience.

Some guidance as to proper cross-examination can be found in the ethical rules of the legal profession. The Code of Conduct: Uniform Rules of the Professional Ethics of the General Bar Council of South Africa\(^{190} \) requires advocates to observe certain

\(^{189}\) 2000 (1) SACR 484 (W). In contrast to the possible harmful effects of legal proceedings, it has been argued by some that the same procedure may be beneficial to a child. Phynoos & Eths1984 *Journal of Social Issues* 98 at 109 argue that testifying can serve as a coping strategy and can provide the child with a sense of psychological closure. The abovementioned case illustrates such an opportunity. Levett “Contradictions and confusions in child sexual abuse” 1991 *SACJ* 9 at 17 agrees that if properly conducted, the outcome of a case may be vindicating for a child but points out that from a South African point of view these cases are in the minority.

ethical rules while cross-examining witnesses. Non-compliance with these rules may lead to certain sanctions such as removal from the Roll of Advocates. Particularly relevant to this thesis is the rule that questions which affect the credibility of a witness, but are not otherwise relevant, should not be asked by an advocate, unless the advocate has reasonable grounds for thinking that the imputation conveyed by the question is true or well-founded. Likewise, questions that relate to matters so remote in time or of such a character that they would not affect the credibility of the witness should not be asked. Advocates should also guard against putting questions which are only intended to incense or annoy the witness.\textsuperscript{191}

In contrast to advocates, attorneys have to respect the rules of their respective provincial law societies. These rules vary from province to province regarding the extent to which and the manner in which misconduct is prohibited.\textsuperscript{192} The rules of the Law Society of the Northern Provinces, for example, do not regulate cross-examination in as much detail as the rules of the Bar Council do. As attorneys and advocates are equally involved in the cross-examination of child witnesses, it is submitted that a uniform code of conduct, prescribing proper conduct to all members of the legal profession, should be considered. This would enhance the quality of cross-examination and assist presiding officers in exercising their discretionary duty in curtailing unbecoming cross-examination.

\textsuperscript{191} See para 3.3 (a) and (d).
\textsuperscript{192} The Cape Law Society Rules in terms of Rule 14.3 provide that members should at all times conduct themselves in the following ways:
14.3.1 maintain the highest standards of honesty and integrity;
14.3.2 treat the interests of their clients as paramount, provided that their conduct shall be subject to
14.3.2.1 their duty to the court;
14.3.2.2 the interests of justice;
14.3.2.3 the observation of the law;
14.3.2.4 the maintenance of the ethical standards prescribed by this rule and generally recognised by the profession.

The Law Society Rules of the Northern Province provide in Rule 89 that unprofessional or dishonourable or unworthy conduct on the part of a practitioner shall include, inter alia, the following acts and omissions:
89.15 neglecting to give proper attention to the affairs of his/her client;
89.30 without reasonable cause or excuse, failing to perform professional work, or work of a kind commonly performed by a practitioner, with such degree of skill, care or attention, or of such a quality or standard as in the opinion of the Council may be reasonably expected.
These rules and guidelines clearly illustrate that the cross-examination of witnesses is by implication open to abuse.\textsuperscript{193} This abuse has even been described by Schwikkard\textsuperscript{194} as “a treadmill of repetition and a quagmire of irrelevancies”. Vexatious, abusive or discourteous cross-examination is not allowed and presiding officers should see to it that the discretion afforded them to disallow this is exercised in the interests of justice.\textsuperscript{195} As was pointed out earlier,\textsuperscript{196} research has shown that because of the neutral role assigned to presiding officers in terms of the adversarial system, they are wary of exercising this discretion for fear of compromising judicial neutrality. Although in theory presiding officers have the authority to limit offensive, abusive and humiliating cross-examination, in practice this may prove a difficult task to perform as a denial of the right to cross-examination will almost without exception lead to a conviction being set aside on appeal.\textsuperscript{197}

Parties to the accusatorial process have a duty to cross-examine witnesses as failure to do so may lead to an inference against such party.\textsuperscript{198} Failure by a court to allow cross-examination may amount to an irregularity even if the refusal to do so is aimed at protecting a witness.\textsuperscript{199} In \textit{R v Ndawo}\textsuperscript{200} an eight-year-old boy was called to testify against his own father in a housebreaking case. He indicated that he did not want to give evidence. The magistrate assured him that he need not be afraid. After being warned by the court to tell the truth, the boy burst into tears and was unable to testify. The magistrate dispensed with his testimony owing to the fact that the boy was “very distressed and frightened” and “had given no evidence in

\textsuperscript{193} S v Booi 1964 (1) SA 224 (E); S v Omar 1982 (2) SA 357 (NPD); S v Hendricks 1997 (1) SACR 17 (C) at 177g-j; \textit{Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd} 2002 (4) SA 681 (SCA).

\textsuperscript{194} Schwikkard \textit{Principles of Evidence} 18 6 5 6.

\textsuperscript{195} S v Cele 1965 (1) SA 82 (A) at 91.

\textsuperscript{196} See para 1 of ch 3 above.

\textsuperscript{197} \textit{Distillers Korporasie v Kotze} 1956 (1) SA 557 (A); S v Cele 1965 (1) SA 82 (A).

\textsuperscript{198} S v Boesak 2000 (1) SACR 633 (SCA); S v Fortuin 2008 (1) SACR 511 (C) at paras [13]-[15]; S v Naidoo 2010 (1) SACR 369 (KZP) at para [15].

\textsuperscript{199} \textit{Distillers Korporasie (SA) Bpk v Kotze} 1956 (1) SA 357 (A); \textit{R v Ndawo} 1961 (1) SA 16 (N) & S v Mugundu 2008 (1) SACR 71 (N) at 77. See also Van der Merwe in Schwikkard & Van der Merwe \textit{Principles of Evidence} 18 6.

\textsuperscript{200} 1961 (1) SA 16 (N) at 16-18.
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connection with the case”. The magistrate therefore did not consider it necessary for the boy to be examined by the accused. The Supreme Court on review held that even though the prosecutor was entitled to abandon the testimony of the child and the magistrate had acted in the child’s interests, the boy was already a Crown witness at that stage. To have disallowed the accused to cross-examine the witness had resulted in an irregularity, hence the conviction and sentence were set aside.

It is widely accepted that cross-examination is stressful for witnesses and there can be no doubt that it is even more so for children. It therefore comes as no surprise that much of the criticism concerning the treatment of child victims and child witnesses is directed against the vigorous cross-examination of the accusatorial system. This criticism is so often repeated that I shall refer to a few examples only. Key, in her description of the case of a twelve-year-old boy who had been sodomised by his father over a period of time, highlights some of the problems faced by the boy during the court process. She states that:

the older boy first gave evidence in court at the beginning of April 1986; eight months after the charges were laid. He was subjected to one and a half days of persistent and detailed cross-examination about appalling sexual abuse to which he had been subjected by his father for as far back as he could remember. Throughout the hearing the boy demonstrated signs of severe anxiety. He held his hands against his face to blinker out the sight of his father. When asked why he was so upset he said that his father had on numerous occasions, produced a knife and threatened to kill him if he ever told anyone about what his father had done to him. The case was remanded for two months and then remanded again because of a change in defence counsel. Finally, in October 1986, 14 months after the original charge was laid this unfortunate child was once again required to stand in the witness box for hour upon hour of gruelling cross-examination. Within 10 minutes of the first day he was in tears. As before, he held his hands against his face to avoid seeing his father. He

201 At 17. Own emphasis.
202 At 18.
203 Key 1988 (1) De Rebus 54.
was bullied about details he could not remember. He was accused of being a liar. At this stage he broke down completely and pleaded to know why the defence did not believe him.

Key points out that the object of cross-examination is to establish whether a child witness is lying.\textsuperscript{204} She emphasises that if the accused conducts the cross-examination himself or herself the effect on the child can be terrifying. In this case a child may agree with the questions put to him or her by the accused out of mere fear of punishment for disagreeing. If the cross-examination is conducted by a lawyer the result is usually even more distressing for the child. She expresses deep concern over the adversarial process and states:

The child will be taken through her evidence in the most intimate details. The cross-examination will tend to bring out facts that are so grotesque that the child could never have imagined them. On the other hand, the child will be bullied for placing events, often months after they occurred, out of sequence and at times when they could not have occurred and for not being able to remember important details concerning an event. In addition the child will be subjected to the trauma of relating in the minutest detail the particulars of the sexual abuse.\textsuperscript{205}

In a feature on \textit{Carte Blanche}\textsuperscript{206} on the planned implementation of Sexual Offences Courts presented on 8 September 2013, one of the family members of a victim of sexual abuse described the cross-examination of the victim as follows:\textsuperscript{207}

And then they [the witnesses] said to my mom, ‘You won’t understand – they jump in from sentence number one, then they are coming back to sentence number four,
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then they are jumping up and down … we can’t take it, it is too much.’ And then they just freak out and he is a free man.

When asked whether there was any justice, she indicated that there was none, instead only deep trauma, and that “he [the victim] tried to commit suicide twice”.

In the same broadcast in an interview on Carte Blanche with the father of two Nelspruit girls who had been sexually abused by Christiaan Lotter, he conveyed a similar experience with regard to the court process and stated:

My child burst out into tears and had a nervous breakdown … We as parents and the new State prosecutor took the decision to save the children further trauma and requested that the State close the case at that stage and Mr Lotter be found guilty and sentenced on what he had already pleaded guilty on. 208

In South Africa, as in most other countries with an adversarial system, the defence might initially proceed tactfully and gently in its cross-examination, but if the line of cross-examination does not yield the desired results the “forensic dual” is all too often employed.209 The adversarial nature of the cross-examination places the child in a position where the child finds himself or herself under attack. In order to achieve the desired aims a particular and highly specialised form of legal language, with very few modifications being made to accommodate children, is used. Children experience severe problems because the questions are complex, confusing, characterised by high-register vocabulary, legal terminology and sentences

209 Van der Merwe 1995 Obiter 194 at 200.
containing complicated grammatical constructions. Brennan and Brennan describe this as follows:

Questions of linguistic appropriateness, comprehensibility and concern for the psychology of the child witness are peripheral at best, and totally exploited at worst. The language format for cross-examination has a linguistic life of its own, independent of the age or status of the witness.

In *K v Regional Court Magistrate* Müller explains in an affidavit that the child’s communication skills and the context in which questions are asked may distort the meaning attached to the child’s language. She also explains that this language problem becomes even more acute in cases of criminal prosecution for sexual offences because “it is overlaid by a range of emotional stresses and fears which flow from the traumatic events about which the child is called to testify”. In addition a number of techniques or tactics common to cross-examination cause serious difficulties with comprehension for child witnesses. These include the use of leading questions, hypothetical questions, age-inappropriate vocabulary, complex syntax, general ambiguity, a focus on peripheral detail and the posing of questions in an unpredictable sequence. Another technique used in cross-examination is either to accuse the child of lying or to cast doubt on the child’s testimony by stating that the child’s memory is faulty or questioning their certainty. These techniques are sure to confuse and disorientate children. Spencer and Glaser point out that “calling a child a liar rapidly reduces most children to tears” and that the “stress induced by this makes it hard for the child to remember accurately and think clearly”.

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210 For an in-depth discussion on the issue, see Müller *Prosecuting the Child Sex Offender* (2001) 176-203.


212 1996 (1) SACR 434 (E).

213 At 443.

In *S v Tswai*\(^ {215}\)* Marais J describes the nature of the questioning to which one of the accused was subjected as follows:

The nature of the questioning to which No 1 was subjected is certainly a cause for concern. He was often asked badly phrased questions which were either very difficult to understand or so ambiguous that they were likely to be misunderstood. He was required to listen to long statements which contained a number of propositions and then to respond unqualifiedly. He was sometimes wrongly accused of not having answered the question which he had in fact answered. He was also wrongly accused of having answered previous questions in a particular manner when the record showed he did not.

That this line of questioning presents serious problems for all witnesses, let alone children, is widely acknowledged across the accusatorial world.\(^ {216}\) These techniques and this particular form of language make it impossible for children to communicate effectively and arguably go beyond testing their evidence.

Fortunately the Commission has acknowledged this problem and in its *Report on the Protection of Child Witnesses* states the following:\(^ {217}\)

It must be accepted that aggression towards witnesses, intimidation, the eliciting of contradictions, clever wordplay and the setting of traps do occur in the adversarial system and there is without a doubt a need to protect child witnesses by providing them with the assistance of professional people in court. The question is however whether the existing protection measures, namely objections and control by the presiding officer, are sufficient to protect the child witness from unfair cross-

\(^{215}\) 1988 (1) SA 851 (C) at 858C.
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examination. The Commission’s view is that the presiding officer’s power to curtail sharp and aggressive questioning, leading or suggestive questioning or protracted questioning is limited.

The Commission has accepted that this aggressive and intimidating cross-examination was neither necessary nor conducive to ascertaining the truth. The Commission has therefore recommended that a procedure of “translated” cross-examination be used to curtail the negative effects of the adversarial system. This entails the use of an intermediary in certain circumstances. It has also recommended that in the event of such an appointment face-to-face confrontation should be eliminated through the use of CCTV or other electronic devices. The Commission was of the view that the use of “translated” cross-examination through an intermediary would not result in the loss of tactical cross-examination, but would limit aggressiveness towards and intimidation of child witnesses.\textsuperscript{218} As a result of the Commission’s recommendations section 170A of the Criminal Procedure Act was accordingly introduced. In terms of subsection (1), whenever it appears to a court in criminal proceedings that a witness under the mental or biological age of eighteen years would be exposed to undue mental stress or suffering if he or she testified in court, the court may appoint a competent person to act as an intermediary. In terms of section 170A(2) no examination-in-chief, cross-examination or re-examination shall take place in any manner other than through the intermediary. Therefore neither the accused nor his or her attorney may question the child witness directly.

In \textit{K v Regional Court Magistrate}\textsuperscript{219} the court analysed the background and purpose of section 170A. The court acknowledged that children experience significant difficulties in dealing with the adversarial environment of a courtroom; that young persons may experience difficulties in fully comprehending the legal language of


\textsuperscript{219} 1996 (1) SACR 434 (E).
legal proceedings and the role of the various participants; and that the adversarial procedure involves confrontation and cross-examination. The court held that it was:

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quite convinced that a child witness may often find it traumatic and stressful to give evidence in the adversarial atmosphere of a court room and that the forceful cross-examination of a young person by skilled counsel may be more likely to obfuscate than to reveal the truth. Moreover, criminal prosecution may be thwarted because of the unwillingness of young witnesses to subject themselves to the ordeal of the court hearing even if the proceedings are in camera. From these remarks it seems to me obvious that the ordinary procedures of the criminal justice system are inadequate to meet the needs and requirements of the child witness. Section 170A is designed to address the imbalance and to provide protection for the young witness.

The court also had to decide whether, in so doing, it was violating the right of an accused to a fair trial, because, inter alia, it was depriving the accused of the right to cross-examine the witness. The court held that section 170A does not exclude the right to cross-examination; it merely states that no cross-examination may take place in any manner other than through an intermediary. The court per Melunsky J held that “the witness may still be questioned on all aspects and the right to challenge the evidence is not impaired”. 221 The court concluded that the purpose of protecting the child witness was balanced against the alleged infringement of the accused’s right to cross-examination; that the procedure would further the truth-seeking process; and that sound reasons existed why such procedure would enable a child to participate properly in the accusatorial system. 222 Section 170A consequently modifies the established adversarial rules of evidence in such a manner that it does not deny an accused the right to cross-examine a witness. It only limits the way in which the cross-examination is conducted. What is precluded

220 1996 (1) SACR 434 (E).
221 At 444.
222 At 444-445.
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is the potential harmful effect on the child witness of rigorous, aggressive and intimidating cross-examination.

Although section 170A is an improvement on the previous adversarial procedure and is greatly welcomed, in practice some serious concerns still prevail. In terms of section 170A an intermediary “may, unless the court directs otherwise, convey the general purport of any question to the witness”. The intermediary is not allowed to question a witness independently. The intermediary’s power to interfere in the process is hence restricted. The intermediary does not have the authority to comment on a question or give an opinion as to whether a child understands a question or not. Furthermore, the intermediary may not argue that questions should not be formulated in a certain manner or presented in a particular sequence. The parties are therefore broadly speaking still in control of the cross-examination of the witness, and in this regard there has been no true deviation from the adversarial model. Schwikkard correctly argues that, although section 170A provides some relief for child witnesses, it does not remove the traumatic effect of the adversarial nature of the trial process for the witness. She points out that it is the adversarial nature of the proceedings that is at the core of the problem and that even the use of CCTV will not prevent a child from being traumatised as long as the trial is viewed as a contest and not as an inquiry into the truth.

According to Müller, the application of section 170A in its present form in essence “amounts to a plaster that is being used to cover the cracks of a system that is not

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223 Müller 2001 Crime Research in South Africa 1 at 4. It should be noted that this is due to the incorrect perception that an intermediary is nothing more than an interpreter as well as the specific intermediary model used by South Africa. For a discussion on the issue and specifically the functions of an intermediary, refer to para 3.4 of ch 5 below.

224 Schwikkard in Schwikkard & Van der Merwe Principles of Evidence 18 11 1.


226 Schwikkard “The child witness: assessment of a practical proposal” 1991 SACJ 44 at 49. See also Davies et al Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models (2011) for a discussion of some of the reactions of the participants on being exposed to the different intermediary models. The study albeit an exploratory one showed that exposure to more inquisitorial proceedings leads to a change in viewpoint as to the benefits of a more inquisitorial model for child witnesses by some of the participants.
capable of dealing with child witnesses”. She bases this argument on the fact that research in the field of child development and language clearly indicates that children are not capable of giving accurate evidence when cross-examined in an adversarial environment. Müller argues that the introduction of statutory exceptions to ameliorate the position of the child witness on an ad hoc basis only gives rise to further confusion.227

It could be asked whether the Commission in its recommendations and the legislature by the use of the words “may, unless the court directs otherwise, convey the general purport” had such a restricted application of section 170A in mind. Firstly, the word “may” instead of “must” suggests some leniency and secondly the words “unless the court directs otherwise” confirm that the court has a discretion to allow an intermediary to point out difficulties and discrepancies. This is particularly relevant if one takes into account that the whole purpose of section 170A is to reduce the traumatic effect of forceful cross-examination on child witnesses.228 Furthermore, in DPP v Minister of Justice229 the court held that the legal and judicial process must always be child-friendly; that statutes must be interpreted in a manner which favours protecting and advancing the interests of children and that courts are bound to give effect to the provisions of section 28(2) in matters that come before them and that involve children. The court pointed out that this is equally true of the position of child witnesses within the criminal justice system and that section 28(2) should be regarded as the starting point which provides the constitutional context within which section 170A should be understood and construed.230

Davies et al231 emphasise the following:

228 K v Regional Court Magistrate1996 (1) SACR 434 (E) at 443.
229 2009 (2) SACR 130 (CC) at paras [74]-[75].
230 DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC) at paras [74]-[75].
231 Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models 5.
The whole point of the exercise [the use of an intermediary] is that there should never be a question which is unfair to a child witness. ... And so that's why it has to be re-crafted. And it's not about the theatre and it's not about having an argument with the witness or confusing the witness. The whole idea is that we are trying to establish a system ... where the witness is not confused. That's the point.

It appears that the restricted use of an intermediary was possibly not intended, but developed in court as a result of an initial uncertainty regarding the role of an intermediary and out of fear on the part of presiding officers of compromising judicial neutrality. In that sense, one can concur with Müller's view that “[i]t does not make sense to modify a system to suit children when the system itself does not support children”.

In comparison with the adversarial system, the inquisitorial system is judge-centred. The judge questions the witness and the distinction between examination-in-chief and cross-examination is unknown in this system. The defence and the prosecution play minor roles at the trial and any questions to the witness may only be directed to the judge, who has the authority to put them to the witness in the manner he or she deems fit. In the French system, the witness is allowed to narrate his or her evidence with little or no interruption. From the perspective of the inquisitorial model, cross-examination is viewed as a means by which “evidence can easily be distorted through skilful and selective manipulation by counsel”. One prominent German writer even suggests that “by cross-examination anything can be achieved, except the discovery of the truth”. Although the inquisitorial system may be preferred for its lack of cross-examination, it is not without its drawbacks. The interviewing of children, especially vulnerable or very young children, is a highly specialised task, for which presiding officers may not be best suited. Child interviewers should be

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232 Refer to para 3.2 of ch 5 below for a discussion of the requirements for a competent intermediary.
234 Herrmann 1978 SACC 3 at 5-6.
236 Snyman 1975 CILSA 100 at 109.
highly trained in developmental psychology, language acquisition and communication with children. To train legal practitioners to such a level of competence may prove to be too time-consuming and may not be cost-effective since the questioning of child witnesses only forms a relatively small portion of their duties. In this regard the use of professional intermediaries may again prove a solution to this dilemma.

2.6 Rules of evidence

The accusatorial system is characterised not only by confrontation and cross-examination but by a very formalistic and rigid adherence to rules of evidence. Emphasis is placed on the admissibility of evidence, with strict rules leading to the exclusion of certain types of evidence. For example, hearsay evidence which cannot be tested by cross-examination is inadmissible. The rules of evidence also influence the evidence of child witnesses in that a child must be found to be competent before the child’s testimony will be heard by a court. The cautionary rule warns against the dangers of convicting on the evidence of a child and requires corroboration in certain circumstances. A proper evaluation of the accusatorial system and its effect on child witnesses therefore includes an evaluation of the testimonial competence of children, the cautionary rule and the rule against hearsay.

2.6.1 The testimonial competence of children

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237 Müller 2001 Crime Research in South Africa 1. This would be more feasible in specialised courts such as the Sexual Offences Courts.

238 Refer to para 3.2 of ch 5 below for more on the plans of the Department of Justice and Constitutional Development to establish the permanent structure of intermediaries within the department as a separate profession.

239 S v Director of Public Prosecutions 2000 (2) SACR 711 (T).
Competence has been described as “central to the workings of the adversarial trial”. In terms of the accusatorial system a witness needs to be competent before evidence may be presented to the court. The general rule, in terms of the South African accusatorial system, is that everyone (including a child) is presumed to be a competent witness. In this regard section 192 of the Criminal Procedure Act states the following:

Every person not expressly excluded from this Act from giving evidence shall, subject to the provisions of s 206, be competent and compellable to give evidence in criminal proceedings.

The question of compellability and competence is decided by the court in which the criminal proceedings are to be conducted. This involves a trial-within-a trial at which the witness may be questioned by the presiding officer. Witnesses may also be called to give testimony as to the competence of the witness. No universal test for the determination of competence exists. An investigation into the competence of a witness involves questions of fact and usually includes an investigation into whether the witness understands and appreciates the nature of an oath.

Children are regarded as competent witnesses if in the opinion of the court they are able to understand the difference between the truth and a lie and have an appreciation of the seriousness of the occasion and the consequences of lying. In this regard it should be noted that an examination of the South African criminal justice system reveals that age itself is not a discernible factor in the determination of children’s competency. Children as young as three or four years have given

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240 Du Toit et al *Commentary on the Criminal Procedure Act* 22-20A.
241 In terms of s 206, the law as to competency, compellability or privilege of witnesses which was in force in respect of criminal proceedings on the thirteenth day of May 1961 shall apply in any case not expressly provided for by this Act or any other law.
242 S 192 of the Criminal Procedure Act.
testimony. In *R v J*, a case of indecent assault, the court found the complainant, a four-year-old girl, to be “a bright little girl who gave her evidence readily without prompting or leading”. Although the question of a child’s competency should, according to Zeffert and Piazes, not be confused with the question whether the child should be required to take the oath or affirmation or be admonished to speak the truth, in practice owing to the requirements of section 162 (that all witnesses must testify under oath) a test for competency has by implication resulted in an enquiry into these aspects.

When a child is called to testify, the presiding officer first has to determine whether the child understands the nature of the oath. In *S v L* the court held that it is the duty of the presiding officer to determine whether the child has sufficient intelligence to appreciate the consequences of the religious obligation and sanctity of the oath; the capacity to understand the difference between the truth and a lie as well as the ability to understand the import of telling the truth. Only if a “child is capable of giving a truthful and intelligible account of the matter upon which he is called” should he or she be allowed to testify.

If the presiding officer is of the opinion that the child does not have a sufficient understanding of the nature and import of an oath, a finding to this effect should be

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244 *R v Manda* 1951 (3) SA 158 (A); *R v Bell* 1929 CPD 478; *R v J* 1958 (3) SA 699 (SR).
245 1958 (3) SA 699 (SR) at 701A.
246 A test for competency should include the child’s ability to communicate, observe and recall. The examination by the courts seems, however, to be focused on the child’s ability to distinguish between a truth and a lie. In *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1021 (A) the court accepted the relevance of the aforementioned principles but attributed them to credibility rather than competence. See also *S v B* 2003 (1) SACR 52 (SCA) at para [14]; *S v Sikhipha* 2006 (2) SACR 439 (SCA) at para [13]; *DPP v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC) at paras [165]-[167]; *S v Swartz* 2009 (1) SACR 452 (C).
247 1973 (1) SA 344 (KPA) at 348A-H.
248 At 348E. See also *S v T* 1973 (3) SA 794 (A); *Chaimowitz v Chaimowitz* (1) 1960 (4) SA 818 (K); *S v N* 1996 (2) SACR 225 (C) at 229I; *S v B* 2003 (1) SACR 52 (SCA) at para [14]; *S v Gallant* 2008 (1) SACR 196 (E); *DPP v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC) at paras [165]-[167]. The religious sanction of the oath has been watered down since the 19th century in view of the fact that not all children receive religious instruction at school (see Lyon “Child witnesses and the oath: empirical evidence” 2000 *South California LR* 1017 at 1020).
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It is recommended that this finding (even if it is not a formal one) as well as the reasons therefore should be recorded. The presiding officer then has to determine whether the child is competent to give unsworn testimony in terms of section 164 of the Criminal Procedure Act. Section 164 states the following:

Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding officer to speak the truth.

In terms of section 164 a child may nevertheless be a competent witness even if he or she does not understand the nature of the oath, provided the child has been admonished by the court to speak the truth. The fact that the child’s evidence is unsworn does not necessarily mean that it will be accorded less weight or that it becomes less reliable. In Chaimowitz v Chaimowitz the court reaffirmed that a child must be either sworn or warned to speak the truth and stated with reference to Scoble:

Obviously, a child whose intellect is so immature that he is incapable of giving a rational or coherent account of his observation, or is unable to distinguish the difference between fact and fancy, or cannot realise the necessity of telling the truth, must be regarded as an incompetent witness.

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249 S v Malinga 2002 (1) SACR 615 (N). In S v B 2003 (1) SACR 52 (SCA) 563 the court held, however, that an inquiry (although desirable) is not always necessary to make a finding in terms of section 164, as a child’s youthfulness may justify such a finding. In S v Gallant 2008 (1) SACR 196 (E) Revelas J held, however, that a failure to make a finding that the witness was unable to understand the oath or admonition rendered the evidence inadmissible. See also S v Williams 2010 (1) SACR 493 (E) where the court relied on S v B 2003 (1) SACR 52 (SCA).

250 S v Stefaans 1999 (1) SACR 182 (C) at 185E.

251 S v BM 2012 (2) SACR 507 (FB).

252 Schwikkard 1996 Acta Juridica 148 at 149. See also R v Manda 1951 (3) SA 158 (A); S v BM 2012 (2) SACR 507 (FB).

253 (1) 1960 (4) SA 818 (T) at 819H and 820A.
Müller\textsuperscript{254} correctly points out that according to Scoble the test entails more than just being able to distinguish between truths and lies. The test requires that a child should be capable of making observations and giving a rational and coherent account of these observations. In addition a child should know the difference between facts and fantasy. The test for a child’s competency therefore involves four fundamental issues which should all be addressed by the presiding officer in his or her determination of a child’s competency, namely:

- the child’s mental capacity to observe an event;
- the child’s capacity to remember the event about which he or she has to testify;
- the child’s capacity to communicate about the event;
- the child’s possession of sufficient intelligence to appreciate the obligation to speak the truth.\textsuperscript{255}

Zeffert and Paizes\textsuperscript{256} point out, however, that the competency test entails that:

if he [a child] does not have the intelligence to distinguish between what is true or false, and to recognise the danger and wickedness of lying, he is incompetent and incompetence cannot be cured by admonishing him to tell the truth.

\textsuperscript{254} Müller \textit{The Judicial Officer} 149.
\textsuperscript{255} Refer to Müller \textit{The Judicial Officer} 149-151 for a detailed discussion of the issues. Also note that in \textit{S v Swartz} 2009 (1) SACR 452 (C) at para [21] the court held that the competency requirements are not satisfied if a child can give an accurate and coherent account of the events, but cannot distinguish between the truth and a lie.
\textsuperscript{256} Zeffert & Paizes \textit{Essential Evidence} 259.
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According to this test, even though a child may have the capacity to observe, recall and communicate, such child cannot be admonished if he or she does not know the difference between a truth and an untruth. Scwikkard\(^{257}\) argues that the abovementioned competency test amounts to a presumption of incompetence as the evidence of children is only permissible once children have been found to be competent witnesses. She correctly contends that no such presumption applies to convicted perjurers or other persons convicted of crimes involving elements of dishonesty. She emphasises that this may lead to reliable testimony being excluded and may inhibit effective prosecution. While the evidence of adults falling into the aforementioned categories would be admissible, even if it is full of lies, inaccuracies and improbabilities, children’s evidence would not be admissible. If adults’ evidence is found to be unreliable, it would merely be rejected.\(^{258}\) Erasmus\(^{259}\) and McEwan\(^{260}\) suggest, which suggestion is supported, that this presumption of incompetence may, despite research findings to the contrary, be the result of the perception that young children are as a rule untruthful. Yet there is no evidence that children are more likely than adults to lie.\(^{261}\) Ovens et al point out, with reference to Quinn,\(^{262}\) that “children do lie, just as adults do lie” but that “often children make statements that are not factually accurate, but they are not ‘lies’ because the child lacks the intention to wilfully mislead or deceive”.\(^{263}\) Wigmore likewise draws attention to the fact that one must accept the “rooted ingenuity of children and their tendency to speak straightforwardly what is in their mind”.\(^{264}\)

Schwikkard furthermore calls attention to the fact that truth and the duty to tell the truth are abstract notions which young children may not be able to understand or explain, but that this does not mean that children cannot give a reliable account of

\(^{257}\) Schwikkard 1996 *Acta Juridica* 148 at 149.
\(^{258}\) Ibid.
\(^{259}\) Erasmus “The truth, the whole truth or nothing…’ Is the competency inquiry applicable to child witnesses an evidentiary barrier to truth finding?” 2010 *Speculum Juris* 103 at 109.
\(^{260}\) McEwan 1988 *CLR* 813 at 815.
\(^{261}\) McEwan 1988 *CLR* 815.
\(^{263}\) Ovens, Lamprechts & Prinsloo “Child witnesses in the criminal justice system” 2001 *Acta Criminologica* 25 at 29.
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the events in question. She advocates that children should still be allowed to testify, stressing that in assessing credibility the court will give little weight to the fact that a witness took the oath or was admonished to tell the truth, but will instead look to factors such as coherence under cross-examination, evidence of surrounding circumstances and demeanour. Wigmore also believes that “the sensible way would be to put the child upon the stand and let it tell its story for what it may seem worth”.

This aspect was specifically addressed in S v Mokoena; S v Paswane. In the said case Bertelsmann J reasoned along similar lines to Wigmore and Schwikkard and held the proviso to section 164(1) to be unacceptable and unconstitutional because it does not:

take into account that a witness who, for whatever reason, may not be able to understand or to verbalise an understanding of the abstract intellectual concepts of truth or falsehood, may nonetheless be perfectly able to convey the general experience that has led to the witness becoming involved in the criminal case.

This finding was not confirmed by the Constitutional Court, however. In DPP v Minister of Justice the court acknowledged that questioning may at times be very confusing and even terrifying for a child. The court also conceded that some of the questions put to children by the judicial officers “are very theoretical and seek to determine the child’s understanding of the abstract concepts of truth and falsehood”. The result of such questions may leave the judicial officer with the

267 2008 (2) SACR 216 (T).
268 Para [139].
269 2009 (2) SACR 130 (CC) at para [165].
270 Para [165].
impression that the child does not understand what it means to speak the truth and may lead to a child’s being disqualified from giving evidence.\textsuperscript{271}

The Constitutional Court pointed out that the reason for receiving evidence under oath or affirmation is to ensure that the evidence given is reliable and does not undermine the accused’s right to a fair trial. The court held that the evidence of a child who does not understand what it means to tell the truth is unreliable. Accordingly, when a child cannot convey his or her appreciation of the abstract concepts of truth and falsehood, the solution does not lie in allowing every child to testify in court.\textsuperscript{272} The solution according to the court lies in the proper questioning of children and in particular of younger children. The purpose of the questioning is to determine whether the child understands what it means to speak the truth and not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood.\textsuperscript{273}

The court concedes that this questioning requires special skill and that although some judicial officers may have this skill, they are the minority. In this regard the court underlines the significant role of intermediaries in that “everything seems to turn upon the need for intermediaries when young children testify in court”.\textsuperscript{274} Properly trained intermediaries have particular skill in questioning and communicating with children. This skill, along with their integrity, is vital in ensuring both that innocent people are not wrongly convicted and that guilty people are held to account. The court therefore concluded that the conclusion by the High Court that the proviso to section 164(1) is inconsistent with the Constitution cannot be upheld.\textsuperscript{275}

\textsuperscript{271} Para [165].
\textsuperscript{272} Paras [166]-[167].
\textsuperscript{273} Paras [166]-[167]. See also \textit{S v BM} 2012 (2) SACR 507 (FB) where the State’s case in a prosecution of rape rested on the evidence of a nine-year-old complainant and her eleven-year-old friend. With reference to \textit{DPP v Minister of Justice and Constitutional Development} it was held by the Court of Appeal at para [8.3] that although the two witnesses might not have had an appreciation of the “abstract concepts of truth and falsehood” they were nevertheless able to and in fact did convey to the \textit{court a quo} what had happened to them.
\textsuperscript{274} 2009 (2) SACR 130 (CC) at para [168].
\textsuperscript{275} Para [169].
The current legal position is therefore that the presiding officer is still obliged to decide on the competency of a witness before testimony can be accepted. In terms of section 165 of the Criminal Procedure Act, this inquiry “may” or “shall” be administered by the presiding officer through an intermediary if the person concerned is to give evidence through an intermediary.\(^{276}\) It is regrettable that the court, despite highlighting the fact that intermediaries are key to the questioning of children in the determination of competency, did not provide any guidelines in *DPP v Minister of Justice and Constitutional Development* as to the circumstances in which an intermediary should assist in this process.\(^{277}\) Are we to assume that this will only be applicable in a section 170A application?\(^{278}\)

Furthermore, although the notion of the use of intermediaries in the determination of competency is supported,\(^{279}\) it should be noted that this solution fails to address the situation where the questioning of a young witness through an intermediary may be vital, but such an intermediary is not available. It is general knowledge that intermediaries are not always available and the court even referred to this problem in *DPP v Minister of Justice*.\(^{280}\) This may still result in a situation where the truthful

\(^{276}\) Note that the heading of section 165 of the Act uses the word “may” whereas the section itself uses the word “shall”. This leaves uncertainty as to whether the use of an intermediary in this context is compulsory or subject to the discretion of the presiding officer.

\(^{277}\) The only indication was with reference to “young children”. See *DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC)* at para [168].

\(^{278}\) See *S v BM 2012 (2) SACR 507 (FB)* where the state’s case in a prosecution of a rape case rested on the evidence of a nine-year-old complainant and her eleven-year-old friend. At trial the complainant in the case testified with the aid of an intermediary and the magistrate satisfied himself of her competence by “virtue of questions put through the medium of the intermediary” (at para [8.2]), while the eleven-year-old witness testified in open court in the presence of the accused and the inquiry into the competence of the child witness was conducted by the magistrate (at para [8.1]). The differentiation in the court’s approach between the complainant and the child witness is not explained, since while the complainant testified to the rape, the child witness was called to testify about knowing the accused and about being requested by the accused to call the complainant to the house that the accused visited. One could possibly assume that the presiding officer and/or prosecutor was of the opinion that the child witness would not suffer undue mental stress or suffering as a result of having to testify in open court. Whether this was the case and whether the child witness was in fact assessed prior to the hearing remains unclear from the record of the reported case. The abovementioned question can therefore not be answered with any certainty.

\(^{279}\) In this regard an intermediary may assist the presiding officer with information pertaining to the child’s cognitive and emotional developmental level.

\(^{280}\) *DPP v Minister of Justice 2009 (2) SACR 130 (CC)* at para [246].
and reliable evidence of a child may be excluded as a result of poor, inadequate and developmentally inappropriate questioning by a presiding officer.\footnote{See for example \textit{S v Raghubar} 2013 (1) SACR 389 (SCA) at para [7].}

The competency of child witnesses was revisited by the Commission in its discussion paper on sexual offences.\footnote{South African Law Commission \textit{Sexual Offences Report} Project 107 (2002) at 99.} The Commission opined that the exclusion of evidence of a witness as a result of that witness not meeting the requirements of sections 162, 163 or 164 of the Criminal Procedure Act seems to run counter to the goal of bringing all relevant evidence before the court. It also ignored the ability of the presiding officer to decide on the weight and credibility to be accorded such evidence.\footnote{South African Law Commission \textit{Sexual Offences Report} Project 107 (2002) at 100-101.} The Commission submitted that all witnesses should be regarded as competent to testify if they are able to understand the questions put to them and the court can understand their answers. If the evidence appears to be unsatisfactory the presiding officer can exercise his or her statutory power to exclude the evidence as irrelevant. Despite their recommendations, the Commission nevertheless acknowledged the seriousness and solemnity of the proceedings and retained the requirement that a witness be enjoined to tell the truth. The Commission thus recommended that:\footnote{Müller \textit{The Judicial Officer} 160.}

\begin{quote}
section 164(1) of the Criminal Procedure Act be amended that all witnesses should be regarded as competent to testify if they can understand the questions put to them and can in return give answers that the court can understand. Further that a new section be inserted in the Sexual Offences Act clearly establishing that any child in a sexual offence trial is competent to testify.
\end{quote}

The Commission’s proposal therefore entails a completely new test for competency, namely the ability to understand and answer questions. The test focuses largely on the cognitive abilities of a child and relates to language development and communication skills.\footnote{Müller \textit{The Judicial Officer} 160.} What is required of the court is to determine whether the
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The child is able to communicate and give a coherent and comprehensible account of matters in relation to his or her testimony. Again, the role of skilled questioners is vital to the successful implementation of such a test.

The proposals of the Commission have not been implemented yet. In S v Swartz\textsuperscript{286} the court pointed out that an examination of most Anglo-American jurisdictions shows that what these competency tests should account for is the likelihood that the child has an accurate memory of the events, is able to recall those memories and can communicate the recalled information accurately. The court pointed out that our criminal system still requires competency (the ability to distinguish between truth and falsehood) when dealing with child witnesses as opposed to intelligibility, as required by some other Anglo-American jurisdictions.\textsuperscript{287} In S v Swartz\textsuperscript{288} Steyn AJ held that this competency requirement cannot be abandoned simply because it appears to operate unfairly.

It is widely submitted,\textsuperscript{289} which submission is supported, that the competency test does in fact operate unfairly and that the use thereof warrants serious reconsideration. If the courts insist on a competency test of some kind in the meantime, it is imperative that such an inquiry should be child-sensitive and developmentally age-appropriate.\textsuperscript{290} If this is the case the child will be a competent witness and as accurate as an adult, if not more so.\textsuperscript{291} Cashmore\textsuperscript{292} sums up this phenomenon clearly by stating that the competence of children to interact with the legal system is a function of the competence of those dealing with them within that legal system.

\textsuperscript{286} 2009 (1) SACR 452 (C) at para [16].
\textsuperscript{287} See for example s 52 of England’s Criminal Justice Act 1991.
\textsuperscript{288} 2009 (1) SACR 452 (C) at para [21].
\textsuperscript{290} Erasmus 2010 Speculum Juris 103 at 114.
\textsuperscript{291} Müller Prosecuting the Child Sex Offender 161.
\textsuperscript{292} Cashmore “Problems and solutions in lawyer-child communication” 1991 CLJ 193 as quoted by Müller in The Judicial Officer at 161.
In comparison with the accusatorial system, the rules of evidence of the inquisitorial system are less restrictive. In terms of the inquisitorial system the presiding officer has the task of determining the probative value of evidence placed before him. The presiding officer sifts through the evidence presented and tests the reliability and accuracy of witnesses, including child witnesses, in the course of a comprehensive interrogation. The French inquisitorial system, for example, examines all evidence given by a witness, provided it is relevant. The presiding officer would only exclude evidence if its probative value was outweighed by other risks. The general principle is therefore that nearly all evidence is admissible. This does not imply that no exclusionary rules exist. In order for the evidence to be admissible it has to be relevant. The focus of the inquisitorial system is therefore on the weight of the evidence and not on its admissibility. In terms of the inquisitorial system a child will present his or her evidence, after which the presiding officer will weigh the relevance of the evidence. In Norway, for example, the oath has been replaced by a solemn declaration that the witness is telling the truth. However, a declaration is not required if the witness is under the age of fourteen. There is also no age limit for the competency of a child to give evidence. The competency of a child is determined with regard to whether the child has sufficient understanding and ability to express

293 Herrmann 1978 SACC 3 at 5; Henderson “Innovative practices in other jurisdictions” in Hanna et al Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy (2011) 156. It should be noted that the presiding officer is sometimes assisted in this task by an expert such as a psychologist who makes a psychological evaluation and reports on the child’s credibility – see for example the position in France as described by Henderson in Hanna et al Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy 156-157.


herself. A child who is too young to give evidence at the trial may be able to give intelligible evidence in an informal interview out of court.

This correlates with the aforementioned proposal by Wigmore and Schwikkard, namely to allow a child to testify and then to evaluate the child’s evidence for what it may seem to be worth. If the evidence is found to be unreliable, the court may reject such evidence. This underlines the notion that children may be inadequate witnesses in the same way that adults may be inadequate witnesses, but that the court should be allowed to come to an “intelligent conclusion” on the evidence of the children concerned. The essence of the inquisitorial trial has thus been called “a seeking of the truth by interrogation”.

2.6.2 The cautionary rule and children’s testimony

The origin of the cautionary rule stems from the practice of warning the jury against certain kinds of witnesses, notably accomplices, complainants in sexual cases and young children. This stems from the notion that these witnesses could not safely be relied upon without some kind of corroboration or other form of evidence confirming


299 S v S 1995 (1) SACR 50 (ZS) at 60.

300 Herrmann 1978 SACC 3 at 6.
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their trustworthiness. The presiding officer was also required to show that he or she had kept the warning given to the jury in mind. In this way the cautionary rule persisted even when the jury system was abolished.\textsuperscript{301}

The starting point in any criminal matter is that the State must prove the guilt of the accused beyond any reasonable doubt. This must never be lost sight of even where a number of cautionary rules apply.\textsuperscript{302} The purpose of the cautionary rule is to assist the court in deciding whether or not the onus of the State has been discharged.\textsuperscript{303} It should accordingly be borne in mind that satisfying the rule does not in itself guarantee a conviction. The rule is merely an aid in establishing the truth. The final analysis is whether the court is satisfied beyond a reasonable doubt that all the evidence presented is essentially true.\textsuperscript{304}

The cautionary rule relating to the evidence of children entails that the presiding officer should fully appreciate the dangers of accepting the evidence of children. In this regard children’s evidence is considered in the same light as that of accomplices and complainants in sexual cases.\textsuperscript{305} In terms of the cautionary rule a court should not easily convict unless the evidence of the child has been treated with due caution. Where the child is also the sole witness the evidence will be regarded with even more caution.\textsuperscript{306} As a consequence the court will seek corroboration, even though corroboration of a child’s evidence is not required by law or by practice. A child’s

\textsuperscript{301} Zeffert \& Paizes \textit{Essential Evidence} 308-309.
\textsuperscript{302} \textit{S v Hanekom} 2011 (1) SACR 430 (WCC) at para [8].
\textsuperscript{303} \textit{S v Hanekom} 2011(1) SACR 430 (WCC).
\textsuperscript{304} \textit{S v Francis} 1991 (1) SACR 198 (A) at 205f.
\textsuperscript{305} Prior to 1998, the law took the view that the cautionary rule as it applies to accomplices had to be applied to the evidence of complainants in sexual cases. This rule was, however, abolished by the Supreme Court of Appeal in \textit{S v Jackson} 1998 (1) SACR 470 (A). It was further held in \textit{S v M} 1999 (2) SACR 548 (SCA) at 554-555 that the approach applied in the former case also applied to all cases in which an act of a sexual nature was an element and thus also to the evidence of children. Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 now also provides that a court may not treat the evidence of a complainant in a sexual offence with caution on account of the nature of the offence.
\textsuperscript{306} \textit{S v Mokoena} 1932 OPD 79 at 80.
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evidence, if not corroborated, will therefore be scrutinised with great care in terms of this rule and will be accepted with great caution.\(^{307}\)

There is no particular age below which the cautionary rule applies. The degree of corroboration or other factors required to reduce the danger of reliance on the child’s evidence will vary with the age of the child and the other circumstances of the case.\(^{308}\) The court does not enumerate the factors that could increase or lessen the danger, nor does it define the class of children to whom the danger of reliance on the child’s evidence is applicable.\(^{309}\) However, the younger the child the greater the likelihood that the court will require substantial confirmation of the evidence.\(^{310}\)

In *R v Manda*\(^{311}\) the court emphasised that the dangers inherent in reliance upon the uncorroborated evidence of a young child should not be underrated. The court explained that the danger involved in the evidence of children can be attributed (among a number of factors) to their “imaginativeness and suggestibility” ... “that require their evidence to be scrutinised with care, amounting perhaps to suspicion”.\(^{312}\) However, in *R v J*\(^{313}\) the court held that although there may be circumstances that necessitate special caution, “the exercise of caution should not be allowed to displace the exercise of common sense”.\(^{314}\)

\(^{307}\) *R v Manda* 1951 (3) SA 158 (A).
\(^{308}\) *R v Manda* 1951 (3) SA 158 (A); *Woij v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A). Note that a child means a person under the age of eighteen years. Refer to s 28(3) of the Constitution.
\(^{309}\) Joubert et al *The Law of South Africa Vol 9 Evidence* para 832.
\(^{310}\) *R v Bell* 1929 CPD 478; *De Beer v R* 1933 NPD 30; *R v W* 1949 (3) SA 772 (A); *R v J* 1958 (3) SA 699 (SR).
\(^{311}\) 1951 (3) SA 158 (A) at 163.
\(^{312}\) At 163. The court did not elaborate on the other factors.
\(^{313}\) 1958 (3) SA 699 (SR).
\(^{314}\) At 90.
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The manner in which the evidence of young children should be approached is set out in the judgment of Diemont JA in the civil case of *Wojj v Santam Insurance Co Ltd*, where the learned judge stated the following:

The question which the trial Court must ask itself is whether the young witness’s evidence is trustworthy. Trustworthiness … depends on factors such as the child’s power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears “intelligent enough to observe”. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion “to remember what occurs” while the capacity of narration or communication raises the question whether the child has “the capacity to understand the question put, and to frame and express intelligent answers” … There are other factors as well which the Court will take into account in assessing the child’s trustworthiness in the witness-box. Does he appear to be honest – is there a consciousness of the duty to speak the truth?

It should be noted that although *Wojj* recognised children’s individuality, the court’s decision was based on the premise that children are inherently unreliable witnesses. A further useful discussion of the evidence of children appears in *S v S*, a Zimbabwean case per Ebrahim AJ. Drawing on the work of Spencer and Flin, he refers to six of the objections which are raised against the evidence of children:

- **a)** children’s memories are unreliable;
- **b)** children are egocentric;

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315 1981 (1) SA 1020 (A) at 1027H-1028A.
317 1995 (1) SACR 50 (ZS).
319 1995 (1) SACR 50 (ZS) at 54.
c) children are highly suggestible;

d) children have difficulty distinguishing fact from fantasy;

e) children make false allegations, particularly of sexual assault; and

f) children do not understand the duty to tell the truth.

He then evaluates each of these objections and provides useful guidelines. He highlights the fact that research has shown, contrary to earlier belief, that children generally have a good recall of events and points out that children respond better to questioning by a sympathetic questioner. He furthermore states that all human beings are egocentric and that this is not a problem unique to children. He points out that reliable psychological research shows that children, like adults, can be suggestible, but that this can be minimised by questions especially designed to overcome the known pitfalls. With regard to children’s fantasising over events, he emphasises that children do not fantasise over things that are beyond their own direct or indirect experience. He also suggests that the incidence of false allegations is much lower than is generally believed. He believes that the question of credibility should be answered by considering each case on its own individual merits. With regard to the last objection, that children do not understand the duty to tell the truth, he says that this is a sweeping statement that ignores differences in age, intelligence and morality between children.

He concludes by calling for a new, more specific approach instead of merely seeking corroboration. He warns that “in approaching cases with a single minded eye towards seeking corroboration ... the courts tend to lose sight of the reason for seeking it”. What is required to reach a rational and intelligent conclusion on the credibility of a child witness is a proper analysis of likely shortcomings in such

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320 At 54-55.
321 At 55-59.
322 At 59.
evidence, in which a certain amount of psychology and a recent awareness of advances in that discipline are applied.\textsuperscript{323}

In \textit{S v Director of Public Prosecutions}\textsuperscript{324} the court followed the approach of \textit{S v Jackson}\textsuperscript{325} and, referring to trends in countries such as Canada, Ireland, the United Kingdom, Australia and New Zealand, held that the proper approach was not to insist on the application of the cautionary rule as though it was a matter of rote, but to consider each case on its own merits. Although the evidence in a particular case might call for a cautionary approach, this was not a general rule. The court stressed that it could not be said that the evidence of children, in sexual and other cases, where they were sole witnesses, obliged the court to apply the cautionary rules before a conviction could take place.\textsuperscript{326} What was required of the State was to prove the accused’s guilt beyond all reasonable doubt. This might require the court to apply the cautionary rule. In \textit{S v M}\textsuperscript{327} Shakenovsky AJ also held that the correct approach was not to apply a general cautionary rule, but to look at the evidence as a whole and the reliability of what had been placed before the court.

Despite what appeared to be the application of a more enlightened approach by the judiciary, case law suggests the contrary. In the case of \textit{S v Hanekom}\textsuperscript{328} the magistrate was criticised for not taking sufficient notice of the two cautionary rules applicable to the case (the complainant was both a sole witness and a child) and for failing to apply them with the degree of attention to detail demanded by the particular circumstances of the case. According to Saner AJ the magistrate had merely paid

\begin{itemize}
  \item \textsuperscript{323} At 59-60.
  \item \textsuperscript{324} 2000 (2) SA 711 (T).
  \item \textsuperscript{325} 1998 (1) SACR 470 (A).
  \item \textsuperscript{326} 2000 (2) SACR 711 (T) at 715A-B. In the case under discussion the court \textit{a quo} applied the cautionary rule in respect of all three aspects, namely the evidence of children in sexual cases where they are single witnesses (see \textit{Director of Public Prosecutions v S} 2000 (2) SACR 711 (T) at para 715G-H).
  \item \textsuperscript{327} 1999 (2) SACR 548 (A) at 501.
  \item \textsuperscript{328} 2011 (1) SACR 430 (WCC).
\end{itemize}
lip service to the rules.\textsuperscript{329} The court referred to \textit{R v Manda}\textsuperscript{330} and \textit{S v Viveiros},\textsuperscript{331} stating that because of the potentially unreliable and untrustworthy nature of the evidence, it fully intended to follow the warning against accepting the evidence of children.\textsuperscript{332} In \textit{Maema v S}\textsuperscript{333} the Supreme Court of Appeal per Shongwe JA, referring also to \textit{R v Manda}, uncritically accepted the application of the cautionary rule to the evidence of children. In \textit{S v Raghubar}\textsuperscript{334} as well the trial court was criticised for merely paying lip service to the cautionary rule in respect of a sole child witness aged fourteen.

It is unsurprising that the rule has its critics. Whitear-Nel\textsuperscript{335} expresses her concern, and rightly so, over the fact that the court in the \textit{Hanekom} case did not refer to recent research in the arena of child psychology and development, which shows that children’s ability to give reliable evidence has been greatly underestimated.\textsuperscript{336} Schwikkard also points out that the trend internationally has been to abolish this cautionary rule.\textsuperscript{337} She furthermore emphasises that as the rule is based on discredited beliefs, its application is more likely to lead to error than to the discovery of truth.\textsuperscript{338} A strong argument was therefore made by Schwikkard, which is supported, that just as the cautionary rule applicable to complainants in sexual cases was found to be irrational and based on stereotyped notions and was therefore abolished, so too should the cautionary rule applicable to children be abolished.\textsuperscript{339} She submits that the cautionary rules applicable to children are \textit{prima facie} discriminatory in that witnesses are disadvantaged on the basis of age and

\textsuperscript{329} Para [7].
\textsuperscript{330} 1951 (3) SA 158 (A).
\textsuperscript{331} [2000] 2 All SA 86 (SCA).
\textsuperscript{332} 2011 (1) SACR 430 (WC) at para [9] and [10].
\textsuperscript{333} [2011] ZASCA 175 (unreported case 147/, 2011, 29/09/2011) at para [14].
\textsuperscript{334} 2013 (1) SACR 389 (SCA).
\textsuperscript{335} 2011 SACJ/382 at 396.
\textsuperscript{337} Schwikkard in Artz & Smythe (eds) \textit{Should we Consent? Rape Law Reform in South Africa} 79.
\textsuperscript{338} Schwikard 1996 \textit{Acta Juridica} 154.
\textsuperscript{339} Schwikard 1996 \textit{Acta Juridica} 154
that this infringement of the equality clause will not pass constitutional scrutiny in terms of the limitation clause.\textsuperscript{340}

In 2002, the Commission\textsuperscript{341} also acknowledged the vast amount of research indicating that children are no more unreliable than adults and recommended the abolition of the cautionary rule applicable to children. Whitear-Nel\textsuperscript{342} states that in the light of the acceptance of the cautionary rule in cases such as the \textit{Hanekom} case and \textit{Maemu v S} it is becoming evident that the cautionary rule is not likely to be abolished without a constitutional challenge. She emphasises that the time is ripe for change and that South Africa’s crime rate with high levels of child abuse and low rates of conviction for such crimes demands that the issue be reconsidered.\textsuperscript{343} She stresses, and rightly so, that it is inappropriate or even irresponsible to continue to blindly rely on the authority of old cases such as \textit{R v Manda}\textsuperscript{344} and \textit{Woij v Santam Insurance Co Ltd}\textsuperscript{345} to justify the application of the cautionary rule to children.\textsuperscript{346}

It should be noted that the advocates for the abolition of the cautionary rule do not suggest that there may not be good reason for treating a child’s evidence with caution, but argue that the issue should be decided on the basis of the case before the court and not on a generalised and unsubstantiated perception that children are unreliable witnesses.\textsuperscript{347}

\textsuperscript{340} Schwikard 1996 \textit{Acta Juridica} 154.
\textsuperscript{342} 2011 SACJ 382 at 398.
\textsuperscript{343} Refer to para 1.1 fn 15 and 17 of ch 1 above for more on the crime rate pertaining to children in South Africa.
\textsuperscript{344} 1951 (3) SA 158 (A).
\textsuperscript{345} 1981 (1) SA 1020 (A). Note above that although the court recognised the individuality of children in the case of \textit{Woij v Santam Insurance Co Ltd} the court’s decision was still based on the premise that children are inherently unreliable witnesses.
\textsuperscript{346} 2011 SACJ 382 at 398.
\textsuperscript{347} 2011 SACJ 382 at 396. This is in line with the notion held in \textit{S v Jackson} 1998 (1) SACR 470 (A) where the court stated with regard to the former cautionary rule relating to sexual cases at 476 that although “evidence in a particular case might call for a cautionary approach, but that is a far cry from the application of a general cautionary rule”.
In comparison with the accusatorial system, the rules of evidence of the inquisitorial system are less restrictive, with few exclusionary rules of evidence existing. French law, for example, allows all the evidence a witness gives, provided it is relevant, and then sifts through it. Likewise, in terms of Austrian law, hardly any evidentiary rules apply and no need for corroboration exists. The rules that do exist apply to evidence given by all witnesses. No irrelevant or prejudicial rules are applied. Instead, the Austrian inquisitorial system applies the principle of “free assessment of evidence”. This entails that presiding officers are to be guided solely by scientific knowledge and the principles of logic and common sense. Presiding officers are trusted to weigh the evidence correctly and distinguish between trustworthy and unreliable evidence. This correlates with the aforementioned proposal advocated by Scwikkard and Whitear-Nel, namely that decisions should be taken on the basis of the case before the court.

2.6.3 The hearsay rule and children’s testimony

Hearsay evidence is evidence of a statement by a person other than a witness which is relied upon to prove what the statement asserts. The term “hearsay” originates from the fact that the witness says in court what he or she has heard (or read). The term is known to both the inquisitorial and the accusatorial systems, but plays a less important role in the inquisitorial system, where the hearsay nature of evidence affects only its weight. Various reasons have been advanced for the exclusion of hearsay evidence, the most compelling being that it is unreliable evidence and may therefore mislead the court. It is said to be unreliable because the person who witnessed the facts at first hand is not present to tell the court what he or she observed. In terms of the accusatorial system the person testifying should...
testify under oath and there should be an opportunity for cross-examination. This is not the case with hearsay testimony nor is the court in a position to challenge the reliability of the first-hand witness. It is therefore not possible to test the evidence as is required by the accusatorial system. For this reason the rule developed that testimony so given should be excluded uncompromisingly unless it could be accommodated within a recognised exception.\textsuperscript{351}

This rule also found its way into South African law by means of legislative enactments that in effect incorporated the English common-law position on the matter. This remained the position until 1988, when the Law of Evidence Amendment Act 45 of 1988 brought about some changes, replacing the system with a more flexible approach. Although there is still a general rule against hearsay, the new approach gives courts the power to admit hearsay evidence in cases where the traditional hearsay dangers are either satisfactorily accounted for or are insufficiently significant.\textsuperscript{352} Section 3 of the Law of Evidence Amendment Act\textsuperscript{353} has introduced three main exceptions to the rule against hearsay. In terms of this section hearsay may be admitted by agreement, where the person upon whose credibility the probative value of the proceedings depends himself or herself testifies at such proceedings or where the court, having regard to seven listed factors, is of the opinion that such evidence should be admitted in the interests of justice.\textsuperscript{354}

A child may be unable to give evidence at a trial because he or she has either been found incompetent or is too afraid. A report made to a mother, guardian, social worker or police officer depicting the event will amount to hearsay and will not be admissible.\textsuperscript{355} In terms of the three exceptions such a report may be admissible if the other party agrees, the child himself or herself testifies at the trial or the court allows it within its discretion. It is doubtful whether any opposing party in a criminal proceeding would consent to such evidence. The second category is not applicable

\textsuperscript{351} Schmidt & Rademeyer \textit{Law of Evidence} Issue 11 (July 2013) para 18 1. See also Vulcan Rubber Works (Pty) Ltd v SAR & H 1958 (3) SA 285 (A); S v Mpofu 1993 (3) SA 864 (N).
\textsuperscript{352} Zeffert & Paizes \textit{Essential Evidence} 135.
\textsuperscript{353} 45 of 1988.
\textsuperscript{354} S 3 (1)(a)-(c) of the Law of Evidence Amendment Act.
\textsuperscript{355} S v T 1973 (3) SA 794 (A).
as the child does not want to testify or is not allowed to do so, having being declared incompetent. The third category may hence prove to be the vehicle through which to submit children’s hearsay evidence.

Section 3(1)(c) affords the court a wide discretion to admit hearsay evidence if this is in the interests of justice. In considering the interests of justice and in deciding how much weight should be afforded to the hearsay evidence, the courts must take into account the nature of the proceedings, the nature of the evidence, the purpose for which the evidence is tendered, the reason why the evidence is not being given by the person upon whose credibility the probative value of such evidence depends, any prejudice to a party which the admission of such evidence might entail and any other factor which should in the opinion of the court be taken into account. The court therefore has to weigh up all the factors in exercising its discretion to admit the hearsay evidence. This provision is the most far-reaching of the three exceptions.356 Everything depends on how far the courts are prepared to go in exercising their discretion to introduce evidence of this nature. The response has been mixed, with some courts expressing reluctance, especially in criminal cases, to exercise a wide discretion.357

In S v Ramavhale358 the court stated that it has an “intuitive reluctance to permit untested evidence to be used against an accused” in a criminal case as an accused person “usually has enough to contend with without expecting him to engage in mortal combat with an absent witness”. It also emphasised that “a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there is compelling justification

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356 Zeffert & Paizes Essential Evidence 139.

357 Zeffert & Paizes Essential Evidence 139. See for example also S v Dyimbane 1990 (2) SACR 502 (SE) where evidence as to the statements of the two deceased were admitted, in comparison to S v Cekiso 1990 (4) SA 20 (E) at 22A, where hearsay evidence on “controversial issues upon which conflicting evidence has already been given” was disallowed.

358 1996 (1) SACR 639 (A) at 647-648.
for doing so". The importance of this caution was emphasised in *S v Ndholovu* where Cameron JA held that a trial court, in applying the hearsay exceptions, must be scrupulous in ensuring respect for the fundamental right of the accused to a fair trial. Cameron JA concluded, however, that where the interests of justice require the admission of hearsay, the provision “does not require the absence of all prejudice”. In *S v Shaik*, a case where the conviction of the appellants on some of the charges depended heavily on hearsay evidence, the Supreme Court of Appeal received the evidence, stating that “sight should not be lost of the true test for the evidence to be admitted, and that is whether the interest of justice demands its reception”.

The importance of allowing the hearsay evidence of children has recently been highlighted albeit in a Labour Court dispute. In the case of *Minister of Police v M*, a case of the rape of a child was connected with a dismissal dispute in the Labour Court. The employee (RM) was dismissed because he had raped his daughter over a period of time starting when she was fourteen years old. Her father (RM) was employed in the VIP protection unit of the South African Police Service (SAPS). After his arrest in 2009 he faced both a criminal trial and a disciplinary hearing in which it was alleged that he had contravened the SAPS code of conduct. The daughter (K) testified against her father at the internal disciplinary hearing. Her testimony was corroborated by two other witnesses who were present in the house where some of the sexual assaults/rape allegedly occurred. RM was represented at the disciplinary hearing by a union representative. The witnesses were cross-examined by the representative. RM also testified in his own defence and was cross-examined. The presiding officer at the disciplinary hearing found RM guilty on the charges and he was dismissed. RM lodged an internal appeal, but was unsuccessful. He then referred an unfair dismissal dispute to the Safety and Security

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359 At 649d-e.
360 2002 (2) SACR 325 (SCA) at 337-338.
361 At 348.
362 2007 (1) SA 240 (SCA).
363 Para [171].
365 *Minister of Police v M* (JR 56/14) [2016] ZALCJHB 314 (19/08/2016) at paras [1]-[2].
366 Paras [3]-[4].
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Sectoral Bargaining Council (SSSBC) for arbitration. As the arbitration constituted a new hearing the evidence had to be introduced de novo. At this point the victim, K, refused to testify again. Consequently the employer had to rely on the transcripts of the internal disciplinary hearing to prove the substantive fairness of RM’s dismissal. SAPS applied to have the transcripts admitted as hearsay in terms of one of the exceptions listed in section 3 of the Law of Evidence Amendment Act, namely that of in the interests of justice. The commissioner agreed to admit the transcripts but found the weight of the evidence derived from the transcripts against RM to be “minimal without additional testimony or documents substantiating the allegations”. As the arbitration was a hearing de novo, the commissioner consequently found RM’s dismissal substantively unfair and reinstated him. The Minister of Police challenged this decision in the Labour Court before Judge Whitcher.

In evaluating the matter, Judge Whitcher emphasised that the commissioner had correctly admitted the transcripts as hearsay evidence, but that the matter rested on the question of what weight this hearsay evidence should be afforded. The judge stated that she had some sympathy for the approach adopted by the commissioner in not readily admitting hearsay evidence. She however pointed out that while it may be unreasonable to give hearsay evidence too much weight, the opposite is also true. Not giving hearsay evidence sufficient weight may also constitute a material error or irregularity.

According to Whitcher J the present case represented an example of a case in which the hearsay evidence was not given enough weight in that the commissioner did not seem to realise that the transcripts were no ordinary hearsay but were “hearsay of

367 Para [5].
369 Minister of Police v M (JR 56/14) [2016] ZALCJHB 314 (19/08/2016) at paras [5]-[7].
370 Para [35].
371 Para [37].
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a special type”. The reason for this is that the transcripts comprised a bilateral and comprehensive record of earlier proceedings in which the child victim’s evidence was corroborated by at least two other witnesses, with the evidence withstanding rigorous cross-examination and in which RM’s own defence was “ventilated and exposed as being implausible”. The learned judge stated that transcripts such as the ones in this case must be afforded greater intrinsic weight than simple hearsay because they constitute a comprehensive and reliable record of a prior quasi-judicial encounter between the parties.

Whitcher J also commented on the child victim’s unavailability as a witness at the SSSBC hearing. She pointed out that, to the extent that this refusal may have influenced the commissioner’s decision, it should be noted that K did not simply refuse to testify but gave two cogent reasons for not testifying, namely that she was no longer “prepared to go through this trauma” and that she was undergoing therapy which would be disrupted if she reopened old wounds. Although not specifically stated by Whitcher J, it is submitted that this implies that not only the refusal to testify but also the reasons therefore should be given the necessary consideration by the presiding officer when weighing up hearsay evidence.

Whitcher J furthermore commented on the fact that the situation in which the SAPS found itself in this case may not be unique, as the labour relations system is designed to give dismissed employees a fresh opportunity to fight their case in another forum. This system therefore envisages that vulnerable classes of victims, such as children, would have to testify at least twice before an offending employee can finally be removed from service. She highlighted that one way of avoiding this

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372 Para [37].
373 Para [37].
374 Para [37].
375 Para [48].
376 Although not addressed in the case, the fact that the employee/accused RM was also criminally charged may in all likelihood result in the victim (K) having to testify in the criminal trial. The acceptance of the transcripts as an exception to the hearsay rule in the criminal trial may thus prove to be equally important to the victim and may protect her from secondary traumatization.
and of minimising the secondary traumatisation of vulnerable witnesses is to ensure that a good record is created of a procedurally fair enquiry. This would enable the employer in appropriate factual circumstances to rely on the transcript of the initial internal hearing should the original witness not be in a position to testify again at arbitration.\textsuperscript{377}

The case of \textit{Minister of Police v M}\textsuperscript{378} again highlights the importance of allowing the hearsay evidence of child victims in appropriate circumstances and affording it the weight it deserves. However, the admission of hearsay evidence remains within the discretion of the presiding officer. It is for this very reason that academics such as Zeiff and Müller argue that an additional statutory provision should be introduced, creating a general exception to the hearsay rule for the statements of children in sexual abuse cases.\textsuperscript{379} In making this proposal they refer to similar child victim hearsay legislation in the United States of America, especially the model created by the Washington legislature in 1982.\textsuperscript{380} Under the Washington statute evidence which is sufficiently reliable may be admitted if the child testifies at the trial and is subjected to cross-examination. If, however, the child is unavailable as a witness, the hearsay evidence may only be admitted if there is evidence to corroborate the act or events. The corroboration requirement may be fulfilled through eyewitness testimony; an admission or confession by the defendant; physical evidence that the child was abused; expert psychological testimony that the abuse occurred or any other evidence that corroborates the child’s statement.\textsuperscript{381}

\textsuperscript{377} \textit{Minister of Police v M} (JR 56/14) [2016] ZALCJHB 314 (19/08/2016) at paras [49]-[50]. Whitcher J subsequently ordered at para [52] that the arbitration be set aside and that the matter be heard \textit{de novo} before a new commissioner.

\textsuperscript{378} (JR 56/14) [2016] ZALCJHB 314 (19/08/2016).

\textsuperscript{379} Zeiff 1991 \textit{SACJ} at 32; Müller \textit{The Child Witness in the Accusatorial System} (PhD Rhodes University 1998) 304.

\textsuperscript{380} WASH. REV.CODE: 9A.44.120 (1982) available at \url{http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.120} (accessed 05/03/2016).

\textsuperscript{381} Zeiff 1991 \textit{SACJ} at 32; Müller \textit{The Child Witness in the Accusatorial System} 304.
The United Kingdom has also reformed its law with regard to hearsay evidence in Chapter 2 of Part 11 of the Criminal Justice Act of 2003.\textsuperscript{382} Under the reformed law the hearsay rule is retained for the purpose of criminal proceedings, but made subject to a more general and wider statutory list of exceptions. One of these exceptions, set out in section 116 of the Act, provides for hearsay evidence to be allowed where the original witness is “unavailable” due to a specified list of reasons. One of these reasons includes unavailability through fear. The courts have also been granted an “exclusionary discretion” to allow evidence that falls outside the explicit exceptions where a court is satisfied that it is in the interests of justice to admit such evidence.\textsuperscript{383} In the last instance the court has to consider a list of nine factors set out in section 114(2) of the Act as well as any other factor it considers relevant.

Spencer\textsuperscript{384} points out that despite the fact that the hearsay rules are couched in what appear to be extremely cautious terms, the last-mentioned reform of the hearsay rule is potentially significant for child abuse cases. This was vividly illustrated in the case of \textit{R v J (S)}.\textsuperscript{385} In the said case the defendant was accused of grave sexual assault on his partner’s baby daughter, who was aged two-and-a-half at the time. While she was lying in bed, someone entered her room and penetrated her vagina to such an extent that she required surgical intervention. The only two people who had access to her room were her mother and the defendant. In the days following the event several people asked her what had happened and she told them that Sid had hurt her. The judge ruled this evidence admissible under the aforementioned exclusionary discretion. This decision was upheld by the Court of Appeal. In his judgment, Lord Justice Hooper on behalf of the Court of Appeal stated that “[w]e have no doubt that the judge was right to rule the evidence in”.\textsuperscript{386}

\begin{itemize}
  \item \textsuperscript{384} Spencer in Spencer et al \textit{Children and Cross-examination: Time to Change the Rules?} 6.
  \item \textsuperscript{385} \textit{R v J (S)} [2009] EWCA Crim 1869.
  \item \textsuperscript{386} \textit{R v J (S)} [2011] EWCA Crim 3021.
\end{itemize}
Müller points out that although the factors listed in the Washington statute (and, as indicated above, in that of the United Kingdom) may sound very similar to those in section 3(1)(c) of the Law of Evidence Amendment Act, the real advantage of introducing a new statutory provision would be emphasis on the admissibility of children’s hearsay evidence, in other words, the intention of the legislature would be that the hearsay evidence of children should, where shown to be reliable, be admissible. This would impose a more stringent duty on the court to make the statements admissible. She advocates that the court should evaluate the hearsay evidence placed before it and accord it the weight it deserves.\textsuperscript{387}

This is in line with the inquisitorial system, where hearsay evidence, provided it is relevant, is admissible. In terms of this model nothing prevents the court from hearing testimony from a parent, guardian, doctor, social worker or police officer, for example, about the child’s initial statement. The focus of the court would then be on how much weight should be attributed to the hearsay evidence and not on whether or not it should be admissible.\textsuperscript{388} Zeiff\textsuperscript{389} expresses the view that although the enactment of a new statutory exception allowing children’s hearsay evidence to be accepted as evidence would probably be opposed on the grounds that it goes against the common-law tradition or its basic principles, the law of evidence, like the legal system as a whole, must adapt to modern social requirements and attitudes. He believes that the proposed reform will strike a balance between the welfare of the child, the rights of the accused and the needs of society.\textsuperscript{390}

\section{CONCLUSION}

\textsuperscript{387} Müller \textit{The Child Witness in the Accusatorial System} 305.
\textsuperscript{388} Andaneas in Spencer & Flin \textit{Children’s Evidence in Legal Proceedings} 9.
\textsuperscript{389} Zeiff 1991 \textit{SACJ} 33.
\textsuperscript{390} Zeiff 1991 \textit{SACJ} 33.
An evaluation of the elements of the accusatorial system, especially those of confrontation and cross-examination, clearly illustrates that children find it problematic to give evidence within this system. It is precisely for this reason that some commentators have suggested doing away with the accusatorial procedure and adopting an inquisitorial approach to solve the dilemmas facing child witnesses in the courtroom. In this regard McEwan suggests that it would be a great step forward if they “[the legislature] investigate the possibility of a completely different procedure, rather than look for flexibility within the straitjacket of the traditional criminal trial”.

The inquisitorial system is not without its problems, with the presiding officer having to fulfil the roles of both prosecutor and adjudicator. Perhaps the solution to the problem lies not in choosing between the two different systems but in finding the middle ground. One possible way of doing so would be to combine inquisitorial elements with accusatorial elements. In this regard the Norwegian model is an excellent example of such a system.

Norway’s criminal justice system is similar to the adversarial model in the pre-trial stages in that the police are in charge of the investigation and the prosecution decides whether to prosecute or not. The judge does not initiate any proceedings and plays no substantive role in the investigation. Norway also has a strong preference for oral evidence and examination. However, there is no tradition of aggressive, adversarial cross-examination. In terms of the Norwegian model children below the age of sixteen years of age are entitled to give their evidence by way of a pre-trial deposition in the form of a forensic interview under judicial supervision. This interview is conducted by highly trained police officers in specially designed video interview suites. The interviewer is trained in cognitive child

391 See Zieff 1991 SACJ 21 at 37; McEwan 1988 CLR 813.
392 McEwan 1988 CLR 813.
development and language acquisition. This pre-trial deposition replaces the child’s evidence-in-chief and cross-examination. The pre-trial deposition is conducted in a manner similar to that prescribed in section 170A in that the interviewer sits with the child in another room which is linked to the court via CCTV.\textsuperscript{395} The accused, his legal representative and the court are able to watch the interview. The accused is therefore still entitled to hear the child’s testimony and is able to observe the child’s demeanour. The Norwegian system differs from the system utilised in terms of section 170A in that the interview is firstly conducted by the interviewer in accordance with his or her professional judgment. The interviewer then takes a break while the camera is still running and consults with counsel, the prosecutor and the judge. This affords both parties the opportunity to challenge any evidence by suggesting topics or identifying contradictions they want investigated further.\textsuperscript{396} This should not be seen by the court as an opportunity to “cross-examine” the witness, but rather as an opportunity to raise matters that have not been covered or have created confusion.\textsuperscript{397} The interviewer returns to the interviewing room and addresses these issues. This process continues until all parties involved are satisfied that all aspects have been addressed. The interview is transcribed and the video together with the transcription is accepted as evidence-in-chief. The child need not attend court. If further evidence is required the child may be re-interviewed using the same process as described above. Re-interviewing is, however, very rare.\textsuperscript{398}

This system protects the child witness against rigorous cross-examination while avoiding the objection raised by adversarial advocates to the inquisitorial process, namely that the right to challenge evidence is infringed. It also retains the two-party character of the adversarial proceedings.\textsuperscript{399} The use of such a system hence warrants further investigation. The possible introduction of such a system into the

\textsuperscript{395} Müller 2001 Crime Research in South Africa 1 at 7
\textsuperscript{397} Müller 2001 Crime Research in South Africa 1 at 7.
South African system and consequential amendments to section 170A will be discussed in more detail later in this thesis.  

It is important to note that although a move from an accusatorial system to a more inquisitorial form of procedure in certain circumstances may entail a significant change this does not mean that we should shy away from such a change.

In delivering the Bar Council’s annual law reform lecture the former Chief Justice of England and Wales, Lord Igor Baron, expressed the following view:

We have to face the reality that if the adversarial system does not do proper justice – that is, justice to everyone involved in the process – it will have to be re-examined and it should be re-examined. If it fails to do justice then the system requires to be changed … [He had] great faith in the adaptability of our system, and the ability of those involved in it, whether judges or advocates, to recognize when change is necessary, and to change.

This is equally applicable to South Africa.

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400 Refer to paras 3.1.4-3.1.6; 3.4 and 4 of ch 5 below. Note this system is also preferred as an alternative to the current position in New Zealand. Refer to ch 7 para 2.6.4 below.

CHAPTER 4

The protection of child victims and witnesses in terms of the Constitution of the Republic of South Africa, 1996, and international instruments

By the present Declaration of the Right of the Child, commonly known as the “Declaration of Geneva”, men and women of all nations, recognising that mankind owes to the Child the best it has to give, declare and accept it as their duty …¹

1  INTRODUCTION

Children’s rights in South Africa have undergone a significant change since 1994. This can be attributed to the enactment of a democratic Constitutional legal order, as well as South Africa’s ratification and adoption of principal international instruments protecting the rights of children.² The principles encompassed in the Constitution and these international instruments enhance the level of protection afforded to children in South Africa. This also applies to the rights of child victims and child witnesses³ within the criminal justice system.

This chapter accordingly consists of an in-depth discussion of the rights of the child victim and child witness encompassed in the Constitution and international

³ Refer to fn 3 of ch 1 above for a definition of child victims and child witnesses.
The protection of child victims and witnesses in terms of the Constitution of the Republic of South Africa, 1996, and international instruments. The protection of child victims and child witnesses in the criminal justice system is of vital importance, not only at national level but also at international level. The purpose of this in-depth discussion of South Africa’s constitutional and international obligations is to enable me to determine whether the current protection afforded to child victims and child witnesses while testifying in criminal proceedings in South Africa is in line with South Africa’s constitutional and international obligations. Strong emphasis will therefore be placed on the constitutional and international obligations relating to the protection of child victims and child witnesses while testifying in criminal proceedings. In line with the focus of this study, the role of an intermediary in the upholding of these rights will also receive particular attention.

2 CONSTITUTIONAL PROTECTION OF CHILDREN

2.1 Introduction

The South African Constitution incorporates an extensive Bill of Rights which has been internationally acclaimed as a good example of a Constitution that provides for the advancement and protection of children’s rights. In this regard the Bill of Rights includes a special section or children’s clause, namely section 28, which affords specific protection to children. In so doing, the Constitution recognises that

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5 S 28 provides as follows:
  1) Every child has the right—
     (a) to a name and a nationality from birth;
     (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
     (c) to basic nutrition, shelter, basic health care services and social services;
     (d) to be protected from maltreatment, neglect, abuse or degradation;
     (e) to be protected from exploitative labour practices;
     (f) not to be required or permitted to perform work or provide services that—
        (i) are inappropriate for a person of that child’s age; or
        (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;
children are particularly vulnerable to violations of their rights and are in need of unique and distinct protection. Section 28 gives effect to the recognition of this vulnerability and embodies a dedicated commitment to the realisation of children’s rights.\(^6\)

Children are also included under “all people” in South Africa. They are thus afforded all the rights in the Bill of Rights\(^7\) except for those rights that are expressly restricted to adults, such as the right to vote and to seek public office.\(^8\) The rights in the Bill of Rights are repeated in section 28 to some degree. These rights therefore provide the context for the rights contained in section 28.\(^9\) Children are not only protected in general as “persons or people” in the Bill of Rights but are also specifically protected in terms of section 28.\(^10\)

In order to throw light on the impact of the Bill of Rights on child victims and child witnesses in the criminal justice system, a general overview of the constitutional rights in the Bill of Rights relating to child victims and child witnesses will be given. Thereafter the specific constitutional rights of child victims and child witnesses in section 28 of the Bill of Rights will be discussed.

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\(^{7}\) S 7(1) of the Constitution. See also *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (1) SACR 327 (CC) at para [38].

\(^{8}\) S 19(3)(a) and (b). See also *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (1) SACR 327 (CC) at para [38].

\(^{9}\) Bekink & Brand in Davel (ed) *Introduction to Child Law in South Africa* 178.

2.2 The rights in the Bill of Rights as they relate to child victims and child witnesses within the criminal justice system

The Bill of Rights enshrines the fundamental rights of all people in South Africa.\textsuperscript{11} These rights are not mere guidelines; on the contrary the State is obligated “to respect, promote and fulfil” these rights. The Bill of Rights places an unambiguous obligation on the State with regard to the promotion, protection and realisation of children’s rights.\textsuperscript{12} These include the rights to equality;\textsuperscript{13} dignity;\textsuperscript{14} life;\textsuperscript{15} freedom and security of the person;\textsuperscript{16} individual autonomy construed from the rights to privacy;\textsuperscript{17} freedom of religion;\textsuperscript{18} freedom of expression\textsuperscript{19} and freedom of association;\textsuperscript{20} property;\textsuperscript{21} housing;\textsuperscript{22} health care services; food, water and social security;\textsuperscript{23} education;\textsuperscript{24} just administrative action\textsuperscript{25} and the rights of arrested, detained and accused persons to a range of protections.\textsuperscript{26} The rights that are the most important or have the most significant impact on the child victim and child witness are the rights to equality, human dignity, freedom and security of the person (specifically the right to be free from all forms of violence) and the right to individual autonomy (specifically the right to privacy and freedom of expression). These rights are discussed separately below.

\textsuperscript{11} S 7(2) of the Constitution. See also Bekink & Brand in Davel (ed) \textit{Introduction to Child Law in South Africa} 173 & Christian Lawyers Association \textit{v} Minister of Health 2005 (1) SA 509 (T) where the court held at 528D that ss 10, 12(2)(a) and (b), 14 and 27(1)(a) of the Constitution apply to everyone.

\textsuperscript{12} S v M (Centre for Child Law as amicus curiae) 2007 (2) SACR 539 (CC) at para [14].

\textsuperscript{13} S 9.

\textsuperscript{14} S 10.

\textsuperscript{15} S 11.

\textsuperscript{16} S 12.

\textsuperscript{17} S 14.

\textsuperscript{18} S 15.

\textsuperscript{19} S 16.

\textsuperscript{20} S 17.

\textsuperscript{21} S 25.

\textsuperscript{22} S 26.

\textsuperscript{23} S 27.

\textsuperscript{24} S 29.

\textsuperscript{25} S 33.

\textsuperscript{26} S 35.
2.2.1 The rights to equality, human dignity and freedom and security of the person

Section 9 of the Constitution affords everyone the right to equality, and section 9(1) guarantees the right to equality before the law and equal protection and benefit of the law. Section 9(3) and 9(4) describes how this equality should be realised, namely by prohibiting unfair discrimination by the state and by private entities on a non-exclusive list of grounds. One of the grounds listed in section 9(3) is “age”. The effect of this is that any distinction between children and others based on their age will be scrutinised in terms of the Constitution to determine whether it complies with the prohibition on unfair discrimination. In Christian Lawyers Association v Minister of Health the High Court considered age as a ground for discrimination. In the case in question the applicants challenged the validity of the provisions of the Choice on Termination of Pregnancy Act, on the grounds that girls under the age of 18 years should not be able to choose to terminate their pregnancies without parental consent as they were not capable of making the decision alone. The court rejected this challenge and concluded that the Act made informed consent, and not age, the basis for its regulation of access to termination of pregnancy. Mojapelo J emphasised that everyone is equal before the law and has the right to equal protection and benefit of the law and that any distinction between women on the grounds of age would infringe these rights.

The Constitutional Court has developed a detailed test to be followed when confronted with claims of unfair discrimination. This test assists the court in its decision on whether the state or a private party has unfairly discriminated against

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28 2005 (1) SA 509 (T).
29 Act 92 of 1996.
30 Christian Lawyers Association v Minister of Health 2005 (1) SA 509 (T) at 528E.
any person. The test was first set out in *Harksen v Lane*. The Constitutional Court tabulated the test along the following lines:

(a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) Secondly, if the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of sections 9(3) and 9(4).

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31 1998 (1) SA 300 (CC) at para [54]. It should be noted that although the test was developed under the Interim Constitution it has been followed under the Final Constitution. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para [15].

32 1998 (1) SA 300 (CC) at para [53].
(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

In essence, the test means that a preliminary enquiry must be conducted to establish whether the provision or conduct differentiates between people or categories of people. This is a threshold test in that if there is no differentiation then there can be no question of a violation of section 9(1). If a provision or conduct does differentiate between people or categories of people, a two-stage analysis must follow. The first stage concerns the question whether the differentiation amounts to discrimination. The test here is whether the law or conduct has a rational basis. This is the case where the differentiation bears a rational relation to a legitimate government purpose. If the answer is no, the law or conduct violates section 9(1) and fails at the first stage. If, however, the differentiation is shown to be rational the second stage of the enquiry is activated, namely whether the differentiation, even if it is rational, nevertheless amounts to unfair discrimination under section 9(3) or 9(4). If the discrimination is on a specified ground, it would be presumed to be unfair. If the discrimination occurs on an unspecified ground the complainant will have to establish that the discrimination was unfair.

If the discrimination is found to be unfair a court will proceed to the final stage of the enquiry as to whether the provision can be justified under section 36 of the Constitution, the limitation clause. This final stage, according to the Constitutional Court, “involve[s] a weighing of the purpose and effect of the provision in question

Ngcukaitobi “Equality” in Currie & De Waal The Bill of Rights Handbook 6 ed (2013) 209 at 216. Note, however, that the Constitutional Court held in National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para [18] that this does not mean that in all cases the rational connection enquiry of the first stage must inevitably precede the second stage. According to the Constitutional Court the rational connection enquiry would clearly be unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable. A court need not perform both stages of the enquiry.


The protection of child victims and witnesses in terms of the Constitution of the Republic of South Africa, 1996, and international instruments

and a determination as to the proportionality thereof in relation to the extent of its infringement of equality”. However, this stage only applies to discrimination in terms of law of general application since it is only such discrimination that can be justified under the limitation clause.

Chapter 3 of this thesis contains a discussion of the cautionary rule and children’s testimony. This rule stems from the practice of warning the jury (presiding officer) against a certain kind of witness, notably accomplices, complainants in sexual cases and young witnesses. The cautionary rule originated from the notion that the evidence of these witnesses could not safely be relied upon without some kind of corroboration in the form of other evidence confirming their trustworthiness. This rule differentiates between children and other witnesses on the grounds of age. Although the rule is no longer applicable in our law, recent case law suggests otherwise. In the case of S v Hanekom the magistrate was criticised for failing to give sufficient weight to the two cautionary rules applicable to the case (the complainant was both a single witness and a child) and for failing to apply them with the degree of attention to detail demanded by the particular circumstances of the case. According to Saner AJ the magistrate had merely paid lip service to the cautionary rules. The court referred to R v Manda and S v Viveiros stating that because of the potentially unreliable and untrustworthy nature of such evidence, it fully intended to heed the warning against accepting the evidence of children. According to the learned judge, the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness.

36 Harksen v Lane 1998 (1) SA 3009 (CC) at para [52].
38 Refer to para 2.6.2 of ch 3 above.
39 See S v M 1999 (2) SACR 548 (SCA); Director of Public Prosecutions v S 2000 (2) SA 711 (T).
40 See S v Hanekom 2011 (1) SACR 430 (WCC).
41 2011 (1) SACR 430 (WCC).
42 Para [7].
43 1951 (3) SA 158 (A).
45 2011(1) SACR 430 (WCC) at paras [9]-[10].
Schwikkard, in criticising this state of affairs, points out that the trend internationally has been to abolish this cautionary rule.\textsuperscript{46} She furthermore stresses that as the rule is based on discredited beliefs, a strong argument can be made that, just as the cautionary rule applicable to complainants in sexual cases was found to be irrational and based on stereotyped notions and hence abolished, so too should the cautionary rule applicable to children be abolished.\textsuperscript{47} Schwikkard submits, which submission is supported, that in the absence of a clear rationale it becomes difficult to justify the cautionary rule’s inconsistency with a constitutional commitment to equality.\textsuperscript{48}

It should be kept in mind that equality is a very contentious and intricate issue when it comes to children’s rights. Skelton points out that, as a general rule, the children’s rights sector petitions for the special protection, rather than the equality of children. She emphasises, however, that despite this call, there is a strong case to be made for the position that children should not receive less protection than adults would in the same circumstances.\textsuperscript{49} In addition, cognisance should be taken of the fact that children’s inequality is often the very cause of their need for special protection. Birch comments that child abuse occurs in part because of the inequalities between a child and an adult in size, knowledge and power, and that these inequalities have been institutionalised by one-sided rules of evidence.\textsuperscript{50} The cross-examination of child victims and child witnesses during a criminal trial serves as an example. For cross-examination to be fair and just the parties to the proceedings should have equal standing.\textsuperscript{51} It goes without saying that, when exposed to harsh cross-examination by adults, children are in an unequal position to that of the adults and

\textsuperscript{47} Schwikkard “The abused child: a few rules of evidence considered” 1996 \textit{Acta Juridica} 148 at154.
\textsuperscript{48} Schwikkard “The evidence of sexual complainants and the demise of the 2004 Criminal Procedure Act” 2009 \textit{Namibia LJ} 5 at 14.
\textsuperscript{49} Skelton in Boezaart (ed) \textit{Child Law in South Africa} 277.
\textsuperscript{50} Birch “Children’s evidence” 1992 \textit{CLR} 262 at 269.
may find it difficult to protect themselves. In order to uphold children’s right to equality and to ensure equality of outcome, it may therefore be necessary to treat children differently from everyone else.\textsuperscript{52} This type of differentiation is acknowledged by section 9(2) of the equality clause, which provides that legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken in order to promote equality.\textsuperscript{53} It is submitted that the application of section 170A of the Criminal Procedure Act 51 of 1977, which allows for children to be cross-examined by an intermediary, could level the playing field in this regard. The use of an intermediary therefore provides an enabling environment for the child witness and child victim to present his or her testimony and should be regarded as an example of an equalising measure.

The right to dignity is enshrined in section 10 of the Constitution. The Constitutional Court in \textit{S v Makwanyane}\textsuperscript{54} stated as follows:

\begin{quote}
The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.
\end{quote}

The Constitutional Court further pointed out that the right to dignity is intricately linked to other human rights.\textsuperscript{55} According to the Constitutional Court:

\begin{quote}
Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.
\end{quote}

\textsuperscript{52} Currie & De Waal \textit{The Bill of Rights Handbook} 6 ed (2013) 210-211.
\textsuperscript{53} Elphick et al “Substantive equality and caregiver responses to discrimination against children with disabilities in Orange farm” 2014 \textit{SAJHR} 221 at 227.
\textsuperscript{54} 1995 (3) SA 391 (CC) at para [144].
\textsuperscript{55} Para [328].
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This right therefore is the foundation of many of the other rights that are specifically entrenched in chap 3.\textsuperscript{56}

In \textit{Dawood v Minister of Home Affairs}\textsuperscript{57} the Constitutional Court further elaborated on the importance of this right by stating that “dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected”. Currie and De Waal point out that although we can be certain of the pivotal importance of human dignity in the Constitution we can be less certain of the meaning of the concept. This is because neither the Constitution nor the Constitutional Court has ventured to offer a comprehensive definition of human dignity.\textsuperscript{58} Instead, the court has stated it has “a wide meaning which covers a number of different values” and which gives a person “infinite worth”.\textsuperscript{59}

It goes without saying that children are also entitled to the right to dignity. In \textit{S v Mokoena; S v Phaswane}\textsuperscript{60} Bertelsmann J with reference to Sachs J in \textit{S v M (Centre for Child Law as amicus curiae)}\textsuperscript{61} pointed out that every child has a dignity of his or her own, which entails that a child is to be constitutionally regarded as an individual with a distinctive personality and not merely as a miniature adult waiting to reach full size. The court emphasised that the importance of the right to dignity for the \textit{child victim and child witness} demands the following:\textsuperscript{62}

At the very least the criminal procedure and the courts should administer the criminal justice system in such a fashion that children who are caught up in its workings are

\textsuperscript{56}Para [328].
\textsuperscript{57}2000 (3) SA 936 (CC) at para [35].
\textsuperscript{58}See Woolman “Dignity” in Woolman et al (eds) \textit{Constitutional Law of South Africa} 2 ed loose-leaf updates 36.2 where he identifies five definitions of dignity in the Constitutional Court’s jurisprudence.
\textsuperscript{59}Currie & De Waal \textit{The Bill of Rights Handbook} 251; Le Roux v Dey 2011 (3) SA 274 (CC) at para [138]; \textit{S v Dodo} 2001 (3) SA 382 (CC) at para [38].
\textsuperscript{60}2008 (2) SACR 216 (T) at para [50] (hereinafter referred to as \textit{S v Mokoena}).
\textsuperscript{61}2007 (2) SACR 539 (CC) at para [18].
\textsuperscript{62}2008 (2) SACR 216 (T) at para [50].
protected from further trauma and are treated with proper respect for their dignity and their unique status as vulnerable young human beings.

This position was reiterated by the Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*\(^\text{63}\) when it held the following:

> Each child must be treated as a unique and valuable human being with his or her individual needs, wishes and feelings respected. Children must be treated with dignity and compassion. In my view these considerations should also inform the principle that the best interest of the child are of paramount importance in all matters concerning the child as envisaged in s 28(2) of the Constitution.

In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*\(^\text{64}\) the Constitutional Court, in addition to reaffirming the importance of dignity in recognising the inherent worth of children, emphasised that children’s dignity rights are not dependent on the rights of their parents, nor is the exercise of these rights held in abeyance until children reach a certain age.

It is clearly not only important that the child victim and child witness be treated with the necessary dignity and compassion, but also essential that the child victim and child witness should not be exposed to treatment such as demeaning cross-examination while testifying. Once again, the use of an intermediary may prove to be invaluable in this regard.

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\(^\text{63}\) 2009 (2) SACR 130 (CC) at para [79] (hereinafter referred to as *DPP v Minister of Justice and Constitutional Development*).

\(^\text{64}\) 2014 (2) SA 168 (CC) at para [52].
Section 12 of the Constitution guarantees the right to freedom and security of the person. Of particular importance to the child victim and child witness is the right guaranteed in section 12(1)(c) of the Constitution, namely the right to be free from violence as well as that guaranteed in section 12(1)(e), namely not to be treated or punished in a cruel, inhuman or degrading way.

Although sections 12(1)(c) and 12(1)(e) may normally not be associated with court proceedings, it is submitted that it can be argued that exposing a child in open court to aggressive cross-examination by the alleged perpetrator or legal representative may amount to (secondary) violence or cruel, inhuman or degrading treatment. In support of this argument the Constitutional Court in *DPP v Minister of Justice and Constitutional Development* acknowledged that a child complainant who relates in open court in graphic detail in the presence of the accused the abusive acts perpetrated upon him or her will in most instances experience undue stress and suffering. This is exacerbated when the child is subjected to intensive and at times aggressive cross-examination by the accused or his or her legal representative. The Constitutional Court emphasised that cumulatively these experiences are often “as traumatic and as damaging to the emotional and psychological wellbeing of the child complainant as the original abusive act” or may even expose

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65 S 12 states that:
(1) Everyone has the right to freedom and security of the person, which includes the right –
(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way;
(2) Everyone has the right to bodily and psychological integrity, which includes the right –
(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent.

66 Although one may normally not associate court proceedings with violence, cognisance should be taken of the fact that General Comment No 13 (2011) of the CRC defines violence as including all forms of physical or mental violence, including psychological maltreatment. It calls on all States Parties to introduce legislation and other measures to implement the rights of children in its guidelines, including treating child victims in a child-friendly and sensitive manner. Refer also to para 4.3.2.1 below for more on General Comment No 13.

67 Own emphasis added.

68 2009 (2) SACR 130 (CC) at para [108].
the child to “further trauma, possibly as severe as the trauma caused by the crime” itself.

Currie and De Waal define violence against an individual as a grave invasion of that individual’s personal security. Bishop and Woolman point out, however, that the violence contemplated in section 12(c) should not be narrowly construed as “grave” violations, as this would fail many of the people whom the right is meant to protect. In support of their argument they point out that women for example (or men) trapped in abusive relationships may suffer from psychological as well as physical violence that could probably not be successfully categorised as grave but could still entitle them to the protection of section 12(1)(c).

Section 12(1)(c) guarantees the right to be protected against such an invasion, whether by the state or by private individuals. It therefore places an obligation on the state to protect individuals, both negatively by itself refraining from such invasion and positively by restraining or discouraging private individuals from any invasion.

With specific reference to the child victim and child witness, Bertelsmann J in S v Mokoena emphasised that “foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear and avoidable trauma”. The learned judge pointed out that both individually and collectively all children have the right to:

express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to

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72 2008 (2) SACR 216 (T) at para [19].
73 Para [19].
understand their own bodies, minds and emotions, and above all to learn as they
grow how they should conduct themselves and make choices in the wide social and
moral world of adulthood.\footnote{Para [19]}

He furthermore stressed that, although no constitutional injunction can in and of
itself isolate children from the shocks and peril of harsh family and neighbourhood
environments, the law can create conditions that protect children from abuse. The
state should create positive conditions for recovery to take place and diligently seek
to avoid conduct by its agencies that has the effect of placing children in peril.\footnote{Para [20].}

It can be argued that this means that the State has an obligation to protect children
from further trauma; to develop conditions for the child to testify in a child-friendly
environment conducive to recovery and to refrain from placing the child in further
peril by for example requiring the child to testify in the sight of an alleged perpetrator.
It is precisely this secondary trauma that section 170A(1) seeks to prevent,\footnote{Para [108].}
and accordingly the application of section 170A(1) could play an invaluable role in
fulfilling this obligation.

\subsection*{2.2.2 The right to individual autonomy}

Like everyone else, children are entitled to the rights to privacy,\footnote{S 14.} freedom of
religion,\footnote{S 15.} freedom of expression\footnote{S 16.} and freedom of association.\footnote{S 17.} Of particular
importance to the child victim and child witness is the right to privacy and the right to freedom of expression.

Section 14 of the Constitution provides that everyone has the right to privacy, which includes the right not to have their person, property or home searched, their possessions seized or the privacy of their communications infringed. This right in the Bill of Rights closely relates to the common-law personality right to privacy, which forms part of a person's dignitas. Neethling et al, in confirmation of the importance of the right to privacy, point out that a lack of privacy may negate the whole physical disposition of a person. A breach of a person’s right to privacy may occur in two ways, namely when there is an unlawful intrusion of a person’s personal privacy (for example where electronic equipment is used to eavesdrop on a private conversation) or an unlawful disclosure of private facts about a person (for example where a doctor relates his patient’s ills to friends). This infringement must be subjectively contrary to the person’s will and must also be objectively contrary to the contemporary boni mores and the general sense of justice of the community, as perceived by the courts.

The importance of protecting the privacy of the child victim and child witness in criminal proceedings is recognised by our law in that sections 153 and 154 of the Criminal Procedure Act respectively make provision for children to testify “in camera” and prohibit the publication of information which might reveal the identity of the complainant or the witness at such criminal proceedings. In S v Mokoena Bertelsmann J describes the rationale for the protection of the privacy of the child victim and witnesses while testifying in criminal proceedings as follows:

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81 Currie & De Waal The Bill of Rights Handbook 296.
83 Prinsloo v Bramley Children’s Home 2005 (5) SA 119 (T); Neethling et al Law of Personality 33.
84 Currie & De Waal The Bill of Rights Handbook 296.
85 2008 (2) SACR 216 (T) at para [101].
Vulnerable witnesses must be protected from public exposure, either because disclosure of their identity may endanger their life or limb or because the sense of embarrassment and discomfort at having to testify before an audience, particularly concerning traumatic and sexually sensitive events, may expose the witness to emotional and psychological harm.

The need to protect such a child victim and child witness from possible harm therefore warrants the court's excluding the public or certain members of the public from attending the hearing and from revealing the identity of the child witness to the public.\textsuperscript{86}

The child victim's right to privacy was examined by the court in \textit{Prinsloo v Bramley Children's Home}.\textsuperscript{87} The applicants in the case were facing criminal charges for indecent assault and the possession of child pornography. The applicants launched a civil application for an order granting them access to the personal files, held by the Bramley Children's Home, of the two minor complainants in the criminal case. The applicants were suggesting that the children might have been involved in previous sexual misbehaviour or other improper conduct. They hoped to discover facts or suggestions in the children's personal files that might enable them, \textit{inter alia}, to confront the minors during cross-examination with innuendos or allegations of misbehaviour of this nature.\textsuperscript{88}

As to the merits of the application for access to the information, the court noted that there was no suggestion that the applicants had any knowledge that any such impropriety had occurred in the past and that they had intended to launch a dragnet

\textsuperscript{86} See for example \textit{Prinsloo v Bramley Children's Home} 2005 (5) SA 119 (T), where the applicants cited the minors individually and by name. The court held at 123C-D that the minors could be seriously harmed if they were identified regardless of the outcome of the application. The court accordingly ordered at 123I that the minors were not to be identified by the media or anybody else, by name or otherwise, either directly or indirectly.

\textsuperscript{87} 2005 (5) SA 119 (T).

\textsuperscript{88} At 123D-E.
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operation to uncover anything of this nature to discredit the complainants’ characters.\(^89\) The court furthermore stated that the information being sought was of a very personal nature and it was clear that the mere launching of such an application, even if nothing relevant was found in the personal files, might cause the children considerable distress. The children’s involvement in the criminal trial would be traumatic in itself without having to face the additional prospect of an attack of this nature being launched upon their credibility, morals and probity.\(^90\)

The court stressed that it was of paramount importance that the children’s interests should be safeguarded by the court and that to allow access to the information would result in the infringement and limitation of the rights of the children and in particular their right to privacy, to emotional and psychological integrity and to dignity.\(^91\)

The court therefore resolved that the applicants bore the onus of proving to the court that their right to a fair trial justified the limitation of the children’s aforementioned rights. The court held that in order to succeed with such an application, the applicants had to persuade the court, on a balance of probabilities, that it was essential for the preparation of their defence to have access to the information.\(^92\) In this instance the applicants had chosen not to disclose the nature of their defence and had failed to show any basis for the relief sought; instead the grounds presented by them were “vague, superficial and unsupported by factual allegations”. The application was accordingly dismissed.\(^93\) It is submitted that unless very strong factual grounds are presented, the application of the best interests of the child criteria will prevent any limitation of the child’s right to privacy.

\(^89\) At 123 E-H.
\(^90\) At 123E-H.
\(^91\) At 128 B-C.
\(^92\) At 128 B-C.
\(^93\) At 123I-J; 130 B-C.
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Children’s right to privacy and dignity (albeit in a civil matter) was examined by the Constitutional Court in *Johncom Media Investments Limited v M*. The applicants sought an order declaring section 12 of the Divorce Act, which prohibited the publication of “any particulars of a divorce action or any information which comes to light during the course of such an action” unconstitutional on the grounds that it limited their right to freedom of expression. The section was declared invalid by the High Court on the grounds that it was an infringement of the media’s freedom of expression. After weighing up the competing constitutional rights (the right to freedom of expression versus the right to privacy and the right to dignity) the Constitutional Court confirmed the invalidity of the impugned provision due to its inconsistency with section 16 (the right to freedom of expression) of the Constitution.

The Constitutional Court held that the restriction imposed on the media to report on matters of public interest arising from divorce proceedings was disproportionate to the aim of the restriction, namely to protect the privacy and dignity of parties involved in divorce proceedings, in particular children. The protection of the privacy and dignity of children caught up in divorce proceedings was, however, still of grave concern to the court. The Constitutional Court consequently included an order prohibiting, save in exceptional circumstances, the publication of any information that could reveal the identity of any party or child in any divorce proceedings. Failure to comply with such an order would amount to contempt of court.

Although the privacy and dignity of children caught up in divorce proceedings were protected by the said court, the case has been criticised by Albertus for failing to provide guidance as to what information would be seen as “leading to the revealing

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94 2009 (4) SA 7 (CC).
95 Act 70 of 1979.
96 2009 (4) SA 7 (CC) at paras [2], [13].
97 Para [31].
98 Paras [42]-[45].
99 Albertus “Has the balance been struck? The decision in *Johncom Media Investments Limited v M* 2009 (4) SA 7 (CC) 2011 PER 216 at 227-230.
of the identities of the parties" or as to what would amount to "exceptional circumstances". She points out that it therefore remains up to the High Court to determine the contravention of such an order and to develop precedents as to what would constitute exceptional circumstances.\textsuperscript{100} Kruger,\textsuperscript{101} who agrees with Albertus' criticism, points out that although the Constitutional Court may be criticised for its choice of remedy to cure the constitutional defects of section 12, it should be commended for basing its decision of unconstitutionality on the privacy rights of the children of divorcing parents, inter alia.

The right to privacy of children also played a significant role in another leading decision of the Constitutional Court, namely Teddy Bear Clinic for Abused Children \textit{v} Minister of Justice and Constitutional Development.\textsuperscript{102} The case concerned an application for confirmation of a ruling by the High Court that certain provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act\textsuperscript{103} relating to the criminalisation of consensual sexual conduct with children of a certain age were unconstitutional and accordingly invalid.

It is important to note that in considering the matter the Constitutional Court emphasised from the outset that the case was not about whether children should or should not engage in sexual conduct, nor was it about whether Parliament may set a minimum age for consensual sexual conduct. Rather it dealt with the question whether it was constitutionally permissible for children to be subjected to criminal sanction in order to deter early sexual intimacy and combat the risks associated therewith.\textsuperscript{104}

\textsuperscript{100} Albertus \textit{PER} 216 at 230.
\textsuperscript{102} 2014 (2) SA 168 (CC).
\textsuperscript{103} Act 32 of 2007 (hereinafter the Sexual Offences Act).
\textsuperscript{104} 2014 (2) SA 168 (CC) at para [3].
The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development case was primarily concerned with Part 1 of Chapter 3 of the Sexual Offences Act, which criminalises the performance of certain consensual sexual acts (by adults and children) with children who are between the ages of twelve and sixteen years (adolescents). Section 15 of the Sexual Offences Act deals with the offence of “statutory rape”. In terms of this section a person who commits an act of sexual penetration with a child is guilty of the offence, despite the consent of the child. If both parties were adolescents at the time of the commission of the offence the National Director of Public Prosecutions is obliged to authorise the institution of a prosecution and must charge both parties with a contravention of the subsection. The term “sexual penetration” is given a wide definition.

Section 16 creates the offence of “statutory sexual assault”. In terms of this section a person who commits an act of sexual violation with a child is guilty of this offence despite the consent of the child to the commission of such an act. As under section 15, if both parties were adolescents at the time of the commission of the offence, the children involved must be prosecuted by the National Director of Public Prosecutions. The term “sexual violation” is also defined in very broad terms and refers to any direct or indirect contact between the parties, including petting, kissing and hugging.

Section 56 of the Sexual Offences Act provides a child who has been charged with statutory sexual assault with a close-in-age defence. This is not available to a child who has been charged with statutory rape. In terms of section 56 it is a valid defence for the accused child to contend that both the accused persons were...

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105 Note that a “child” is defined for the purposes of sections 15 and 16 of the Sexual Offences Act as “a person 12 years or older but under the age of 16 years”. For ease of reference the Constitutional Court refers to children that fall into this category as adolescents. See Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development 2014 (2) SA 168 (CC) fn 5 at para [15].
106 Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development 2014 (2) SA 168 (CC) at para [12].
107 Para [22].
108 Sexual Offences Act s 56(2)/(b).
children and that the age difference between them was not more than two years at the time of the alleged commission of the offence. For the purposes of section 56 a child is defined as a person under the age of eighteen years. It would seem that the defence is available to children under the age of eighteen years. However, if a sexual violation has been committed and the parties have an age difference of more than two years between them no defence is available. Consequently, if a twelve-year-old and a fifteen-year-old engage in kissing or petting, they are both committing an offence in terms of section 16 and neither may claim the close-in-age defence.

Sections 50(2)(a)(i) and 54 of the Sexual Offences Act are also pertinent to the discussion. In terms of section 50(2)(a)(i) a court that convicts a person of a sexual offence against a child must make an order to the effect that the particulars of the person are to be included in the National Register for Sex Offenders. Section 54 creates an obligation and an offence in relating to the reporting of, or failure to report, sexual offences against children.

The main question before the Constitutional Court was whether the impugned sections were inconsistent with the Constitution insofar as they limited adolescents’ fundamental rights. The court found that sections 15 and 16 of the Sexual Offences Act did in fact constitute an encroachment on adolescents’ rights and specifically their rights to human dignity (section 10), privacy (section 14), and the best interests of the child principle (section 28(2)) as set out in the Constitution. The court also found that these limitations were not reasonable and justifiable in terms of section 36 of the Constitution.

109 Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development 2014 (2) SA 168 (CC) at para [24].
110 Para [24].
111 Para [37].
112 Paras [58], [64] and [79].
113 Paras [94], [100].
In considering whether the impugned sections infringed adolescents’ right to privacy the Constitutional Court referred to *Bernstein v Bester NNO*\(^{114}\) where the court identified the “inner sanctum” of personhood that is protected by the right to privacy. This inner sanctum includes a person’s “family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community”.\(^{115}\) The Constitutional Court also referred to *National Coalition for Gay and Lesbian Equality v Minister of Justice*,\(^{116}\) where it was held as follows:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

The Constitutional Court held that the principled basis of reasoning followed in the *National Coalition for Gay and Lesbian Equality v Minister of Justice* applied with equal force to the consensual sexual conduct of adolescents.\(^{117}\) This was due to the fact that the criminal offences under sections 15 and 16 of the Sexual Offences Act apply to the most intimate sphere of personal relationships and inevitably involve adolescents’ constitutional right to privacy.\(^{118}\) The offences allow police officers, prosecutors and judicial officers to scrutinise and assume control of the intimate relationships of adolescents, thereby intruding into the personal realm of their lives. This intrusion, the court pointed out, is exacerbated by the reporting provisions set out in section 54, which oblige third parties to disclose information which may have been shared with them in the strictest confidence.\(^{119}\)

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\(^{114}\) 1996 (2) SA 751 (CC) at para [32].

\(^{115}\) *Bernstein v Bester NNO* 1996 (2) SA 751 (CC) at paras [67] and [79].

\(^{116}\) 1999 (1) SA 6 (CC) at para [32].

\(^{117}\) 2014 (2) SA 168 (CC) at para [60].

\(^{118}\) Para [60].

\(^{119}\) Para [60].

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The Constitutional Court accordingly declared sections 15 and 16 of the Sexual Offences Act inconsistent with the Constitution and invalid to the extent that they impose criminal liability on children under the age of sixteen years.\textsuperscript{120} This declaration of invalidity was suspended for a period of eighteen months, allowing Parliament to correct the defects in the Sexual Offences Act. A moratorium was furthermore placed on all investigations into, arrests of, prosecution of, and criminal and ancillary proceedings pending against children under the age of sixteen years in relation to sections 15 and 16 of the Sexual Offences Act. The Minister of Justice and Constitutional Development was also ordered to expunge any existing conviction and sentence or diversion orders made in terms of sections 15 and 16 relating to children under the age of sixteen years. The details of such children were also not to appear in the National Register of Sex Offenders.\textsuperscript{121}

The two aforementioned constitutional cases, namely \textit{Johncom Media Investments Limited v M} and \textit{Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development}, are welcomed in that they contribute to developing a jurisprudence that recognises children as independent rights-holders of fundamental rights such as the right to privacy.\textsuperscript{122}

Section 16 of the Constitution guarantees everyone, including children, the right to freedom of expression.\textsuperscript{123} This includes the freedom of the press and media, freedom to receive or impart information and ideas, artistic creativity and academic freedom and scientific research. Of particular importance to the child witness is the freedom to receive or impart information and ideas.\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{120} Para [110].
\item \textsuperscript{121} Para [117].
\item \textsuperscript{122} Kruger in Potgieter, Knobel & Jansen \textit{Essays in Honour of Johann Neethling 283}.
\item \textsuperscript{123} Milo et al “Freedom of expression” in Woolman et al (eds) \textit{Constitutional Law of South Africa 2 ed loose-leaf updates 42-30}.
\item \textsuperscript{124} S 16(1)(b) of the Constitution.
\end{itemize}
Currie and De Waal contend that as section 16(1) protects free expression in principle one could argue that every act by which a person attempts to express some emotion, belief or grievance should qualify as “expression”.¹²⁵ According to them the wide, almost unlimited, conception of expression in section 16 means that protection is accorded in many problematic forms of speech that would be left out of constitutional consideration in other jurisdictions.¹²⁶ In the context of the child victim and child witness, one could accordingly argue that this provision guarantees the child witness the right to express himself or herself in a variety of ways, including in a non-conventional, novel or creative manner.¹²⁷ This correlates with section 161(2) of the Criminal Procedure Act, which states that in the case of a witness under the age of eighteen years evidence shall be deemed to include “demonstrations, gestures or any other form of non-verbal expression”.

In addition child witnesses should be able to express themselves “freely” when giving testimony in the criminal justice setting.¹²⁸ The possibility of doing so for children in an adversarial criminal justice system has been questioned by professionals and academics.¹²⁹ Empirical evidence has in fact shown that the confrontational setting decreases the child’s willingness and ability to give an accurate description of the events he or she has to testify about. Children are more likely to say “I don’t know” or may even refrain from answering at all.¹³⁰

Section 170 of the Criminal Procedure Act recognises the context within which a child complainant or child witness has to testify. It accepts that testifying in court carries with it a certain degree of mental stress or suffering for the child. Its objective

¹²⁵ Currie & De Waal *The Bill of Rights Handbook* 341.
¹²⁶ Currie & De Waal *The Bill of Rights Handbook* 342.
¹²⁷ Milo et al in Woolman et al (eds) *Constitutional Law of South Africa* 42-33. Children may therefore express themselves in a manner that takes their childhood into account, for example by way of anatomic dolls or with the aid of drawings.
¹²⁸ S 161(2) of the Criminal Procedure Act.
¹²⁹ Schwikkard 1996 *Acta Juridica* 148 at 158
is to reduce to the minimum the degree of stress experienced by the child and to create an atmosphere that is conducive to allowing the child to speak freely about the events relating to the offence committed against the child. The provision of an intermediary is intended to create this atmosphere for the child. One could therefore argue that, in order to ensure that a child has full realisation of the right to freedom of expression, the presiding officer should give serious consideration to the desirability of appointing an intermediary when exercising his discretion on whether or not to appoint an intermediary.

2.3 Section 28(1): Specific children’s rights

Section 28(1) of the Bill of Rights affords children specific protection in that it provides as follows:

(1) Every child has the right -

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that -

(i) are inappropriate for a person of that child’s age; or

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131 DPP v Minister of Justice and Constitutional Development at para [96].
(ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child’s age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child’s best interests are of paramount importance in every matter concerning the child.

A perusal of the above section reveals that section 28(1) does not afford the child victim and child witness a specific right to protection as a victim or witness. Nevertheless, the right not to be subjected to neglect, abuse or degradation as set out in section 28(1)(d) is of particular importance to the child victim and child witness. This right will accordingly be discussed in more detail below.

2.3.1 The right not to be subjected to neglect, abuse or degradation

Section 28(1)(d) of the Constitution provides that a child has a right to be protected from maltreatment, neglect, abuse or degradation. This right reflects society’s belief that children are vulnerable and can be seen as a domestic endorsement of article
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19 of the CRC. According to Bekink and Brand section 28(1)(d) imposes a constitutional duty on private persons, as well as the State, to refrain from these forms of treatment and in addition imposes a positive obligation on the State to prevent harm to children.

The second obligation is of particular importance in two possible instances. Firstly, the state is required to put an end to situations of on-going maltreatment, neglect, abuse and degradation in the family or any other context by means such as removing the child from such a situation. This duty is given specific legislative effect in the Children’s Act. For instance, Chapter 7 of the Children’s Act provides special measures for reporting cases of abuse or neglect of children, while Chapter 9 of the Children’s Act provides the legal machinery to intervene when a child is in need of care and protection, such as the removal of the child to temporary safe care.

Bekink and Brand point out that, in order to meet this positive constitutional duty to intervene in situations of on-going abuse to protect a child, the State in many instances acts in conflict with the child’s right to family or parental care. They argue that this creates the need for a flexible test against which to decide whether the decision by the State to intervene in a situation of abuse is constitutionally sound. Kruger maintains that this infringement of the child’s right to family or parental

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132 Refer to ch 4 para 4.3.2 below.
133 Bekink & Brand in Davel (ed) Introduction to Child Law 188. The authors point out that the fact that the right is phrased as a right to be protected against maltreatment, abuse, neglect or degradation whereas a comparable right in the interim Constitution (s 30(1)(d)) only said a child should not be subjected to such treatment underscores the fact that s 28(1)(d) imposes a positive obligation to protect children against such treatment. This view is also held by Friedman et al in Woolman et al (eds) Constitutional Law of South Africa 47-24. See also s 7(2) of the Constitution, which states that “[t]he state must respect, protect and fulfil the rights in the Bill of Rights.”
134 Bekink & Brand in Davel (ed) Introduction to Child Law 188.
135 Act 38 of 2005 (hereinafter “the Children’s Act”).
136 See s 110 of the Children’s Act.
137 See ss 151-152 of the Children’s Act.
138 Bekink & Brand in Davel (ed) Introduction to Child Law in South Africa 189.
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Care is probably justified in terms of the limitation clause in situations of on-going abuse.

The second context within which the State must act to prevent the neglect, abuse, maltreatment and degradation of children is the general context of legislative and policy protection of rights. In this regard the State is under a constitutional duty to create legislative and other measures to protect children against potential maltreatment, neglect, abuse and degradation. Examples of such legislation include the Children’s Act as well as the Criminal Law (Sexual Offences and Related Matters) Amendment Act, which introduces a whole range of new offences aimed at protecting children from violence. These statutory instruments bear witness to an increasing awareness of and concern on the part of the legislature for the need to ensure that children are protected against the increasing atmosphere of violence that engulfs our society.

Of particular consequence to the topic of this thesis are the various amendments made by the latter Act to the Criminal Procedure Act to provide for special measures for children to testify, such as the use of an intermediary. In so doing the legislature has tried to ameliorate, if not eradicate, those aspects of the criminal process that tend to expose the child to secondary psychological trauma or emotional harm.

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140 Ch 7 and 9 of Act 38 of 2005. The National Child Protection Register serves as an example of a measure to protect children against potential abuse or maltreatment. See ss 111-128A of the Children’s Act.

141 Ch 6 of Act 32 of 2007.

142 S v Mokoena 2008 (2) SACR 216 (T) at para [41].

143 Refer to ss 158 and 170A of the Criminal Procedure Act. S 170A was inserted by s 3 of the Criminal Law Amendment Act 135 of 1991. This amendment came into operation on 30 July 1993. Subsection (1) was later substituted by s 68 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by the insertion of the words “biological or mental” before “age of eighteen years”, making it clear that it is not only chronological age that is contemplated. Section 158 was enacted in 1996 by s 7 of the Criminal Procedure Amendment Act 86 of 1996.

144 S v Mokoena 2008 (2) SACR 216 (T) at para [63].
In *S v Mokoena* Bertelsmann J emphasised that in the light of the occurrence of this secondary trauma (the child having to give evidence in court about his or her experience), it is incumbent upon the criminal law and criminal procedure and upon the courts along with their functionaries and practitioners to administer the criminal justice system in such a fashion that children who are caught up in its workings are protected from further harm and are treated with proper respect. The appointment of an intermediary goes a long way to ensuring that this right not to be subjected to (further) harm or abuse is accomplished. This view is particularly apposite if one takes into account that the Children’s Act includes in its definition of “abuse” the prevention of “exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally”.

In *DPP v Minister of Justice and Constitutional Development* the Constitutional Court acknowledged that for a child witness to relate the graphic details of the abusive acts in open court in the presence of the accused combined with aggressive cross-examination, sometimes by the accused, will often be as traumatic and damaging to the psychological and emotional wellbeing of the child as the original abusive act. To subject the child to the normal adversarial process of testifying in court may accordingly fall squarely within the definition of abuse in the Children’s Act.

The Constitutional Court has dealt with the right (among others) not to be subjected to maltreatment, neglect, abuse or degradation in two cases dealing with the corporal punishment of children in public settings. While these cases were brought on grounds that included the right to be protected against maltreatment, neglect, abuse or degradation as stipulated in section 28(1)(d), the court did not make any significant pronouncements on the meaning of the subsection in either of the judgments.

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145 2008 (2) SACR 216 (T) at paras [49]-[50].
146 Paras [50] and [87].
147 S 1 of the Children’s Act.
148 2009 (2) SACR 130 (CC).
149 2009 (2) SACR 130 (CC) at para [108].
In *S v Williams*\(^ {151}\) the court declared the section of the Criminal Procedure Act that allowed for the corporal punishment of juvenile delinquents to be invalid, owing to its being a violation of the right to be protected from cruel and degrading punishment. The court unfortunately did not find it necessary to examine the right in any detail.

The second case, *Christian Education SA v Minister of Education*\(^ {152}\) was decided after the promulgation of the South African Schools Act,\(^ {153}\) which banned corporal punishment in schools. In dealing with the matter the Constitutional Court did not decide whether corporal punishment was in violation of the Bill of Rights, but instead focused on the right to freedom of religion, and subjected the infringement of the right to a limitations analysis in terms of section 36 of the Constitution.\(^ {154}\) The court came to the conclusion that although the parents’ right to freedom of religion was being violated by the ban on corporal punishment, the limitation was justifiable.\(^ {155}\)

Of value, however, for the child victim and child witness is the emphasis placed by Sachs J in his judgment on the fact that the State has a constitutional obligation to protect all people and especially children from maltreatment, abuse or degradation.\(^ {156}\) He added that by ratifying the CRC the State undertook to take all appropriate measures to protect the child from violence, injury or abuse and stated that one of the reasons for the provisions banning corporal punishment was “to protect the learner from physical and emotional abuse”.\(^ {157}\)

\(^{151}\) 1995 (3) SA 632 (CC).
\(^{152}\) 2000 (4) SA 757 (CC).
\(^{153}\) Act 84 of 1996.
\(^{154}\) Skelton in Currie & De Waal *The Bill of Rights Handbook* 613.
\(^{155}\) Skelton in Currie & De Waal *The Bill of Rights Handbook* 613.
\(^{156}\) 2000 (4) SA 757 (CC) at para [40].
\(^{157}\) 2000 (4) SA 757 (CC) at para [50].
Prinsloo\textsuperscript{158} points out that when child victims and child witnesses are subjected to “necessary” stress in open court and confronted by their alleged assailants, their right to be protected from maltreatment, neglect, abuse or degradation is overlooked. I therefore argue that the use of an intermediary as contemplated in section 170A of the Criminal Procedure Act will not only increase the potential for successful prosecution, but will also buttress a child victim’s and child witness’s constitutional right to security and freedom from abuse.

2.3.2 The paramountcy of the child’s best interests

The best interests principle was established in South African law in the 1940s.\textsuperscript{159} Its influence was, however, previously limited to family law proceedings. In emulation of international instruments,\textsuperscript{160} the application of the best interests of the child principle has been expanded to all aspects of the law affecting children. In \textit{Minister of Welfare and Population Development v Fitzpatrick}\textsuperscript{161} Goldstone J pointed out that section 28(1) is not exhaustive of children’s rights, but that:

> section 28(2) requires that the child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).

This makes it clear that section 28(2) should not be limited to the rights enumerated in section 28(1), but that section 28(2) is a right on its own. It should therefore not

\textsuperscript{158} Prinsloo “In the best interest of the child: the protection of child victims and witnesses in the South African Criminal Justice system” 2008 CARSA 49 at 53.
\textsuperscript{159} \textit{Fletcher v Fletcher} 1948 (1) SA 130 (A).
\textsuperscript{160} A 3 of the CRC, a 4 of the ACRWC.
\textsuperscript{161} 2000 (3) SA 422 (CC) at para [17].
be regarded as a mere guideline. In addition to being an independent right, this right also reinforces other rights. This has been confirmed by the Constitutional Court’s application of the best interests principle in a variety of cases involving children’s rights, such as the right to family or parental care, the adoption of children by unmarried fathers, the right to social assistance, the right of children to privacy and dignity, as well as in cases involving the testimony of child victims and witnesses.

The best interests principle has furthermore been used to determine the ambit of, as well as to limit, other competing rights. The Constitutional Court, for example in *De Reuck v Director of Public Prosecution* has found that although the law banning child pornography limits the applicant’s rights to privacy and freedom of expression, this limitation is justifiable in view of the importance of the purpose of protecting the child’s best interests.

It should, however, be noted that, despite the emphatic word “paramount” coupled with the far-reaching phrase “in every matter concerning the child” in section 28(2), this right does not automatically trump all other rights. In the High Court judgment of *De Reuck v Director of Public Prosecution* Epstein AJ held as follows:

> The fact that the Constitution regards the child’s best interest of paramount importance must be emphasised. It is the single most important factor to be

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162 As was done in *Du Toit v Minister of Welfare and Population Development* 2003 (3) SA 198 (CC).
164 *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).
165 *De Reuck v Director of Public Prosecution* 2004 (1) SA 406 (CC).
166 *Khoza v Minister of Social Development; Mahaule v Minister of Social Development* 2004 (6) SA 505 (CC).
167 *Johncom Media Investments Limited v M* 2009 (4) SA 7 (CC).
168 *DPP v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC).
169 *Sonderup v Tondelli* 2001 (1) SA 1171 (CC); *De Reuck v Director of Public Prosecution* 2004 (1) SA 406 (CC).
170 2004 (1) SA 406 (CC) at paras [88]-[91].
171 2003 (3) SA 389 (WLD) at para [10].
considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the right of children unless unjustifiable.

This decision was, however, overruled by the Constitutional Court. The court held that to say that "s 28(2) of the Constitution ‘trumps’ other provisions of the Bill of Rights … would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system".

The court therefore stated that “s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36”.172 It follows, then, that the fact that the best interests of the child are paramount does not mean that they are absolute.173 Section 28(2) should be treated in a manner comparable to other constitutional rights. Like all rights in the Bill of Rights, this right should be balanced against other rights and is capable of limitation by section 36 of the Bill of Rights.174

The concept of the best interests of the child has in the past been criticised as being inherently indeterminate, providing little guidance to those given the task of applying it to matters concerning children.175 This was partly due to the absence of a statutory checklist of factors to be taken into account when assessing what is in a child’s best interests.176 For the Law Reform Commission,177 and some commentators,178 this

172 2004 (1) SA 406 (CC) at para [55].
173 DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC) at para [72].
174 S v M 2007 (2) SACR 539 (CC) at para [26].
175 Boezaart “General principles” in Davel & Skelton (eds) Commentary on the Children’s Act loose-leaf (revised service 6, 2013) 2-6; S v M 2007 (2) SACR 539 (CC) at para [23].
176 Note, however, that a comprehensive list of factors was proposed in McCall v McCall 1994 (3) SA 201 (C) at 205B-G which identified 13 factors in an open-ended list specifically designed for resolving custody disputes.
proved to be an unacceptable shortcoming in child law legislation. A statutory checklist of the best interests of the child standard was accordingly included in the Children's Act. Section 7 of the Children's Act sets out a list of fourteen factors that must, where relevant, be considered by every decision maker who applies this principle. Boezaart points out that regrettably the list provided in the Act is a

179 Schäfer Child Law in South Africa: Domestic and International Perspectives (2011) 155.

180 S 7(1) states as follows: “Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely -

(a) the nature of the personal relationship between -
   (i) the child and the parents, or any specific parent; and
   (ii) the child and any other care-giver or person relevant in those circumstances;
(b) the attitude of the parents, or any specific parent, towards -
   (i) the child; and
   (ii) the exercise of parental responsibilities and rights in respect of the child;
(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
(d) the likely effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from -
   (i) both or either of the parents; or
   (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
(e) the practical difficulty and expense of the child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents or any specific parent on a regular basis;
(f) the need for the child -
   (i) to remain in the care of his or her parent, family and extended family; and
   (ii) to maintain a connection with his or her family, extended family, culture or tradition;
(g) the child’s -
   (i) age, maturity and stage of development;
   (ii) gender;
   (iii) background; and
   (iv) any other relevant characteristics of the child;
(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
(i) any disability that a child may have;
(j) any chronic illness from which the child may suffer;
(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environmental resembling as closely as possible a caring family environment;
(l) the need to protect the child from any physical or psychological harm that may be caused by -
   (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
   (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
(m) any family violence involving the child or a family member of the child; and
(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

181 In Davel & Skelton (eds) Commentary on the Children’s Act 2-8.
closed list in that it does not provide for “any other factor that may be relevant” as was the case in *McCall v McCall*[^82] and that this may prove to be a limitation in practice. However, she underscores, judicial officers can and should use their judicial discretion to consider any other factor where relevant.[^183] Although no checklist can fully eliminate the indeterminate nature of the best interests of the child standard, the use of the checklist helps to ensure that relevant considerations are taken into account and that the decision-making process follows a rational and structured approach.

In *S v M*[^184] the Constitutional Court acknowledged the difficulties with the indeterminate nature of the best interests standard. Sachs J noted that the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular. The court pointed out, however, that it is precisely this contextual nature and inherent flexibility of section 28 that constitutes the source of its strength. With reference to *Minister of Welfare and Population Development v Fitzpatrick*[^185] the court emphasised that the best interests principle has never been given exhaustive context, but that it is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child. Viewed in this light, indeterminacy of outcome should, according to the court, not be regarded as a weakness. On the contrary, to apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would not be in the best interests of the child concerned.[^186]

In *DPP v Minister of Justice and Constitutional Development*[^187] the court likewise found that it was neither necessary nor desirable to define with any precision the

[^182]: 1994 (3) SA 201 (C) at 205 B-G.
[^184]: 2007 (2) SACR 539 (CC) at para [23].
[^185]: 2000 (3) SA 422 (CC).
[^186]: 2007 (2) SACR 539 (CC) at para [24].
[^187]: 2009 (2) SACR 130 (CC) at para [73].
contents of the right to have the child’s best interests given paramount importance in matters concerning the child. This provision, the court noted, provides a benchmark for the treatment and protection of children in the form of an expansive guarantee and imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance. Courts are hence obliged to give consideration to the effect that their decisions will have on the rights and interests of children. The legal and judicial process must accordingly always be child-sensitive and statutes must be interpreted in a manner which favours protecting and advancing the interests of children.\textsuperscript{188}

As stated previously, the best interests principle also plays an important role in jurisprudence relating to the testimony of child victims and child witnesses in criminal trials. In \textit{S v Mokoena}\textsuperscript{189} Judge Bertelsmann declared section 170A(1) of the Criminal Procedure Act to be unconstitutional in that the subsection grants a discretion to a court to appoint or not to appoint an intermediary when a child witness has to present testimony in a criminal trial. Bertelsmann J relied on section 28 of the Constitution, which demanded that a child should be exposed to as little stress and mental anguish as possible, particularly in the case of a child witness who has been the victim of a sexual attack.\textsuperscript{190} The learned judge noted that it was difficult to understand why the legislature should insist that the child victim should be exposed to undue stress and suffering before the services of an intermediary may be considered. In his view, this threshold provision places a limitation upon the best interests of the child that is neither rational nor justifiable when weighed up against the legitimate concerns of the accused, the court and the public interest. In his view, to demand an extraordinary measure of stress or anguish before the assistance of an intermediary can be called upon clearly discriminates against the child and is constitutionally untenable. In addition, according to him, this section infringes upon the child victim’s right to equal treatment, dignity and a fair trial.\textsuperscript{191}

\textsuperscript{188} 2009 (2) SACR 130 (CC) at para [74].
\textsuperscript{189} 2008 (2) SACR 216 (T).
\textsuperscript{190} Para [78].
\textsuperscript{191} Paras [79]-[80].
However, in *DPP v Minister of Justice and Constitutional Development*\(^{192}\) the Constitutional Court refused to confirm the order of invalidity. The Constitutional Court dealt with the matter by looking at four interrelated questions:\(^{193}\)

- the object of section 170A(1);
- the proper meaning of the phrase “undue mental stress or suffering”;
- whether this subsection is capable of being implemented in a manner that is consistent with the Constitution;
- whether this subsection is unconstitutional to the extent that it gives discretion to the judicial officer whether or not to appoint an intermediary.

Firstly, the Constitutional Court confirmed that the *object* of section 170A(1) is to protect child complainants in sexual offence cases and other child witnesses from undergoing the undue mental stress or suffering that may be caused by testifying in court. This object is consistent with the principle that the best interests of children are of paramount importance in criminal trials involving child witnesses. The court pointed out that section 170A(1) recognises the context in which a child complainant testifies in court and aims to prevent a child from undergoing undue mental stress or suffering while giving testimony by permitting the child to testify through an intermediary. Section 170A(1) must therefore be construed so as to give effect to this object, namely to protect child complainants from the hardship and trauma that may result from their participation in the criminal justice system.\(^{194}\)

\(^{192}\) 2009 (2) SACR 130 (CC) at para [132].
\(^{193}\) Para [92].
\(^{194}\) Para [98].
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Secondly, with regard to the *meaning of* the phrase “undue mental stress or suffering” the Constitutional Court stressed that, as the phrase is not defined, the meaning of the phrase must be understood in the context of the objectives of section 170A(1) as informed by section 28(2) of the Constitution, and the atmosphere in which a child is testifying in court. The court highlighted that courts have come to accept that the giving of evidence in cases involving sexual offences exposes complainants to further trauma that may be as severe as the trauma caused by the crime. In addition the Constitutional Court pointed out that it is accepted by the court that a child complainant in a sexual offence case who testifies without the assistance of an intermediary faces a high risk of exposure to undue mental stress or suffering. The object of section 170A(1) read with section 170A(3) is precisely to prevent this risk of exposure.

Thirdly, the Constitutional Court has emphasised that this risk of exposure was also the reason why, contrary to the reasoning of the High Court, the subsection does not require that the child first be exposed to undue mental stress or suffering before the provision may be invoked. Such an interpretation of the *implementation of* section 170A(1) would be inimical to the objectives of both section 28(2) and section 170A(1) as well as article 3(1) of the CRC. What subsection 170A(1) contemplates is that the child should be assessed prior to testifying in court in order to determine whether the services of an intermediary are required. If such an assessment reveals that the services of an intermediary are needed, then the State must see to it that

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195 The Constitutional Court in *DPP v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC) at paras [94]-[97] lists the objectives of section 170A(1) as:
- aiming to prevent a child from undergoing undue mental stress and suffering while giving evidence;
- recognising the context in which a child witness testifies in court;
- aiming to reduce to the minimum the degree of stress or mental suffering and creating an atmosphere that is conducive for a child to speak freely about the events;
- recognising that children are often intimidated by the court environment, especially if they must confront their alleged abuser;
- recognising the role of an intermediary in fulfilling the objectives.

196 Para [100].

197 Paras [108]-[109]. See also the court’s description from para [101] onwards, of the difficulties experienced by the child witness and child victim while testifying. These include multiple interviews, an imposing court atmosphere and severe cross-examination.
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an application for the appointment of an intermediary in terms of section 170A(1) is made before the child testifies.\textsuperscript{198}

According to the Constitutional Court this procedure should be followed in all matters involving child complainants in sexual offence cases and should become a standard pre-occupation of our criminal courts dealing with complainants in sexual offence cases. In applying the best interests principle, judicial officers should therefore consider how the child’s rights and interests are, or will be, affected if the child complainant in a sexual offence case has to testify without the aid of an intermediary. Where the prosecutor fails to raise this matter it follows that the judicial officer must, of his or her own accord, raise the need for an intermediary to assist the child in giving testimony.\textsuperscript{199}

Furthermore, it should be noted that, according to the Constitutional Court,\textsuperscript{200} the nature of an enquiry into the need for an intermediary is not akin to that of a civil trial, which attracts a burden of proof, as was found in the case of \textit{S v F}.\textsuperscript{201} Rather, it is an enquiry which is conducted in the interests of a person (the child) who is not a party to the proceedings but who possesses constitutional rights.\textsuperscript{202} What is required of the judicial officer is therefore to consider whether, on the evidence presented to him or her, viewed in the light of the objectives of the Constitution and section 170A(1), it is in the best interests of the child that an intermediary be appointed.\textsuperscript{203}

\textsuperscript{198} Paras [110]-[112]. This is precisely what was done in the matter of \textit{S v Mokoena} 2008 (2) SACR 216 (T).

\textsuperscript{199} Paras [112]-[113].

\textsuperscript{200} Para [114].

\textsuperscript{201} 1999 (1) SACR 571 (C). In the said case, the court equated an enquiry into the desirability of appointing an intermediary with a trial in which the State bears the burden of proof to establish the need for the appointment of an intermediary on a balance of probabilities.

\textsuperscript{202} \textit{DPP v Minister of Justice and Constitutional Development} 2009 (2) SACR 130 (CC) at para [114]. It is precisely for this reason that the need for separate legal representation for the child victim has been advocated – see for example Iyer & Ndlovu “Protecting the child victim in sexual offences: is there a need for separate legal presentation?” 2012 \textit{Obiter} 72.

\textsuperscript{203} Para [115].
Fourthly, in considering the question whether the discretion given to judicial officers to appoint intermediaries renders section 170A(1) unconstitutional, Ngcobo J stated that the conferral of a discretion on judicial officers “cannot be unconstitutional simply because some judicial officers may exercise the discretion incorrectly”. Ngcobo J emphasised the importance of judicial discretion and stated that “what is required is individualised justice, that is, justice which is appropriately tailored to the needs of the individual case”. Moreover, Ngcobo stated, discretion is a flexible tool which enables judicial officers to decide each case on its own merits. In the context of the appointment of an intermediary the conferral of judicial discretion recognises the existence of a wide range of factors, such as the age, gender, disability and level of maturity of a specific child and the nature of the offence, that could influence the appointment of an intermediary in a particular case. The exercise of this discretion is, however, circumscribed in that it must be exercised with due regard to the objective of protecting the child from the undue stress or suffering that may arise from testifying in court and the principle that the child’s best interests are of paramount importance in criminal proceedings concerning a sexual offence against a child. The exercise of this discretion must therefore be so construed as to give effect to the aforementioned objective and the principle of the best interests of the child. The Constitutional Court therefore intertwines the test of undue mental stress or suffering with the best interests test.

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204 Para [119].
205 Para [120].
206 Paras [122]-[124]. Refer also to Heaton “An individualized, contextualized and child-centred determination of the child’s best interests, and the implications of such an approach in the South African context” 2009 Journal for Juridical Science 1 for a discussion of an individualised, contextualised and child-centred determination of the child’s best interests. She submits that an individualised, contextualised and child-centred determination of the child’s best interests is one that takes into account the cultural and religious circumstances, interests and needs of the individual child. She concludes that all factors that are relevant because they have or could have either a negative or positive impact on the individual child should be taken into account when assessing a child’s best interests.
207 Paras [126]-[128].
209 2011 (2) SACR 109 (GP) at para [7].
Constitutional Development that “[i]t is clear that the enquiry has a narrow focus: to determine whether it is in the best interests of the child that an intermediary be appointed”.

The Constitutional Court concluded that, if section 170A(1) fails to meet the objective of section 28(2), the fault lies not in the provision itself but in the manner in which it is interpreted and implemented. In the words of Ngcobo J an incorrect interpretation or implementation of the provision does not render it unconstitutional. The solution, according to the Constitutional Court, does not lie in making the appointment of an intermediary compulsory in every sexual offence case in which a child complainant is involved, but in making judicial officers and prosecutors aware of their constitutional obligations to ensure that the best interests of children are of paramount importance in criminal trials involving child complainants. In this context judicial education and the training of prosecutors and other officials who deal with victims of sexual offences are of vital importance.210

Although it may be argued, which argument is supported, that by issuing the above-mentioned dictum the Constitutional Court has effectively reduced the best interests of the child principle to essentially a matter of statutory interpretation,211 the importance of the role of the best interests principle and the objective of section 170A(1), namely to prevent children from being exposed to undue mental stress or suffering while testifying, have been reaffirmed by the Constitutional Court beyond any doubt.

210 Paras [131]-[132].
211 Prinsloo “The rights of child victims and witnesses of crime: an international analysis” 2012 CARSA 74 at 75.
In *Kerkhoff v Minister of Justice and Constitutional Development*212 Southwood J stated with regard to the inquiry into what is in the best interests of the child when deciding on the appointment of an intermediary that the inquiry:

is not concerned with whether the child is competent to give evidence or whether the child’s evidence is admissible, credible and reliable. These are issues which will arise in the trial and will be decided by the court in the light of all the evidence. It is significant that section 170A makes provision for a simple procedure for the appointment of an intermediary and essential jurisdictional fact: i.e. when it appears to the court that the relevant witness would be exposed to undue mental stress and suffering.

This, however, places an enormous responsibility on the courts and those dealing with child victims and child witnesses within the criminal justice system to ensure that section 170A is correctly interpreted and implemented, as an incorrect interpretation or implementation might result in a child who is in need of assistance being left out in the cold.

### 3 THE PROTECTION OF CHILDREN IN INTERNATIONAL LAW

The body of international law pertaining to children’s issues consists of a multitude of instruments. These instruments include treaties, inter-state agreements and statements of general principle accepted by governments.213 Some of these instruments deal explicitly with children,214 whereas others have only an indirect

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212 2011 (2) SACR 109 (GP) at para [7].
impact on children.\textsuperscript{215} Also, it should be noted that none of these instruments, with
the exception of the UN Economic and Social Resolution 2005/20 (“Guidelines on
Justice in Matters involving Child Victims and Witnesses of Crime”), deals
specifically with child victims and/or witnesses. However, they may have an implicit
application, as will be demonstrated in each instance.

In view of their importance, the international and regional child instruments, namely
the League of Nations Declaration of the Rights of the Child, 1924, the Declaration
of the Rights of the Child 1959, the United Nations Convention on the Rights of the
Child and the African Charter on the Rights and Welfare of the Child, that deal
specifically with children will be discussed in detail.

4 INTERNATIONAL CHILDREN’S RIGHTS INSTRUMENTS

4.1 The League of Nations Declaration of the Rights of the Child 1924

Historically children were not regarded as the bearers of rights but were seen as
non-entities or the possessions of their parents.\textsuperscript{216} The turn of the 20th century,
however, saw the emergence of an international movement towards the recognition
of children’s rights and the subsequent drafting of children’s rights instruments. In
1924 the fifth Assembly of the League of Nations adopted the Declaration of the
Rights of the Child, also known as the “1924 Declaration” or the “Geneva
Declaration”.\textsuperscript{217} This Declaration proclaimed that “mankind owes to the child the best

\textsuperscript{215} See for example the Universal Declaration of Human Rights (GA RES 217(11) 1948). The text
of the Declaration appears in Mtshaulana et al (eds) \textit{Documents on International Law} 172.
\textsuperscript{216} Hart & Pavlovic “Children’s rights in education: a historical perspective” 1991 \textit{School
Psychology Review} 345.
\textsuperscript{217} United Nations “Geneva Declaration of the Right of the Child 1924” \url{http://www.un-
documents.net/gdrc1924.htm} (accessed 27/05/2014).
it has to give” and set out five principles which were principally concerned with the provision of children’s economic, social and psychological needs.\(^{218}\)

Despite being termed a “Declaration of the Rights of the Child”, this declaration can be regarded as a welfare document rather than a rights document, in that children were seen as the recipients of welfare rather than the holders of specific rights. Furthermore, there is no reference in the text to the obligation on states to ensure its fulfilment; instead the responsibility for fulfilment is placed on the “men and women of all nations”. Despite these shortcomings it is still of great value as it lays the foundation or groundwork for the proposition that the welfare of children can best be served through the protection of their rights.\(^{219}\) It also served as the basis for the slightly expanded declaration adopted by the General Assembly of the newly formed United Nations in 1959.

### 4.2 The Declaration of the Rights of the Child, 1959

A further step towards the protection of children was taken in 1959 when the General Assembly of the United Nations adopted the Declaration of the Rights of the Child, 1959 (“the 1959 Declaration”).\(^{220}\) The preamble to the 1959 Declaration reaffirmed the 1924 Declaration’s commitment of mankind to give “the Child the best it has to give” and called upon voluntary organisations, local authorities and national

\(^{218}\) The five principles are:

I. The child must be given the means requisite for its normal development, both materially and spiritually;

II. The child that is hungry must be fed; the child that is sick must be helped; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured;

III. The child must be the first to receive relief in times of distress;

IV. The child must be put in a position to earn a livelihood and must be protected against every form of exploitation;

V. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

\(^{219}\) Kaimé *The Convention on the Rights of the Child: A Cultural Legitimacy Critique* (2011) 13; Van Bueren *International Documents on Children* (1993) xv. It should be noted that the acknowledgement of children as the bearers of rights preceded the eventual protection of the rights.

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governments to recognise and strive for the observance of the rights of children set out in the document through legislative and other means progressively taken.\textsuperscript{221}

The specific value of the document lies in the fact that it represents a serious first attempt to rationally catalogue the rights of children.\textsuperscript{222} It comprises ten principles and includes the rights to protection;\textsuperscript{223} to a name and nationality;\textsuperscript{224} to social security;\textsuperscript{225} to special protection for the handicapped;\textsuperscript{226} to full and harmonious development;\textsuperscript{227} to education;\textsuperscript{228} to be among the first to receive relief and protection;\textsuperscript{229} to protection from neglect or exploitation\textsuperscript{230} as well as to protection from abusive cultural or religious practices.\textsuperscript{231}

Of particular importance is the fact that the 1959 Declaration contains a general non-discrimination clause protecting children from practices that may foster racial, religious or any other form of discrimination. It was also the first international instrument to incorporate the principle that “the best interests of the child shall be the paramount consideration” in the protection and implementation of children’s rights.\textsuperscript{232} In addition, the 1959 Declaration, although it was a non-binding resolution of the General Assembly, represented great progress in conceptual thinking on children’s rights, in that it marked a transformation in the conception of children as mere beneficiaries of charity, to that of children as distinct subjects of international

\textsuperscript{221} Preamble to the United Nations Declaration of the Rights of the Child 1959, as set out in Van Bueren \textit{International Documents on Children} 4.
\textsuperscript{222} Kaime \textit{The Convention on the Rights of the Child: A Cultural Legitimacy Critique} 15.
\textsuperscript{223} Principle 2.
\textsuperscript{224} Principle 3.
\textsuperscript{225} Principle 4.
\textsuperscript{226} Principle 5.
\textsuperscript{227} Principle 6.
\textsuperscript{228} Principle 7.
\textsuperscript{229} Principle 8.
\textsuperscript{230} Principle 9.
\textsuperscript{231} Principle 10.
\textsuperscript{232} Principles 1 and 2.
law, whose ability to enjoy the benefits of individual rights and freedoms was recognised.233


Building on the 1959 Declaration, child advocates came to believe that a more comprehensive and binding document was needed to protect the rights of children.234 The first step in creating such a document took the form of a first draft of the Convention, submitted by Poland to the Commission on Human Rights in 1978, as a way of celebrating the International Year of the Child in 1979. In many respects this draft resembled the 1959 Declaration. However, it took ten years of deliberation by the States Parties of the UN before a final report was produced. This report was unanimously adopted by the General Assembly on 20 November 1989. It was ratified by the required twenty states in record time, bringing the Convention on the Rights of the Child (“the CRC”)235 into force on 2 September 1990, less than a year after its adoption.236

The CRC applies to “every human being below the age of eighteen years”237 and includes 41 substantive articles, providing for rights ranging from civil and political to economic, social and cultural rights, as well as 13 procedural and administrative articles. The CRC establishes the child as a rights-bearing person and makes provision for almost every aspect of a child’s life. It may rightly be described as the

234 Hart et al “A new age of child protection – General comment 13: Why it is important, how it was constructed, and what it intends?” 2011 Child Abuse and Neglect 970 at 972.
237 A 1, save where under the law applicable to the child majority is attained earlier.
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“greatest qualitative leap in history in the conceptualisation of and respect for the child”, 238 “forming the core of the international law on the rights of the child”. 239

4.3.1 The CRC principles

Broadly speaking, the CRC is concerned with what has been labelled the four P’s or “pillars” of the CRC which serve as the common overall classification of all the rights in the Convention: the participation of children in decisions affecting them; the protection of children against discrimination and all forms of exploitation and neglect; the prevention of harm to children and the provision of assistance to meet children’s needs. The Committee on the Rights of the Child 240 has also identified four general principles, which are held to be fundamental to the implementation of the whole Convention. 241 These four principles accord children:

- the right to protection against non-discrimination (art 2);
- the right to have their best interests made a primary consideration in all actions concerning them (art 3);
- the inherent right to life (art 6); and
- the right of a child who is capable of forming his or her own views to express those views freely in all matters affecting the child (art 12).

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238 Hart et al 2011 Child Abuse and Neglect 970 at 972.
240 This committee is established in terms of art 43 of the CRC.
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The breakdown of the CRC in this way is useful as it makes the treaty easy to comprehend for both children and adults and accordingly furthers proper implementation of the rights contained therein by States Parties to the CRC.\textsuperscript{242}

For present purposes, three principles of the CRC are of particular importance when considering child victims and/or child witnesses, namely the best interests of the child (art 3), the right of the child to be heard (art 12) and the right of the child to freedom from all forms of violence (art 19). Article 19 will be discussed first, after which the specific relevance of articles 12 and 3 to the protection of child victims and witnesses will be discussed. The General Comments on articles 19, 12 and 3, developed by the Committee on the Rights of the Child,\textsuperscript{243} will also be discussed as these comments serve to guide the interpretation of the specific articles in the CRC and constitute an authoritative interpretation as to what is expected of States Parties as they implement the obligations contained in the CRC.

\textbf{4.3.2 Article 19}

Article 19 of the CRC reads as follows:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.


\textsuperscript{243} See General Comment 12 (GC 12) of the Committee on the Rights of the Child (20/07/2009); General Comment 13 (GC 13) of the Committee on the Rights of the Child (18/04/2011) & General Comment 14 (GC 14) of the Committee on the Rights of the Child (29/05/2013), available at \url{http://www2.ohchr.org/english/bodies/crc/comments.htm} (accessed 06/06/2014).
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 19 encapsulates the CRC’s central and most comprehensive conceptualisation of the protection of children against all forms of violence. In doing so it clearly places a legal obligation on States Parties to the CRC to establish measures for the protection of children against all forms of violence. Such protective measures should include a range of interventions, namely legislative, administrative, social and educational measures as well as social programmes of support for the child and his or her caregivers, proactive prevention against the experience of violence and treatment for those who have been the victims of violence.

4.3.2.1 General Comments 13: the right of the child to freedom from all forms of violence

In its introduction to General Comment No 13 (2011) The right of the child to be free from all forms of violence (hereafter “GC 13”) the Committee on the Rights of the Child (“the Committee”) highlights the unfortunate factual situation that despite numerous initiatives developed by States Parties to the CRC and others to prevent and respond to violence against children, high rates of violence against children still prevail. In recognition of this fact and with a view to improving the current

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Svevo-Cianci et al “The right of the child to freedom from all forms of violence’ - Changing how the world conceptualises child protection” 2011 Child Abuse and Neglect 979 at 980.
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situation, the Committee issued a general comment on article 19, known as General Comment 13, which was adopted on 11 February 2011. In this regard GC 13 states that the “legal frameworks in a majority of States still fail to prohibit all forms of violence against children, and where laws are in place, their enforcement is often inadequate”. GC 13 therefore bears testimony to a need for a complete change in the manner in which violence against children is understood and provides the basis for a transformation in child protection towards a child’s rights-based approach.  

In order to effect such a transformation the Committee set forth certain objectives in the guidelines. These objectives, directed to States Parties and other relevant stakeholders, are to:

- provide guidance in understanding their obligations
- outline legislative, judicial, administrative, social and educational measures that have to be adopted;
- overcome isolated, fragmented and reactive initiatives which have limited impact;
- promote a holistic approach;
- provide a basis on which to develop a coordinating framework; and
- highlight the need to move quickly towards the fulfilment of article 19 obligations.  

Major elements of these objectives are described below. Particular attention is given to those elements that affect child victims.

*Human rights imperative*

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246 Hart et al 2011 *Child Abuse and Neglect* 970 at 973.

247 GC 13 para 11.
The Committee in paragraph 13 of the GC 13 emphasises that in order to address and eliminate the widespread prevalence and incidence of violence against children, it is imperative that any strategies and systems aimed at preventing and responding to violence should adopt a child’s-rights approach rather than a welfare approach. The goal of States Parties should therefore be not only to provide child protection, but to do so in a way that secures and promotes children’s fundamental rights to respect for their human dignity and physical and psychological integrity.

*Holistic approach*

Although article 19 forms the core provision for discussions and strategies against all forms of violence, the Committee clearly recognises the importance of the Convention as a whole. All rights proclaimed in the Convention are to be respected in their collective and individual synergistic meaning. In this regard the Committee points out that in addition to the fact that article 19 is strongly linked to a broad range of provisions in the Convention beyond those relating directly to violence, the implementation of article 19 must be situated in the context of articles 5, 9, 18 and 27 of the CRC.\(^{248}\) The holistic approach applied to the protection of children therefore requires that their protection should be accomplished in a manner that gives priority to the wellbeing of the child on a physical, spiritual, mental, moral and social level.\(^{249}\)

\(^{248}\) GC 13 para 7.
\(^{249}\) Hart et al 2011 *Child Abuse and Neglect* 970 at 974.
Primary prevention

The Committee emphasises in the strongest terms that child protection must begin with proactive prevention of all forms of violence, stating that “primary prevention, through public health, education, social services and other approaches is of paramount importance”. Essential preventative measures are identified which include particular support to children and their families as well as educational measures. The Committee points out that the commitment to prevention nonetheless does not lessen the State’s obligation to respond to violence when it does occur.

Children to whom GC 13 applies

In terms of article 1 of the CRC, a child means “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. The Committee has determined that “while respecting the evolving capacities and progressive autonomy of the child”, GC 13 should nevertheless apply to all children below the age of eighteen years who are “in the care of primary or proxy caregivers, or in the de facto care of the State” or who have “attained majority or emancipation through early marriage and/or forced marriage”. GC 13 therefore covers all children emancipated inadequately or improperly and includes young persons in vulnerable positions such as child-headed households, street children, children of migrating parents or unaccompanied children outside their country or region of origin.

250 GC 13 para 3g and 46.
251 GC 13 para 47 and 44.
252 GC 13 para 46.
253 GC 13 para 33 and fn 13.
254 GC 13 para 34 and 35.
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**Violence defined**

Article 19 of the CRC establishes that the child must be protected from all forms of violence. General Comment 13 defines violence as meaning “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment or exploitation including sexual abuse”. The Committee emphasises that it has consistently maintained the position that all forms of violence, without exception, are unacceptable and that the choice of the term violence must in no way be interpreted as minimising the impact of and need to address non-physical and/or non-intentional forms of harm (such as neglect or psychological maltreatment). While choosing not to attempt to list all forms of violence, helpful descriptions of a wide variety of forms of violence such as neglect, mental violence, corporal punishment and sexual abuse are given. Additionally, the Committee recognises the influence and role of the mass media, information and communications technologies and institutions in the emergence of violence against children.

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**Definition of caregivers**

Article 19 of the CRC promotes the protection of children from all forms of violence “while in the care of parent(s), legal guardian(s), or any person who has the care of such child”. In defining caregivers the Committee follows an inclusive interpretation and states that article 19 applies to those with clear, recognised, legal, professional-ethical and/or cultural responsibility for the safety, health, development and well-being of the child. The numerous examples provided include parents, foster parents, adoptive parents, guardians, extended family and community members, educational, school and early childhood personnel, recreational and sports coaches.

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255 GC 13 paras 4 and 17-32.
256 GC 13 paras 30-32.
and institutional personnel. In the case of unaccompanied children, the State is identified as the *de facto* caregiver.\(^{257}\)

**Comprehensive intervention**

The Committee reaffirmed the States' strict obligation to undertake all appropriate measures to fully implement this right for children. States Parties are reminded that the term "appropriate" refers to the broad range of measures cutting across all sectors of government and all levels – national, provincial and municipal.\(^{258}\) Adequate budget allocations for the implementation of legislation and other measures are expected to be put in place by the States Parties.\(^{259}\) Of particular interest to the present study is the role of judicial intervention. In this regard the Committee emphasises that:\(^{260}\)

- the protection and further development of the child and his or her best interests must form the primary purpose of any decision making;
- children and their parents should be promptly and adequately informed of the judicial process;
- child victims should be treated in a child-friendly and sensitive manner;
- judicial involvement should be prevented where possible; and
- in all proceedings involving child victims, the celerity (speed/haste) principle must be applied, while respecting the rule of law.

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\(^{257}\) GC 13 para 33.
\(^{258}\) GC 13 paras 37-56.
\(^{259}\) GC 13 para 41(e).
\(^{260}\) GC 13 para 54.
In addition the Committee indicates that judicial involvement may consist of an order to ensure compensation and rehabilitation for child victims. States are also encouraged to establish specialised juvenile or family courts as well as tailor-made criminal procedures for child victims. This could include the establishment of specialised units within the police, the judiciary and the prosecutor’s office. All professionals working with and for children involved in such cases should, according to the Committee, receive specific inter-disciplinary training on the rights and needs of children of different age groups as well as on proceedings that are adapted to them.\textsuperscript{261}

\textit{National coordinating framework}

States Parties to the CRC have previously been encouraged to adopt national plans of action to implement the rights of the child. While contributing to greater enjoyment of their rights by children, such plans of action have nevertheless been faced with challenges in the areas of implementation, monitoring, evaluation and follow-up. In order to achieve a more feasible and flexible solution, the Committee proposes to introduce a coordinating framework on violence against children. A coordinating framework of this nature can be used where a national plan does not exist or can complement an effective existing national plan by stimulating discussion and generating new ideas.\textsuperscript{262}

\textsuperscript{261} GC 13 paras 55 and 56.
\textsuperscript{262} GC 13 para 68. Although recognising that there is no single model for a framework of this nature the Committee nevertheless recommends that the following ten elements should be included in such a national coordinating framework: child rights approach; gender dimension of violence against children; primary prevention; primary position of families in care-giving and protection strategies; resilience and protective factors; risk factors; children in potentially
4.3.3 Article 12

Article 12 of the CRC reads as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 12 of the CRC addresses the legal status of children who on the one hand lack the full autonomy of adults, but on the other are the subjects of individual rights. Article 12 accomplishes this by assuring every child capable of forming his or her views the right to express those views freely in all matters affecting the child, which views should be given due weight in accordance with the age and maturity of the child. Paragraph 2 in particular affords the child this right in any judicial or administrative proceedings affecting the child.

The right of a child to be heard constitutes one of the fundamental core values of the CRC. Not only is the right established in article 12 as a right in itself but it should also be considered in the interpretation and implementation of other rights, thereby enhancing its importance.\(^{263}\)

\(^{263}\) GC 12 paras 71-72.

vulnerable situations; resource allocations; coordinating mechanism; accountability (GC 13 paras 1-3).
4.3.3.1 General Comment 12: the right of the child to be heard

Despite States Parties’ commitment to the realisation of article 12, implementation of the child’s right to express his or her views freely continues to be impeded by many long-standing practices and attitudes as well as by political and economic barriers. This is particularly true for certain groups of children, such as younger boys and girls, as well as children belonging to marginalised and disadvantaged groups. In recognition of this fact, the Committee on the Rights of the Child deemed it important and necessary to issue a general comment on article 12. The Committee therefore issued General Comment No 12 (2009) The right of the child to be heard (hereafter “GC 12”), which was adopted on 20 July 2009.

According to the Committee the overall objective of the general comments is to support States Parties in their effective implementation of the right. In so doing the Committee seeks to:

a) improve understanding of the meaning of article 12 and its implications for States Parties and other stakeholders;

b) elaborate on the scope of legislation, policy and practice necessary to achieve the full implementation of article 12;

c) emphasise positive approaches in implementing article 12; and

d) propose basic requirements for appropriate ways to give due weight to children’s views in matters affecting them.

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264 GC 12 para 4.
266 GC 12 para 8.
In order to achieve the first objective, namely to have a clear understanding of the meaning of article 12, the Committee provides an in-depth analysis of article 12. Major elements of this analysis are described below. Particular attention is given to those elements that affect child victims.

(a) Paragraph 1 of article 12

(i) “shall assure”

Article 12, paragraph 1, provides that States Parties “shall assure” the right of children to freely express their respective views in all matters affecting them. States Parties are reminded by the Committee that this places a positive obligation on them to ensure that mechanisms are in place for children to express their views and for due weight to be given to such views.

(ii) “capable of forming his or her views”

The Committee states that this phrase should not be seen as a limitation, but rather as an obligation on States Parties to assess the capacity of the child as far as possible. In this regard States Parties should presume that a child is capable of expressing his or her views, and has the right to express them. In terms of the principles of the article, it is therefore not up to the child to prove his or her capacity.

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267 GC 12 paras19-38.
268 GC 12 para 19.
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The Committee furthermore emphasises that article 12 imposes no age limit on the right of the child to express his or her views. States Parties are discouraged from introducing any age limits either in law or in practice that would disqualify children from exercising this right. In this regard the Committee underlines certain important factors:

- That even very young children are capable of expressing their views. The full implementation of article 12 thus requires recognition of, and respect for, non-verbal forms of communication, such as play, body language and drawing and painting, through which young children can demonstrate and express their views.

- It is not necessary for a child to have a comprehensive knowledge of all aspects of the matter affecting him or her, but rather a sufficient understanding to be able to appropriately form his or her views on the matter.

- States Parties are under an obligation to ensure the implementation of the right for children experiencing difficulties in expressing their views, such as disabled children or children who do not speak the majority language.

- States Parties must be aware of the potential negative consequences of an inconsiderate application of article 12, drawing particular attention to cases involving very young children or to instances where the child has been the victim of a criminal offence, sexual abuse, violence or another form of mistreatment.269

(iii) “the right to express those views freely”

The Committee points out that “freely” implies that a child can choose whether or not he or she wants to exercise his or her right to be heard. A child should therefore not be manipulated or subjected to undue influence or pressure. States Parties

269 GC 12 paras 20-21.
should hence provide the child with an environment in which the child feels respected and secure when freely expressing his or her views. Children should also not be interviewed more often than necessary and should be informed of any matter affecting them, such as the conditions under which the child will be asked to express his or her views.\(^{270}\)

(iv) “in all matters affecting the child”

If a matter under discussion affects a child, the child has a right to be heard and must be heard. This basic condition has to be respected and understood by States Parties in a broad sense.\(^{271}\)

(v) “being given due weight in accordance with the age and maturity of the child”

The Committee stresses that the term “being given due weight” implies that simply listening to the child is not sufficient; the views of the child have to be taken seriously. In addition they point out that by referring to the age and maturity of the child it is clear that age alone cannot determine the significance of the child’s views. The views of each child should therefore be determined on a case-by-case basis, taking the maturity of the child into account.\(^{272}\)

(b) Paragraph 2 of article 12

\(^{270}\) GC 12 paras 22-25.

\(^{271}\) GC 12 paras 26-27. It should be noted that the Open-ended Working Group established by the Commission on Human Rights, which drafted the text of the Convention, rejected a proposal to define these “matters” by a list limiting the considerations of a child’s or children’s views. Instead, it was decided that the right of the child to be heard should refer to “all matters affecting the child”.

\(^{272}\) GC 12 paras 28-31.
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(i) The right “to be heard in any judicial and administrative proceeding affecting the child”

The Committee emphasises that the provision applies to all relevant judicial and administrative proceedings affecting the child, without limitation, including, for example, the separation of parents, care and adoption issues as well as children who have fallen victim to physical or psychological violence, sexual abuse and other crimes.

The Committee also states that a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate to the child’s age. Proceedings must also be both accessible and child-appropriate. Particular attention needs to be paid by States Parties to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of courtrooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.273

(ii) “either directly, or through a representative or an appropriate body”

According to article 12 the child has a right to decide how to be heard, namely either directly or through a representative or appropriate body. The Committee recommends, however, that, where possible, the child should be given the opportunity to express his or her views directly. If the child’s hearing is undertaken through a representative, it is of the utmost importance that the child’s views should be transmitted correctly to the decision maker by the representative. Such

273 GC 12 paras 32-34.
representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and should be experienced in working with children. The representative must be aware of the fact that she or he represents the interests of the child exclusively and not the interests of other persons (for example parent(s), institutions or society). The Committee accordingly recommends that a code of conduct be developed for such representatives.\(^{274}\)

(iii) “in a manner consistent with the procedural rules of national law”

The Committee points out that this clause is not to be interpreted as permitting States Parties the use of procedural legislation which restricts or prevents enjoyment of this fundamental right. On the contrary, States Parties are urged to comply with the basic rules of fair procedure, such as the right to a defence.\(^{275}\)

With regard to the Committee’s second objective stated above, namely to elaborate on the scope of legislation, policy and practice necessary to achieve the full implementation of article 12, the Committee provided a five-step plan that needs to be followed by States Parties. This entails preparation, the hearing itself including the assessment of the capacity of the child (ie evidentiary issues), information about the weight given to the views of the child (feedback) as well as complaints, remedies and redress. In terms of these steps children should be informed of their right to express their views, which views should be taken seriously at the hearing itself. Furthermore, the child’s views must be given due weight by those assessing them, while taking the child’s capacity into account. This should take place on a case-by-case basis. Once the child has expressed his or her views, feedback must be provided on the outcome of the process and the way in which his or her views were

\(^{274}\) GC 12 paras 35-37.  
\(^{275}\) GC 12 para 38.
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considered. Lastly, legislation must also be enacted to enable children to complain if this right has been disregarded or violated.276

The Committee also deemed it necessary to remind States Parties of their core obligations in terms of article 12, namely to amend legislation in order to introduce mechanisms providing children with access to appropriate information, adequate support, if necessary, feedback on the weight given to their views, and procedures for complaints, remedies or redress. In order to fulfil these obligations, States Parties should adopt the following strategies:

- Review and withdraw restrictive declarations and reservations in terms of article 12.
- Establish independent human rights institutions, such as children’s ombudsmen or commissioners with a broad children’s rights mandate.
- Provide training on article 12 and its application in practice for all professionals working with and for children, such as lawyers, judges, police, social workers, community workers, psychologists and caregivers.
- Ensure appropriate conditions for supporting and encouraging children to express their views, and make sure that these views are given due weight.
- Combat negative attitudes that impede the full realisation of the child’s right to be heard, through inter alia public campaigns, opinion leaders and the media.277

In addition the Committee sets out specific obligations with regard to judicial (civil and penal) and administrative proceedings that need to be adhered to. Regarding child victims in the penal judicial proceedings, the Committee states that the child victim of a crime must be given an opportunity to fully exercise his or her right to

276 GC 12 paras 40-47.
277 GC 12 paras 48-49.
freely express his or her views. This should be done in accordance with the United Nations Economic and Social Council resolution 2005/20 ("Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime"). Every effort must therefore be made to ensure that child victims are consulted on the relevant matters with regard to involvement in the case under scrutiny, and enabled to express freely, and in their own manner, views and concerns regarding their involvement in the judicial process.

The right of child victims to express their views is also linked to the right to be informed about relevant issues such as the availability of health, psychological and social services, the role of the child victims in the process, the ways in which “questioning” is conducted, existing support mechanisms in place for the children when submitting a complaint and participating in investigations and court proceedings, the specific places and times of hearings, the availability of protective measures, the possibilities of receiving reparation, and the provisions for appeal.\textsuperscript{278}

The Committee then explains the right to be heard in relation to the other provisions of the Convention (in part B of GC 12) and gives an explanation of the way in which the right can be implemented in different situations and settings, such as the family, alternative care, health care, education and the school, et cetera (in part C of GC 12).\textsuperscript{279} The Committee concludes its comments by listing the basic requirements for the proper implementation of the right (in part D of the GC 12). In this regard all processes in which a child is heard must be transparent and informative; voluntary; respectful; relevant; child-friendly; inclusive; supported by training; safe and sensitive to risk and accountable.\textsuperscript{280}

\textsuperscript{278} GC 12 paras 62-64.  
\textsuperscript{279} GC 12 paras 68-131.  
\textsuperscript{280} GC 12 paras 132-134.
4.3.4 Article 3

Article 3 of the CRC reads as follows:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 3 of the CRC gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern the child, in both the public and the private spheres. Moreover, it expresses one of the fundamental values of the CRC and has been identified by the Committee as one of the four general principles of the Convention for interpreting and implementing all the rights of the child.\textsuperscript{281}

4.3.4.1 General Comment 14: the right of the child to have his or her best interests treated as a primary consideration

It is widely accepted that the "best interests of the child" principle is a dynamic concept that encompasses various issues which are continuously evolving. This makes the application of the concept cumbersome. In recognition of this fact the Committee on the Rights of the Child issued \textit{General Comment No 14 on the right of the child to have his or her best interest taken as a primary consideration (art 3, para 1)} ("GC 14"), which was adopted on 1 February 2013.\textsuperscript{282} In so doing the

\textsuperscript{281} GC 14 para 1.
\textsuperscript{282} See General Comment 14 (GC 14) of the Committee on the Rights of the Child (29/05/2013), available at http://www2.ohchr.org/english/bodies/crc/comments.htm (accessed 06/06/2014).
Committee seeks to provide a framework for assessing and determining the child’s best interests, thereby promoting the application of the right.\textsuperscript{283}

The main objective of GC 14 as stated by the Committee is therefore to strengthen the understanding and application of the right of children to have their best interests assessed and taken into consideration as a primary consideration or, in some cases, the paramount consideration.\textsuperscript{284} General Comment 14 defines the requirements for due consideration, especially in judicial and administrative decisions as well as in other actions concerning the child, and at all stages of the adoption of laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines.\textsuperscript{285} For this reason the Committee expects that GC 14 will guide decisions by all those concerned with children, including parents and caregivers.\textsuperscript{286}

The Committee starts out by underlining the fact that the child’s best interest is a threefold concept, namely a substantive right; a fundamental interpretive legal principle and a rule of procedure. General Comment 14 covers all three of these dimensions.\textsuperscript{287}

The Committee then reaffirms States Parties’ obligation to undertake all appropriate measures to fully implement this right for children. The nature and scope of these obligations are accordingly outlined. The Committee also emphasises that article 3, paragraph 1 establishes a framework with three different types of obligations to States Parties, namely to ensure the following:

\textsuperscript{283} GC 14 para 11.
\textsuperscript{284} GC 14 paras 36-40.
\textsuperscript{285} GC 14 para 10.
\textsuperscript{286} GC 14 paras 6, 7 and 10.
\textsuperscript{287} GC 14 paras 6 and 7.
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- The child’s best interests are appropriately integrated and consistently applied in every action taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children.

- All judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child’s best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.

- The interests of the child have been assessed and treated as a primary consideration in decisions and actions taken by the private sector, including those providing services, or any other private entity or institution making decisions that concern or impact on a child.

To further States Parties’ understanding and application of the right of children to have their best interests assessed and treated as a primary consideration, the Committee sets out a legal analysis of the concepts and indicates links to the general principles of the Convention. Major elements of this analysis are described below. Particular attention is given to those elements that affect child witnesses and child victims.

(a) “in all actions concerning children”

The Committee emphasises that article 3 seeks to ensure that the right is guaranteed in all decisions and actions concerning children and therefore includes conduct, proposals, services, procedures and other measures. This legal duty applies to all decisions and actions that either directly or indirectly affect children and must accordingly be understood in a very broad sense. The term “children”,

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288 GC 14 paras 17-83. This includes the right to non-discrimination, to life, survival and development as well as the right to be heard.
according to the Committee, refers to all persons under the age of 18 within the jurisdiction of the State Party, without any discrimination of any kind.

(b) “by public or private welfare institutions, courts of law, administrative authorities or legislative bodies”

The obligation of States Parties to duly consider the child’s best interests is a comprehensive obligation in that it encompasses all public and private social welfare institutions, courts of law, administrative authorities and legislative bodies involving or concerning children.

The Committee states that “courts” refer to all judicial proceedings, in all instances, irrespective of whether they are staffed by professional judges or lay persons, and all relevant procedures concerning children, without restriction. This includes the processes of conciliation, mediation and arbitration. The Committee states that in criminal cases the best interests principle applies to children in “conflict (i.e. alleged to have infringed, or accused or recognised as having infringed the law) or in contact (as victims or witnesses) with the law, as well as children affected by the situation of their parents in conflict with the law.”

(c) “the best interest of the child”

The Committee expressed its awareness of the fact that the concept of the best interests of the child is complex and that its content should therefore be determined on a case-by-case basis, taking into account the child or children’s personal

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GC 14 para 28. Children are affected by the situation of their parents in conflict with the law where for example they have been abandoned because their parents have been imprisoned.
situation, context and needs. In individual decisions, the child’s best interests must be assessed and determined in the light of the specific circumstances of the particular child, whereas for collective decisions (such as by the legislator) the best interests of children in general must be assessed and determined in the light of the circumstances of the particular group and/or children in general. As the principle of the child’s best interests should be applied to all matters concerning the child or children, particular attention should, according to the Committee, be given to resolving any possible conflicts among the rights enshrined in the Convention and other human rights treaties with a view to identifying possible solutions which are in the child’s best interests. This implies that States Parties are under an obligation to clarify the best interests of all children when adopting implementation measures. The Committee also acknowledges most unfortunately the flexibility of the concept has been abused by, among others, governments to justify racist policies, professionals who see the assessment of the child’s best interests as irrelevant or unimportant and even parents in defending their own interests in custody disputes.\(^{290}\)

(d) “shall be a primary consideration”

The words “shall be” place a strong legal obligation on States Parties. States Parties are reminded by the Committee that they do not have the right to exercise discretion as to whether children’s best interests are to be assessed and given the proper weight as a primary consideration in any action undertaken. The expression “primary consideration” entails that the child’s best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child, such as dependency, maturity, legal status and, often, voicelessness. In respect of specifically the adoption (art 21) of children, the best interests principle is further strengthened in that the Committee specifically states

\(^{290}\) GC 14 paras 32-34.
that the principle should not simply be regarded as “a primary consideration” but as “the paramount consideration”.  

Nonetheless, the Committee recognises that the best interests of the child might conflict with other interests or rights (eg of other children, the public, parents, etc). Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general, have to be resolved on a case-by-case basis. The authorities and decision makers should accomplish this by carefully balancing the interests of all parties with a view to finding a suitable compromise. If harmonisation is not possible, authorities and decision makers will have to analyse and weigh the rights of all those concerned, taking into consideration that the right of children to have their best interests treated as a primary consideration means that a child’s interests have high priority and should not be regarded as just one of several considerations.  

To ensure compliance with the “best interests of the child” right, the Committee calls attention to the fact that States Parties should undertake a number of implementation measures in accordance with articles 4, 42 and 44, paragraph 6, of the Convention, as well as those stipulated in paragraphs 15 and 16 of GC 14. According to the Committee such measures include a proper assessment and determination of the best interests of the child and entail that:

- the specific factual context of the case should be determined; and
- this should be accomplished through a procedure that ensures legal guarantees and proper application of the right.

\[291\text{ GC 14 paras 36-38.}\]
\[292\text{ GC 14 para 39.}\]
\[293\text{ GC 14 paras 13-16.}\]
In order to determine the factual context of the case the Committee recommends that certain elements should be taken into account, such as: the child’s views; the child’s identity (sex, sexual orientation, national origin, religion and beliefs, cultural identity and language); preservation of the family environment and maintenance of relations; care, protection and safety of the child; situation of vulnerability; right to health; and right to education. In addition States Parties should pay special attention to the following procedural safeguards: the right of the child to express his or her views; establishment of facts through well-trained professionals; time perception (procedures impacting on children should be prioritised and completed in the shortest time possible); use of qualified professionals; legal representation; legal reasoning; mechanisms to revise decisions and a child-rights impact assessment.

In conclusion the Committee recommends that States Parties widely disseminate the general comments to all stakeholders including children. This should include translations of the GC into all languages in child-friendly versions. States are also urged by the Committee to include information in their periodic reporting to the Committee on the challenges they face and the measures they have taken to apply and respect the child’s best interests in all judicial and administrative decisions and other actions concerning the child or children in general.


Building on the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of 29 November 1985,

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294 GC 14 paras 52-99.

295 Refer to [http://www.un.org/documents/ga/res/40/a40r034.htm](http://www.un.org/documents/ga/res/40/a40r034.htm) (accessed 23/07/2014) for more on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. As the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime incorporate/build on the principles of the former document while specifically focusing on child victims and child witnesses, the former document is not discussed in this dissertation as it might amount to a repetition of some of the principles.
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the provisions of the CRC, as well as the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, the UN Economic and Social Council in its resolution 2005/20 of 22 July 2005 adopted the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (“the Guidelines”). In its Guidelines the Economic and Social Council (“the Council”) draws specific attention to the vulnerability of child victims and witnesses. Emphasis is also placed on the fact that millions of children throughout the world suffer harm as a result of crime and the abuse of power, and that the rights of these children are not adequately recognised. The Council furthermore states that they are mindful of the fact that the participation of child victims and witnesses in the criminal justice processes is necessary for effective prosecutions, in particular where the child victim may be the only witness. Recognition is also given to the fact that child victims and witnesses are in need of special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent possible hardship and trauma that may result from their participation in the criminal justice process.

The Council fittingly reaffirms that every effort should be made to prevent the victimisation of children and calls on all those involved in the judicial process to assist children in all possible ways in the unfortunate situation where those children have been the subject of victimisation.

The Guideline to the resolution, as stated by the Council, sets forth good practices based on the consensus of contemporary knowledge and relevant information and regional norms, standards and principles and is meant as a framework to assist Member States in enhancing the protection of child victims and witnesses in the criminal justice system. According to the Council the Guidelines also serve as a practical framework to achieve the following objectives:

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297 Preamble to the Guidelines.
298 Guidelines para 7.
299 Guidelines para 1.
• To assist in the review of national and domestic laws, procedures and practices to ensure the full respect of the rights of child victims and witnesses of crime;

• To assist governments and other stakeholders in designing and implementing legislation, policy, programmes and practices that address key issues related to child victims and witnesses;

• To guide professionals and volunteers working with child victims and witnesses in their day-to-day practice within the juvenile justice process at a national, regional and international level. This should be in accordance with the principles of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; and

• To assist and support those caring for child victims and witnesses of crime.\textsuperscript{300}

In order to achieve these objectives, the Council sets forth four cross-cutting principles that should be adhered to by professionals and those responsible for the wellbeing of child victims and child witnesses, namely:

• the right to dignity;

• the right to non-discrimination;

• the best interests of the child (which include the right to protection and to the opportunity for harmonious development) and;

• the right to participation.\textsuperscript{301}

\textsuperscript{300} Guidelines para 3.
\textsuperscript{301} Guidelines para 8.
In its Guidelines the Council also sets out a valuable in-depth analysis of certain rights of child victims and witnesses. Major elements of each of these rights are described below:

- **The right to be treated with dignity and compassion**

In the view of the Council, this right entails that child victims and witnesses of crime should be treated in a caring and sensitive manner throughout the judicial process. This will ensure that child victims and witnesses play a meaningful role throughout the process. All interactions with the child or witness should be conducted in a child-sensitive manner. This may be achieved by treating children according to their individual needs and evolving capacities. Children should therefore be treated according to their age and level of maturity. Children also have the right to be treated with compassion, which implies understanding of and sensitivity to their feelings, needs, beliefs, communicative style and individual experiences. Anyone dealing with child victims and witnesses of crime should recognise that the child may not be in a position at a given time to fully understand and recount events that happened or to comprehend the full impact of the crime. Appropriate support should be provided to the child in this respect and all interviews in this regard should be conducted by trained professionals. Ideally, the training of those dealing with child victims and witnesses of crime should include, in addition to their professional training, special multidisciplinary training on how to deal with children in a child-friendly manner. The Council furthermore emphasises that

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302 Guidelines paras 10-14.
304 Guidelines paras 10-14.
every child should be treated as an individual and those interacting with the child should be mindful to keep any interference with the child’s private life to the minimum.\textsuperscript{308}

- \textit{The right to be protected from discrimination}

The Council places particular emphasis on the right of a child to be protected from discrimination of any kind and states in its Guidelines that child victims and witnesses have the right to have access to support within the justice system regardless of factors such as race, colour, gender, language, religion, political or other opinion, nationality, ethnic origin, or other status.\textsuperscript{309} Attention should also be drawn to the fact that the list of discriminatory grounds in paragraph 15 of the Guidelines is non-exhaustive, as shown by the final reference to the words “other status”. Such a broad approach is desirable, since it gives this provision of the Guidelines the necessary flexibility to be adapted to a specific situation and allows judges the discretion to include in the protection from discrimination specific grounds that may not be part of the relevant Member States’ domestic legislation.\textsuperscript{310} The justice process and support services should in fact be sensitive to a child’s individual characteristics. In certain cases, such as sexual assault, special services and protection will be needed to take account of the gender and specific offence directed against the child. According to the Council this right furthermore entails that age should not be regarded as a barrier to a child’s right to participate fully in the judicial process. Each child should be treated as a capable witness, and the child’s testimony should be presumed to be valid and trustworthy, unless otherwise proven.\textsuperscript{311} This implies that the child’s competency to testify should be regarded as a criterion of the reliability of the child’s testimony, rather than the admissibility of

\textsuperscript{308} Guidelines paras 11-12.
\textsuperscript{309} Guidelines para 15.
\textsuperscript{310} UN Office on Drugs and Crime (UNODC) \textit{Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime} 23.
\textsuperscript{311} Guidelines para 15-18.
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such evidence.\textsuperscript{312} The child’s age should accordingly not be an exclusionary factor but rather a factor to be taken into account in the assessment of the reliability of the child’s testimony. Such an evolution may require the amendment of some States’ domestic legislation.\textsuperscript{313}

- The right to be informed

As stated by the Council in its Guidelines, the right to be informed requires those involved with the child victim and witness within the judicial system to inform the child victim and witness and their parents and/or guardians of inter alia the availability of health, psychological, social and other relevant services, the justice process and the role of the child during such process as well as of the support and protective measures available to the child.\textsuperscript{314} It should be noted that child victims and witnesses have the right not only to be informed in general on the assistance they are entitled to and the way the justice process is organised, but also to receive information on the specific case in which the child is involved. This implies being informed about aspects such as the progress of the case, the scheduling of the proceedings, what is expected of the child, the decisions rendered and the outcome of the case. It is also important to emphasise that any information offered to the child needs to be provided in a language that the child is able to understand.\textsuperscript{315} Child victims and witnesses and their parents and/or guardians also have the right to be informed of the mechanisms for judicial review as well as of opportunities to obtain reparation from the offender.\textsuperscript{316}

\textsuperscript{312} It should be noted that the admissibility of testimony relates to whether a judge can accept the presentation of the evidence and take it into account in the determination of the case whereas the reliability of the evidence relates to the weight the judge will attach to previously admitted evidence.

\textsuperscript{313} UN Office on Drugs and Crime (UNODC) Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime 25.

\textsuperscript{314} Guidelines para 19-20.

\textsuperscript{315} UN Office on Drugs and Crime (UNODC) Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime 32.

\textsuperscript{316} Guidelines para 19-20.
• *The right to be heard and to express views and concerns*

In keeping with the provisions of article 12 of the CRC, the Council emphasises that every effort should be made to enable child victims and witnesses to express their views or concerns relating to their involvement in the judicial process. In so doing professionals should ensure that child victims and witnesses are appropriately consulted and are able to express their views freely and in their own manner.\(^{317}\)

Cognisance should be taken of the fact that the right to be heard goes well beyond giving evidence or being present at a trial as a victim or witness. It includes the right to express, beyond a formal statement of the facts, views and concerns on the impact of the offence, on the way the proceedings are conducted and on the child’s needs and expectations. The right to be heard and to express views and concerns implies not only that those dealing with child victims and witnesses give them an opportunity to express themselves fully, but that they listen to the child victims and witnesses, and give due regard to their views. This right also implies that when, for any good reason, the expectations of the child cannot be met, this is explained to the child. A child victim or witness often has his or her own perception of the importance of certain aspects of the crime and of his or her testimony. It needs to be explained to the child, in a child-friendly way, why certain decisions are made, why certain facts are not discussed in court and why certain views are not taken into consideration. It is important to show respect for elements that a child may find important in his or her account of the events, but that may not necessarily be relevant as evidence.\(^{318}\)

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\(^{317}\) Guidelines para 21.

\(^{318}\) UN Office on Drugs and Crime (UNODC) *Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime* 43.
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- **The right to effective assistance**

In discussing this right, the Council not only highlights the importance of providing assistance to child victims and witnesses and, where appropriate, family members, but points out that such assistance should be provided by trained professionals. The Council also set out recommendations in paragraphs 40 to 42 of the Guidelines on how such training should be conducted. A non-exclusive list of possible assistance that may be rendered to child victims and witnesses, such as financial, legal, counselling, health, social and educational services and services to promote physical and psychological recovery et cetera is also provided. Professionals are also urged to make every effort to coordinate support, so as not to subject the child to excessive interventions; and to develop and implement measures to make it easier for children to testify.\(^{319}\)

As stated in paragraph 22 of the Guidelines, effective assistance for child victims and witnesses may include State-provided access to legal assistance. This unfortunately has serious cost implications and may prove to be problematic for developing countries. States should nevertheless consider providing legal assistance, free of charge, to child victims during the criminal justice process. The main consideration in deciding whether such assistance should be provided is the principle of the best interests of the child.\(^{320}\)

- **The right to privacy**

The dissemination of information about a child victim or witness, in particular in the media, could have grave consequences for the child. It could endanger the child’s

\(^{319}\) Guidelines paras 22-25.  
\(^{320}\) UN Office on Drugs and Crime (UNODC) *Justice in Matters involving Child Victims and Witnesses of Crime. Model Law and Related Commentary* 44.
safety, cause the child intense shame and humiliation, discourage the child from telling what happened and could also put a strain on the relationships of the child with his or her family, peers and community, especially in cases of sexual abuse. In some cases it might even lead to stigmatisation by the community, thereby aggravating secondary victimisation of the child.\textsuperscript{321}

It therefore comes as no surprise that the Council emphasises the protection of the privacy of child victims and witnesses as a matter of primary importance.\textsuperscript{322} Protection could be ensured by maintaining confidentiality and by restricting disclosure of information that could lead to the identification of the child victim or witness.\textsuperscript{323} Measures should be taken to protect the child from undue exposure to the public, by for example excluding the public and the media from the courtroom when the child is testifying.\textsuperscript{324}

- \textit{The right to be protected from hardship during the justice process}

Mindful of the fact that children find the judicial process particularly onerous, the Council points out in its Guidelines that throughout the judicial process professionals should take measures to prevent children from experiencing hardship.\textsuperscript{325} In so doing professionals\textsuperscript{326} should treat the child with sensitivity and take care to provide the

\textsuperscript{321} UN Office on Drugs and Crime (UNODC) \textit{Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime} 59.
\textsuperscript{322} Guidelines para 26.
\textsuperscript{323} Guidelines para 27.
\textsuperscript{324} Guidelines para 28.
\textsuperscript{325} Guidelines para 29.
\textsuperscript{326} “Professionals” are defined in para 9(b) of the Guidelines as: “persons who, within the context of their work, are in contact with child victims and witnesses of crime or are responsible for addressing the needs of children in the justice system and to whom these Guidelines are applicable. This includes, but is not limited to, the following: child and victim advocates and support persons; child protection service practitioners; child welfare agency staff; prosecutors and, where appropriate, defence lawyers; diplomatic and consular staff; domestic violence
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following: support to the child throughout his or her involvement in the justice process; certainty about the process, including clear expectations as to what to expect during each stage of the process and the avoidance of delays by ensuring that the trial takes place as soon as is practicable, unless such delays are in the interests of the child.\textsuperscript{327} Child-sensitive measures should also be used, such as special interview rooms, modified courtrooms, CCTV, limiting the number of interviews and protecting the child from being interviewed by the alleged perpetrator. All questioning should be conducted in a child-sensitive manner, for example by using testimonial aids or appointing psychological experts such as intermediaries or communicators to assist with the questioning of child victims and witnesses.\textsuperscript{328}

- \textit{The right to safety}

Involvement as a victim or witness in a criminal process may be a dangerous or risky experience, especially when organised crime is involved. In such instances victims and witnesses may fear a threat to their lives or may be at risk of intimidation because of their involvement in the justice process.\textsuperscript{329} Where the safety of a child victim or witness is at risk the Council stresses that appropriate measures should be taken to report such risks to appropriate authorities and to protect the child from the risk, be it before, during or after the justice process. Professionals should be trained to recognise risks of this nature and should be required to notify authorities if they suspect any possible risk to the child.\textsuperscript{330} Paragraph 33 of the Guidelines therefore contemplates the mandatory reporting of offences against children immediately upon the discovery of the offence.\textsuperscript{331} Appropriate safeguards should

\begin{itemize}
\item Paragraph 33 of the Guidelines therefore contemplates the mandatory reporting of offences against children immediately upon the discovery of the offence.
\item Appropriate safeguards should
\end{itemize}

\textsuperscript{327} Guidelines para 30.
\textsuperscript{328} Guidelines para 31; UN Office on Drugs and Crime (UNODC), \textit{Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime} 83.
\textsuperscript{329} Guidelines para 31; UN Office on Drugs and Crime (UNODC) \textit{Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime} 90.
\textsuperscript{330} Guidelines para 32-34.
\textsuperscript{331} Guidelines para 31; UN Office on Drugs and Crime (UNODC), \textit{Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime} 90.
then be put in place to ensure the safety of the child. Such safeguards could include: avoidance of direct contact with the alleged perpetrator, restraining orders, pre-trail detention of the accused or protection of the child by the police or other relevant authorities. It should be noted that the list of appropriate safeguards as set out in paragraph 34 of the Guidelines is not exhaustive, as shown by the words “[s]uch safeguards could include” and that the relevant authorities may implement such measures as they deem fit to protect the child victim or witness.

- **The right to reparation**

According to the Guidelines, child victims and witnesses should, whenever possible, receive reparation in order to ensure full redress, reintegration and recovery. Procedures to accomplish such reparation should be readily accessible and should be child-sensitive. Reparation could include aid from victim compensation programmes or restitution from the offender, where so ordered by the criminal court.

- **The right to special preventative measures**

The Council states that, in addition to preventative measures that should be in place for all children, special strategies are required for child victims and witnesses, who

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332 Guidelines para 32-34.
334 Compensation may include cover for treatment and rehabilitation for physical and psychological injuries, loss of income, pain and suffering, material damages, or financial support for dependants.
335 Restitution may include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services or even symbolic sentences or atonement (such as a memorial service or memorial sites).
336 Guidelines paras 35-37.
are particularly vulnerable to recurring victimisation or offending. Children are more at risk of repeated victimisation than adults because they are often vulnerable and unable to properly assert or protect themselves against an adult or are perceived by a potential perpetrator to be so. Professionals should accordingly develop and implement comprehensive and specially tailored strategies and interventions in cases where children may be at risk of further victimisation.

The Council concludes its Guidelines by calling on professionals to make every effort to adopt an interdisciplinary and cooperative approach when aiding child victims and witnesses. States and all sectors of society, at both the national and the international level, are urged in addition to enhance international cooperation, including mutual assistance for the purpose of facilitating the collection and exchange of information and the detection, investigation and prosecution of transnational crimes involving child victims and witnesses.

In conclusion, the aforementioned Guidelines serve as a valuable tool to aid governments in drafting relevant national legislation, policies or protocols involving child victims and witnesses in conformity with the principles contained in the Guidelines and other relevant international legal instruments such as the CRC. They should accordingly be consulted as such.

5 REGIONAL CHILD INSTRUMENTS

5.1 The Declaration on the Rights and Welfare of the African Child, 1979
The Assembly of Heads of Government of the Organisation of Africa Unity ("the OAU") at its meeting of the sixteenth ordinary session adopted the Declaration on the Rights and Welfare of the African Child.\textsuperscript{341} In so doing the OAU specifically recognised the 1959 UN Declaration on the Rights of the Child as well as the UN General Assembly Resolution A/31/169 proclaiming 1979 as the International Year of the Child ("the IYC"). In this regard the OAU called on all AOU member states to be cognisant of the IYC and to implement all possible programmes to promote the welfare of the child at national, sub-regional and regional levels, in conjunction with national and international organisations.\textsuperscript{342}

In addition, in its African Children’s Declaration the OAU expressed deep concern for the future of African children as inheritors and keepers of the African cultural heritage. However, at the same time, the Declaration underlined the fact that the recognition of cultural values should not assume primacy over the protection of the rights of the child.\textsuperscript{343} Rather, the two concepts should complement one another in achieving adequate protection for the rights of the children of Africa.\textsuperscript{344}

\textbf{5.2 The African Charter on the Rights and Welfare of the Child 1990}

Following closely on the CRC, the African Charter on the Rights and Welfare of the Child ("the African Children’s Charter") was adopted by the Assembly of the Heads of State and the OAU in July 1990 and came into force in November 1999.\textsuperscript{345}

\begin{itemize}
\item \textsuperscript{341} The text of the Declaration appears in Van Bueren \textit{International Documents on Children} 31.
\item \textsuperscript{342} African Children’s Declaration para 1.
\item \textsuperscript{343} African Children’s Declaration paras 2-3.
\item \textsuperscript{344} Kaime \textit{Convention on the Rights of the Child} 23.
\item \textsuperscript{345} The text of the Declaration appears in Van Bueren \textit{International Documents on Children} 33. South Africa ratified the African Children’s Charter on 7 January 2000.
\end{itemize}
A separate regional African Children’s Charter was adopted for political and legal reasons. On a political level the adoption of the document is the result of the perception by the OAU of the initial exclusion and marginalisation of African states in the drafting process of the CRC.\textsuperscript{346} From a legal standpoint, a desire was identified by the OAU to address certain problems pertinent to African children, for example the fact that children were living under apartheid, the deployment of child soldiers, female genital mutilation and circumcision, that were not sufficiently addressed in the UN instrument.\textsuperscript{347} The African Children’s Charter therefore represents the “African” concepts of children’s rights and strives to promote and protect the rights and welfare of the African child. It should be noted, however, that the African Children’s Charter is not opposed to the CRC; rather, the two documents are complementary and both provide a framework for the enhanced protection of African children.\textsuperscript{348}

The African Children’s Charter defines a child as “every human being below the age of 18 years” and therefore applies to everyone below the age of eighteen years, thus ensuring that young people in ratifying states where adulthood is attained earlier still enjoy a favourable position. Part I of the Charter includes 31 articles, covering both the substantive and the procedural rights of the child. These rights include what are termed survival rights, community rights, self-assertion rights, protection rights and development rights.\textsuperscript{349} The Charter stipulates certain responsibilities of the child as well as duties on the part of parents and States Parties.\textsuperscript{350} The remainder of the Charter deals with certain administrative and procedural matters, and provides for the establishment and organisation of the African Committee of Experts on the

\textsuperscript{346} The African involvement in the drafting process was limited, in that in five of the nine years in which the working group took a final proposal to draft only three African states participated. By 1989 nine African states were participating.


\textsuperscript{348} Kaime The Convention on the Rights of the Child 25.

\textsuperscript{349} Viljoen in Boezaart (ed) Child Law in South Africa 337-339.

\textsuperscript{350} A 31.
Rights and Welfare of the Child.\textsuperscript{351} This Committee is tasked with promoting and protecting the rights contained in the African Children’s Charter.\textsuperscript{352}

5.2.1 Main features

According to Viljoen, the African Children’s Charter is best understood with reference to three pivotal principles, namely the child’s best interests, the principle of non-discrimination and the primacy of the Charter over harmful customs and cultural practices.\textsuperscript{353} This entails that in all actions concerning the child, the best interests of the child must be the primary consideration.\textsuperscript{354} Children are furthermore entitled to equal protection under the Charter, irrespective of their or their parents’ status.\textsuperscript{355} In addition the African Children’s Charter expressly asserts primacy over any customs or culture, such as female genital mutilation, arranged marriages and child marriages that are harmful or prejudicial to children.\textsuperscript{356}

For present purposes, two principles of the African Children’s Charter are of particular importance when considering the protection of child victims and child witnesses, namely the best interests of the child (art 4.1) and the right of the child to be heard (art 4.2).

5.2.2 Article 4.1

\textsuperscript{351} A 32-47.  
\textsuperscript{352} A 42.  
\textsuperscript{353} Viljoen in Boezaart (ed) \textit{Child Law in South Africa} 336.  
\textsuperscript{354} A 4.  
\textsuperscript{355} A 3.  
\textsuperscript{356} A 1 and 21.
Article 4.1 of the African Children’s Charter reads as follows:

In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

One of the most important features of the African Children’s Charter is that the child’s best interests are made the paramount consideration. While the CRC states that a child’s best interests shall be “a” primary consideration, the African Children’s Charter goes a step further by declaring these interests “the” primary consideration in all actions concerning the child. Although the use of the definite instead of the indefinite article may seem pedantic, it nonetheless has significant practical implications. Through this wording the Charter elevates the best interests principle to an overriding consideration and thereby offers better protection to children.357

5.2.3 Article 4.2

Article 4.2 of the African Children’s Charter reads as follows:

In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate laws.

Like the CRC, the African Children’s Charter recognises children as autonomous beings and guarantees them several participatory rights. This is of significance considering that in Africa children are not generally perceived as autonomous. In some communities, for example, decisions concerning children are made by the male elders. At most children are only heard indirectly through aunts, uncles or grandparents. The specific guarantee of participatory rights for children in the African Children’s Charter is therefore commendable.

Article 4.2, like the CRC, guarantees children the right to be given an opportunity to express their views in all judicial and administrative proceedings affecting them. However, this right as set out in the African Children’s Charter is qualified in that the child has to be capable of communicating his or her views. In this regard the similar provision in the CRC is preferable as it only requires that the child should be able to form a view. The right is further qualified in that the child has to be “a party to the proceedings”. This implies that if the child is not a party to the proceedings, but for instance only a witness, the right is not guaranteed. The provisions of the CRC are preferable here as well as it contains no such limitation. Furthermore, in terms of the African Children’s Charter the views of the child must be taken into consideration by the relevant authority in “accordance with the provisions of appropriate laws”, whereas the CRC only requires the “view of the child [to be] given due weight in accordance with the age and maturity of the child”. Here again the CRC is less restrictive.

Unless the right expressed in article 4.2 is interpreted progressively, the qualifications to the child’s right to express a view in all judicial and administrative proceedings affecting him or her may be rendered meaningless. Furthermore, by

358 Art 7, 8 and 9.
360 The right expressed in art 4.2 should hence be interpreted with a view to increasing a child’s right to express himself or herself rather than applying this principle restrictively in national legislation.
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equating the protection under international law to that provided for in national (appropriate) law, the higher protection afforded to the child may be negated.\(^{361}\)

\section{6 THE RELATIONSHIP BETWEEN INTERNATIONAL AND REGIONAL LEGAL INSTRUMENTS AND SOUTH AFRICAN CHILD LAW}

\subsection{6.1 Introduction}

An analysis of the principles encapsulated in the aforementioned international and regional instruments clearly illustrates their importance in South African child law. At the most basic level these instruments provide a set of standards against which all laws, legislative programmes, decisions, policies and all other government actions and inactions relating to children can be measured. The past fifteen years have also seen an increased commitment on the part of government towards the ratification of international and regional child law instruments. South Africa has ratified all the major human rights instruments dealing with children, such as the CRC and the African Children’s Charter, the most recent being the African Youth Charter (2006) and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed conflict.\(^{362}\) The introduction of international child law into domestic law has also gained importance.\(^{363}\) This is especially noticeable in several recent Acts of parliament, such as the Children’s Act and the Child Justice Act 75 of 2008.\(^{364}\) International law has also gained

\(^{361}\) Viljoen in Boezaart (ed) \textit{Child Law in South Africa} 338.
\(^{362}\) South Africa ratified the African Youth Charter on 28 May 2009 and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict on 24 September 2009.
\(^{363}\) Schäfer \textit{Child Law in South Africa: Domestic and International Perspectives} 82.
\(^{364}\) Refer to the Preamble to the Children’s Act and the Preamble to the Child Justice Act, where special reference is made to \textit{inter alia} the role of the CRC, the African Children’s Charter and the Universal Declaration of Human Rights and its importance in the protection of children’s rights.
importance as an interpretative tool in the hands of the judiciary, and has proved significant in the courts’ review of children’s rights.\textsuperscript{365}

\section*{6.2 International law as an interpretative source of fundamental rights}

Two constitutional directives, namely section 39(1) of the Bill of Rights and section 233 of the Constitution, illustrate the significance of the interpretative role of international law in South African law. Section 39(1) of the Bill of Rights requires that when interpreting the Bill of Rights all courts, tribunals or forums must consider international law and may consider foreign law. This obligation provides the courts with a meaningful opportunity to interpret provisions of the Bill of Rights in line with international instruments such as the CRC, the African Children’s Charter and even General Comments issued by the UN Committee on the Rights of the Child. The value of such judicial notice cannot be underestimated and is clearly illustrated in case law.\textsuperscript{366} In \textit{Bhe v Magistrate, Kayelitsha}\textsuperscript{367} for example, the Constitutional Court highlighted South Africa’s international obligations and referred in reaching its decision to article 2 of the CRC and article 3 of the African Children’s Charter on non-discrimination.\textsuperscript{368}

\textsuperscript{365} Schäfer \textit{Child Law in South Africa: Domestic and International Perspectives} 82. Also refer for example to \textit{S v Makwanyane 1995 (3) SA 391 (CC)}; \textit{Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)} and \textit{DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC)}.

\textsuperscript{366} See for example \textit{Centre for Child Law v Minister of Home Affairs 2005 (6) SA 50 (T)}; \textit{Rosen v Havenga [2006] 4 All SA 199 (C)}; \textit{S v M 2007 (2) SACR 539 (CC)}.

\textsuperscript{367} 2005 (1) BCLR 19 (CC).

\textsuperscript{368} Paras [53] and [55]. The main point to consider in the case under discussion was whether the first two applicants, two female African persons, whose parents were not married or were married according to African law and customs, were entitled to inherit \textit{ab intestato} upon the death of their father. Intestate succession in terms of African customary law is based on the principle of primogeniture. The general rule is that only a male who is related to the deceased through a male line qualifies as an intestate heir. The court held that irrespective of whether the two female children were legitimate or not, this did not alter the consequences flowing from the status of the legal relationship between the parents at the time of the father’s death. The court held further that the only reason why the two applicants could not inherit from their father’s estate was that they were black and they were females. This was \textit{per se} discrimination on the grounds of race and gender. It was \textit{prima facie} unfair and therefore offended against the provisions of section 9(1) and (3) of the Constitution. The court was thus bound to declare such law unconstitutional and invalid. The court accordingly held that the first two applicants
In addition, section 233 of the Constitution states that, when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law to any interpretation that is inconsistent with international law. Section 233 widens the application of international law, in that it governs the interpretation of “any legislation” and not only that of the Bill of Rights. For present purposes this implies that international law principles may assume jurisprudential relevance in relation to the interpretation of any legislation pertaining to children, including section 170A of the Criminal Procedure Act.

6.3 The National Programme of Action for Children

By ratifying the CRC on 16 June 1995, the South African government (“government”) committed itself not only to the promotion and protection of children’s rights in South Africa, but also to implementing the principle of a “first call for children”. In view of having ratified the CRC and in accordance with its obligation as a signatory to the CRC to develop a Plan of Action for children, government developed its National Programme of Action for Children (“the NPAC”).

The NPAC is the instrument through which South Africa’s commitments to children are put into practice, and as such it outlines the actions that government intends to take to implement these commitments. In so doing, it provides a holistic framework for the integration of all policies, programmes, strategies and plans developed by government departments and non-governmental organisations to promote the well-being of children. It has fittingly been described as the vehicle for ensuring that

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370 See the Introduction of the NPAC.
the rights of children outlined in the CRC and the Constitution do not become meaningless.\textsuperscript{371}

Of particular relevance to the topic under discussion is the fact that the NPAC makes special provision for the protection of children.\textsuperscript{372} The goals relating to child protection as stated in the NPAC are the following:\textsuperscript{373}

- To ensure that the best interests of the child are protected within the criminal and civil justice system.
- To ensure that the child has the right
  - to security and the relevant social services;
  - not to be subject to neglect or abuse;
  - not to be subject to exploitative labour practices nor to be required or permitted to do work which is hazardous or harmful to the child’s education or well-being;
  - in criminal matters, to be treated in a way that takes account of his or her age.
- Within the framework of 1 and 2 above, to:
  - establish a separate juvenile criminal justice system;
  - address the problems related to children who are involved in all forms of abuse, including sexual abuse;
  - protect children from using and trafficking in narcotic drugs;


\textsuperscript{372} See para 9. Other goals set by the NPAC include nutrition, child health, water and sanitation, early childhood development and basic education, social welfare development (family environment, out-of-home care and social security), and leisure and cultural activities.

\textsuperscript{373} See para 9 of the NPAC (1996).
o address problems relating to children of divorcing, divorced or separated parents and to children of single parents;

o eliminate any form of racial, gender or geographic discrimination or imbalances still existing in the criminal and civil justice system in respect of children;

o promote justice that is sensitive to children, with an emphasis on the training of personnel who work with children in the justice system.

- In the attainment of the above, to promote and strengthen the partnerships within state departments and between state departments and organisations in civil society which are involved in the administration of justice.

- To link the entire question of children in the civil and criminal justice system to broader developmental issues.

- To promote the Convention on the Rights of the Child within a broader framework of a human rights culture and to make the public and people in the justice system aware of it.

An analysis of the aforementioned paragraph of the NPAC confirms government’s commitment to upholding the best interests of the child in general as well as within the criminal justice system. In terms of its principles, not only should the child victim and child witness be treated in a way that takes account of the child’s age, but this should also take place in a child-friendly and sensitive manner. Emphasis is furthermore placed on the training of those involved with children in the justice system.

A need to review the initial NPAC was identified by government in 2011 and this process gained momentum in line with the mandate of the Ministry for Women, Children and People with Disabilities. The National Plan of Action 2012-2017 (“NPAC 2012”) was hence developed in close collaboration with government departments and non-governmental organisations, to ensure that existing priorities,
The protection of child victims and witnesses in terms of the Constitution of the Republic of South Africa, 1996, and international instruments programmes and commitments are in line with government’s overall strategies in the realisation of children’s rights.\textsuperscript{374}

The National Plan of Action for Children 2012, like its predecessor, affirms its commitment to child protection.\textsuperscript{375} The goals relating to child protection as stated in NPAC 2012 are the following:\textsuperscript{376}

- To protect children against all forms of crime and violence in their homes, in the home, school and the community and in institutions were children are accommodated.
- To protect children against sexual, physical and emotional abuse and neglect.
- To protect children against maltreatment, torture and degrading treatment.
- To ensure that the national integrated child protection system is effective, accountable and responsive.
- To provide victim support to children who are abused and neglected.

Of further significance is the fact that in NPAC 2012 special emphasis is placed inter alia on the role of the Department of Justice and Constitutional Development in ensuring that children’s courts are child-friendly; in building the capacity of the staff of the Department of Justice and Constitutional Development in fulfilling its role toward the applicable child-friendly legislation and in providing child-friendly victim support services.

\textsuperscript{374} Department of Women, Children and People with Disabilities \textit{National Plan of Action for Children in South Africa (2012)} s 1.

\textsuperscript{375} Refer to part C of NPAC 2012.

\textsuperscript{376} Refer to para C1 of NPAC 2012.
Both NPAC and NPAC 2012 clearly illustrate government's commitment towards the realisation of the best interests of children in general, and that of the best interests of the child victim and child witness within the criminal justice system in particular.

6.4 The Service Charter for Victims of Crime

In keeping with the spirit of the South African Constitution, and in compliance with the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the South African government approved a Service Charter for Victims of Crime (the Victims’ Charter) on 1 December 2004.377 The Victims’ Charter is a product of the National Crime Prevention Strategy of 1996 and the National Victim Empowerment Programme of 1998 and is part of government’s commitment to dealing with crime by focusing on the important role that victims play within the criminal justice system.378

The Victims’ Charter aims to ensure that victims remain central to the criminal justice process in South Africa; to eliminate secondary victimisation in the criminal justice process; to clarify the service standards to be accorded to victims by the criminal justice system; and to provide avenues of recourse for victims when these standards are not met.379 In order to facilitate the effective implementation of the Victims’ Charter it is imperative that those providing service to victims clearly understand who is regarded as a victim of crime. In this regard the Victims’ Charter provides a well-defined definition of a victim. A victim is defined in term of the Victims’ Charter as a person who has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of the person’s fundamental rights through acts or omissions that are in violation of criminal law. The term “victim”

378 Refer to the Introduction to the Victims’ Charter.
379 Refer to the Preamble to the Victims’ Charter.
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Furthermore includes, where appropriate, the immediate family or dependants of the direct victim.\textsuperscript{380} A person may also be considered a victim regardless of whether the perpetrator has been identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim.\textsuperscript{381} The Victims’ Charter therefore gives a broad interpretation to the term “victim”. Although the Victims’ Charter does not refer to children \textit{per se}, it is clear that children are included within the ambit of the charter as direct victims, children of adult victims, siblings of child victims and witnesses to crimes committed against adults or children.\textsuperscript{382}

In terms of the Victims’ Charter a victim of crime has the right to insist that the following seven rights, as contained in the Constitution and relevant legislation, \textit{are upheld} when interacting with the criminal justice system:

- The right to be treated with fairness and with respect for dignity and privacy;
- The right to offer information;
- The right to receive information;
- The right to protection;
- The right to assistance;
- The right to compensation;
- The right to restitution\textsuperscript{383}


\textsuperscript{381} Department of Justice and Constitutional Development \textit{Minimum Standards on Services for Victims of Crime} 3

\textsuperscript{382} Van der Merwe “Children as victims and witnesses” in Boezaart (ed) \textit{Child Law in South Africa} (2009) 563 at 564.

\textsuperscript{383} Own emphasis added. Refer to the Victims’ Charter 6-10.
As indicated in the document itself, the Victims’ Charter does not create any new rights but aims to consolidate the legal framework in South Africa relating to the rights of and services provided to victims of crime. For example, with regard to child victims, the right to protection includes a prohibition on the publication of the identity of the child victim, the possibility of the trial being held in camera, and the child being placed in a witness protection programme. As part of the right to assistance, child victims have the right, inter alia, to request assistance and where relevant to have access to social, health and counselling services as well as legal assistance, while the right to offer information refers to the possibility of making a victim’s statement.

If a victim is of the opinion that any of the aforementioned seven rights has not been observed or that the service received has not complied with the principles of the Victims’ Charter, the victim has the right, in terms of the Victims’ Charter, to complain to the government department or service provider concerned. The victim could also inter alia contact organisations such as the Office of the Public Protector, the South African Human Rights Commission or the Commission on Gender Equality for assistance.

Despite the fact that the standing of the Victims’ Charter is open to question since the Victims’ Charter itself does not provide a victim with a legally enforceable right, but only gives a victim the recourse of complaint or assistance when standards are not met, the importance of the Victims’ Charter should not be underestimated. The significance of the Victims’ Charter lies in the fact that it gives recognition to the serious impact of crime on victims and its potential for undermining a victim’s human rights. Furthermore, by highlighting victims’ rights in a charter, government has illustrated its commitment to promoting the equal enjoyment of all the rights and freedoms guaranteed in the Constitution to both victims and offenders. It also

384 Victims’ Charter 6.
385 Victims’ Charter 8.
386 Refer to the Preamble to the Victims’ Charter. Also note that the Constitution gives special recognition to arrested, detained and accused persons in section 35, while no such provision
serves to create awareness, inform victims of the various stages of the criminal trial and of their involvement therein, provides minimum standards that victims can expect from all service providers involved and strives to minimise secondary victimisation.  

6.5 Minimum Standards on Services for Victims of Crime

A Minimum Service Standard for Victims of Crime (“Minimum Standards”) was approved by cabinet in 2004. This complementary document aims to explain the rights contained in the Victims’ Charter in more detail, and serves as a guideline for service providers (police, public protectors, social workers, magistrates, health and correctional services etc) when interacting with victims of crime. The Minimum Standards sets out the different processes and responsibilities victims can expect from a government department such as the South African Police Service, the National Prosecuting Authority, the Departments of Health, Justice and Constitutional Development, Social Development and Correctional Services, when presenting themselves at public institutions such as courts, police stations and hospitals. The Minimum Standards therefore serves to hold government accountable for providing the necessary services and assistance to the victims of crime.

Documents such as the Victims’ Charter and the Minimum Standards are welcomed as they affirm the right of victims of crime, including those of child victims, and ensure that they are central to the criminal justice system. They also reflect government’s commitment to improving services for the victims of crime.

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387 Victim’s Charter 4-9.
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7 CONCLUSION

The right of the child to freedom from violence provides the foundation for children’s rights in the Constitution and international children’s rights instruments such as the CRC. This right is inherent in the human dignity of the child and stands as a crucial indicator of any government’s commitment to the safeguarding of their children’s human rights. A reflection on the aforementioned national implementation efforts of the South African government through the adoption of public policies and legal reforms reveals government’s commitment to achieving this goal. Despite this positive trend, much still needs to be done to address the high levels of violence against children as this occurrence of violence directed against children remains a discernible barrier to the full realisation of their human rights as enshrined in our Constitution.

There can be no doubt that the international instruments, together with the Constitution and other national documents, are powerful tools in enhancing the lives of child victims and child witnesses in South Africa. These instruments and documents serve inter alia to guarantee child victims and child witnesses the right to respect for their human dignity and physical and psychological integrity, and advocate a criminal procedure that is tailored to their individual needs.

However, it would be foolish to pretend that the answer to all the problems associated with child victims and child witnesses lies in international instruments and national documents. The theoretical exercise is only one part of the solution.


the other is to transcend the rhetoric of international and national documents and proceed to implement them, thereby making the rights of child victims and witnesses a reality.\textsuperscript{391} In \textit{DPP v Minister of Justice and Constitutional Development}\textsuperscript{392} the Constitutional Court remarked as follows with reference to the availability of intermediaries to child complainants in criminal cases:

The record suggests a disturbing inconsistency between the promises that the laws make and implementation of the laws. Compliance with the Constitution requires not only that laws be enacted to give effect to the rights in the Constitution, but also requires that these laws be implemented. Failure to implement laws that protect Constitutional rights is a violation of the Constitution.

\textsuperscript{391} Jamieson, Stein and Warehouse in their report on “Children and Law Reform” in Matthews et al (eds) \textit{South African Child Gauge 2014} (2014) 1 at 18, for example, comment on the new legislation safeguarding the on-going provisions of specialised Sexual Offences Courts. They point out that the Act is weak from an implementation perspective, in that it does not provide direction on the pace of implementation of the courts; does not require the Department to provide resources for the courts; and sets no standards in terms of infrastructure, staffing or support services to victims. Without these, they argue, there is no guarantee that Sexual Offences Courts will reduce secondary victimisation and improve conviction rights.

\textsuperscript{392} 2009 (2) SACR 130 (CC) at para [201].
CHAPTER 5

The intermediary system in South Africa

Everything seems to turn upon the need for intermediaries when young children testify in court. Properly trained intermediaries are key to ensuring the fairness of the trial. Their integrity and skill will be vital in ensuring both that innocent people are not wrongly convicted and that guilty people are properly held to account.¹

1 INTRODUCTION

It is clear from the discussion in the previous chapters that a steadfast awareness of the importance of the protection of children exists and that progress has been made in this regard in South Africa.² One such legislative advancement at national level was effected in terms of the Interim Constitution and is central to the theme of this study, namely the introduction of the intermediary into the criminal justice system.³

In this chapter, the historical background to the introduction and role of the intermediary in the South African criminal justice system will be discussed briefly. The appointment of an intermediary, the role and functions of an intermediary, categories of people qualified to act as an intermediary, as well as the problems

¹ Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC) at para [168] (hereinafter DPP v Minister of Justice and Constitutional Development).
² See ch 4 of this thesis.
³ Note that although s 170A of the Criminal Procedure Act was introduced in 1993, under the interim Constitution, the constitutionality of the section was only confirmed in 1996 in K v Regional Court, Magistrate 1996 (1) SACR 434 (E).
experienced within the intermediary system will be analysed. Where relevant, measures to enhance the intermediary system will be considered.

2 HISTORICAL BACKGROUND TO THE INTRODUCTION OF THE PERSONA OR FUNCTION OF AN INTERMEDIARY

In 1989, the then Minister of Justice, Mr HJ Coetzee, requested the South African Law Commission (as it was then known) (the Commission) to conduct an investigation into the position of child witnesses in court proceedings.\textsuperscript{4} In this regard the Commission was requested to give particular consideration to the following possible protective measures and procedures:\textsuperscript{5}

- That a child giving evidence in a trial be assisted by a representative;
- That the identification of the suspect by the child ought not to take place in open court, but from behind a one-way mirror;
- That the evidence of a child be heard in an informal atmosphere, which includes the hearing of such evidence in a room other than a court of law, and which also includes the possibility of hearing the child’s evidence whilst the child is screened off by a one-way mirror or in the absence of the accused;
- That a pre-trial questioning of the child be carried out by a psychologist appointed by the court, who must be entitled to express his or her opinion in court regarding the child’s credibility; such questioning to take place in consultation with the accused, the prosecution and the presiding officer;

That videotapes relating to interviews between the child and social workers during the investigation stages of the case ought to be admissible in court and ought to be made available to the accused before the trial.

The Commission came to the conclusion that child witnesses experience significant difficulties in dealing with the traditional adversarial court environment, comprising a presiding officer, an accused, legal representatives of the accused and a prosecutor (some of whom wear black robes). Furthermore, the ordinary procedures of the criminal justice system that involve confrontation and extensive cross-examination have proved to be inadequate for the needs and protection of child witnesses. This, the Commission stated, results in the child witness “being afraid, uncertain and confused”. Consequently alternative procedures and mechanisms have had to be developed to facilitate the reception of the evidence of child witnesses in criminal proceedings. In this regard, the Commission looked at possible solutions such as the use of a child investigator, special courtrooms and “translated” cross-examination, legal assistance, and the video recording of the initial statement as admissible evidence.

In its final report on the matter, the Commission recommended that in certain circumstances a child should be allowed to give evidence via electronic means, in a place other than the courtroom, with the assistance of an intermediary. This recommendation gave rise to the introduction of section 170A into the Criminal Procedure Act. Section 170A of the Criminal Procedure Act provides as follows:

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9 Act 51 of 1977 (hereinafter the Criminal Procedure Act). Section 170A was inserted by section 3 of the Criminal Law Amendment Act 135 of 1991. This amendment came into operation on 30 July 1993. Subsection (1) was later substituted by section 68 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by the insertion of the words “biological or mental” before “age of eighteen years” making it clear that not only chronological age is contemplated, as was held in *S v Dayimani* 2006 (2) SACR 594 (EC) at para [9].
(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

(2)(a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.

(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place -

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

(4)(a) The Minister may by notice in the Gazette\textsuperscript{10} determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

\textsuperscript{10} The Minister of Justice in Government Notice R 137 Government Gazette 150 of 30 July 1990, as amended by Government Notice R 360 Government Gazette 1782 of 28 February 1997, as amended by Government Notice R 597 Government Gazette 2 2435 of 2 July 2001, made the following determination regarding the categories or classes of persons competent to be appointed as intermediaries:

(a) Medical practitioners who are registered as such in the Medical, Dental and Supplementary Health Services Professions Act, 1974 (Act 56 of 1974), and against whose names the speciality paediatrics is also registered.

(b) Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Services Professions Act, 1974, and against whose name the speciality psychiatry is also registered.

(c) Family counsellors who are appointed as such under section 3 of the Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987), and who are or were registered as
(b) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister, with the concurrence of the Minister of Finance, may determine.

(5)(a) No oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a), at the time when such oath, affirmation or admonition was administered or such evidence was presented.

(b) If in any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of such appointment, was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to -

(i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

social workers under sections 17 of the Social Services Professions Act, 1978 (Act 110 of 1978), or who are or were educators as contemplated in paragraph (f) hereunder, or who are or were registered as clinical, educational or counselling psychologists under the Medical, Dental and Supplementary Health Services Professions Act, 1974.

(d) Child care workers who have successfully completed a two-year course in child and youth care approved by the National Association of Child Care Workers and who have two years' experience in child care.

(e) (i) Social workers who are registered as such under section 17 of the Social Service Professions Act, 1978, and who have two years' experience in social work; and
(ii) persons who obtained a masters degree in social work and who have two years' experience in social work.

(f) (i) Persons who have four years' experience as educators who have not at any stage, as a result of misconduct, been dismissed from service as educators.
(ii) For the purposes of subparagraph (i) 'educators' means persons who teach, or train other persons, or who provide professional educational services, including provisional therapy and educational psychological services at a public independent, or private school as contemplated in the South African Schools Act, 1996 (Act 84 of 99), including former and retired educators.

(g) Psychologists who are registered as clinical educators or counselling psychologists under the Medical, Dental and Supplementary Health Services Professions Act, 1974.
(ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

(6)(a) Subsection (5) does not prevent the prosecution from presenting anew any evidence which was presented through an intermediary referred to in that subsection.

(b) The provisions of subsection (5) shall also be applicable in respect of all cases where an intermediary referred to in that subsection has been appointed, and in respect of which, at the time of the commencement of that subsection -

(i) the trial court; or

(ii) the court considering an appeal or review, has not delivered judgment.

(7) The court shall provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of child complainants below the age of 14 years, immediately upon refusal and such reasons shall be entered into the record of the proceedings.

(8) An intermediary referred to in subsection (1) shall be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary.

(9) If, at the commencement of or at any stage before the completion of the proceedings concerned, an intermediary appointed by the court -

(a) is for any reason absent;

(b) becomes unable to act as an intermediary in the opinion of the court; or

(c) dies,

the court may, in the interests of justice and after due consideration of the arguments put forward by the accused person and the prosecutor -

(i) postpone the proceedings in order to obtain the intermediary's presence;
(ii) summons the intermediary to appear before the court to advance reasons for being absent;

(iii) direct that the appointment of the intermediary be revoked and appoint another intermediary; or

(iv) direct that the appointment of the intermediary be revoked and that the proceedings continue in the absence of an intermediary.

(10) The court shall immediately give reasons for any direction or order referred to in subsection (9)(iv), which reasons shall be entered into the record of the proceedings.

3 ANALYSIS OF THE INTERMEDIARY SYSTEM

Although the introduction of section 170A has alleviated some of the stress experienced by child witnesses, it is nonetheless submitted that this section is still deficient in a number of respects. It is therefore necessary and important to conduct a proper analysis of the section to assess its full value and to provide possible solutions for shortcomings, thereby enhancing its application.

3.1 The appointment of an intermediary

Section 170A(1) of the Criminal Procedure Act provides that whenever criminal proceedings are pending before any court and it appears to the court that a witness under the biological or mental age of eighteen years would be exposed to undue mental stress or suffering by testifying at such proceedings, the court may appoint a competent person as an intermediary in order to enable such witness to give testimony through that intermediary.
3.1.1 When must an application be made and by whom?

Section 170A(1) can be invoked whenever criminal proceedings are pending,\textsuperscript{11} and applies to all criminal proceedings.\textsuperscript{12} The subsection comes into operation once the prosecutor has made an application for the appointment of an intermediary. A single application may be made on behalf of one or more minor complainants.\textsuperscript{13} If the prosecutor fails to make such an application, the presiding judicial officer must initiate an enquiry into the desirability of appointing an intermediary.\textsuperscript{14} It should be noted that the Constitutional Court per Ngcobo J in \textit{DPP v Minister of Justice and Constitutional Development}\textsuperscript{15} held that contrary to what was believed in \textit{S v Moekoena; S v Phaswane}\textsuperscript{16} the subsection does not require that a child should first be exposed to undue mental stress or suffering before the provision may be invoked, as the object of the subsection is to prevent the child from being exposed to undue mental stress or suffering as a result of testifying in court. What this subsection contemplates is that a child would be assessed prior to testifying in court in order to determine whether the services of an intermediary should be used. If such an assessment reveals that the services of an intermediary are needed, the state must arrange for an intermediary to be present in court when the accused goes on trial.\textsuperscript{17}

Properly construed, therefore, the court held in \textit{DPP v Minister of Justice and Constitutional Development}\textsuperscript{18} that section 170A(1), read with section 170A(3),

\textsuperscript{11} Refer to \textit{S v Klink} ECD case no RC 6/68/95, unreported. The court held that the proceedings in a summary charge commenced with the lodging of a charge sheet and that for the purposes of section 170A criminal proceedings were pending even before the accused had pleaded. An intermediary could therefore be appointed before the accused had pleaded.\textsuperscript{12} \textit{K v Regional Court Magistrate} 1996 (1) SACR 434 (E) at 440.\textsuperscript{13} \textit{S v Peyani} 2014 (2) SACR 127 (G).\textsuperscript{14} \textit{DPP v Minister of Justice and Constitutional Development} 2009 (2) SACR 130 (CC) at para [112]; See also \textit{Director of Public Prosecutions North Gauteng, Pretoria v Makhubela} (unreported, GP case no A 91/2014 (06/08/2014) at para [14], where the court held that "[i]t is of fundamental importance to note that the interests of justice serve that the court is likewise obligated to invoke the provisions of section 170A \textit{mero motu} if it appears to it at any stage of the trial that a child under the age of 18 years is or might be exposed to undue mental stress or suffering".\textsuperscript{15} 2009 (2) SACR 130 (CC) at para [112].\textsuperscript{16} 2008(2) SACR 216 (T) at para [79] (hereinafter \textit{S v Mokoena}).\textsuperscript{17} 2009 (2) SACR 130 (CC) at paras [110]-[111].\textsuperscript{18} Para [111].
contemplates that in every trial in which a child is to testify, the court will enquire into the desirability of appointing an intermediary. Ngcobo J explained that the nature of the enquiry that is required is not the same as in a civil trial, which attracts a burden of proof. It is an enquiry conducted on behalf of a person who is not a party to the proceedings but who possesses constitutional rights. Therefore, what is required of the judicial officer, according to Ngcobo J, is to consider whether, on the evidence presented to the judicial officer and viewed in the light of the objectives of the Constitution and section 170A(1), it is in the best interests of the child that an intermediary be appointed.\textsuperscript{19} In \textit{Director of Public Prosecutions North Gauteng, Pretoria v Makhubela}\textsuperscript{20} the High Court again emphasised the importance of such an enquiry and pointed out that the court was obliged to consider or hear an application for the child to testify through an intermediary even though such an application may delay the process by a further postponement.

3.1.2 \textit{Witness under the biological or mental age of eighteen years}

Section 170A may be invoked where the biological or mental age of the witness is below eighteen years. The age refers to the date on which the witness testifies and is not the age at the time of the commission of the crime.\textsuperscript{21} Before the amendment of subsection (1)\textsuperscript{22} the section only referred to “age”, which was taken to mean “biological age”. Subsection (1) now refers to “mental age” as well and therefore allows a witness above the age of eighteen years, but with a mental maturity that falls below that of a typical eighteen-year-old, to testify with the assistance of an intermediary. The term is not defined, which leaves the court with the task of making a finding on the level of mental maturity of the witness. Although this is not necessarily an easy task, given the purposes of the Criminal Law (Sexual Offences

\textsuperscript{19} Paras [114]-[115]. Refer to the Preamble to the Constitution for the objectives of the Constitution and to para 2.2 of ch 4 above for a discussion of the constitutional rights of child victims and child witnesses.

\textsuperscript{20} Unreported, GP case no A 91/2014 (06/08/2014) at para [15].

\textsuperscript{21} S v Dayimani\textsuperscript{\textregistered} 2006 (2) SACR 594 (EC) at para [10].

\textsuperscript{22} Subsection (1) was substituted by section 68 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by the insertion of the words “biological or mental” before “age of eighteen years”.
and Related Matters) Amendment Act, such an interpretation is likely to be made by the courts, with the assistance of an expert witness, and may involve a liberal interpretation of the meaning of the term “mental maturity” of the witness.\(^\text{23}\)

However, cognisance should be taken of the fact that the biological age or mental maturity of the witness has to be below eighteen years before an intermediary may be appointed. \(S \text{ v Hewitt}\)\(^\text{24}\) was an application for leave to appeal against the certification, on special review, that the proceedings in the magistrate’s court in a trial for rape were in accordance of justice. Pillay J had to consider whether allowing the complainant who was just over the biological age of eighteen years to testify with the aid of an intermediary resulted in an irregularity.\(^\text{25}\) The court held that no irregularity had occurred, but reasoned that “I interpret s170A (1) to mean that the age limit of 18 years to be a guideline. It is but one indication of the capability of a witness to testify, namely her biological level of maturity. Emotional and psychological maturity must also be factored into the discretion. By treating the section as a guideline assures its constitutional validity.”\(^\text{26}\)

Conversely, in a similar case (\(ZF \text{ v } S\))\(^\text{27}\) where the High Court was confronted with the question whether allowing a complainant twenty years of age to testify with the aid of an intermediary resulted in an irregularity, the High Court correctly disagreed with the finding of \(S \text{ v Hewitt}\).\(^\text{28}\) With reference to the principles of interpretation of documents as set out in \(Cool Ideas 1186 CC \text{ v Hubbard}\),\(^\text{29}\) the court held that the ordinary grammatical meaning of the section is that the section applies only to those

\(^{23}\) Van der Merwe et al Du Toit’s Commentary on the Criminal Procedure Act (loose-leaf, revised service ed 50, 2013) 22-110.

\(^{24}\) Unreported review case no DR 349/11, KwaZulu-Natal Local Division, Durban, as referred to in \(ZF \text{ v } S\) Unreported KZN case no AR 764/2014 (22/10/2015) at para [8].

\(^{25}\) Own emphasis. Note that the mental maturity of the witness was not an issue in this case.

\(^{26}\) Unreported review case no DR 349/11, KwaZulu-Natal Local Division, Durban, as referred to in \(ZF \text{ v } S\) Unreported KZN case no AR 764/2014 (22/10/2015) at para [8].

\(^{27}\) Unreported KZN case no AR 764/2014 (22/10/2015).

\(^{28}\) Paras [9]-[10].

\(^{29}\) 2014 (4) SA 474 (CC) at para [28]. In terms of the approach followed by the court in \(Cool Ideas 1186 CC \text{ v Hubbard}\) at para [28] “[a] fundamental tenet of statutory interpretation is that the words in the statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity”.
under the biological or mental age of eighteen years. The High Court also held that a finding that the legislature did not mean to limit the application of section 170A to those under the biological or mental age of eighteen would be contrary to the principles of the interpretation of documents. The High Court pointed out that by including the words “those under the mental age of eighteen years” in the section the legislature clearly intended to exclude all adults who have a mental age over eighteen years. Furthermore, such an interpretation does not lead to an absurdity and there are other forms of protection available to adults who do not qualify under section 170A to reduce possible trauma. An example is section 158(2) of the Criminal Procedure Act, which allows for protection to be given by means of CCTV or similar electronic media. In addition, the High Court stressed that the purpose of the section is “to ensure the paramountcy of the best interests of the child complainant in criminal proceedings in which the child testifies” and “that the constitutional validity of the section is not threatened by this approach”.

The High Court concluded that the use of an intermediary in the said case had resulted in an irregularity. Despite this the High Court held that the irregularity did not result in the evidence of the complainant being inadmissible as the evidence presented was still her evidence. The irregularity did not result in a failure of justice either, as the accused was still fairly tried and was afforded an opportunity to adduce and challenge evidence. The appeal against the convictions of the accused was therefore dismissed.

3.1.3 How is an intermediary appointed?

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30 Unreported KZN case no AR 764/2014 (22/10/2015) at para [10].
31 Unreported KZN case no AR 764/2014 (22/10/2015) at para [10].
32 Unreported KZN case no AR 764/2014 (22/10/2015) at paras [15]-[16] and [47].
No formalities for the appointment of an intermediary are set out in the Criminal Procedure Act or any other statute. Whitear-Nel\textsuperscript{33} emphasises that for the appointment to take place general principles of law dictate that the court is required to form, and to communicate, the intention to appoint the intermediary irrespective of whether an application was made by the prosecutor or initiated by the judicial officer. The validity of an appointment will depend on an assessment of whether the criteria for the appointment of an intermediary set out in section 170A(1) are met. The competency of the person recommended will be assessed by the court. With reference to \textit{S v Boo}\textsuperscript{34} Whitear-Nel points out that in order for such an assessment to be made the name of the intermediary and the intermediary's qualifications should appear on the record. If this information is not present on the record, further evidence will have to be led in order for the High Court to assess the validity of such an appointment.\textsuperscript{35}

An intermediary is appointed for each case irrespective of whether the intermediary regularly fulfils this duty in the same court and is well acquainted with the court officials. Furthermore, an intermediary is not appointed on a permanent basis as is the case with court interpreters, who are court officials.\textsuperscript{36}

\textit{3.1.4 The discretion of the court to appoint an intermediary}

Section 170A(1) uses the expression “the court may”. This implies that the appointment of an intermediary is not automatic but suggests a discretion on the part of the trial court as to whether or not to allow the appointment of an intermediary. This discretion is subject to the prerequisites stated in section 170A(1). A trial court may accordingly only appoint an intermediary when it is apparent that a witness

\textsuperscript{33} Whitear-Nel “Intermediaries appointed in terms of s 170A of the Criminal Procedure Act 51 of 1977: new developments?” 2006 SACJ 334 at 335.
\textsuperscript{34} 2005 (1) SACR 599 (B).
\textsuperscript{35} Para [7].
\textsuperscript{36} Para [24].
under the biological or mental age of eighteen years will be exposed to undue mental stress or suffering if such witness testified at the proceedings without the use of an intermediary. The discretionary nature of section 170A has been the subject of a considerable amount of criticism.\textsuperscript{37} According to Schwikkard, the result of this discretion is that children testifying through intermediaries are viewed as the exception rather than the norm.\textsuperscript{38} According to Matthias and Zaal\textsuperscript{39} the problem appears to be that section 170A(1) is capable of being interpreted to mean that, even if an exceptional degree of stress in a witness can be proven, the presiding officer can nevertheless refuse an application. They point out that some critics argue that this renders the grounds pointless as well as difficult to understand, while contributing further to the lack of uniformity in appointments.\textsuperscript{40} Schwikkard and Müller\textsuperscript{41} are of the opinion that section 170A would be more effective if subsection (1) were amended to require a court to use an intermediary in all cases where a child (complainant)\textsuperscript{42} was required to testify; the court should only be excused from doing so where it was clear that the child would not be traumatised or where it was impossible to do so.\textsuperscript{43} This viewpoint is endorsed.

In \textit{S v Mokoena}\textsuperscript{44} the High Court reviewed the constitutionality of a number of sections pertaining to the position of children involved in criminal trials, as complainants, victims or witnesses. One of the issues was whether section 170A(1) is unconstitutional in so far as it confers a discretion on the judicial officer as to whether to appoint an intermediary. The High Court per Bertelsmann J held that


\textsuperscript{38} Schwikkard 1996 \textit{Acta Juridica} 148.


\textsuperscript{40} Schwikkard & Zaal 2011 \textit{International Journal of Children’s Rights} 251 at 257.

\textsuperscript{41} Schwikkard 1996 \textit{Acta Juridica} 148 at 159; Müller 2001 \textit{Crime Research in South Africa} 1 at 3.

\textsuperscript{42} Note that whereas Schwikkard argues for the amendment in favour of child complainants Müller advocates for all children ie victims as well as witnesses. The latter viewpoint is endorsed.

\textsuperscript{43} Schwikkard 1996 \textit{Acta Juridica} 148 at 159; Müller 2001 \textit{Crime Research in South Africa} 1 at 3.

\textsuperscript{44} 2008 (2) SACR 216 (T). This included sections 170A(1) and (7), 153(3) and (5), 158(5) and 164 (1) of the Criminal Procedure Act.
section 170A(1) was unconstitutional on account of the provisions of section 28(2) of the Constitution. Section 28(2) states: “A child’s best interests are of paramount importance in every matter concerning the child.” Bertelsmann J stated that section 28(2) of the Constitution demands that the child should be exposed to as little stress and mental anguish as possible. It is therefore difficult, according to the learned judge, to fathom why the legislature should insist that the child witness should be exposed to undue mental stress or suffering before the services of an intermediary may be considered by a court. Bertelsmann J furthermore stated:

This threshold provision places a limitation upon the best interests of the child that is neither rational nor justifiable when weighed up against the legitimate concerns of the accused, the court and the public interest. The child is entitled as of right to a procedure that eliminates as much as possible of the anguish that accompanies the necessity of having to relive the horror of abuse, violation, rape, assault or deprivation the child experienced when he or she became a victim or witness. To demand an extraordinary measure of stress or anguish before the assistance of an intermediary can be called upon clearly discriminates against the child and is constitutionally untenable.

Section 170A(1) was subsequently declared unconstitutional by the High Court “in that it grants a discretion to the trial court to appoint or not to appoint an intermediary when a child witness is to be called in a criminal trial”. The Constitutional Court in DPP v Minister of Justice and Constitutional Development, however, refused to confirm the order of invalidity but instead per Ngcobo J held as follows:

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45 2008 (2) SACR 216 (T) at para [78].
46 Para [79].
47 Para [185].
48 2009 (2) SACR 130 (CC) at para [79]. The Constitutional Court was confronted with a number of questions. The central question presented was whether the provisions of sections 153(3)
The conferral of discretion on judicial officers cannot be unconstitutional simply because some judicial offices may exercise the discretion incorrectly. The question therefore is whether this subsection is unconstitutional merely because it confers discretion on judicial officers whether to appoint an intermediary.  

Ngcobo J stressed the import of judicial discretion in that it permits judicial officers to take into account the unique facts and circumstances of a particular case. This is important because section 170A(1) deals with a wide range of witnesses who are under the age of eighteen years, such as complainants in sexual offence cases; child witnesses to sexual offence cases; and child witnesses to other offences generally. This means that the nature of the evidence given by the witnesses will differ from case to case and the stress caused by giving that evidence will also vary. In addition, the age of the child and his or her independence, level of maturity and feelings and wishes will also differ from case to case. He added the following:

A child who is 17 years old who is outspoken and assertive may consider it an affront to his or her dignity to suggest that he or she should testify through an intermediary. Similarly, it would be absurd to expect a child of that age whose only testimony relates to identifying his or her stolen cellular phone to testify through an intermediary. Yet a child who is of the same age who is a complainant in a rape case, who is shy and was severely traumatised by the rape, may need the services of an intermediary. The exercise of judicial discretion enables the court to apply the provisions in a flexible manner, bearing in mind that the primary objective is to give effect to the provisions of s 170A(1) and s 28(2) of the Constitution.

Given these factors Ngcobo J emphasised that what is required is individualised justice, that is, justice which is appropriately tailored to the needs of the individual.

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49 2009 (2) SACR 130 (CC) at para [118].
50 Para [120].
51 Para [124].
52 Para [125].
case.\textsuperscript{53} This in the learned judge’s view conforms to the principle that the best interests of the child must be of paramount importance in matters concerning the child.\textsuperscript{54}

Ngcobo J cautioned, however, that the exercise of the discretion conferred by the subsection is constrained by the Constitution and the purposes for which it was conferred, namely to protect children from undue stress or suffering that may arise from testifying in court.\textsuperscript{55} He added that in his view the answer to the problems identified by the \textit{amici} and the Department of Public Prosecution does not lie in making the appointment of an intermediary compulsory in every sexual offence case in which a child complainant is involved. According to the learned judge it would not be in the best interests of the child who wishes to confront his or her abusers in court to impose an intermediary on that child. Nor does the answer lie in making the appointment compulsory unless the circumstances of the child dictate otherwise. Ngcobo stated that this might undermine the right of the child to be treated as an individual with individual needs, wishes and feelings.\textsuperscript{56}

Ngcobo J concluded that the discretion conferred on judicial officers in respect of whether or not to appoint an intermediary was not inconsistent with section 28(2) and was therefore not unconstitutional.\textsuperscript{57} He added that if section 170A(1) is properly interpreted and applied it will comply with the principle that the child’s best interests are of paramount importance in criminal proceedings concerning a sexual offence against a child. If, however, the objectives of section 28(2) are not being achieved through the interpretation and application of section 170A(1), the fault lies not with the provision itself, but with the manner in which it is interpreted and implemented.

\textsuperscript{53} Para [120].
\textsuperscript{54} Para [123].
\textsuperscript{55} Para [126].
\textsuperscript{56} Para [127].
\textsuperscript{57} Paras [129]-[132].
by prosecutors and judicial officers. This fault could be remedied, according to Ngcobo J, through judicial education and training.\^58

The Constitutional Court’s view that section 170A(1) is not unconstitutional simply because it confers a discretion to appoint an intermediary on the courts has been the subject of some criticism. Freedman\^59 points out that the Constitutional Court’s reasons for rejecting the High Court’s view that section 170A(1) is unconstitutional because it confers a discretion to appoint an intermediary are not entirely convincing, at least in so far as sexual abuse cases are concerned. He points out, and rightly so, that while it is true that some child complainants may want to confront their abusers, it is very unlikely that the majority of child complainants will want to. Given this fact he finds it difficult to understand why a right that may be claimed by a small minority of child complainants should outweigh the danger that conferring a discretion on the court to appoint an intermediary poses for the majority of child complainants. He stresses that in this respect it is important to bear in mind that it was the High Court that misinterpreted section 170A(1) and diluted the protection it confers on child complainants.\^60

Similarly, Matthias and Zaal\^61 are of the opinion that the High Court’s approach is preferred for a society in which (as was generally agreed in both cases, according to them) the problems of insufficiently motivated and sensitised prosecutors and magistrates are extensive. The High Court’s approach would have compelled prosecutors and magistrates to supply a cogent justification for the avoidance of intermediaries. Bertelsmann J states that the substantial reason qualification\^62 in fact creates the flexibility which the Constitutional Court holds to be so vital.\^63

58 Paras [130]-[131].
59 Freedman “Recent cases - Constitutional Law” 2010 SACJ 299 at 305.
60 Freedman 2010 SACJ 299 at 305.
62 What is required according to this principle is that the appointment of an intermediary should be subject to a standard norm which could be departed from only for a good reason found and reported.
Freedman is of the view that the High Court’s approach is flawed owing to its discretionary nature. With reference to Schwikkard\textsuperscript{64} he argues that the flawed approach adopted by the High Court towards section 170A(1) appears to have arisen out of a bias in favour of the accused’s right to confront and to cross-examine the child witness and it is not entirely clear whether this bias can be overcome through a process of judicial education, as the Constitutional Court suggested. In addition, the Constitutional Court gives no indication of who should take responsibility for developing and implementing such a program. Freedman points out, and rightly so, that the Constitutional Court’s suggestion has simply been left hanging in the air.\textsuperscript{65}

After considering the aforementioned arguments, the approach of the High Court is preferred in that it sets a standard norm for the appointment of intermediaries which can be departed from in the event that a child witness so wishes or cogent reasons can be found by the presiding judicial officer for not appointing an intermediary. This not only simplifies the process while allowing for flexibility but in addition ensures a more consistent interpretation and implementation of section 170A(1). Both the High Court and the Constitutional Court clearly accept as a point of departure the fact that testifying as a complainant in a criminal trial is stressful.\textsuperscript{66} It is therefore difficult to imagine how the interests of justice will not be best served by allowing for the appointment of an intermediary as a standard norm.

\subsection*{3.1.5 Undue mental stress or suffering}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{64} Schwikkard 1996 \textit{Acta Juridica} 148 at 162.
\item\textsuperscript{65} Freedman 2011 \textit{SACJ} 299 at 305.
\item\textsuperscript{66} S v Mokoena 2008 (2) SACR 216 (T) at para [77]; \textit{DPP v Minister of Justice and Constitutional Development} 2009 (2) SACR 130 (CC) at para [108].
\end{itemize}
\end{footnotesize}
In terms of section 170A(1) a court in exercising its aforementioned discretion has to decide whether a child will be exposed to “undue mental stress or suffering” in the event that such child testifies at the proceedings in the normal manner. This phrase is not defined in the Criminal Procedure Act, nor have any specific guidelines been laid down. Furthermore by their very nature the concepts included in the phrase are exceedingly vague, complex and difficult to give content to. Uncertainty also exists as to how acute mental stress or suffering must be before it can be classified as “undue”. The absence of a clear definition is problematic as it may lead to inconsistency in the meaning given to the phrase, with some courts interpreting the phrase in a narrow sense while others may not, thereby resulting in inconsistent application and consequential injustices.67

Matthias and Zaal point out that, in the light of this difficulty some magistrates have adopted the position that the only way to establish whether a witness would experience undue stress is to call an expert witness to give evidence on the point. Since calling expert witnesses to deal with the grounds of undue mental stress and suffering delays proceedings and increases costs, this practice tends to be viewed as a reason not to use intermediaries.68

It is precisely for these reasons that various commentators have advocated the amendment of subsection (1) to allow for all children to testify with the aid of an intermediary without the need to show “undue mental stress or suffering”, save where there are cogent reasons for not appointing an intermediary.69 Müller and Tait,70 for example, recommend that the appointment of an intermediary should be mandatory in all cases in which the witness is under the age of thirteen years but that if the child is thirteen years or older the court should retain its discretion to

67 Müller & Tait “Section 158 of the Criminal Procedure Act 51 of 1977: a potential weapon in the battle to protect child witnesses” 1999 SACJ 57 at 60.
69 Schwikkard 1996 Acta Juridica 150 at 159; Müller & Tait “Little witnesses: a suggestion for improving the lot of children in court” 1999 THRHR 241 at 247; S v Mokoena 2008 (2) SACR 216 (T) at para [185].
70 Müller & Tait 1999 THRHR 241 at 256-257.
appoint an intermediary if it appears to be in the interests of justice. This viewpoint was endorsed by the High Court in *S v Mokoena*\(^\text{71}\) where the court, with reference to the grounds of "undue mental stress and suffering", held as follows:

The child is entitled as of right to a procedure that eliminates as much as possible of the anguish that accompanies the necessity of having to relive the horror of abuse, violation, rape, assault or deprivation that the child experienced when he or she became a victim or witness. To demand an extraordinary measure of stress or anguish before the assistance of an intermediary can be called upon clearly discriminates against the child and is constitutionally untenable. This approach also infringes upon the child victim's right to equal treatment, to dignity and to a fair trial.

The High Court accordingly ordered that section 170A(1) should read as follows:\(^\text{72}\)

Subject to subsection (4), whenever criminal proceedings are pending before any court in which any witness under the biological or mental age of eighteen years is to testify, the court shall appoint a competent person as an intermediary for each witness under the biological age of eighteen years in order to enable such witness to give his or her evidence through that intermediary as contemplated in this section, unless there are cogent reasons not to appoint such intermediary, in which event the court shall place such reasons on record before the commencement of the proceedings; and the court may appoint a competent person for a witness under the mental age of eighteen years in order to give his or her evidence through that intermediary.

In *DPP v Minister of Justice and Constitutional Development*\(^\text{73}\) the Constitutional Court acknowledged the fact that the Criminal Procedure Act does not define the phrase "undue mental stress or suffering". The Constitutional Court, however, did

\(^{71}\) 2008 (2) SACR 216 (T) at paras [79]-[80].
\(^{72}\) Para [185].
\(^{73}\) Para [100].
not attempt to define the meaning of the phrase but held that it must be understood in the context of the objectives of section 170A(1), as informed by section 28(2) of the Constitution, and the atmosphere in which a child testifies in court. Ncgobo J pointed out that the objective is to protect children from the undue mental stress or suffering that may be caused by testifying in court. The Constitutional Court consequently refused to uphold the aforementioned order of the High Court but in fact held that the High Court had been incorrect in its understanding of the “undue stress or suffering” grounds for the appointment of an intermediary in terms of the subsection. The court found that the High Court had misread the ground as requiring proof that the child must already have experienced undue suffering before an intermediary could be appointed. This approach, the court stated, would be inconsistent with section 28(2) of the Constitution and the section itself. Rather, the objective of section 170A(1) is to prevent the child from being exposed to undue mental stress or suffering as a result of testifying in court. To overcome the problem of inconsistent applications, the Constitutional Court directed that all child complainants called to testify should be assessed prior to testifying in order to establish whether an intermediary was required. According to the court, the problem does not lie with the interpretation of section 170A(1) (or the definition of any of its concepts), but rather with its implementation.

Section 170A(1) therefore still stands as is on the statute books and the courts are still faced with the dilemma of determining the content of the phrase “undue mental stress or suffering”.

An analysis of the wording of the phrase indicates that the mental stress or suffering experienced by the child would have to exceed normal mental stress or suffering,

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74 Para [110].
75 Although the Constitutional Court did not indicate by whom such an assessment should be made, it is usually carried out by a social worker or psychologist. See for example S v Mokoena 2008 (2) SACR 216 (T); K v Regional Court Magistrate 1996 (1) SACR 434 (E).
76 2009 (2) SACR 130 (CC) at para [109].
as the term “undue” is used to qualify the phrase “mental stress or suffering”. In *S v Stefaans* the court held that “undue” is “something in excess of ordinary stresses”. According to the court, section 170A(1) can therefore only be implemented if the witness would suffer more stress than is ordinarily experienced. Nonetheless, research has indicated that even the ordinary stress suffered by children when testifying in an adversarial court can be regarded as undue stress.

To complicate the matter further, the word “undue” has several meanings. In standard dictionaries the word undue is defined as “excessive, unwarranted, unjust or improper” or “inappropriate or disproportionate”. Schwikkard argues in favour of the meaning “not in accordance with what is right and just” since this definition accommodates a consideration of the best interests of the child witness. She furthermore points out that such an interpretation is also in line with the Afrikaans text of section 170A(1), which refers to “onredelike geestespanning of lyding” (unreasonable) and not to “excessive” stress or suffering. In view of the aforementioned, Schwikkard argues that it is therefore difficult to agree with the findings in *S v Stefaans* that “undue” requires “something in excess of ordinary stresses”. This viewpoint is endorsed.

To define “undue” as “not in accordance with what is right and just” also seems to be a more reasonable interpretation of section 170A(1) if one compares it to its counterpart, namely section 158 of the Criminal Procedure Act. Section 158 provides for witnesses older than eighteen years (for example victims of violent crimes) to testify by means of closed circuit television (CCTV) or similar electronic

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78 1999 (1) SACR 182 (C) at 188.
83 Schwikkard & Van der Merwe *Principles of Evidence* 18 11 3.
84 See s 158(3) of the Act. Own emphasis added.
85 Bekink 2014 *CARSA* 39 at 41.
media without having to be present in court. For section 158 to find application, the court should be convinced that to testify as such, will:

(a) prevent unreasonable delay;

(b) save costs;

(c) be convenient;

(d) be in the interests of the security of the State or of public safety or in the interests of justice or the public; or

(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.\(^86\)


\(^{86}\) Own emphasis added.

**The distinction between the two tests has been criticised in that it would be more difficult for a child to make use of the procedure in terms of section 170A than it would be for an adult to make use of the provisions of section 158.**** The use of Scwikkard’s interpretation of “not in accordance with what is right and just” is therefore advocated as it would align the two tests more equitably.

The latter interpretation is furthermore favoured as it encompasses an *individual* assessment of what is reasonable or unreasonable in the particular case and corresponds to the Constitutional Court’s approach in *DPP v Minister of Justice and Constitutional Development*,\(^88\) where the court held that “in every trial in which a child is to testify, the court will enquire into the desirability [reasonableness] of appointing an intermediary” and that in doing so the judicial officer is to consider whether on the evidence presented “viewed in the light of the objectives of the Constitution and the subsection, it is in the best interests of the child that an intermediary be appointed”.\(^89\) The court thus intertwines the test of undue mental stress or suffering with that of the best interests of the child. This approach was also

\(^{87}\) Müller & Tait 1999 *SACJ* 57 at 61.

\(^{88}\) 2009 (2) SACR 130 (CC) at paras [114]-[115].

\(^{89}\) Paras [114]-[115].
followed in *Kerkhoff v Minister of Justice and Constitutional Development*,\(^90\) where Southwood J, after referring to *DPP v Minister of Constitutional Development*, added that “[i]t is clear that the enquiry has a narrow focus: to determine whether it is in the best interests of the child that an intermediary be appointed”.

Despite these guidelines, the proper implementation of the section remains a challenge for judicial officers due to the vagueness and indeterminacy of the concepts of undue mental stress and suffering. Fortunately judicial precedent sheds some light on the factors that may be taken into account by the courts when exercising their discretion as to whether or not to appoint an intermediary.

In *S v Stefaans*\(^91\) the Cape High Court regarded the following general principles as important:

- **Age** – the younger the witness (and more emotionally immature) the more likely that the stress experienced will be undue.

- **Familiarity** – where the witness is known to the accused and is nevertheless willing to testify the witness is less likely to be unduly stressed.\(^92\)

In *S v Mathubula*\(^93\) the court per Stafford J held that although the age of the complainant is important, it is only one of the factors that should be taken into account by the court. The learned judge pointed out that the court has to consider a

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\(^90\) 2011 (2) SACR 109 (GNP) at para [7].  
\(^91\) 1999 (1) SACR 182 (C) at 188.  
\(^92\) This assumption has, however, been criticised as it is contrary to available research findings. See Schwikkard 1999 SACJ 260-261. See also *S v Abrahams* 2002 (1) SACR 116 (SCA) at 125 where the court stated that a family victim may find it more difficult to testify because of conflicting feelings and loyalties.  
\(^93\) 1996 (2) SACR 231 (T) at 234.
number of factors which may include the child’s intelligence, age, gender and personality, as well as the nature of the evidence.

Apart from the two guiding principles set out by the court in *DPP v Minister of Justice and Constitutional Development* the court recognised that such an enquiry may include a wide range of factors such as the child’s personal situation, immediate needs, age, gender, disability, level of maturity, feelings and wishes, as well as a consideration of the nature of the offence and the nature of the evidence.

These factors may assist presiding officers in their evaluation of section 170A(1) applications and are consequently of significant value. Nonetheless, a statutory section which sets out guidelines as to which factors a court should take into account in all criminal cases affecting children, when determining the concept of “undue mental stress or suffering”, would go a long way towards promoting the interests of justice in such cases.

The aforementioned dilemma of determining the meaning of the phrase “undue mental stress and suffering” brings to mind the “best interests of the child standard”, as this standard was similarly criticised for a long time for being vague and indeterminate. For years the best interests of the child standard had to be applied by the courts without recourse to a list of factors. Only with the enactment of the

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94 2009 (2) SACR 130 (CC) at paras [115] and [126]. These guiding principles are the objectives of the Constitution and in particular the best interests of the child principle as set out in section 28(2) thereof; they are also the objectives of section 170A(1), namely to prevent the child from exposure to undue stress that may arise from giving evidence in court.

95 Bekink 2014 *CARSA* 39 at 42. This would also be in line with the position in other foreign systems such as Scotland, the United Kingdom and New Zealand. For more on the position in foreign systems, refer to Bekink 2014 *CARSA* at 42-45.


Children’s Act was a list of factors finally formalised. This development is believed to have significantly enhanced the position of children within the judiciary and would serve a similar purpose in terms of section 170A matters.

When evaluating section 170A applications, cognisance should be taken of some reforms that have been introduced by the legislature in the Criminal Law (Sexual Offences and Related Matters) Amendment Act ("the Amendment Act") as part of an effort to ameliorate the plight of child complainants in sexual cases. In this regard, special reference must be made to section 66(2)(a) of the Amendment Act, which provides as follows:

The National Director of Public Prosecutions must, in consultation with the Minister and after consultation with the National Commissioner of the South African Police Services and Correctional Services and the Director-General: Health and Social Development, issue and publish in the Gazette directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complaints of such offences, including the following:

(iii) the criteria to be used and circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977, in respect of witnesses and, in particular, child complainants below the age of 16 years;

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98 Act 38 of 2005.
99 See Children’s Act s 7(1). This section came into operation on 1 July 2007: GG 30030 of 29 June 2007. See also para 2.3.2 of ch 4 above.
100 Act 32 of 2007 (as amended by the Judicial Matters Second Amendment Act 43 of 2013).
In giving effect to the provisions of section 66(2)(a) of the Amendment Act the following directives with regard to the application of section 170A have been proposed and may soon be applicable:\footnote{Directives issued in terms of section 66(2)(a) and (c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007) 8 available at \url{https://www.npa.gov.za/sites/default/files/Library/Sexual%20Offences%20Directives%20tabled%20in%20Parliament%20September%202010%20final_0.pdf} (accessed 30/04/2016).}

1. The prosecutor must consider the application of this measure in all sexual offence matters involving complainants or witnesses under the biological or mental age of 18 years, and should as a rule bring such application where the complainants or witnesses are under the biological or mental age of 14 years.

2. If an application for a child complainant under the age of 14 years old is refused and the court fails to provide reasons as required in terms of the Act (s 170A(7) of the Criminal Procedure Act 51 of 1977), the prosecutor should remind the court to do so.

3. The \textit{circumstances} that should be considered when bringing an application in terms of s 170A include, but are not limited to -

\begin{itemize}
  \item[a)] Where the witness is unwilling or unable to testify in the presence of the accused due to fear of the accused;
  \item[b)] Where the nature of the offence involved violence;
  \item[c)] Where the complainant is acquainted [with] or related to the accused;
  \item[d)] Where the courtroom environment intimidates the witness;
  \item[e)] Fear of being intimidated as a witness by the accused and or member of the public;
  \item[f)] Where the witness may be part of a witness protection programme in terms of the Witness Protection Act, 1988;
  \item[g)] The impact of the offence is so severe on the witness that he/she is unable to testify in open court;
\end{itemize}
The intermediary system in South Africa

h) That the quality of the testimony of the witness would be compromised should he/she testify in the presence of the accused;

i) The mental age of the witness; and

j) The youthfulness of the witness.

It is submitted that the words in the proposed directives “but are not limited to” furthermore indicate that the list is not an inclusive one, but imply that other factors such as the feeling and wishes of the witness as well as the linguistic or cultural background of the witness may also be taken into consideration. The directives are welcomed as these guidelines may enhance the proper evaluation of the concept “undue mental stress and suffering” and may lead to more consistent and objective judgment.102

The wording of section 66(2)(a) of the Amendment Act, “with the institution and conducting of prosecution in sexual offence cases in order to achieve the objects of this Act” suggests, however, that the criteria set out in the directives should only be considered when bringing an application in terms of section 170A in sexual offence cases and as such will not find application in other instances. This is regrettable as children may be equally traumatised when experiencing or witnessing other violent crimes (such as child abuse, assault or the witnessing of the assault or murder of a family member) that are not necessarily of a sexual character. One could possibly argue that the best interests of the child principle set out in section 28(2) of the Constitution may demand that judicial cognisance should be taken of the aforementioned directives, but here again the absence of clear guidelines could result in further uncertainty. Although the directives are welcomed as a positive first step in the right direction, serious consideration should be given by the legislature to extending the application thereof to other non-sexual cases.103

102 Bekink 2014 CARSA 39 at 45.
103 Bekink 2014 CARSA 39 at 46.
3.1.6 Reasons for refusal of the court to appoint an intermediary

Section 170A(7) of the Act provides that a court must furnish reasons immediately upon refusal for refusing to appoint an intermediary where a child complainant is under the age of fourteen years. The High Court in *S v Mokoena* viewed the section as irrational and discriminatory and consequently unconstitutional in that it differentiates between children below the age of fourteen years and children above that age. Bertelsmann J pointed out as follows:

> It is a well-known fact that children develop mentally and physically at different rates of progress and that their cognitive abilities differ widely from individual to individual. Some 14-year-old victims may be much better equipped emotionally or mentally to deal with the horror of a sexual assault than some 17-year-old children in a comparable position.

> It is difficult to understand why the legislature should have decided to discriminate between children under the age of 14 and those above that age. There is no apparent and rational basis for suggesting that the hurt, trauma and stress experienced by a 13-year-old who has to face an alleged attacker or rapist are in any way less than that suffered by the 17-year-old.

In addition the High Court found the section objectionable in that it does not cater for children who may not be victims (complainants), but have observed criminal conduct that has led to their being called as witnesses. Provisions of the Criminal Procedure Act, which deals with a similar issue in that the court must provide reasons for refusing an application by the prosecutor for testimony to be given by means of closed circuit television or similar electronic media. — Refer also to s 158(5) of the Criminal Procedure Act.
Procedure Act that shield child victims must, according to the court, therefore be interpreted as though they relate to child witnesses as well.\textsuperscript{108}

In its evaluation of the constitutionality of the subsection the Constitutional Court in \textit{DPP v Minister of Justice and Constitutional Development}\textsuperscript{109} stated that to construe the subsection (as well as section 158(5)) as not requiring a court to furnish reasons for refusing the application in the case of children over the age of fourteen years, as the High Court did, renders this subsection inconsistent with the Constitution. Such a construction, the Constitutional Court held, ignores the principle of constitutional interpretation which requires courts, where possible, to construe the statute in a manner that promotes the Constitution and in particular the principles of accountability, responsiveness and openness. A construction that will bring the subsection within constitutional bounds must therefore be preferred to any other construction that would render the subsection unconstitutional.\textsuperscript{110}

As to whether this was possible in the current situation, the Constitutional Court held that the subsection was capable of being read in a manner that is consistent with the Constitution.\textsuperscript{111} Ngcobo J explained that section 170A(7) must be construed as requiring a court to give reasons whenever it refuses to allow the appointment of an intermediary in respect of children below the age of eighteen years. The mere fact that the subsection requires a court to give reasons in the case of a child complainant under the age of fourteen years does not exclude the need for reasons in respect of a child complainant over the age of fourteen years. The distinction drawn by the subsection does not lie between an obligation to give reasons and no obligation to give reasons but rather between an obligation to give reasons immediately upon refusal, where the child complainant is below fourteen years of age and an obligation to give reasons only at a later stage or at the end of the matter where the child complainant is fourteen years of age or older.\textsuperscript{112} While conceding

\begin{flushleft}
\textsuperscript{108} Para [83].  \\
\textsuperscript{109} 2009 (2) SACR 130 (CC).  \\
\textsuperscript{110} Paras [156]-[158].  \\
\textsuperscript{111} Para [159].  \\
\textsuperscript{112} Para [160].
\end{flushleft}
that the selection of the age of fourteen years may possibly be perceived as arbitrary, the issue according to Ncgobo J is one of emphasis rather than one of exclusion. What this subsection emphasises is that the younger the child, the greater the need for protection. This distinction, according to the learned judge, is neither irrational nor unfair but merely serves to remind presiding officers of the greater vulnerability of young children. An intermediary can still be appointed for children who are fourteen years or older. For all of these reasons, the Constitutional Court concluded that section 170A(7) (as well as section 158(5)) in its current form was not unconstitutional.\textsuperscript{113}

Not surprisingly, the Constitutional Court’s viewpoint with regard to section 170A(7) has been the subject of criticism. Van der Merwe et al\textsuperscript{114} draw attention to the fact that the Constitutional Court’s interpretation may appear to some to be too strenuous an attempt to save legislation by attributing to the legislature an oversubtle design forged out of constitutional propriety. They correctly state that “one would be surprised to learn that the legislature was moved by such motives or even had in mind what was attributed to it in an attempt to keep its handiwork intact”.\textsuperscript{115} Matthias and Zaal\textsuperscript{116} find the Constitutional Court’s reasoning rather blurred. They point out that the court based its argument for retention on references to a distinction simply between “children” above and below the age of fourteen years, whereas section 170A(7), by referring to “complainant”, in fact denies the right of a category of children below the age of fourteen to immediate reasons for refusal of an intermediary. This, they highlight, considerably weakens the Constitutional Court’s rationale that the subsection passes constitutional muster because it encourages magistrates to view younger children as more vulnerable. Allowing some children the right to reasons immediately and others only later on in proceedings when they are very unlikely to be present is, according to the authors, discriminatory and in contravention of international standards such as the 2005 UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime. On

\textsuperscript{113} Paras [161]-[162].
\textsuperscript{114} Van der Merwe et al \textit{Du Toit’s Commentary on the Criminal Procedure Act} 22-109.
\textsuperscript{115} Van der Merwe et al \textit{Du Toit’s Commentary on the Criminal Procedure Act} 22-109.
\textsuperscript{116} Matthias & Zaal 2011 \textit{International Journal of Children’s Rights} 251 at 266.
the other hand, providing reasons immediately when the child is available to hear them would be in accordance with paragraphs 19(b) and 30(b) of the said Guidelines. They accordingly correctly emphasise that section 170A(7) falls short of international standards and Bertelsmann J was quite correct in his finding that it is highly discriminatory.\textsuperscript{117}

It is also puzzling that the Constitutional Court, in its judgment on the constitutionality of the discretion given to judicial officers by section 170A(1) on whether or not to appoint an intermediary, values individual justice as essential to the proper administration of justice,\textsuperscript{118} while following a non-individualised approach and finding no fault in making an arbitrary distinction between children below the age of fourteen and those above the age of fourteen. It is submitted that an individualised approach appropriately tailored to the needs of the individual case would surely take cognisance of the known fact that children develop mentally and physically at different rates and that their cognitive abilities differ widely from individual to individual, as so clearly pointed out by the High Court.\textsuperscript{119}

Prinsloo,\textsuperscript{120} with reference to \textit{Centre for Child Law v Minister of Justice and Others,}\textsuperscript{121} emphasises that “[a] child’s interests are not capable of legislative determination by group” but that the children’s rights provision applies to each child in his or her individual circumstances. The aforementioned distinction between children older or younger than fourteen years of age is, according to the author, therefore contradictory to a just and child-centred or individualised approach. He points out that acknowledgement of children’s heightened vulnerability, relative lack of maturity and reduced capacity is fundamental to our notion of how a fair legal system ought to operate. In addition, he stresses that the children’s rights clause

\textsuperscript{117}Matthias & Zaal 2011 \textit{International Journal of Children’s Rights} 251 at 266.
\textsuperscript{118}2009 (2) SACR 130 (CC) at para [120].
\textsuperscript{119}2008 (2) SACR 216 (T) at para [87].
\textsuperscript{120}Prinsloo “The constitutional right to protection of child victims and witnesses in the South African criminal justice system: \textit{Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and others}” 2010 CARSA 1 at 9.
\textsuperscript{121}2009 (2) SACR 477 (CC) at 478H.
applies to all children under the age of eighteen years. These rights do not apply indifferently to children by category, such as children below the age of fourteen, but equally to all children. Manipulation of the formal understanding of the age determination of a child, in other words a person younger than eighteen years, coinciding with diminished rights and protection, is thus unacceptable.\textsuperscript{122}

In addition it should be noted that both the Constitution and international child rights documents such as the CRC define a child as a person under the \textit{age of eighteen years}.\textsuperscript{123} There are no “subclasses of children” in these documents. The viewpoint of the High Court in \textit{S v Mokoena}\textsuperscript{124} is hence endorsed. It is therefore submitted that section 170A(7) should either be declared unconstitutional as recommended by the High Court\textsuperscript{125} or amended by the legislature to read as follows:

\begin{quote}
The court shall provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of each witness under the biological or mental age of 18 years immediately upon refusal and such reasons shall be entered into the record of the proceedings.
\end{quote}

\textbf{3.1.7 Effect of the defence’s objection to the appointment of an intermediary}

In \textit{S v Stefaans}\textsuperscript{126} the court in setting out certain guidelines for the appointment of an intermediary held that an application to invoke the section may be more readily granted where there is no objection to the appointment of an intermediary by the defence. The court further held that an unrepresented accused should be told of his right to oppose the application and if any doubt exists as to the accused’s

\begin{footnotes}
\item \textsuperscript{122} Prinsloo 2010 \textit{CARSA} 1 at 9
\item \textsuperscript{123} S 28(3) of the Constitution and art 1 of the CRC.
\item \textsuperscript{124} 2008 (2) \textit{SACR} 216 (T) at para [185].
\item \textsuperscript{125} Para [185].
\item \textsuperscript{126} 1999 (1) \textit{SACR} 182 (C).
\end{footnotes}
understanding of the matter the application should be treated as if it were opposed.\(^\text{127}\)

In *S v Booï*\(^\text{128}\) however, the court disagreed with *S v Stefaans* on this point. The court correctly held that the attitude of the accused’s counsel is not *decisive*, but that the court is under a duty to establish for itself whether the requirements for the application of section 170A have been met.\(^\text{129}\) This is the case even if the accused is legally represented and there is no opposition to the application.\(^\text{130}\) The court furthermore pointed out that the fact that an application was not opposed, for instance, would not prevent counsel from making the point on appeal that the statutory requirements for appointing an intermediary had not been met if that was indeed the case.\(^\text{131}\)

In *Kerkhoff v Minister of Justice and Constitutional Development*\(^\text{132}\) Southwood J points out that although an accused must have a right to be heard on the issue of the application for the appointment of an intermediary, no provision is made in the section for the accused to oppose the appointment of an intermediary. The learned judge emphasised that it is clear that the enquiry has a narrow focus: to determine whether it is in the best interests of the child that an intermediary be appointed. With reference to *DPP v Minister of Justice and Constitutional Development*\(^\text{133}\) Southwood J reiterated that the fairness of a trial stands to be enhanced by these procedures and should not be seen as a limitation on the rights to a fair trial, but as conducive to a trial that is fair to all.\(^\text{134}\)

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127 At 183.
128 2005 (1) SACR 599 (B).
129 Paras [14]-[15].
130 Para [16].
131 Para [17].
132 2011 (2) SACR 109 (GP) at para [7].
133 2009 (2) SACR 130 (CC).
134 2011 (2) SACR 109 (GNP) at para [6].
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The conclusions reached in both *S v Booi*\(^\text{135}\) and *Kerkhoff v Minister of Justice and Constitutional Development*\(^\text{136}\) are endorsed. It is accordingly submitted that although an accused may convey an “objection” to the appointment of an intermediary this is only one aspect that will be considered by the courts in their determination of whether an intermediary should be appointed. When the courts reach their final conclusion on the appointment of an intermediary the question remains whether the requirements of section 170A have been met.

### 3.2 Appointment of a competent person as intermediary

Once it has been established that the child witness would be exposed to undue mental stress or suffering if he or she testifies at such proceedings the court may, subject to subsection (4), appoint a *competent* person as an intermediary in order to enable the witness to give his or her evidence through that intermediary. The Criminal Procedure Act does not define the term “competent” other than to provide in section 170A(4)(a) that the Minister may by notice in the *Government Gazette* determine the persons or the category or class of persons who are competent to be appointed as intermediaries. The list of eligible people was set out in the *Government Gazette*,\(^\text{137}\) and has subsequently been amended on a number of occasions to extend eligibility.\(^\text{138}\) Seven categories of competent intermediaries have been identified; these include medical practitioners specialising in paediatrics or psychiatry, family counsellors, child care workers who have successfully completed a two-year course in child and youth care work and who have four years’ work experience in child care, social workers with at least two years’ work

\(^{135}\) 2005 (1) SACR 599 (B).
\(^{136}\) 2011 (2) SACR 109 (GP) at para [7].
\(^{137}\) GN R 1374 in GG 15024, 30/07/1993.
\(^{138}\) Refer to fn 10 above. The National Intermediary Committee has drafted an amendment to Government Notice: Determination of Persons or Category or Class of Persons who are Appointed as Intermediaries in terms of Section 170A (4) of the Criminal Procedure Act, 1977 to ensure an enlarged but competent category of persons who could provide these services. This Draft Amendment is currently being taken through the inter-sectoral adoption process, and will be submitted to the Minister for approval as soon as all the comments and inputs from the relevant stakeholders (including NGOs) have been received. Refer to the Department of Justice and Constitutional Development: *Report on the Implementation of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007: 01 April 2013 to 31 March 2014* at para 3.8 available at [http://www.justice.gov.za/vg/sxo/2013-2014-sxo-ProgressReport](http://www.justice.gov.za/vg/sxo/2013-2014-sxo-ProgressReport) (accessed 25/04/2015).
experience, school teachers with at least four years’ work experience and who have not at any stage for any reason whatever been suspended or dismissed from service in teaching, as well as clinical, educational or counselling psychologists. In practice, intermediaries are, however, largely appointed from two of these categories, namely social workers and psychologists.¹³⁹

Neither the Criminal Procedure Act nor the Gazette prescribes any additional qualifications for a person to be appointed as an intermediary other than those attached to the specific category as set out in the Gazette.¹⁴⁰ Furthermore, an intermediary is not required to undergo any special training before being appointed as an intermediary.¹⁴¹ A potential candidate will therefore be deemed competent in terms of section 170A(4)(a) if the person falls into one of the prescribed categories. It is, however, widely accepted that because of the functions he or she will have to perform an intermediary is generally expected to possess the following attributes or knowledge.¹⁴²

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¹³⁹ See for example S v Stefaans 1999 (1) SACR 182 (C); K v Regional Court Magistrate 1996 (1) SACR 434 (E); S v Mathebela 1996 (2) SACR 231 (T); S v Mokoena 2008 (2) SACR 216 (T); S v Peyani 2014 (2) SACR 127 (GP). See also Schwikkard et al Principles of Evidence 18 11.

¹⁴⁰ For example, if a child care worker is appointed as an intermediary such a child care worker must in terms of the GG have successfully completed a two-year course in child and youth care approved by the National Association of Child Care Workers and must have two years’ experience in child care. Refer to fn 10 above for a discussion of the persons or different category or class of persons who are competent to be appointed as intermediaries.


¹⁴² Jonker & Swanzen “Intermediary services for child witnesses testifying in South African criminal courts” 2007 SUR International Journal of Human Rights 91 at 95; Müller & Tait 1999 THRHR 241 at 253; Müller & Marowa-Wilkerson “An innovative approach to the use of intermediaries: lessons from Zimbabwe” 2011 CARSA 13 at 17; refer also to the proposed job description for court intermediaries attached to the thesis as Annexure A, graciously provided by Ms Kamogelo Lebuke-Wilderson, Director: Victim Support and Specialised Services.
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- an understanding of the developmental stages through which children pass in order to deal appropriately with a child of a particular age;

- knowledge of the critical framework of a child’s ability to understand language in order to communicate with a child of a particular age in a manner that the child will understand;

- knowledge of children’s communication patterns and styles;

- proficiency in local languages and language skills;

- an understanding of social and cultural diversities;

- a proven ability to relate to children and an ability to develop rapport in a short time;

- sound interpretation skills;

- an understanding of the psychological effects of testifying and incidental stress which the child is likely to experience, as well as the effects of abuse where the child witness is a victim of abuse;

- knowledge of trauma;

- knowledge of the legal framework, especially court proceedings, including an understanding of the features of a legal (forensic) interview as opposed to a therapeutic interview;

- knowledge of legal terms and terminology;

- no previous convictions of a sexual offence involving children or convictions of child abuse;

- the intermediary must not be the subject of a domestic violence protection order;

- the intermediary must not have been the subject of disciplinary action during the course of such a person’s career.

In essence, an intermediary should be skilled at communicating with children and should also have some insight into the law. It is therefore surprising that the list of
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competent persons does not include the profession of speech and language therapists. Communication is part of the core skills of a speech or language therapy professional and a speech or language therapist would be particularly suitable as an intermediary.\textsuperscript{143} The Department of Justice and Constitutional Development indicates\textsuperscript{144} that it has recently drafted an amendment to the Government Notice dealing with the determination of persons or categories or classes of persons who may be appointed as intermediaries in terms of section 170A(4) of the Criminal Procedure Act in order to ensure enlarged but competent categories of persons who could provide these services. It is hoped that this draft will include speech and language therapists in its list of persons who could provide these services.

Müller and Tait\textsuperscript{145} point out that the persons who have currently been designated by the Minister as being capable of acting as intermediaries seem to have been chosen on the basis that they are people who regularly come into contact with children. They emphasise, however, that paediatricians, family counsellors, teachers and even some psychiatrists and psychologists are not trained to communicate with children unless they specialise in this field. A paediatrician, for example, is a medical doctor and is not qualified to interview children, and some social workers have no experience of working with children.\textsuperscript{146} An evaluation of the persons listed in the categories of persons eligible to perform intermediary functions also reveals a lack of familiarity with legal practices. This may consequently result in intermediary services being provided without the proper knowledge or skills. There is therefore a need to professionalise intermediaries by requiring them to possess a single accredited qualification that will equip them with the necessary skills to perform their functions.

\textsuperscript{143} Countries such as England and Wales make extensive use of speech and language therapists as intermediaries. See Davies et al \textit{Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models} (2011) 1 at 12.


\textsuperscript{145} 1999 \textit{THRHR} 241 at 254.

\textsuperscript{146} Müller and Tait 1999 \textit{THRHR} 241 at 254.
In realising this shortcoming or need the National Intermediary Committee (the Intermediary Committee) in the Department of Justice and Constitutional Development (the department) has been mandated by the department to establish a permanent structure for intermediaries within the department with a view to addressing all challenges relating to the execution of the functions of intermediaries. In this regard the Intermediary Committee has finalised an investigation into the viability of establishing permanent posts for intermediaries within the departmental structure and addressing all challenges relating to the execution of the functions of intermediaries. The findings of this investigation resulted in the development of a job description for intermediaries. In this regard the following areas of job knowledge, skills and personal attributes have been identified by the department as relevant:

- Knowledge of legislation and regulations pertaining to the public service and administration, specifically the following:
  - Public Service Act and Regulations
  - Basic Conditions of Employment Act
  - Criminal Procedure Act, sections 170A, 158 and 153
  - Intermediary training manual
  - Intermediary Policies, Procedures and Norms and Standards
  - Children’s Act

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148 Refer to the proposed job description for court intermediaries attached to the thesis as Annexure A as well as the proposed draft job description for regional intermediaries attached to the thesis as Annexure B, graciously provided by Ms Kamogelo Lebuke-Wilderson, Director: Victim Support and Specialised Services.

149 Refer to the proposed job description for court intermediaries attached to the thesis as Annexure A as well as the proposed draft job description for regional intermediaries attached to the thesis as Annexure B, graciously provided by Ms Kamogelo Lebuke-Wilderson, Director: Victim Support and Specialised Services.
- Sexual Offences Act
  - Knowledge of trauma and developmental stages of witnesses;
  - Keeping abreast of new work-related developments;
  - Knowledge and understanding of human rights;
  - Knowledge of children’s and mentally disabled communication patterns and styles;
  - Knowledge of legal terms and terminology;
  - Knowledge of relevant prescripts, policies and practices;
  - Ability to apply technical/professional knowledge and skills;
  - Ability to communicate on a child’s level;
  - Ability to engage with all vulnerable witnesses;
  - Ability to co-operate well with supervisors, colleagues and other managers;
  - Ability to demonstrate a sound and healthy attitude when interacting with others;
  - Ability to provide containment skills when required during the intermediary session;
  - Ability to execute functions as instructed and within agreed time frames, including punctuality;
  - Administrative skills;
  - Communication skills;
  - Customer focus and responsiveness;
  - Excellent working relations;
  - Problem solving and decision making skills;
  - Computer literacy.

The Intermediary Committee also recommended the progressive, permanent appointment of 185 court intermediaries, 21 area intermediaries and nine regional intermediaries. At the time of drafting this thesis the approval of this recommendation was pending at the Department of Public Service and Administration.\(^{150}\)

3.2.1 Implications of an incompetent intermediary

Section 170A(5)(a) provides that no oath or affirmation or admonition which has been administered through an intermediary shall be invalid\textsuperscript{151} and no evidence presented through an incompetent intermediary, appointed in good faith, will be inadmissible solely on the basis that the intermediary was incompetent to act as such. Instead, section 170A(5)(b) empowers the court to consider the effect of the incompetence of an intermediary on the validity of the oath, affirmation or admonition or the admissibility of that evidence given through that intermediary, as the case may be, with due regard to the three factors listed in section 170A(5)(b), namely:

(i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

(ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

As can be noted from the three factors, the aim of section 170A(5)(b) is to balance the rights of the accused against the rights of the complainant in the overall interests of justice. The section therefore provides a safeguard against the failure of justice owing to technical non-compliance with the rules relating to the appointment of an intermediary.\textsuperscript{152}

\textsuperscript{151} The implication of an invalid oath, affirmation or admonition is that the witness’s evidence would be inadmissible. Refer to sections 162, 163 and 164 of the Act.

\textsuperscript{152} Whitear-Nel 2006 SACJ 334 at 335.
In *S v Boo*\(^{153}\) the court pointed out that the said subsection only finds application where the intermediary has been appointed, but the appointment is invalid owing to the fact that the intermediary in question does not meet any of the requirements for competence or appointment set out by the Minister in the *Gazettes* referred to in section 170A(4)(a).\(^{154}\)

In *S v SN*\(^{155}\) the person used as an intermediary held a Bachelor of Social Science degree and was registered with the South African Council for Social Service Professions. She did not, however, have the two years’ work experience in social work required by paragraph (e)(i) of Government Notice R597 of 2 July 2001 nor did she have the qualification of a two-year course in Child and Youth Care approved by the National Association of Child Care Workers, as contemplated in paragraph (d) of the same Government Notice. The matter was accordingly referred to the High Court for special review, so that the court could determine and decide whether the use of the intermediary had or had not affected the conduct of the proceedings. The High Court held that the intermediary’s qualifications fell short of the said requirements as set out in the specific categories,\(^{156}\) but that in so far as the trial itself was concerned there had been no breakdown in communication, no irregularity or breach of procedure when the intermediary performed her duties. She had in fact successfully and completely breached the communication gap between the minor witnesses (including the complainant) and the officials in court.\(^{157}\)

With reference to section 170A(5)(a) the High Court made it clear that the lack of the intermediary’s qualifications did not per se invalidate the proceedings, but that a finding as to the validity of the oath administered or evidence admitted had to be made. The High Court concluded, however, that it was better for the court *a quo* to make a finding as to the admissibility of the evidence in the trial with due regard to the various factors involved as it was better placed than the reviewing court to do

\(^{153}\) 2005 (1) SACR 599 (B).
\(^{154}\) Para [28].
\(^{155}\) 2012 (2) SACR 317 (GNP).
\(^{156}\) Para [12].
\(^{157}\) Para [27].
so.\textsuperscript{158} The High Court held in addition that the enactment of section 170A(5) and (6) made it unnecessary in future to refer the issue of an intermediary who is unqualified in terms of section 170A of the Act for special review, as the trial court was empowered to deal with such situations whenever they arose.\textsuperscript{159}

\textbf{3.2.2 Implications of an appointed but unavailable intermediary}

Section 170A(9) provides that in instances where an intermediary has been appointed by the court, but becomes unavailable to complete his or her duties (due to being absent for any reason, unable to act as an intermediary in the opinion of the court or dies) before the completion of the proceedings concerned, the court may take certain steps to ensure the continuation of the proceedings. The court may, in the interests of justice and after due consideration of any arguments put forward by the accused person and the prosecutor, either postpone the proceedings in order to obtain the intermediary’s presence, appoint another intermediary or revoke the intermediary’s appointment and direct that the proceedings continue in the absence of an intermediary.

As can be noted from the listed alternatives, the purpose of section 170A(9) is to maintain a balance between the rights of the child witness and those of the accused in the overall interests of justice. The section thus ensures that justice will prevail despite the unavailability of an appointed intermediary.\textsuperscript{160}

It is important that a court should not hesitate to postpone proceedings to obtain the presence of an appointed but absent intermediary or to consider the appointment of an alternative intermediary. In \textit{Director of Public Prosecutions v Makhubela}\textsuperscript{161} the

\begin{footnotesize}
\begin{enumerate}
\item Para [28].
\item Para [30].
\item Whitear-Nel 2006 \textit{SACJ} 334 at 335.
\item Unreported, GP case no A 91/2014 (06/08/2014) at para [15].
\end{enumerate}
\end{footnotesize}
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High Court stated that it was obliged to consider or hear an application for a child witness to testify through an intermediary even though this might result in the further postponement of the proceedings.

If the court directs or orders that the appointment of the intermediary be revoked and that the proceedings continue in the absence of an intermediary as provided for in section 170A(9)(iv), the court must immediately give reasons for such a decision or order, which reasons must be entered into the record of the proceedings. It is submitted that in view of the extra requirements set out in section 170A(9)(vi) the continuance of the proceedings in the absence of an intermediary should be seen by the court as a last resort.

3.2.3 Concerns about the availability of competent intermediaries

It goes without saying that the proper implementation of any intermediary system is dependent on the availability of competent intermediaries. In the event of an intermediary not being available a child witness faces the dilemma of the case being postponed in order to obtain the services of an intermediary or having to testify without the aid of an intermediary. An audit conducted by the National Prosecuting Authority in February 2005 on the functioning of the Sexual Offences Courts revealed that 91.6% of cases in Gauteng, 4.7% of cases in KwaZulu Natal and 2% of cases in the Eastern Cape were postponed as a result of the non-availability of intermediaries.\textsuperscript{162} A follow-up audit conducted by the office of the National Prosecuting Authority in November 2008 revealed that the unavailability of intermediaries resulted in 594 postponements in cases involving the rape of children.\textsuperscript{163}

\textsuperscript{162} Department of Justice and Constitutional Development \textit{Draft Discussion Document on Intermediaries} (2008) 1 at 12.

\textsuperscript{163} Department of Justice and Constitutional Development \textit{Report of the Director-General} (October 2009) at para 3.
In *S v Mokoena*\(^{164}\) the High Court expressed its concern about the shortage of suitably qualified intermediaries and pointed out that this creates a serious obstacle to the realisation of the rights of child witnesses. In *DPP v Minister of Justice and Constitutional Development*\(^{165}\) the Constitutional Court reiterated this concern by stating that “the rights of child complainants in sexual offence cases are threatened by the non-availability of intermediaries and related child protection facilities” while the “subsections also contemplate that the state will commit the necessary resources in order to achieve the objects of the subsection consistently with s 28(2) of the Constitution and give effect to ss 170A(1) and 170A(3). The non-availability of these measures contemplated in the CPA is not only a breach of the relevant provisions of the CPA, but is indeed a breach of the Constitution.”\(^{166}\)

The Constitutional Court held, appropriately so, that these concerns required urgent attention. The Constitutional Court considered it appropriate to call for information as a first step in the court’s supervisory processes. The Director-General for the Department of Justice and Constitutional Development was therefore ordered to furnish the court with the following information:\(^{167}\)

(1) A list of regional courts indicating how many intermediaries each regional court requires to meet its needs and how many intermediaries each regional court has.

(2) If the regional courts do not have the number of intermediaries required to meet their needs, the steps which are being taken to ensure that each regional court has the number of intermediaries necessary to meet its needs.

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\(^{164}\) 2008 (2) SACR 216 (T) at paras [165]-[168].

\(^{165}\) 2009 (2) SACR 130 (CC) at paras [191]-[192].

\(^{166}\) Paras [202]-[203].

\(^{167}\) Para [209].
In his report\textsuperscript{168} the Director-General stated that despite the availability of a total of 155 intermediaries a shortage of 150 intermediaries still prevailed. In order to meet this need the Department of Justice and Constitutional Development (the department) intended to phase in the appointment of more intermediaries so that by 2011/2012 all of the regional courts in the nine regional divisions of the country would have at least one intermediary available to assist child witnesses.\textsuperscript{169}

However, the Director-General emphasised that the appointment of intermediaries had to be considered against the backdrop of the following factors, namely the dire shortage of social workers in the country as well as the fact that the available intermediaries are also required to serve the children’s courts. The department is of the view that social workers are ideally suited to undertake the tasks that are performed by intermediaries and has historically relied on the Department of Social Development to provide intermediaries. The Department of Social Development is, however, reluctant to fulfil this role, in view of the aforementioned shortage and their need to focus on their core functions. This exacerbated the situation and as a result the department was forced to make \textit{ad hoc} appointments and also to rely on the Office of the Family Advocate as well as on NGOs to provide intermediaries.\textsuperscript{170}

The Director-General further indicated that in order to obviate the need to rely on \textit{ad hoc} intermediaries the department has taken steps to ensure that all the existing intermediaries receive training. It has also consulted with the various sectors with a view to increasing the pool of persons from whom intermediaries may be appointed. Moreover, a data base of intermediaries is being distributed to the regional offices in order to have intermediaries available whenever such services are required.\textsuperscript{171}

\begin{flushleft}
\textsuperscript{168} Department of Justice and Constitutional Development \textit{Report of the Director-General} (July 2009) at paras 6 and 11. I would like to express my appreciation to the Department of Justice and Constitutional Development for providing me with a copy of the said report.
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\begin{flushleft}
\textsuperscript{169} Department of Justice and Constitutional Development \textit{Report of the Director-General} (October 2009) at para 10.
\end{flushleft}

\begin{flushleft}
\textsuperscript{170} Department of Justice and Constitutional Development \textit{Report of the Director-General} (July 2009) at paras 9 and 10.
\end{flushleft}

\begin{flushleft}
\textsuperscript{171} Department of Justice and Constitutional Development \textit{Report of the Director-General} (October 2009) at paras 11 and 15.
\end{flushleft}
It should be noted that the department has since, with the assistance of its Intermediary Committee, progressively appointed intermediaries at provincial and national levels. The progressive appointment of intermediaries at provincial and national levels at 31 March 2014 stood as follows:

<table>
<thead>
<tr>
<th>Region</th>
<th>2012/2013 Contract appointments</th>
<th>2013/2014 Ad hoc intermediaries</th>
<th>DSD social workers</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern Cape</td>
<td>15</td>
<td>19</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Free State</td>
<td>11</td>
<td>14</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>Gauteng</td>
<td>13</td>
<td>16</td>
<td>33</td>
<td>15</td>
</tr>
<tr>
<td>KZN</td>
<td>29</td>
<td>33</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Limpopo</td>
<td>16</td>
<td>19</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>12</td>
<td>15</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>Northern Cape</td>
<td>11</td>
<td>14</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>North West</td>
<td>23</td>
<td>26</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Western Cape</td>
<td>26</td>
<td>29</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>TOTALS</td>
<td>156</td>
<td>185</td>
<td>48</td>
<td>46</td>
</tr>
</tbody>
</table>

Note that the aforementioned report refers to three types or categories of appointments, namely contract appointments, *ad hoc* appointments and appointments of social workers in the employment of the Department of Social Development.
As indicated in the table above, Gauteng Province makes more use of *ad hoc* intermediaries than of those in contract employment. This is due to the fact that the Department of Social Development (DSD) and local NGOs complement the Gauteng regional courts as regards the services of intermediaries. Gauteng has the highest rate of sexual offences in the country and is therefore among the department’s priority focus areas. A situational analysis of the provision of intermediary services in the country conducted by the department during 2013/2014 revealed a need for the appointment of more intermediaries in Gauteng. The department planned to address this matter in 2014/2015 by progressively converting the *ad hoc* posts into permanent intermediary posts.\(^{173}\)

An evaluation of the aforementioned steps taken by the department reveals a noteworthy improvement in the progressive realisation of intermediary services. It is nonetheless imperative that the department should continue to evaluate situational needs in order to address any shortages that may still prevail.

### 3.3 Swearing in of an intermediary

An aspect related to the appointment and function of an intermediary is the question whether intermediaries need to be sworn in by the court in order to be properly

\(^{173}\) The Department of Justice and Constitutional Development: *Report on the Implementation of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007: 01 April 2013 to 31 March 2014* available at [http://www.justice.gov.za/vg/sxo/2013-2014-sxo-ProgressReport](http://www.justice.gov.za/vg/sxo/2013-2014-sxo-ProgressReport) at para 4.3.1. Note s 170A(4) of the Criminal Procedure Act. It is submitted that by referring to the remuneration of intermediaries that are not in the full-time employment of the State this section implies that an intermediary may either be appointed on an *ad hoc* basis or be in the full-time employment of the State. Also note that according to information graciously provided to the author of this thesis by Ms Kamogelo Lebuke-Wilkerson, Director: Victim Support and Specialised Services in an email dated 06/05/2016, intermediary posts were advertised between June and Dec 2015 and a total of 186 Court-Based Intermediaries and 9 Assistant Director Intermediaries (in a supervisory role) have been appointed.
appointed and, if not, whether non-compliance invalidates the child witness testimony.\textsuperscript{174}

A review of statutory law in this regard does not prove to be helpful in answering this question, as the Criminal Procedure Act itself does not contain any requirement or guidance as to whether an intermediary needs to be sworn in; neither the Uniform Rules of Court, the Magistrates’ Court Rules nor any other statute sets such requirements. No such rule could be found at common law.\textsuperscript{175}

The cases dealing with this aspect are furthermore not in agreement. In \textit{S v Motaung}\textsuperscript{176} and \textit{S v Booi}\textsuperscript{177} it was held that an intermediary performs the same function as that of an interpreter and, as such, the same rules of practice require that an oath or affirmation be administered to the intermediary in every matter of course, unless such intermediary is a full-time employee of the state and is generally sworn in. Both \textit{S v Motaung} and \textit{S v Booi} relied in turn on the case of \textit{S v Naidoo}\textsuperscript{178} in which it was held that testimony given in court through an unsworn interpreter is unsworn testimony and thus constitutes an irregularity.\textsuperscript{179}

In \textit{S v Booi}\textsuperscript{180} two intermediaries were used to facilitate communication between the court, counsel and the two minor rape victims. It appeared that the two intermediaries were appointed but the record of the proceedings of the court \textit{a quo} showed no indication thereof.\textsuperscript{181} On referral to the High Court, the court held that the intermediaries were not properly appointed in terms of section 170A and had not been sworn in.\textsuperscript{182} The High Court held that this failure to comply with the proper

\textsuperscript{174} See eg \textit{S v Naidoo} 1962 (2) SA 625 (A); \textit{K v Regional Court Magistrate} 1996 (1) SACR 434 (E); \textit{S v Booi} 2005 (1) SACR 599 (B); \textit{S v Motaung} 2007 (1) SACR 476 (SE); Whitear-Nel 2006 \textit{SACJ} 334; Bekink “Section 170A (1) of the Criminal Procedure Act of 1977: do intermediaries need to be sworn in or not? \textit{S v QN} 2012 (1) SACR 380 (KZP)” 2013 \textit{THRHR} 285.

\textsuperscript{175} Bekink 2013 \textit{THRHR} 285 at 286.

\textsuperscript{176} 2005 (1) SACR 476 (SE) at para [7].

\textsuperscript{177} 1962 (2) SA 625 (A).

\textsuperscript{178} Paras [16]-[17].

\textsuperscript{179} 2005 (1) SACR 599 (B).

\textsuperscript{180} Para [21].

\textsuperscript{181} Paras [21]-[23].
appointment and swearing in of the intermediaries was a serious irregularity which could not be condoned as it resulted in a situation where the accused was not given a fair trial. The conviction was subsequently set aside. The accused was to be tried de novo.\textsuperscript{183}

In \textit{S v Motaung},\textsuperscript{184} a case concerning the rape of a thirteen-year-old girl, an intermediary was also utilised to facilitate communication between the parties. The intermediary was not sworn in.\textsuperscript{185} The High Court, as in \textit{S v Booi}, held that the magistrate’s failure to swear in the intermediary was an irregularity. The court, however, applied a second leg to the “irregularity test”, namely whether this irregularity caused prejudice to the defendant resulting in a failure of justice. The court held that as the complainant had been sworn in and her words were audible to the court there was no evidence of any irregularity in the presentation of her evidence or its admissibility. The proceedings were therefore in accordance with justice despite the initial irregularity, and the conviction was confirmed.\textsuperscript{186}

In \textit{S v QN},\textsuperscript{187} a case concerning the rape of a five-year-old girl, an intermediary was similarly utilised to facilitate communication between the court, counsel and the victim.\textsuperscript{188} In the latter case the court per Gorven J took the view, however, that the decisions in both \textit{S v Booi} and \textit{S v Motaung} were based on an incorrect analogy between the role of an interpreter and that of an intermediary. He pointed out that the crucial role of an interpreter is to convey the evidence of the witness in a language intelligible to the court. The interpreter testifies about the content of the witness’s evidence and therefore has to be sworn in, in order for the witness’s testimony to be placed before the court.\textsuperscript{189} The spoken evidence of the witness is interpreted by the interpreter.\textsuperscript{190}
The court then went on to analyse the precise role of an intermediary as introduced by section 170A of the Criminal Procedure Act. In this regard the court emphasised that although evidence is given through an intermediary, the general practice is that the witness gives his or her own answers to the court. If these answers are given in a language not understood by the court they are then interpreted by an interpreter. The learned judge pointed out that in his view this does not mean that the intermediary is “to convey what is said by the witness as was stated in Motaung”, but that “the purpose of this section is made by mediating the questions put and not the answers given”.\footnote{191} The reason for this is that the witness will not be unduly upset if the answer is not conveyed through the intermediary, nor will the courts have difficulty in understanding its meaning.\footnote{192}

It was moreover held by the court that the analogy between an interpreter and an intermediary breaks down further when the case is conducted in a language common to all participants (such as English). There is then no question of interpretation and once again the intermediary is not conveying the child’s evidence to the court, as does an interpreter. The analogy can only be valid if the intermediary is also fulfilling the role of an interpreter. The most fundamental difference between the two functionaries therefore lies in the fact that “the intermediary is not involved in conveying to the court what emerges from the mouth of the witness” as an interpreter does.\footnote{193}

The court rightly held that, in the absence of a basis for assimilating the function of an intermediary to that of an interpreter, there is no foundation for a conclusion that the failure to swear in an intermediary amounts to an irregularity. The evidence so given is thus neither unsworn nor hearsay.\footnote{194} This, the court pointed out, is lent greater force by the fact that the legislature did not see fit to include such a

\footnote{191}{2012 (1) SACR 380 (KZP) at para [21].}
\footnote{192}{Para [21].}
\footnote{193}{Paras [22]-[23].}
\footnote{194}{Bekink 2013 \textit{THRHR} 285 at 290.}
requirement in the Criminal Procedure Act and “it seems clear from this that the legislature does not see the function of the two as comparable”.  

The role of an intermediary should therefore not be equated with that of an interpreter. The role of an interpreter is clearly to testify about what constitutes the evidence of the witness and to do so in a language intelligible to the court, whereas the role of an intermediary is to act as a conduit and to convey the general purport of the question to the child witness. The child witness gives his or her own answers to the court. The intermediary does not interpret the evidence to the court. A more persuasive argument in support of the practice of administering an oath or affirmation to an intermediary can perhaps be found in the view of Jones J in S v Motaung, namely that the use of an intermediary makes inroads into the fundamental rule that the accused is entitled to be confronted by the accuser in open court and that the administration of an oath is one way of reducing this impact. However, it should be remembered that it is the role of the adjudicating officer who presides at the trial and controls the proceedings to ensure that the intermediary carries out his or her functions properly and without prejudice to the accused. If this role is fulfilled by the presiding officer, one might argue that the administering of an oath or affirmation, although a worthy practice, is superfluous.

In addition, although the practice that has developed in some courts of swearing intermediaries in may be commendable, a failure to do so should not result in an irregularity and a commencement of a trial de novo. Children are already exposed to considerable emotional distress and suffering when they have to testify at a trial. To expect them to go through the ordeal twice, because an intermediary has not been sworn in, is unacceptable and is clearly not in their best interests.

195 2012 (1) SACR 380 (KZP) at para [25].
196 Bekink 2013 THRHR 285 at 291.
197 Bekink 2013 THRHR 285 at 291.
198 2007 (1) SACR 476 (SE) at para [7].
199 K v Regional Court Magistrate 1996 (1) SACR 434 (E).
200 Bekink 2013 THRHR 285 at 291.
201 Bekink 2013 THRHR 285 at 291.
It is furthermore important to note that the purpose of section 170A(5) is to safeguard the oath, affirmation or admonition administered to a child witness through an incompetent (but appointed) intermediary. The taking of the oath or affirmation is not a prerequisite for the proper *appointment* of an intermediary in terms of the Act. If this is indeed a requirement of law, section 170A(5) needs to be amended.

### 3.4 Functions of an intermediary

In terms of section 170A(2)(a) of the Criminal Procedure Act no examination, cross-examination or re-examination of any witness in respect of which the court has appointed an intermediary shall take place in any other manner than through an intermediary. This entails that the parties to the matter may at no stage question the witness directly. As an exception the court may question the witness without the intervention of an intermediary, for instance by putting the original question in a form it thinks fit.\(^{202}\) The court may not, however, cross-examine the witness as this could amount to the court’s descending into the arena.\(^{203}\)

Section 170A(2)(b) provides that the said intermediary may, unless the court directs otherwise, convey the *general purport* of any question to the child witness. The function of the intermediary is thus to convey the overall or broad content and meaning of the questions of the prosecution or the defence to the child in a manner which is understandable to the child so that the child is able to answer the questions properly. In so doing, the intermediary may ignore the *ipsissima verba* of the original question and may rephrase the question in terminology and imagery that the child is able to understand. This allows the intermediary, subject to the court’s final

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\(^{202}\) See s 170A(2)(a)(1) of the Criminal Procedure Act and Van der Merwe “Cross-examination of the (sexually abused) child witness in a constitutionalised adversarial trial system: is the South African intermediary the solution?” 1995 *Obiter* 194 at 197.

\(^{203}\) Van der Merwe 1995 *Obiter* 194 at 197.
control, to “block” any question put by the prosecutor or the defence in the sense that the intermediary may “relay” the question to the witness in a different form.\textsuperscript{204}

An intermediary may thus tone down questions which would otherwise have been aggressive and threatening if put directly to the child witness. The intermediary may also put the questions to the child witness in a language that is familiar to the child by using any slang, jargon or speech that is peculiar to the witness’s age or societal background. In carrying out this duty, the intermediary performs two very distinct functions, namely to protect the child witness against hostile cross-examination and to assist the child in understanding the questions posed to the child witness.\textsuperscript{205}

It is important that the intermediary, while fulfilling the aforementioned duties and rendering emotional support to the child during the trial, should still display the necessary impartiality and remain unbiased. The reason is that the intermediary neither represents the child nor acts on behalf of the prosecution against an accused. The intermediary should also assist the presiding officer who is not trained in interviewing children to understand and evaluate the child’s testimony.\textsuperscript{206} In this regard the intermediary also acts as a conduit.\textsuperscript{207}

In response to the argument that an intermediary’s right to convey the general purport of a question may result in an infringement of an accused’s right to cross-examine the witness, the court in \textit{K v The Regional Court Magistrate}\textsuperscript{208} held that the section, by providing for questions to be put to the witness in a form and manner which are appropriate to the witness’s mental and emotional development, is neither

\begin{flushright}
\textsuperscript{204} Van der Merwe 1995 \textit{Obiter} 194 at 197.  \\
\textsuperscript{205} Müller & Tait 1999 \textit{THRHR} 241 at 251.  \\
\textsuperscript{206} Wattney “Aspekte van getuienisaflegging deur kindergetuies deur bemiddeling van tussengangers” 1989 \textit{THRHR} 423 at 433.  \\
\textsuperscript{207} \textit{S v Peyani} 2014 (2) SACR 127 (GP) at para [3.4].  \\
\textsuperscript{208} 1996 (1) SACR 434 (E) at 445.
\end{flushright}
unconstitutional nor overshoots the mark. The court pointed out in addition that there are sound reasons for this practice, namely:

[T]he conveyance of the general purport of the question might enable a child witness to participate properly in the system. Questions should always be put in a form understandable to the witness so that he or she may answer them properly. Where the witness is a child, there is the possibility that he may not fully comprehend or appreciate the content of the question formulated by counsel. The danger of this happening is more real in the case of a very young child. By conveying “the general purport” of the question, the intermediary is not permitted to alter the question. He must convey the content and meaning of what was asked in a language and form understandable to the witness. From the articles and the evidence put before us it is quite apparent that it is in the interest of justice for questions to be posed to children in a way that is appropriate to their development. This furthers the truth seeking function of the trial court without depriving the accused of his right to cross-examine.

The court also emphasised, with reference to Du Toit et al., that as the legislature has sanctioned the use of intermediaries a certain latitude must be allowed in order to give effect to the subsection, while it must be remembered that the court still has the power to direct that the intermediary should convey the actual question and not merely its general purport. In the final analysis the presiding officer remains in control of the proceedings and has the task of seeing to it that an intermediary performs his or her duties properly and without prejudice to the accused.

Section 170A has, however, been criticised because the intermediary’s powers or functions are unnecessarily limited, in particular the function of assisting the child to

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209 At 445.
210 At 446.
211 Commentary on the Criminal Procedure Act 1995 at 21-33 (note that an updated edition of the Commentary on the Criminal Procedure Act is available).
212 1996 (1) SACR 434 (E) at 445.
understand the questions.\textsuperscript{213} The court may, as was pointed out above, insist that the intermediary repeat the questions exactly as they were phrased. In addition the intermediary does not have the right to comment on a question, to object to certain questions being asked, to suggest that questions be put in a particular sequence, or to object to the way in which questions are phrased. The intermediary also does not have the right to give an opinion as to whether a child understands a question or not, or to alert a court if and when a child witness is fatigued or stressed and requires a recess.\textsuperscript{214}

In \textit{DPP v Minister of Justice and Constitutional Development}\textsuperscript{215} the Constitutional Court emphasised the following:

\begin{quote}
[T]he manner in which the child is questioned is crucial to the enquiry. It is here where the role of an intermediary becomes vital. The intermediary will ensure that questions by the court to the child are conveyed in a manner that the child can comprehend and that the answers given by the child are conveyed in a manner that the court will understand. As pointed out earlier, questioning a child requires a special skill. Not many judicial offices have the skill …. This illustrates the importance of using intermediaries when young children are called upon to testify. They have particular skills in questioning and communicating with children.
\end{quote}

It is incomprehensible that although this crucial element, namely the questioning of child witnesses through intermediaries, is acknowledged by the Constitutional Court, the powers of intermediaries in performing this function are so limited. Available research on child development and language acquisition clearly illustrates

\textsuperscript{213} Müller & Tait 1999 \textit{THRHR} 241 at 251; Jonker & Swansen 2007 \textit{SUR International Journal of Human Rights} 91 at 104.
\textsuperscript{214} Müller & Tait 1999 \textit{THRHR} 241 at 251; see also \textit{S v Mokoena} 2008 (2) SACR 216 (T) at para [98] where the court held that it is clearly in the best interests of the child and of justice that a provision that the intermediary should have the power and duty to bring the circumstances to the court’s attention if and when a child witness was fatigued or stressed, did not understand a question or required a recess, be adopted as a practical measure to be included in the envisaged framework, in which the specific duties of intermediaries might be defined.
\textsuperscript{215} 2009 (2) SACR 130 (CC) at paras [167]-[168].
that the way questions are put to a child witness, such as leading questions, repetitive questions, disclosures, use of negatives, multi-faceted questions or specialised language, plays a significant role in dis-enabling children to give accurate evidence.\textsuperscript{216}

Müller,\textsuperscript{217} for example, points out that the legal language used in courts includes vocabulary and technical terms specific to the discipline of law, such as “I put it to you that …”, “I believe you told us …”, and “Isn’t it a fact that …”, which do not fall within a child’s normal language repertoire. Children who are relatively inexperienced language users find this legal language difficult to comprehend. The legal language furthermore makes use of syntactical structures which include complex linguistic features and are riddled with the use of negative expressions such as “But if as you say it was dark outside, and if as you say there was no light on the room, it would not have been possible for you to see what you said you have seen, would it?” These syntactical and grammatical structures of the language used conform to a set of rules to which children do not have access and cause major difficulties for children.\textsuperscript{218} Moreover, the language used by cross-examiners is sometimes very compact and a lot of information is squeezed into one question. Plotnikoff and Woolfson\textsuperscript{219} give an example of such a question asked of a five-year-old at a murder trial:

\begin{quote}
Do you recall talking to her on the Sunday after they found – discovered – something had happened to Doug and asking her, “Do you know Mark?” and then saying, “That is who did it”? Do you remember telling her that?
\end{quote}


\textsuperscript{217} Müller 2000 CARSA 13 at 21.

\textsuperscript{218} Müller 2000 CARSA 13 at 21.

In order for the child to process the abovementioned question the child has to be able to remember the whole question.\textsuperscript{220} Clearly this line of questioning would prove difficult for a five-year-old, if not for an adult.

In addition, research indicates that certain concepts pose difficulties for children, such as estimating time, duration, numbers, frequency, other people’s intentions, and distinguishing between prepositions such as \textit{before, after, above and below}.\textsuperscript{221} Louw,\textsuperscript{222} for example, points out that the fact that a young child can count from one to ten does not mean that the child understands the underlying concepts. The child’s understanding of the numerals may be mechanical in nature (such as the memorising of a poem).\textsuperscript{223} An eight-year-old child who has been abused numerous times may accordingly report that the abuse occurred on “fifty” occasions or even “two hundred” occasions. This may be due to the fact that numbers are not significant to children of this age and it would be wrong to consider this inaccuracy significant.\textsuperscript{224}

The effective questioning of child witnesses is a highly specialised task and requires an understanding by the interviewer of child development in three critical domains, namely linguistic, cognitive and emotional development, as well as an appreciation of the use of appropriate questions specific to a child’s level of development.\textsuperscript{225} Linguistic development refers to a child’s acquisition of language skills. It involves the acquisition of an understanding of the meaning of words (semantics), grammatical and sentence structure (syntax) and the rules of language used in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{220} Plotnikoff & Woolfson “Measuring up? Evaluating implementation of government commitments to young witnesses in criminal proceedings” 2009 available at www.Nspcc.org.uk/measuringup (accessed 05/06 2014).
\item \textsuperscript{221} Walker Handbook on Questioning Children: A Linguistic Perspective 2 ed (1999); Louw 2005 CARSA 19 at 19-22.
\item \textsuperscript{222} Louw 2005 CARSA 24.
\item \textsuperscript{223} Louw 2005 CARSA 24.
\item \textsuperscript{224} Schuman, Bala & Lee “Developmentally appropriate questions for child witnesses” 1999 Queens LJ 251 at 274.
\item \textsuperscript{225} Schuman, Bala & Lee 1999 Queens LJ 251-304.
\end{itemize}
\end{footnotesize}
different social contexts (pragmatics). Cognitive development refers to the acquisition of a child’s ability to perceive and store information, to form concepts and to reason about various ideas. This developmental stage plays a significant role in determining how well children will function as eyewitnesses in court, because the court often requires of children to make accurate observations, recollect past events, understand concepts such as time, size, numbers and frequency as well as handle abstractions and draw inferences. Emotional development refers to a child’s emotional maturity, including such issues as a child’s reactions to separation from parents and ability to deal with intimidation and frustration. A child’s emotional development accordingly also affects the child’s capacity to answer questions.226

Schuman, Bala and Lee227 point out that when dealing with child witnesses it is useful to remember that there are essentially four periods of child development: infancy – from birth to approximately age two; early childhood – from about age three to age six; middle childhood – from about age seven to age ten; and adolescence – from about age eleven to about age eighteen. Child witnesses should be questioned according to their developmental levels.228 For example, when questioning pre-schoolers it is important to appreciate that there are many words and grammatical rules that they do not understand. They are not familiar with even the simplest legal terms, frequently confuse the meaning of prepositions, have difficulty with pronouns and may interpret words literally and very narrowly.229 They have difficulty accurately comparing quantities, cannot tell time and do not understand the concept of time measurement. They also have difficulty with logical or abstract reasoning and can only focus on one idea at a time.230

226 Schuman, Bala & Lee 1999 Queens LJ 258.
227 Schuman, Bala & Lee 1999 Queens LJ 258. They emphasise, however, that these age groups are only approximate because of individual differences. Children develop at different rates and do not move from one stage to another at a specific age. Furthermore, aspects such as gender, different cultural backgrounds, language spoken at home, home environments and qualities of education may affect how fast and in what manner a child develops. According to the authors it is therefore important that each child be considered individually to determine exactly what type of questions are appropriate to the child witness.
228 Schumann, Bala & Lee 1999 Queens LJ 258.
229 Schumann, Bala & Lee 1999 Queens LJ 261-263.
230 Schumann, Bala & Lee 1999 Queens LJ 265-269.
In comparison children in the middle childhood category have a more sophisticated ability to use language and better reasoning skills than pre-schoolers. The language that children use during this period may even sound very much like that of adults. However, although their conversation may sound like that of an adult this should be regarded with caution, as children in this period of development may still have difficulty with negatives, the passive voice, more advanced verb tenses and complex sentences. During this stage children make substantial gains in cognitive development. They become aware of different perspectives and can recognise similarities and differences between groups of objects or events. However, they cannot apply logical processes to abstract ideas, cannot accurately estimate distances or sizes and also have trouble comparing periods of time.\textsuperscript{231}

As children continue to develop into adolescence their vocabulary continues to grow and they develop the ability to work out the meaning of a word from its context. However because of their lack of exposure to legal phrases these terms may still be misunderstood.\textsuperscript{232} In addition, adolescents still have difficulty with complex forms of negation that involve multiple negatives or phrases and will probably not fully understand the passive voice until the end of this stage. During adolescence children learn to think abstractly and may understand generalisation. This increases their ability to solve problems and allows them to think about hypothetical situations. This also allows them to speculate about the motives of other people.\textsuperscript{233} In late adolescence, children can accurately estimate times, distances and physical dimensions. Schulman, Bala and Lee point out, however, that it is important to consider adolescents’ emotional and social development as confusing or embarrassing questions may cause them to refuse to answer a question, may lead to an evasive or inaccurate answer or may even result in an emotional outburst.\textsuperscript{234}

\textsuperscript{231} Schumann, Bala & Lee 1999 \textit{Queens LJ} 270-275.
\textsuperscript{232} Schumann, Bala & Lee 1999 \textit{Queens LJ} 276.
\textsuperscript{233} Schumann, Bala & Lee 1999 \textit{Queens LJ} 277.
\textsuperscript{234} Schumann, Bala & Lee 1999 \textit{Queens LJ} 277.
Schuman, Bala and Lee emphasise that these differences clearly illustrate that if a child is expected to answer a question that he or she does not understand because the question falls outside one of these developmental levels, the answer will probably be inaccurate. Children are also reluctant to acknowledge that they do not understand a question or to ask for clarification. Children often do not even appreciate that they have not understood the question and as a result may give incorrect answers. Zajac points out that children will even attempt to answer questions that do not make sense, for example “Where do circles live?”

Müller illustrates some of the serious misunderstandings by child witnesses in the courtroom, as well as the direct effect on the outcome of the cases discussed by her. She argues that these misunderstandings occur as a result of a lack of understanding of child development, child language and children’s beliefs, perceptions and fears. She explains for example that children below the age of ten years tend to fuse separate events into a single event. This creates problems in circumstances where a child has been abused or molested more than once. A child may testify to one event and only through further questioning will it appear that the incidents did not happen at the same time or on the same occasion. Children under the age of ten years also find it difficult to handle abstract and hypothetical concepts, which means that they have trouble in describing why they behaved in a certain way, or why they experienced specific emotions, or what they thought. She points out that by asking children questions they are developmentally unable to answer their credibility in the eyes of the court is compromised. She also highlights that adults assume that children use language in the same way adults do and then tend to interpret the child’s communication as they would that of an adult. For example, a common error found in children’s communication is what is referred

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235 Schumann, Bala & Lee 1999 *Queens LJ* 255.
238 Müller 2003 *CARSA* 2 at 2-8.
239 Müller 2003 *CARSA* 2 at 4.
240 Müller 2003 *CARSA* 2 at 4.
241 Müller 2003 *CARSA* 2 at 4.
to as under-extension. Under-extension takes place when a child attributes to a word only part of the meaning attributed by adults. A child may for instance deny that she was wearing any clothing, only to admit later that she was wearing a costume. To the child this does not constitute a contradiction, as a costume is not considered to be clothing. This is further exacerbated by the specialised language employed in the courtroom.\textsuperscript{242} She concludes that in order to elicit accurate evidence from children and to address the serious misunderstanding of children in the courtroom, it is imperative that developmentally appropriate interviewing techniques are used and that the questioning of child witnesses is conducted by professionals who are experienced and skilled in the area.\textsuperscript{243} It is submitted that skilled intermediaries, knowledgeable in child linguistics, behaviour and development, can be utilised to perform this function.

The above difficulties that children experience in being understood and expressing themselves begs the question why intermediaries are not afforded more comprehensive powers. Conceivably, the limited role of intermediaries can be attributed to two factors – the incorrect perception that an intermediary is nothing more than a special kind of interpreter as well as the specific intermediary model used in South Africa.

In \textit{S v Booi}\textsuperscript{244} and \textit{S v Motaung}\textsuperscript{245} it was held that an intermediary performs functions similar to those of an interpreter.\textsuperscript{246} In \textit{S v QN},\textsuperscript{247} however, the court per Gorven J took the view that the decisions in both \textit{S v Booi} and \textit{S v Motaung} were based on an incorrect analogy between the role of an interpreter and that of an intermediary. The court pointed out that the vital role of an interpreter is to convey the evidence of the witness in a language intelligible to the court. The interpreter testifies as to

\textsuperscript{242} Müller 2003 \textit{CARSA} 2 at 4.
\textsuperscript{243} Müller 2001 \textit{Crime Research in South Africa} 1 at 6.
\textsuperscript{244} 2005 (1) SACR 599 (B) at para [25].
\textsuperscript{245} 2007 (1) SACR 476 (SE) at para [7]; see also \textit{K v Regional Court Magistrate} 1996 (1) SACR 434 (E) at 444.
\textsuperscript{246} Refer to para 3.3 above for a discussion of \textit{S v Booi} 2005 (1) SACR 599 (B) & \textit{S v Motaung} 2007 (1) SACR 476 (SE).
\textsuperscript{247} 2012 (1) SACR 380 (KPZ) at paras [16]-[17].
the contents of the witness’s evidence. This is also the reason why an interpreter has to be sworn in, in order for the witness’s testimony to be placed before the court.\textsuperscript{248} The spoken evidence of the witness is interpreted by the interpreter.\textsuperscript{249}

In analysing the precise role of an intermediary in terms of the Criminal Procedure Act, the court emphasised that although evidence is given through an intermediary, the general practice is that the witness should give his or her own answers to the court. These are then interpreted by an interpreter if given in a language not understood by the court. The learned judge pointed out that in his view this does not mean that the intermediary is “to convey what is said by the witness as was stated in \textit{Motauang}, but that “the purpose of this section is made by mediating the questions put and not the answers given”.\textsuperscript{250}

The court held moreover that the analogy between an interpreter and an intermediary breaks down further when the case is conducted in a language common to all participants (such as English). There is then no question of interpretation and the intermediary is not transmitting the child’s evidence to the court as an interpreter does. The analogy can only be valid if the intermediary is also fulfilling the role of an interpreter. The most fundamental difference between the two functionaries therefore continues to be that “the intermediary is not involved in conveying to the court what emerges from the mouth of the witness” as an interpreter does.\textsuperscript{251}

The court correctly concluded that the role of an intermediary should therefore not be equated with that of an interpreter. The role of an interpreter is clearly to testify about the content of the evidence of the witness and to do so in a language intelligible to the court, whereas the role of an intermediary is to convey the question

\textsuperscript{248} Para [18].
\textsuperscript{249} Bekink 2013 \textit{THRHR} 285 at 289.
\textsuperscript{250} 2012 (1) SACR 380 (KPZ) at para [21]. Own emphasis added. Refer also to para 3.3 above.
\textsuperscript{251} Paras [22]-[23].
to the child witness. The child witness gives his or her own answers to the court. The intermediary does not interpret the evidence for the court.  

It is submitted that the decision and conclusions in *S v QN* are correct and should be supported. An intermediary clearly fulfils a role distinct from that of an official court interpreter. The Constitutional Court in *DPP v Minister of Justice and Constitutional Development* pointed out, and correctly so, that an intermediary has a unique role to fulfil, namely to assist the child witness who would be exposed to undue mental stress and suffering when having to testify. The intermediary is also a person specifically skilled in dealing with children and communicating with a child in a manner that is neither intimidating nor embarrassing to the child. This noticeably distinguishes an intermediary from a court interpreter.

Secondly, the limited role of intermediaries can possibly be attributed to the specific intermediary model used in South Africa. In general, three intermediary models can be distinguished. These include the full intermediary model, the question-by-question model, and the topic-by-topic model. In the full intermediary model, the intermediary is briefed by counsel before trial on which aspects of the child’s testimony they want explored and tested. At trial, the intermediary takes responsibility for putting the requested exploration and testing into question form, including determining how questions are phrased and the order in which they are put. In the question-by-question model, counsel determines the questions and poses them one at a time to the intermediary, who translates the question into developmentally appropriate language for the child. In the topic-by-topic model,

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252 Bekink 2013 *THRHR* 285 at 291. See also *S v Peyani* 2014 (2) SACR 127 (GP) at 131 where the court held that “the intermediaries were acting as conduits and not as interpreters”.
253 2009 (2) SACR 130 (CC) at para [96].
255 Refer for example to the system used in Israel. This model offers the most comprehensive protection to the child witness but it is criticised for its failure to provide the defendant with an adequate opportunity to test the child’s evidence. See Henderson “Alternative routes: other accusatorial jurisdictions on the slow road to best evidence” in Spencer & Lamb *Children and Cross-examination: Time to Change the Rules?* (2012) 43 at 60-64.
256 Examples of countries utilising this system include South Africa, England and Wales. Refer to Henderson “Innovative practices in other jurisdictions” in Hanna et al *Child Witnesses in the*
the intermediary is briefed as in the “full intermediary model”, but counsel breaks the questions up into topics, based on the areas of challenge or exploration. At trial there is an interactive process whereby the intermediary questions the child on the first topic, then refers back to the lawyer for further instructions (e.g., to put a question differently or to pick up on any inconsistency) before moving on to the next topic.

It is submitted that the model currently utilised in South Africa can be equated to the question-by-question model. Counsel determines the questions and puts them one at a time to the intermediary, who “translates” the question into developmentally appropriate language for the child. This system is limited, however, as was pointed out above, in that the intermediary does not have the right to point out that the questions posed (such as repetitive questioning, sudden shifts between subjects, multifaceted questions or closed questions) are likely to produce unreliable answers, or to suggest that alternative questioning styles should be used.

This shortcoming can be addressed to some extent by formulating and implementing general rules of practice and by setting specific “ground rules” for the questioning of children before the hearing. Examples of such rules include the following:


An example of a country utilising this system is Norway. Refer to Henderson in Hanna et al Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy 1 at 159-161.

See Davies et al Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models 5-6.

Müller & Holley Introducing the Child Witness (2009) 1 at 43.

Müller 1999 THRHR 252 at 254. In England, for example, an intermediary typically makes an assessment of a child witness’s communication competencies before the trial, gives advice on the ground rules for questioning the child, then monitors counsel’s performance at trial, alerting the judge when a question is inappropriate. Ground rules hearings have recently became a requirement in intermediary cases in England. See England’s Criminal Procedure Rule 3.9(7) 2015 available at https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/crim-proc-rules-2014-part-03.pdf (accessed 10/05/2015). In terms of the Criminal Procedure Rule 3.9(7) 2015, the agenda for the hearing includes directions about inter alia the duration of questioning, the manner of questioning, the use of communication aids, and what questions may or may not be asked.

Spencer “Conclusions” in Spencer & Lamb Children and Cross-Examination: Time to Change the Rules? (2012) at 187-188. See also Plotnikoff & Woolfson Intermediaries in the Criminal
• adapt questions to the specific child’s developmental stage;

• ask short, simple questions – one idea at a time;

• follow a logical sequence;

• speak slowly, pause and allow the child enough time to process each question – for younger children almost twice as much time should be allowed;

• give the child ample opportunity to answer;

• avoid question types which may produce unreliable answers; (Tag questions, for example, “he didn’t touch you, did he?” are particularly complex; rather put the question more directly, for example: “Did John touch you?” or “How did John touch you?” Use names and not pronouns.)

• avoid allegations of misconduct without reasonable grounds (being accused of lying, particularly if the accusation is repeated, may cause a child to give inaccurate answers or may result in the child’s agreeing simply to bring the questions to an end);

• do not ask children to supply personal information such as their address unless for a specific reason;

• do not ask children to demonstrate intimate touching on their body, use a body diagram or anatomic dolls.

It is essential that this should be complemented by an assessment of a child witness’s communication competencies before the trial, as this will alert the court to unsuspected communication issues and affect the ground rules applied.\(^{262}\) An
intermediary could then alert the presiding officer if a question is inappropriate and/or does not adhere to the rules of practice and/or the ground rules set. This is, however, only a partial solution as available research suggests that intermediaries find it difficult to interrupt proceedings, especially where the questioning is becoming faster and more probing.263,264

This begs the question whether more could be done to reform the current South African system or whether the answer lies in following a different system or model. In order to do so we need to examine our assumptions about the need for our current procedures and decide what is in fact fundamental. Cross-examination is considered by many to be the essence of the accusatorial trial. The fundamental purpose of cross-examination is to test the witness’s evidence.265 However, it might be possible to envisage a process or system for testing child witnesses within an accusatorial trial that need not rely upon counsel to act as the direct examiner of the questions. What is essential to a fair trial is that the evidence of a witness should be fairly and thoroughly tested.266 If the purpose of cross-examination can be achieved by a better method, there is nothing to suggest that cross-examination might not be replaced.267

In its Draft Discussion Document on Intermediaries of 2008268 the Department of Justice and Constitutional Development (the department) inter alia evaluated the functions of an intermediary. The department stated that the core function of an intermediary was to convey the general meaning of questions to the child witness in appropriate language. Unfortunately the department did not define the boundaries

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265 Refer to para 2.5 of ch 3 of this thesis.
268 At 21-25.
of this core function but it did express the view that the functions of an intermediary should be broadened to include other duties that would assist the child and his or her family with the court process. According to the department these functions could be extended to include the following duties:

(a) serve as frontline person - provide the interface between the child and the court process;

(b) assess the developmental levels of the child;

(c) provide information – for example, regarding postponements or court procedures to the child;

(d) court preparation – provide the child with knowledge of the process as well as the skills to cope with the court process;

(e) aftercare referral – ensure that the child receives counselling when necessary;

(f) conduct workshops – to provide parents and caregivers with knowledge and skills on how to deal with children who have been abused;

(g) administrative duties – such as obtaining witness fees and compiling statistics on children testifying in court.

These duties have been included in the proposed Draft Job Description for Court Intermediaries,269 drafted by the department, which states as follows:

1. Provide intermediary services for vulnerable witnesses, where an application is granted in court

   • Inform the court at all times about changes/observations regarding the witness’s physical, emotional and mental [behaviour]. Provide emotional and

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269 Refer to the proposed job description for court intermediaries attached to the study as Annexure A, graciously provided to the author hereof on 03/30/2015 by Ms Kamogelo Lebuke-Wilderson, Director: Victim Support and Specialised Services.
The intermediary system in South Africa

psychological support to child witnesses before, during and after testimony.

- Avail and maintain intermediary tools (i.e. the sets of anatomical dolls, intermediary toolkits, first aid crayons and pencil, black paper for drawing, plastic glass and jug of good quality and tissues); that might assist a witness to the court.

- Orientate the child witness with regard to court processes, roles and procedures as applicable to intermediary duties.

- Participate in community outreach activities.

- Recommend referral of child witnesses for [counseling] when necessary.

2. Provide specialized child language services

- Make proper arrangements with qualified individuals in cases where witnesses have a language dialect and/or communication need that the Intermediary cannot assist with.

- Convey the general purport of questions to the witness in age appropriate language.

- Orientate the child witness with regard to court processes, roles and procedures that are applied to intermediary duties.

3. Maintain intermediary room

- Maintain the condition of equipment (CCTV camera) and report faults where necessary.

- Monitor cleanliness of the intermediary room.

- Monitor audibility of the system on both sides and report faults to the court.

4. Render administration support services in courts

- Complete and maintain official registers and intermediary information and statistical files.
• Compile monthly intermediary reports for submission to the direct supervisor.

• Liaise with Court Clerk (stenographer) with regard to arrangements with qualified individual to meet the needs of the said witness.

• Assist with case flow management functions and liaise with judicial officers when necessary.

The formulation of a job description for intermediaries is welcomed as it not only extends intermediaries’ duties but also outlines their duties more clearly. Aspects such as the provision of emotional and psychological support to child witnesses before, during and after testimony is valued as this will lessen the emotional trauma of the whole process for the child. This also addresses uncertainty regarding whether the intermediary should be allowed to meet the child before the trial in order to give the child the opportunity to become familiar with the intermediary, thereby gaining the child’s confidence and putting the child at ease. The orientation of the child witness with regard to the court processes, roles and procedures will ensure that the child is not confronted with an alien environment when required to testify and will reduce feelings of stress or intimidation.270 The recommended referral of child witnesses for counselling when necessary is also welcomed as this will ensure that the child is not abandoned by the criminal justice process once the child has testified. The making of proper arrangements with qualified individuals in cases where witnesses have a language dialect and/or communication need that the intermediary cannot assist with presupposes a pre-trial assessment of children’s developmental competencies. It would, however, enhance the system if the pre-assessment of children’s developmental competencies is set out as a specific duty. This is important because, as was emphasised above, a child’s developmental competencies affect the child’s capacity to answer questions. Section 170A in its current form only requires that an assessment of whether a child will be exposed to undue mental stress or suffering has to be made before the section finds

270 This will help to clear up some of the confusion about what the role of an intermediary encompasses. See for example Müller 1999 THRHR 241 at 254 where these aspects were specifically questioned.
application. Although it may possibly be assumed that the last-mentioned assessment will include an assessment of a child’s developmental competencies, the setting of such a duty will ensure that no uncertainty exists in this regard. The completion and maintenance of official registers pertaining to intermediary information and statistical data are also hailed as a welcome improvement as this will enable on-going evaluation of current systems.

3.5 Intermediary facilities

Section 170A(3) of the Criminal Procedure Act provides that if a court appoints an intermediary in terms of section 170A(1), the court may direct that the witness concerned shall give his or her evidence at any place:

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

Once an intermediary has been appointed, the court has a discretion to make a further order entitling the child to give evidence in a place other than the courtroom, through the medium of any electronic or other device. Müller and Tait point out that the first discretion of the court, namely whether to appoint an intermediary or not, does not appear to make sense unless the second discretion is also exercised.

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271 Refer to para 3.1.5 above.
272 Own emphasis added.
273 Müller and Tait 1999 SACJ 57 at 59.
They emphasise that if the child is not allowed to testify outside the courtroom away from the presence of the accused the child will be exposed to the factors that cause emotional distress and suffering. They suggest that the discretion to make use of a separate room be removed completely and that the use of this facility should be available to all children.\footnote{274}{Müller and Tait 1999 \emph{THRHR} 241 at 257.}

The Constitutional Court in \emph{DPP v Minister of Justice and Constitutional Development}\footnote{275}{2009 (2) SACR 130 (CC) at para [86].} emphasised that section 170A(1) must be understood and construed in the context of section 170A as a whole, and in particular sections 170A(2) and 170A(3). The Constitutional Court furthermore held that section 170A(1) read with section 170A(3) recognises that children are often intimidated by the court environment, especially if they have to confront the alleged abuser. According to the court the sections “therefore contemplate that a child who testifies through an intermediary will not ordinarily testify in the presence of the accused but will testify from a separate room ‘which is informally arranged to set [the child complainant] at ease’.”\footnote{276}{Para [97].} In addition section 170A(3) should be interpreted in a manner consistent with the objectives of section 28(2) of the Constitution and article 3 of the CRC to ensure that a child’s best interests are of paramount importance in all matters concerning the child. The Constitutional Court state\footnote{277}{Para [98].} that this conforms to the Guidelines of the CRC, which proclaim the right of child complainants to be protected from hardship and trauma that may result from their participation in the criminal justice system; provide that the protection of child complainants includes modified court environments; allow the child complainant to testify out of sight of the alleged perpetrator; and envisage testifying with the assistance of a professional such as an intermediary. The prospect of the court’s appointing an intermediary and not also exercising its discretion in favour of allowing the child to testify from a separate room, if available, is accordingly questionable.
Müller and Tait\textsuperscript{278} point out in addition that it is easy to envisage a situation where the appointment of an intermediary may not be necessary, but where it is essential that the child testifies outside the court and outside the presence of the accused. Melunsky J in \textit{K v Regional Court Magistrate}\textsuperscript{279} referred to this incongruity as follows:

\begin{quote}
It should be observed that a court may not direct, in terms of ss (3), that a witness shall give evidence in a separate room unless it makes a provision [for] appointing an intermediary in terms of ss (1). The effect is that the witness who reasonably needs to give evidence in a separate room will also have to be examined and cross-examined through an intermediary although he may not be exposed to undue mental stress and suffering if he testifies without the intermediary’s assistance.
\end{quote}

Müller and Tait\textsuperscript{280} accordingly correctly call for an amendment of the section so that a child’s evidence can be given from outside the courtroom without the use of an intermediary where the latter is not required.

In terms of the subsection the room may be adjacent to the courtroom, in any other room in the court building or in another suitable place. It should be noted that by the use of the words “any place … to set that witness at ease” the legislature makes allowances for a child to testify in a place removed from the courtroom or even the court building. Müller and Tait\textsuperscript{281} indicate that the subsection has in fact been interpreted so widely that in 1995 a young child in East London gave evidence from home, which evidence was relayed to the court by means of a live video link.

\begin{itemize}
\item \textsuperscript{278} Müller and Tait 1999 \textit{SACJ} 57 at 59.
\item \textsuperscript{279} 1996 (1) \textit{SACR} 434 (E) at 440.
\item \textsuperscript{280} Müller and Tait 1999 \textit{SACJ} 57 at 60. For a discussion on whether s 158 of the Act can be used to circumvent the problem inherent in the wording of s 170A(3), refer to Müller & Tait 1999 \textit{SACJ} 57 at 60-61.
\item \textsuperscript{281} Müller and Tait 1999 \textit{THRHR} 241 at 244.
\end{itemize}
In view of the fact that we live in a digital age it is submitted that serious consideration should be given to making more use of what has been labelled “virtual courtrooms”. This will enable a child witness to testify by means of a live video link from any place specifically designated for this purpose, such as the offices of a social worker, psychologist, family counsellor, medical practitioner or childcare worker who has been employed by the department on contract to service the courts. A child witness could, for example, testify from home, as indicated in the scenario above or from the premises of a childcare facility such as the Teddy Bear Clinic via a live video link. An example of testifying from the Teddy Bear Clinic has been described as follows:

A lanky eleven-year-old girl sits on the floor of a brightly painted room at the Teddy Bear Clinic, surrounded by faded stuffed animals and a few well-used toys. Around her are scattered a half dozen puppets and a large laminated photograph of an empty courtroom.

“Hello,” says the doll on the hand of Ntombi Makwanyane, a matronly volunteer counsellor who sits beside the girl. “I am the magistrate.”

“Hello”, responds the girl quietly to the grey-haired, black robed puppet. The doll and the girl chat back and forth in Zulu, a widely spoken South African language. The puppet explains the job of a judge; the girl asks questions or simply indicates that she understands. She is timid at first, but then begins to enjoy the play. Eventually

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282 See Hyde “CJC [Civil Justice Council] calls for online claims resolution” available at http://lawgazette.co.uk/law/cjc-calls-for-online-claimsresolutions/5046775.article (accessed 19/02/2015) in which the author discusses a report of the Civil Justice Council’s advisory body recommending a new internet-based court service run by government to handle civil claims under £25 000. The report also indicates that the jurisdiction of online courts could be extended to suitable family disputes. The report’s principal author, Prof Richard Susskind, said: “Online dispute resolutions is not science fiction. There are examples from around the world that clearly demonstrate its value and future potential not least to litigants in person.”

she picks up another puppet. This one is of a pigtailed girl. It represents her, the child rape victim who is learning to testify in court.

Down the hall, in another brightly painted room, a seven-year-old girl in a pink tank top is preparing to testify. She bounces around the room playfully, waving and chattering, until a large woman in a green suit tells her to come sit down. A retired teacher of 40 years, she serves as an intermediary between the child and the court, relaying questions - which she hears through earphones - while the court watches the girl's responses on closed-circuit television.

A few minutes later, when the testimony begins, the previously bubbly child is gone. Instead, the screen in the courtroom shows a terrified girl huddled close to her intermediary, rubbing her hands nervously as she haltingly tells the court in a high-pitched voice about the day the man held her down and stuck his finger inside her.

An elderly white defence lawyer questions the girl. But there is none of the typical confrontation: no badgering of the witness, no leading questions. Questions are asked repeatedly, in different ways, to clear up confusion. The sometimes curt queries of the defence lawyer are gently interpreted for the child.284

Testifying from home or from facilities such as the Teddy Bear Clinic described above is clearly more child-friendly and has the further advantage that the child witness will not run the risk of coming face-to-face with the alleged perpetrator. In addition such facilities obviate the need to refurbish existing court infrastructure, which can be time-consuming and expensive.

Irrespective of where the room is situated, section 170(A)(3) determines that it should be informally arranged so that the witness is put at ease and placed in a position from which any person whose presence may upset the witness cannot be seen or heard. It should be noted that the subsection refers to “any person”, presumably because the provision also applies to legal representatives and even to the presiding officer.\textsuperscript{285} The court and the parties must, however, be able to see and hear the child witness and the intermediary “either directly or through the medium of any electronic or other devices”.\textsuperscript{286} The use of screens, one-way glass and closed circuit television (CCTV) is envisaged. Although screens may go some way towards reducing confrontational stress, the use of a separate room with one-way glass or CCTV is preferred as this addresses the issues of both confrontation and courtroom stress. Screens should accordingly only be used where a separate room and other electronic devices are not available.\textsuperscript{287}

If a CCTV is used a video camera is mounted on a wall of the room and videotapes both the child witness and the intermediary while the child gives testimony. The intermediary is provided with earphones which enable him or her to follow the proceedings in the courtroom and relay the questions to the child. The child witness’s answers are captured on the live video link and relayed to the courtroom. The courtroom is provided with a television monitor, on which the parties to the proceedings and members of the court are able to view and hear the child and the intermediary as they speak.\textsuperscript{288}

The successful implementation of the intermediary system is reliant on the availability not only of competent intermediaries\textsuperscript{289} but also of the necessary infrastructure. In \textit{S v Mokoena}\textsuperscript{290} the High Court stated that “[i]t is a sad fact that the

\textsuperscript{285} Van der Merwe et al Hiemstra’s \textit{Criminal Procedure} 22-71.
\textsuperscript{286} See s 170(A)(3)(c) of the Criminal Procedure Act.
\textsuperscript{287} Hanna et al \textit{Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implication Policy} 9. This will probably be the case in rural courts where one-way glass or CCTVs are not available.
\textsuperscript{288} Müller & Tait 1999 \textit{THRHR} 241 at 243.
\textsuperscript{289} Refer to para 3.2.3 of ch 5 above.
\textsuperscript{290} 2008 (2) SACR 216 (T) at paras [90]-[91].
majority of our courts do not have access to the services of intermediaries or electronic devices to allow vulnerable witnesses to testify outside the courtroom”. This, the High Court pointed out:

[I]s a systemic challenge that must be overcome as soon as possible. The chronic lack of capacity and resources may well have been the reason for the present approach to make the services of intermediaries available on a selective basis only. A court can obviously not ignore the practical challenges facing the executive in the provision of essential service … but it cannot countenance an institutionalisation of conditions that do not comply with constitutional imperatives and fail to honour fundamental rights of vulnerable members of society.

In *DPP v Minister of Justice and Constitutional Development*\(^\text{291}\) the Constitutional Court reaffirmed the High Court’s concern. The Constitutional Court stated that the results of several surveys undertaken with regard to the availability of intermediary services were most disturbing. The Constitutional Court pointed out that “[o]nly 14% of the approximately 450 regional courts nationwide were equipped with the necessary facilities to promote the use of intermediaries. Even for those courts with these facilities a high percentage have continuing problems with broken or malfunctioning equipment … A very low percentage of courts were equipped with one-way mirrors, and an only slightly higher percentage of courts were reported to have separate waiting rooms in each province”.\(^\text{292}\)

The Constitutional Court emphasised that sections 170A(1) and 170A(3) promise child complainants protective measures, such as the appointment of an intermediary and the creation of child-friendly courts. According to the Constitutional Court the non-availability of these measures not only constituted a breach of the aforementioned provisions of the Criminal Procedure Act but also a breach of the Constitution.\(^\text{293}\) This, the court held, required urgent attention\(^\text{294}\) and the Director-

\(^{291}\) 2009 (2) SACR 130 (CC).

\(^{292}\) Para [195].

\(^{293}\) Para [202].

\(^{294}\) Para [205].
General for the Department of Justice and Constitutional Development was ordered to furnish the court with the following information:

(3) A list of regional courts indicating which of them have the following facilities contemplated in s 170 A(3) of the CPA:

(i) separate rooms from which children may testify;

(ii) closed circuit television facilities; and

(iii) one-way mirrors.

(f) To the extent that there are regional courts that do not have all the facilities in subpara 3 of this order, the steps which are being taken to provide these facilities to these regional courts.

In his report the Director-General reported the availability of the following resources:

<table>
<thead>
<tr>
<th>Number of main Regional Court seats</th>
<th>Province</th>
<th>CCTV available</th>
<th>CCTV required</th>
<th>Children’s witness testifying rooms</th>
<th>Children’s witness testifying rooms required</th>
<th>One-way mirrors available</th>
<th>One-way mirrors required</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>Eastern Cape</td>
<td>50</td>
<td>29</td>
<td>33</td>
<td>32</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>9</td>
<td>Free State</td>
<td>25</td>
<td>7</td>
<td>20</td>
<td>2</td>
<td>6</td>
<td>0</td>
</tr>
</tbody>
</table>

Para [209].

Department of Justice and Constitutional Development Report of the Director-General (July 2009) at para 15 and Annexure A.
As indicated in this table, a total of 272 CCTVs were available countrywide at that time, leaving a shortage of 67 CCTVs. These CCTVs were utilised in the 147 children’s witness testifying rooms. A further 66 testifying rooms were subsequently required. In addition 39 one-way mirrors had been installed in the courtrooms, leaving a shortage of 21 one-way mirrors. In the light of the shortage the department set out to identify the courts most urgently in need in order to provide them with the necessary CCTVs.\(^{297}\)

\(^{297}\) Department of Justice and Constitutional Development *Report of the Director-General* (July 2009) at para 15 and Annexure A.
In a follow-up report\textsuperscript{298} the Director-General reported that of the 47 testifying devices that had been reported to be malfunctioning, 34 were in working order. Those that were still not functional would be replaced or updated with video links. The regional offices had been allocated the necessary budgets to ensure that this is done. A dedicated staff member had also been assigned to attend to matters relating to infrastructure requirements. In addition, audit and maintenance systems had been developed in terms of which all regional offices were required to report on a monthly basis on the availability and functioning of specialised infrastructure.\textsuperscript{299} At December 2012 there were 322 CCTV systems, 98 one-way mirrors and 22 witness testifying rooms.\textsuperscript{300}

Owing to numerous concerns regarding the demise of Sexual Offences Courts in South Africa, the former Minister of Justice and Constitutional Development established the Ministerial Task Team on the Adjudication of Sexual Offences Matters (MATTSO) in June 2012 to investigate the feasibility of re-establishing Sexual Offences Courts in South Africa. MATTSO recommended the urgent reintroduction of these courts. Following the recommendations of the MATTSO report, in August 2013 the department began the process of re-establishing 57 Sexual Offences Courts.\textsuperscript{301} As at 31 March 2014 a total of 21 Sexual Offences Courtrooms had been established. These courtrooms are equipped with features such as a special room where witnesses can testify, a private waiting room for child witnesses, as well as CCTV systems\textsuperscript{302}. The re-establishment of the 21 Sexual

\textsuperscript{298} Department of Justice and Constitutional Development \textit{Report of the Director-General} (October 2009).

\textsuperscript{299} Department of Justice and Constitutional Development \textit{Report of the Director-General} (October 2009) at paras 17 and 18.


\textsuperscript{302} This includes a two-way CCTV system, a 42-inch monitor in the testifying room, a 9-inch monitor for the presiding officer, a large-screen monitor for the other members of the court and a high-resolution camera in the testifying room.
Offences Courts therefore increased the intermediary resources by adding the following facilities:

<table>
<thead>
<tr>
<th>Region</th>
<th>Dual view CCTV system</th>
<th>Testifying rooms</th>
<th>Private child/teen waiting rooms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern Cape</td>
<td>2</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Free State</td>
<td>4</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>Gauteng</td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>KZN</td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Limpopo</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Northern Cape</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>North West</td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Western Cape</td>
<td>5</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>21</strong></td>
<td><strong>21</strong></td>
<td><strong>17</strong></td>
</tr>
</tbody>
</table>

The department plans to re-establish the remaining 36 courtrooms during the period 2014/2015 to 2015/2016. This will contribute further to the provision of intermediary facilities.

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It should be noted that other regional courts also hear sexual offence matters. In instances where these courts are not equipped with the required audiovisual equipment (eg as a result of the fact that the court does not hear enough sexual offence cases to justify the permanent installation of the equipment) it is suggested that the use of mobile equipment be introduced, especially in rural areas where a permanent Sexual Offences Court is not feasible.  

3.6 Intermediary fees

In terms of section 170A(4)(b) an intermediary who is not in the full-time employment of the state shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the minister with the concurrence of the Minister of Finance may determine.

At the time of writing this thesis no tariff of allowances payable to intermediaries in criminal proceedings in terms of the regulations to the Criminal Procedure Act had been promulgated by the minister. Intermediaries are accordingly still paid in terms of the tariff of allowances payable to witnesses in criminal proceedings as set out in the regulations to the Criminal Procedure Act. The payment of a witness fee is currently considered inadequate by many professionals suitably qualified to act as intermediaries.

In his report to the Constitutional Court the Director-General acknowledged that the remuneration of R150 per day paid for intermediary services is unattractive. In

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the light of this the prospect of attracting professionals for appointment as intermediaries is problematic. This, he points out, is unfortunately part of a bigger problem, namely the amount paid to professional witnesses, a matter which is receiving the attention of the department as a matter of priority.  

It is trusted that the promulgation of regulations pertaining to the payment of intermediary services will without further delay receive the urgent attention it deserves as this will help to attract professional intermediary services.

### 3.7 Intermediary services in non-criminal cases

Although the focus of this thesis is the protection of child witnesses and child victims and the role of intermediaries in criminal cases, for the sake of completeness it should be noted that intermediaries may also assist child witnesses in the following non-criminal proceedings.

Firstly, section 61(2) of the Children’s Act provides that a child who is a party or a witness in a matter before a children’s court must be questioned through an intermediary as provided for in section 170A of the Criminal Procedure Act, if the court finds that this would be in the best interests of the child. Secondly, section 44(8)(c) of the Prevention and Combating of Trafficking in Persons Act requires of the National Director of Public Prosecutions to issue directives in respect of the criteria to be used and the circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary as provided for in section 170A of the Criminal Procedure Act, in respect of a child witness. Thirdly,

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308 Department of Justice and Constitutional Development Report of the Director-General (October 2009) at paras 4 and 12. Intermediaries are still paid R150 per day plus travel and subsistence allowances (information provided to author hereof in an e-mail dated 10/05/2015 by the Department of Justice and Constitutional Development).

309 Act 38 of 2005.

310 Act 7 of 2013.

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section 8(7) of the South African Schools Act\textsuperscript{311} determines that whenever disciplinary proceedings are pending before any governing body, and it appears to such governing body that it would expose a witness under the age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings the governing body may, if practicable, appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

The legislature has through the enactment of the abovementioned sections envisaged three further scenarios where a child witness may find it extremely difficult to testify. For example, a child who is the subject of care and protection proceedings, the victim of trafficking, or the victim of or witness to bullying or other serious misconduct by a fellow learner, may find himself or herself in exactly the same situation as in a criminal court – being expected to testify in the presence of the person who has committed the crime or violation against the child, and thus in need of the protection and assistance of an intermediary. The purpose of appointing an intermediary in the three scenarios is, as in criminal law, to provide the child witness, who would otherwise suffer undue mental stress or suffering, with the necessary support of an intermediary. The application of section 170A or a similar provision in these instances is highly valued and is a significant step forward in the development of South African child law.

As noted above, section 61(2) of the Children’s Act states that in addition to the grounds and processes provided for in section 170A of the Criminal Procedure Act, a children’s court must find that the use of an intermediary would be in the best interests of the child who is to give evidence. A children’s court therefore has to apply the grounds of “undue mental stress or suffering” as well as the “best interests of the child” test for the appointment of an intermediary. Matthias and Zaal\textsuperscript{312}

\textsuperscript{311} Act 84 of 1996.

expressed concern that children’s courts may experience difficulty in reading the two provisions together.

In *DPP v Minister of Justice and Constitutional Development*[^313] the Constitutional Court held that “[i]n every trial in which a child is to testify, the court will enquire into the desirability of appointing an intermediary” and in so doing consider whether on the evidence presented “it is in the best interest of the child that an intermediary be appointed”.[^314] As stated above,[^315] the court has to intertwine the test of undue mental stress or suffering with that of the best interests of the child. This approach was also followed in *Kerkhoff v Minister of Justice and Constitutional Development*,[^316] where the High Court, with reference to the tests utilised in *DPP v Minister of Justice and Constitutional Development*, stated that “[it] is clear that the enquiry has a narrow focus: to determine whether it is in the best interests of the child that an intermediary be appointed”. Section 61(2) of the Children’s Act therefore reiterates the principles laid down in legal jurisprudence. It is moreover submitted that it is difficult to contemplate a situation where it would not be in the child’s best interests to appoint an intermediary where a child witness would otherwise have to endure “undue mental stress and suffering”.

### 4 CONCLUSION

There can be no question that the intermediary system is a powerful tool in enhancing the lives of child victims and child witnesses. In this regard, the introduction of the intermediary system in 1993 in South Africa has contributed significantly towards the realisation of the rights of child victims and child witnesses.

[^313]: 2009 (2) SACR 130 (CC).
[^314]: Paras [114]-[115].
[^315]: See para 3.1.5 above.
[^316]: 2011 (2) SACR 109 (GNP) at para [7].
However, the abovementioned analysis reveals some concerns and shortcomings that need to be addressed to develop the current intermediary system:

- The appointment of an intermediary should be mandatory in all cases in which the witness is under the biological or mental age of eighteen years, unless cogent reasons exist not to appoint an intermediary. The setting of a standard norm not only simplifies the process while allowing for flexibility, but also ensures a more consistent interpretation and application of section 170A. This also eliminates the problems emanating from the exercise of the discretion by the courts as alluded to previously.\(^\text{317}\)

- If a child witness under the biological or mental age of eighteen years so wishes or cogent reasons exist not to appoint an intermediary, the court should place such reasons on record before the commencement of the proceedings.\(^\text{318}\)

- If the legislature does not amend section 170A as recommended above, the test for the appointment of an intermediary, namely that of “undue mental stress or suffering”, should be substituted with that of “if it appears to be in the interests of justice”. The use of the latter test aligns the test for the appointment of an intermediary with that of section 158 of the Act (used for adult victims of violent crimes), allows for a number of factors to be considered, including the language and cognitive abilities of a child witness, eliminates the interpretational problems inherent in concepts such as “undue mental stress or suffering” and conforms to the best interests of the child principle as set out in the Constitution.\(^\text{319}\)

- The directives with regard to the application of section 170A (setting certain criteria to be used and circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary) as

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\(^{317}\) See para 3.1.4 above.

\(^{318}\) See para 3.1.6 above.

\(^{319}\) See para 3.1.5 above.
The intermediary system in South Africa

contemplated in section 66(2)(a) of the Amendment Act should be extended to non-sexual cases.\(^{320}\)

- All witnesses under the biological or mental age of eighteen years should be allowed to testify from a room separate to that of the courtroom or any other suitable place through the medium of any electronic or other devices. This ensures that child witnesses are removed from and protected against the confrontational effect of the accusatorial system.\(^{321}\)

- A pre-trial assessment of the communication competencies of all witnesses under the biological or mental age of eighteen years should be conducted. Questioning during the trial should be conducted in accordance with the pre-determined competencies. The assessment would also alert the court to any unsuspected communication issues that need to be taken into account. The pre-trial assessment should be taken into account when “ground rules” for the questioning of a child witness are set.\(^{322}\)

- “Ground rules” as to the way in which the examination of a child witness is to be conducted should be set prior to each trial.\(^{323}\)

- The function or persona of an intermediary should be placed on a professional footing by the requirement of a single accredited qualification. This qualification should include aspects of child development, child communication patterns and styles, psychology of abuse, knowledge of the legal framework, terms and terminology and specialised training in the interviewing of child witnesses. This will ensure that intermediaries are properly equipped to question and assist child witnesses.\(^{324}\)

- The functions of an intermediary should be broadened to include the duties set out in the Draft Discussion Document on Intermediaries of 2008 and the

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\(^{320}\) See para 3.1.5 above.

\(^{321}\) See para 3.5 above.

\(^{322}\) See para 3.4 above.

\(^{323}\) See para 3.4 above.

\(^{324}\) See para 3.2 above.
Draft Job Description for Court Intermediaries drafted by the Department of Justice and Constitutional Development.\(^{325}\)

- A regulatory body within the Department of Justice and Constitutional Development addressing the management, training, supervision and monitoring of intermediaries should be established.\(^{326}\)

- The Minister should by notice in the *Government Gazette* include the profession of speech and language therapists in its list of competent persons to be appointed as intermediaries. In view of speech and language therapists’ skill in communication with children they are particularly suitable as intermediaries.\(^{327}\)

- An official register containing information and statistical data on intermediaries should be set up and maintained by the Department of Justice and Constitutional Development. This would simplify the process of the appointment of intermediaries and enable concerned parties to evaluate current systems.\(^{328}\)

- The Department of Justice and Constitutional Development should continue in its efforts towards the realisation of intermediary services by progressively appointing intermediaries and by converting the *ad hoc* posts into permanent intermediary posts.\(^{329}\)

- The Department of Justice and Constitutional Development should continue in its efforts to provide intermediary facilities such as a special room where witnesses can testify, a private waiting room for child witnesses as well as CCTV systems.\(^{330}\)

- The Minister of Justice with the concurrence of the Minister of Finance should determine the amounts to be paid as travelling and subsistence and other allowances in respect of the services rendered by an intermediary who is not

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\(^{325}\) See para 3.2 above.

\(^{326}\) See para 3.4 above.

\(^{327}\) See para 3.2 above.

\(^{328}\) See para 3.2.3 above.

\(^{329}\) See para 3.2.3 above.

\(^{330}\) See para 3.5 above.
in the full-time employment of the state as set out in section 170A(4)(b) of the Criminal Procedure Act. The prospect of attracting professionals for appointment as intermediaries will be greatly enhanced through proper remuneration for intermediary services.\textsuperscript{331}

In conclusion, it is believed that the aforementioned recommendations will be a further step on the journey towards the full realisation of the rights of child victims and child witnesses within the criminal justice system in South Africa. Although in some instances this may require a move away from the traditional adversarial process to incorporate aspects of an inquisitorial system, such a fresh approach should not be met with fear or circumspection but should rather be seen as a catalyst inspiring enhancement of protection for child victims and child witnesses.

As indicated in the introduction, the research also comprise of a comparative component. It is anticipated that such a study will be of significant value in providing new insights and knowledge, which may in turn give rise to suggestions for meaningful legal reform. In this regard the intermediary systems in Namibia and New Zealand are considered in chapter 6 and 7 respectively. Namibia and New Zealand share certain aspects with South Africa, such as an accusatorial criminal justice system and high levels of crime. These two countries are also signatories to key international instruments, for example the CRC. These chapters are therefore significant since they provide a comparative perspective on how Namibia and New Zealand meet their national and international obligations with regards to the protection of child victims and child witnesses within their respective criminal justice systems. As Namibia is also a signatory to several African treaties, for example the African Children’s Charter, a study of Namibian law also enables legal comparison on a regional level. Valuable features and shortcomings in the respective jurisdictions are considered with a view to enhancing the South African position.

\textsuperscript{331} See para 3.6 above.
Approximately 60 per cent of people in Namibia are under the age of 25. Nearly 40 per cent of the population is under the age of 15. The fact that children make up such a large portion of the population is reason enough to support the need for robust legislation on the care and protection of children. But there are more reasons. Many more. Children cannot keep for themselves in the same way that adults can. Children cannot make decisions for themselves in the same way that adults can. Children cannot protect themselves from home in the same way that adults can. There is an urgent need for all countries, including Namibia, to ensure that they have legislation in place that provides the basis for the care and protection of children.¹

1 INTRODUCTION

The Republic of Namibia was declared a German Protectorate in 1884 and a Crown Colony in 1890. It later became known as South-West Africa. The territory remained a German Colony until 1915, when it was occupied by South African forces. From 1920 onwards South-West Africa became a Protectorate of South Africa in terms of the Peace Treaty of Versailles. Namibia finally achieved its independence with the aid of the United Nations (UN) in 1990, after a long struggle on both diplomatic and military fronts.² With the achievement of sovereignty and self-determination, Namibia adopted the Constitution of the Republic of Namibia of 1990 (hereinafter “the Constitution of Namibia”), which is the supreme law of the country and is

founded upon the principles of democracy, the rule of law and justice for all. At the time the Constitution of Namibia was hailed as one of the most democratic constitutions in Africa. It has been praised for its strong provisions on fundamental human rights and freedoms.

This chapter consists of a discussion of child victims’ and child witnesses’ rights under the Namibian criminal justice system. These discussions are important because, as will be pointed out, South Africa and Namibia can learn from one another in this regard. South Africa and Namibia have similar constitutions, for example, and is it beneficial to both countries to compare these two constitutions in order to identify possible shortcomings as well as valuable features in the respective constitutions.

Like South Africa, Namibia is a signatory to important international and regional human rights instruments such as the Universal Declaration of Human Rights, the UN Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children’s Charter). It will be informative to see how Namibia meets its international and regional obligations regarding the protection of child victims and child witnesses in its criminal justice system.

As a result of South Africa’s prolonged control over Namibia, the judicial structure in Namibia largely parallels that of South Africa. Prior to 1977, Namibian criminal prosecutions were conducted in terms of the Criminal Ordinance, which was similar to the Criminal Procedure Act 51 of 1977 of South Africa (hereinafter the South African Criminal Procedure Act). This also explains why the Namibian Criminal Procedure Act 51 of 1977 (hereinafter the Namibian Criminal Procedure Act), which

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3 See 1(1) & (6) of the Constitution of Namibia.
4 Adkisson (ed) *Children in Namibia: Reaching Towards the Rights of Every Child* (1995) 8. The rights and freedoms are contained in ch 3 of the Constitution of Namibia and include the rights to protection of life; protection of liberty; respectful human dignity; equality and freedom from discrimination, arbitrary arrest and detention; access to a fair trial; the right to privacy and respect for family and the rights of children.
bears the same name, amounts to a replica of the South African Act. The Namibian criminal justice system is therefore, like that of South Africa, accusatorial in nature.\(^5\)

Since independence, all laws in Namibia derive their legitimacy from the Constitution of Namibia. However, in order to prevent the creation of a legal vacuum, article 140 of the Constitution of Namibia provides that all laws in force immediately before the date of independence shall remain in force until repealed or amended by an Act of Parliament or until such law has been declared unconstitutional by a competent court. Therefore, although the South African Criminal Procedure Act is still applicable, no amendments to the said Act after 1990 are applicable in Namibia unless such amendments have been enacted in Namibia.\(^6\) Both South Africa and Namibia have since amended their respective Criminal Procedure Acts to address the needs of child victims and child witnesses.\(^7\) A comparative perspective on Namibia’s amendments in respect of its criminal procedure to enhance the protection of the rights of child victims and child witnesses within their criminal justice system would be valuable. Such a comparison would enable South Africa to learn from Namibia’s shortcomings and successes.\(^8\)

In addition Namibian children face some of the same challenges that South African children are confronted with. Like South Africa, Namibia is subject to high levels of crime.\(^9\) According to studies conducted in Namibia, Namibian children themselves

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\(^7\) See s 170A of the South African Criminal Procedure Act and ss 158 & 166 of the Namibian Criminal Procedure Act as amended by the Namibian Criminal Procedure Amendment Act 24 of 2003.

\(^8\) As a matter of interest it should be noted that between 1999 and 2000 Namibia carried out what is known as the Victim Friendly Sexual Offences Court Project. As part of the project Namibia visited South Africa in order to study the mechanisms, systems and procedures in place for the protection of victims of sexual violence in South Africa, in its quest to eliminate violence against women and children in Namibia. See UNESCO *Towards Victim Friendly Sexual Offences Courts in Namibia* (2001) 1.

\(^9\) The victim statistics of 2012/2013 indicate that 73 780 persons were the victims of crime. Of these 622 were males under the age of eighteen years, and 858 were females under the age of eighteen years. See NAMPOL 2012-2013 crime statistics available at
identified violence directed against them as a key problem in Namibia.\textsuperscript{10} Namibian children, similar to South African children, also have to deal with socio-economic problems such as poverty, HIV/AIDS, discrimination and in some cases harmful cultural practices.\textsuperscript{11}

2 THE RIGHT TO PROTECTION OF NAMIBIAN CHILD VICTIMS AND CHILD WITNESSES

2.1 The Constitution of Namibia

The Constitution of Namibia is the supreme law of the country and provides for the promotion and protection of a wide range of human rights. The supremacy of the Constitution of Namibia entails that any law or conduct inconsistent with the provisions of the Constitution of Namibia will be invalid.\textsuperscript{12} The Constitution of Namibia also promotes and protects children’s rights, albeit in some instances indirectly. The first protection that is accorded by the Constitution of Namibia to all individuals, including children, is found in the Preamble, which inter alia provides the following:


Data from Lifeline Namibia collected in 2008 indicated that “abuse and violence” was the second most common reason why children approached them for assistance. Children aged from eight to seventeen who took part in focus group discussions held in 2010 in four of the regions of Namibia, for a report published by the National Planning Commission, also listed “domestic violence” and “being physically abused” as being among the top ten most serious problems faced by children in Namibia. See Hubbard & Ruth \textit{Seeking Safety: Domestic Violence in Namibia and the Combatting of Domestic Violence Act 4 of 2003 Summary Report} (2012) 21.


A 25(1) of the Constitution of Namibia.
Whereas the recognition of the inherent dignity and of the equal and inalienable right of all members of the human family is indispensable for freedom, justice and peace:

Whereas the said rights include the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status.

Furthermore, in terms of the provisions of the Constitution of Namibia, children are entitled to a dignified life, liberty and the right to pursue happiness.\textsuperscript{13} In addition children are afforded the right to life,\textsuperscript{14} the right to human dignity including the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment\textsuperscript{15} as well as the right to equality, which includes the right to be equal before the law.\textsuperscript{16} The family, as the natural and fundamental group unit of society, is accorded special protection by society and the State in article 14 of the Constitution of Namibia. Article 14 also puts men and women (and thus also boys and girls) in an equal position regarding their rights as to marriage, during marriage and upon its dissolution. Article 15 of the Constitution of Namibia specifically refers to children’s rights and provides as follows:

\begin{enumerate}
  \item Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.
  \item Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this Sub-Article children shall be persons under the age of sixteen (16) years.
\end{enumerate}

\textsuperscript{13} Preamble to the Constitution of Namibia.
\textsuperscript{14} A 6 of the Constitution of Namibia.
\textsuperscript{15} A 8(2) of the Constitution of Namibia.
\textsuperscript{16} A 10 of the Constitution of Namibia.
(3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this Sub-Article shall be construed as derogating in any way from Sub-Article (2) hereof.

(4) Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of Article 9 hereof be deemed to constitute an arrangement or scheme to compel the performance of forced labour.

(5) No law authorising preventative detention shall permit children under the age of sixteen (16) years to be detained.

Article 15 of the Constitution of Namibia corresponds to a certain degree with section 28 of the Constitution of South African. Both constitutions afford children the right to a name and nationality, family care or parental care, and protection from economic exploitation and preventative detention.\(^17\) However, while the Constitution of Namibia does not permit the detention of children under the age of sixteen years the Constitution of South African allows for children under the age of eighteen years to be detained as a measure of last resort subject to certain conditions.\(^18\)

Unlike the Constitution of South Africa, which specifically defines a “child” as a person under the age of eighteen years\(^19\) and provides that “[a] child’s best interests are of paramount importance in every matter concerning the child”,\(^20\) there are no such provisions in article 15 of the Constitution of Namibia. One may accordingly argue that in comparison with South Africa, the Constitution of Namibia is underutilised as a tool for the protection of children’s rights. This may possibly be due to the fact that the concept of rights, let alone children’s rights, was relatively

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\(^18\) See s 28(1)(g) of the Constitution of South Africa.

\(^19\) See s 28(3) of the Constitution of South Africa.

\(^20\) See s 28(2) of the Constitution of South Africa.
new in Namibia at the time of the drafting of its Constitution. However, the legislature remedied this lacuna through the Namibian Child Care and Protection Act. In terms of the Child Care and Protection Act a child “means a person who has not attained the age of 18 years”. In addition, section 3(1) of the Child Care and Protection Act sets out the best interests of the child principle as follows:

This Act must be interpreted and applied so that in all matters concerning the care, protection and well-being of a child arising under this Act or under any proceedings, actions and decisions by an organ of state in any matter concerning a child or children in general, the best interests of the child concerned is the paramount consideration.

The legislature deemed it important to specifically highlight the significance and influence of the CRC and the African Children’s Charter in this regard by stating that the best interests principle as set out in the Bill is based on article 3.1 of the CRC as well as article 4.1 of the African Children’s Charter. It should be noted that in terms of the Child Care and Protection Bill the best interests of the child principle is regarded as the paramount consideration, thereby elevating its importance.

The legislature, similar to its South African counterpart, lists certain factors that must be taken into consideration, where relevant, in determining the best interests

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22 Act 3 of 2015.
23 S 1 of Act 3 of 2015.
24 Refer also to paras 4.3.4 and 5.2.2 of ch 4 above for a comprehensive discussion on a 3.1 of the CRC and a 4.1 of the African Children’s Charter.
25 See s 7 of the Children’s Act 38 of 2005. Refer also to para 2.3.2 of ch 4 above for a discussion on the best interests of the child in terms of the Constitution of South Africa and the Children’s Act.
of the child. It is envisaged that, once promulgated, the Bill will give adequate content to the principle of the best interests of the child.

An analysis of article 15 of the Constitution of Namibia reveals that the section does not afford the child victim and child witness a specific right to protection. Neither does the section afford the child witness and child victim indirect protection, as is

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26 S 3(2) states the following: “In determining the best interests of the child, the following factors must be taken into consideration, where relevant:
(a) the child’s age, maturity and stage of development, gender, background, and any other relevant characteristics of the child;
(b) the child’s physical and emotional security and his or her intellectual, emotional, social and cultural development;
(c) any views or opinions expressed by the child with due regard to the child’s age, maturity and stage of development;
(d) the right of the child to know and be cared for by both parents, unless his or her rights are persistently abused by either or both parents, or continued contact with either parent or both parents would be detrimental to the child’s well-being;
(e) the nature of the personal relationship between the child and other significant persons in the child’s life, including each of the child’s parents, any relevant family member, any other care-giver of the child or any other relevant person;
(f) the attitude of the each of the child’s parents towards the child and towards the exercise of parental responsibilities and rights in respect of the child;
(g) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
(h) the desirability of keeping siblings together;
(i) the likely effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from –
   (i) both or either of the parents; or
   (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
(j) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
(k) the need for the child to maintain a connection with his or her family, extended family, culture or tradition;
(l) any disability that a child may have;
(m) any chronic illness from which a child may suffer;
(n) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
(o) the need to protect the child from any physical or psychological harm that may be caused by –
   (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour;
   (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person; or
   (iii) any family violence involving the child or a family member of the child;
(p) the need to avoid or minimise further legal or administrative proceedings in relation to the child; and
(q) any other relevant factor.”


28 This is similar to the position in s 28 of the Constitution of South Africa.
the case with section 28(1)(d) of the Constitution of South Africa, which guarantees every child the right “to be protected from maltreatment, neglect, abuse or degradation”. Protection for the child victim and child witness is, however, to be found in international and regional instruments, in particular the CRC and the African Children’s Charter, as well as in domestic law.


The Constitution of Namibia explicitly incorporates international law and makes it part of Namibian domestic law. This is done in article 144 of the Constitution of Namibia, which states the following:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

In terms of article 144 of the Constitution of Namibia, public international law and international agreements are therefore part of the law of Namibia ab initio. No transformation or subsequent act by the legislature is required for public international law or international agreements to become part of the law as the Constitution incorporates them as part of the law of the land. However, as the Constitution is the supreme law, for international law to find domestic application, it has to conform to the provisions of the Constitution.29

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Since Namibia has ratified both the CRC\(^{30}\) and the African Children’s Charter,\(^{31}\) the government of Namibia is also obliged to fulfil its obligations in terms of the provisions pertaining to child victims and child witnesses contained in the said instruments. Three principles of the CRC, as well as the General Comments developed by the Committee on the Rights of the Child on the principles, are of particular importance, namely the best interests of the child (art 3), the right of the child to be heard (art 12) and the right of the child to freedom from all forms of violence (art 19). In terms of the three principles Namibia as a State Party to the CRC has to ensure that the child’s best interests are taken into account as a primary consideration in all actions or decisions that concern the child, in both the public and the private sphere. In addition, the government of Namibia should afford every child capable of forming his or her own views the right to express those views freely in all matters affecting the child, which views should be given due weight in accordance with the age and maturity of the child. A child capable of forming his or her own views should be afforded the opportunity to express those views either directly or through legal representation.\(^{32}\) The government of Namibia is also obliged to introduce measures for the protection of children from all forms of violence. Such protective measures should include a range of interventions, namely legislative, administrative, social and educational measures as well as proactive prevention, to provide protection against the experience of violence and maltreatment for those who have been the victims of violence.\(^{33}\)

As a signatory to the African Children’s Charter the government of Namibia must also fulfil its obligations in terms of the regional child law instrument. When considering child victims and child witnesses, two principles of the African Children’s Charter are of particular importance, namely that of the best interest of the child (art 4.1) and the right of the child to be heard (art 4.2).\(^{34}\)

\(^{30}\) Namibia ratified the CRC on 30 September 1990.


\(^{32}\) Art 12(2) of the CRC.

\(^{33}\) Refer to ch 4 above for a comprehensive discussion on arts 3, 12 & 9 as well as the General Comments of the Committee on the Rights of the Child on the articles.

\(^{34}\) Refer to ch 4 above for a comprehensive discussion on art 4.1 & 4.2 of the African Children’s Charter.
2.3 The Criminal Procedure Amendment Act 24 of 2003

Prior to the enactment of the Criminal Procedure Amendment Act 24 of 2003 (hereinafter “the 2003 Criminal Procedure Amendment Act”), child victims and child witnesses did not enjoy any special protection under the Namibian criminal justice system. Like any other adversarial system, the Namibian criminal justice system required child victims to testify in open court (although some testified in camera) and to give evidence viva voce without assistance. Child witnesses were also cross-examined by the accused or the defence counsel. Not surprisingly, children experienced severe difficulties in the courtroom. In 1998, a Namibian prosecutor, expressing his concern over the circumstances, stated the following:

The current criminal justice system in Namibia leads to a second victimisation of the sexually abused woman or child. It is a standing rule that a complainant giving evidence must do so in the presence of the accused, despite her age. The complainant stands alone in the witness box and can be intimidated by the accused’s presence, often a male parent or relative. The complainant becomes more anxious and forgets facts which make her testimony less reliable and valuable in the prosecution. The alien atmosphere of the court combined with other factors as mentioned above, have such an impact on the young female witness that they are often reduced to silence which effectively wins the case for the defence. This is one of the most important reasons why cases of sexual abuse are not officially reported.

Newspaper accounts of sexual offences committed at the time similarly illustrate some of the difficulties experienced by child witnesses. One such an account, in 1998, reports that a ten-year-old girl had to testify while sitting opposite her accused rapist – a man who had helped to raise her from the time she was three years old.

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35 Ss 153 & 154 of the Namibian Criminal Procedure Act.
In full view of the man whom she had regarded as a father, she testified that he had threatened to kill her with a knife and an axe if she told what he had done. In another case involving a hostel father accused of sodomising six young hearing-impaired boys, one of the boys (who was twelve years old at the time of the alleged offence) turned and bolted out of the courtroom on seeing his alleged attacker. He was only later persuaded to return to the courtroom to give his testimony in sign language.\footnote{37}

In response to the discontent with the Namibian judiciary system at the time, a multi-sectoral project under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO), namely the Victim-Friendly Sexual Offences Court Project, was initiated and ran from 1999 to 2000. The main objective of the project was to identify possible solutions towards the eradication of violence against women and children.\footnote{38} The subsequent project report entitled “Towards Victim Friendly Sexual Offences Courts in Namibia” reported inter alia on the high levels of discomfort experienced by young children as they struggled to give evidence in court. Recommendations for changes to the Namibian criminal justice system were subsequently made. These recommendations underscored the need for the amendment of the 1977 Namibian Criminal Procedure Act in order to afford child witnesses more protection as they interface with the criminal justice system.\footnote{39} This law reform materialised in December 2003 through the 2003 Criminal Procedure Amendment Act.\footnote{40} This Act amended the Namibian Criminal Procedure Act\footnote{41} to provide for, inter alia, the introduction of special measures for vulnerable witnesses, to further regulate the admissibility of unsworn or unaffirmed evidence, to provide for the manner of cross-examination of witnesses under a certain age and to provide for matters incidental thereto.

\footnote{37}{As quoted by Hubbard \textit{Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project} 142.}
\footnote{38}{UNESCO \textit{Towards Victim Friendly Sexual Offences Courts in Namibia} (2001) 1.}
\footnote{39}{UNESCO \textit{Towards Victim Friendly Sexual Offences Courts in Namibia} 24-25.}
The 2003 Criminal Procedure Amendment Act specifically, through the insertion of section 158A into and the amendment of section 166 of the Namibian Criminal Procedure Act, introduced special arrangements for the protection of vulnerable witnesses (including children) while providing for the way in which the cross-examination of young witnesses should be conducted. Although the focus of the provisions of section 158A is not only on children as vulnerable witnesses, but on “all” vulnerable victims as defined in the Act, it impacts significantly on child witnesses and is therefore worthy of further discussion. Section 166 also introduced the concept of an “intermediary” in that it provides for the cross-examination of a witness “through a person other than the presiding officer”. Although section 166 does not use the term “intermediary” it is generally accepted that the person mentioned in the section is essentially an intermediary.

The Namibian government promulgated the Criminal Procedure Act 25 of 2004 (hereinafter the 2004 Criminal Procedure Act) in 2004. This Act is meant to replace the Namibian Criminal Procedure Act, including all its amendments. Section 193 of the 2004 Criminal Procedure Act provides for the appointment of an intermediary. In terms of section 373 of the 2004 Criminal Procedure Act, the Act will come into operation on a date determined by the Minister by notice in the Gazette. No such notice has been published. The reason cited for the indefinite suspension of the implementation of the Act is that the Namibian government lacks adequate resources to fully implement the Act. The non-implementation of the 2004 Criminal Procedure Act means that the 2003 Criminal Procedure Amendment Act remains effective until such time as the 2004 Criminal Procedure Act comes into operation.

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42 S 158A (3) of the Namibian Criminal Procedure Act.
43 S 166(5) of the Namibian Criminal Procedure Act. Refer to para 2.5 below for more on section 166 of the Namibian Criminal Procedure Act.
45 These include the Criminal Amendment Act 24 of 2003.
46 S 193 closely resembled section 170A of the South African Criminal Procedure Act.
The intermediary system in Namibia

force. The Namibian government’s position is that once it has secured adequate financial resources to fully implement the 2004 Criminal Procedure Act, renewed attention will be given to the possible coming into force of the said Act. This is still the position and is it doubtful whether the Act will come into force in view of the fact that more than ten years have passed.

In order to examine the position of child witnesses and the role intermediaries play in the Namibian criminal justice system, sections 158A and the relevant subsections of section 166 of the Namibian Criminal Procedure Act as well as section 193 of the 2004 Criminal Procedure Act will be evaluated. Section 158A and subsections of section 166 of the Namibian Criminal Procedure Act will be discussed first, after which section 193 of the 2004 Criminal Procedure Act will be discussed.

2.4 Section 158A of the Namibian Criminal Procedure Act

Section 158A, commonly referred to as the “Vulnerable Witness Act”, provides as follows:

(1) A court before whom a vulnerable witness gives evidence in criminal proceedings, may on the application of any party to such proceedings or the witness concerned, or on its own motion make an order that special arrangements be made for the giving of the evidence of that witness.

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50 It should be noted that there is speculation that this Act will not be brought into force, but will be replaced instead with a substituted version. See http://www.lac.org.na/namlex/ Crimlaw.pdf (accessed 15/05/2016).
51 As inserted into the Namibian Criminal Procedure Act by the Criminal Procedure Amendment Act 24 of 2003.
(2) “Special arrangements” means one or more of the following steps:

(a) The relocation of the trial to another location while the evidence of the vulnerable witness is being heard;

(b) the rearrangement of the furniture in a court room, or the removal from or addition of certain furniture or objects to or from the court room, or a direction that certain persons sit or stand at certain locations in the court room;

(c) notwithstanding the provisions of section 153 the granting of permission to any person (hereinafter referred to as a “support person”) who is a fit person for that purpose to accompany the witness while he or she is giving evidence;

(d) the granting of permission to the witness to give evidence behind a screen or in another room which is connected to the court room by means of closed circuit television or a one way mirror or by any other device or method that complies with subsection (6);

(e) the taking of any other steps that in the opinion of the court are expedient and desirable in order to facilitate the giving of evidence by the vulnerable witness concerned.

(3) For the purposes of this section a vulnerable witness is a person -

(a) who is under the age of eighteen;

(b) against whom an offence of a sexual or indecent nature has been committed;

(c) against whom any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship;

(d) who as a result of some mental or physical disability, the possibility of intimidation by the accused or any other person, or for any other reason will suffer undue stress while giving evidence, or who as a result of such disability, background, possibility or other reason will be unable to give full and proper evidence.
(4) The support person is entitled to -

(a) stand or sit near the witness and to give such physical comfort to the witness as may be desirable;

(b) interrupt the proceedings to alert the presiding officer to the fact that the witness is experiencing undue distress:

Provided that subject to subsection (5), the support person shall not be entitled to assist the witness with the answering of a question or instruct the witness in the giving of evidence.

(5) The court may give instructions to a support person prohibiting him or her from communicating with the witness or from taking certain actions, or may instruct the support person to take such actions as the court may consider necessary.

(6) When a witness gives evidence behind a screen or in another room, the accused, his or her legal representative, the prosecutor in the case and the presiding officer shall be able to hear the witness and shall also be able to observe the witness while such witness gives evidence.

(7) When a court is considering whether an order under this section should be made, it shall also consider the following matters –

(a) the interest of the state in adducing the complete and undistorted evidence of a vulnerable witness concerned;

(b) the interests and well-being of the witness concerned;

(c) the availability of necessary equipment and locations;

(d) the interests of justice in general.

2.4.1 Application
Section 158A(1) applies to all criminal proceedings and comes into operation once an application for special arrangements has been made. An application may be made by any party to the proceedings or the witness concerned, or on the court’s own motion. If the prosecutor or a vulnerable witness fails to apply for special arrangements a court before whom a vulnerable witness is to testify may make such an order if it deems the witness to be deserving of such arrangements.\textsuperscript{52}

Section 158A(1) uses the words “a court” … “may”, implying that the granting of special measures is not automatic, but that section 158A(1) has the effect of affording a discretion to the trial court whether or not to make an order allowing for special arrangements to be made. This discretion is subject thereto that the witness falls within the definition of a “vulnerable witness” as provided for in section 158A(3) of the Namibian Criminal Procedure Act. No other prerequisites are provided for in section 158A other than that the court should consider certain matters as provided for in section 158A(7) of the Namibian Criminal Procedure Act, such as the interests and well-being of the witness concerned, the availability of equipment and locations and the interests of justice in general.

If the vulnerable witness is a child under the age of eighteen a court may order that special arrangements be made for the child witness’s testimony (such as allowing the child to testify at another location with the aid of closed-circuit television (CCTV)) if the court deems it to be in the interests of the child and necessary for the child’s well-being and in the interests of justice in general.\textsuperscript{53} These provisions may be compared with section 170A of the South African Criminal Procedure Act, which also affords the trial court a discretion whether or not to allow a child witness to give

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\textsuperscript{52} Hubbard \textit{Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project} at 434 points out, however, that in practice uncertainty exists as to whose responsibility it is to initiate an application. Hubbard suggests that prosecutors should take primary responsibility, but presiding officers should be sensitised to play a more active role in this regard, just as they are expected to give special attention to the rights of an unrepresentative accused.

\textsuperscript{53} S 158(2) of the Namibian Criminal Procedure Act. See para 2.4.2 below.
evidence through an intermediary at a place which has been informally arranged with the aid of any electronic or other devices.\textsuperscript{54}

Despite the fact that the discretionary nature of section 158A may be attributed to the fact that the purpose of the insertion of section 158A into the Namibian Criminal Procedure Act is to provide for special arrangements for vulnerable witnesses in general and not for children in particular, it is submitted that section 158A would be more effective if it were amended to require a court to make use of special arrangements in all cases where a person under the age of eighteen years is required to testify. The court should only be excused from doing so where it is clear that the child would not be traumatised or where it would be impossible to do so.

\textit{2.4.2 Special arrangements}

Section 158A(2) sets out the various steps that a court may take in order to accommodate a vulnerable witness who is giving evidence. These could include \textit{any one or more} of the following arrangements:

- The trial may be held in a less formal and less intimidating environment than a court.\textsuperscript{55} A small child, for example, may feel more comfortable testifying in an office than in a courtroom.\textsuperscript{56}

- The court may also order that the courtroom furniture be removed or rearranged, or persons attending the court may be directed to sit or stand in

\textsuperscript{54} Schwikkard “The abused child: a few rules of evidence considered” 1996 \textit{Acta Juridica} 148 at 159. Refer also to ch 5 below for a discussion on the discretion of the South African courts to appoint an intermediary. The discretionary nature of section 170A of the South African Criminal Procedure Act has been criticised in that the application of the section has become the exception rather than the norm.

\textsuperscript{55} S 158A(2)(a) of the Namibian Criminal Procedure Act.

\textsuperscript{56} Hubbard \textit{Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project} 145.
different places from their usual places. This might be done where, for example, a young child is too short to be seen while sitting in the usual witness box. It is thus possible to adapt the court environment to make the witness feel more comfortable. In his address on the occasion of the inauguration of the High Court Vulnerable Witness Project, High Court, Windhoek, Judge President PT Damaseb described how the High Court has been assiduous in establishing the facilities that would enable the Court to implement the relevant provisions of the Act as follows:

[S]ome Judges [have] been very imaginative: they have reverted to all manner of arrangements that would create a less intimidating environment in the courtroom. For example, some Judges [have] cast away their robes and have literally descended from the Bench in order to get closer to such witnesses, particularly very young children who are alleged victims of sexual assault.

- A support person may accompany the witness while testifying. A young child, for example, may present his or her testimony while sitting on the lap of a support person who is a family member, friend or teacher. The support person is entitled to interrupt the proceedings to alert the presiding officer to the fact that the witness is experiencing undue distress, or may need a short recess. The support person may not, however, give testimony in the same case or help the witness answer questions or instruct the witness on what to say. The presiding officer is entitled to instruct the support person not to

57 S 158A(2)(b) of the Namibian Criminal Procedure Act.
58 Hub bard Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project 145.
60 S 158A(2)(c) of the Namibian Criminal Procedure Act.
61 S 158A(4)(b) of the Namibian Criminal Procedure Act. See also Hubbard Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project 146.
communicate with the witness during testimony or to refrain from doing anything which might interfere with the evidence.\textsuperscript{62}

- A witness may also be allowed to testify from behind a one-way screen or from another room by means of CCTV or any other device suitable for such purpose.\textsuperscript{63} The accused, the accused’s legal representative, the prosecutor in the case and the presiding officer must, however, be able to hear and observe the witness while such witness gives testimony.\textsuperscript{64} The witness, however, does not have to see the accused, which ensures that the accused’s intimidating presence is out of sight of the witness.\textsuperscript{65} The Katutura Regional Magistrates' Court Victim Friendly Sexual Offences Courtroom serves as an example of such a facility, where vulnerable witnesses can testify behind a one-way window or by means of CCTV from a child-friendly room. This separate room, annexed to the courtroom, is equipped with the necessary technical equipment to enable the court to hear and observe the child. The room is also suitably furnished with inviting toys, colouring materials, children's books and other furnishings aimed at putting the vulnerable child witness at ease.\textsuperscript{66}

- The presiding officer may also take any other steps that, in the opinion of the court, are "expedient and desirable" in order to facilitate the giving of evidence by a vulnerable witness.\textsuperscript{67} A presiding officer may, for example, explain to a vulnerable witness how the procedure will work before the testimony commences.\textsuperscript{68}

2.4.3 **Vulnerable witnesses**

\textsuperscript{62} S 158A(5) of the Namibian Criminal Procedure Act.
\textsuperscript{63} S 158A(2)(d) of the Namibian Criminal Procedure Act.
\textsuperscript{64} S 158A(6) of the Namibian Criminal Procedure Act.
\textsuperscript{65} Schwikkard 2007 Namibian Law Journal 25.
\textsuperscript{66} Hubbard Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project 1 at 142; Silungwe in Ruppel (ed) Children's Rights in Namibia (2009) 329-330.
\textsuperscript{67} S 158A (2)(e) of the Namibian Criminal Procedure Act.
\textsuperscript{68} Hubbard Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project 146.
Section 158A(3) of the Namibian Criminal Procedure Act provides a definition of persons who are regarded as vulnerable witnesses. In terms of the definition a vulnerable witness may be any person under the age of eighteen; any victim of a sexual offence or an offence of an indecent nature or any victim of an offence involving violence that has been committed by a close family member, a spouse, or a partner in any permanent relationship. A person may also qualify as a vulnerable witness if he or she, because of some mental or physical disability, may be intimidated by the accused or any other person\(^69\) and may for that reason suffer undue stress while giving evidence, or may be unable to give full and proper evidence. The factors listed in the subsection are not cumulative but should be read disjunctively. This effectively means that a child below the age of eighteen will qualify as a vulnerable witness and will be able to make use of special arrangements without having to convince the court of any additional conditions in order to be allowed to make use of the special arrangements.

Section 158A of the Namibian Criminal Procedure Act closely resembles section 158 of the South African Criminal Procedure Act in this regard. Section 158 of the South African Criminal Procedure Act essentially provides that evidence can be given by a witness by means of CCTV or similar electronic media if the equipment therefor is readily available or obtainable and if, inter alia, to do so would be in the interests of justice or prevent the likelihood that prejudice or harm might be experienced by the witness if he or she testifies at such proceedings.\(^70\)

An evaluation of the aforementioned provisions of section 158A of the Namibian Criminal Procedure Act reveals that the conditions for its application in situations where child witnesses are present are much less stringent than the requirements of section 170A of the South African Criminal Procedure Act. This could possibly be

\(^{69}\) The words “or any other person” are not defined for the purposes of s 158 of the Namibian Criminal Procedure Act. It is assumed, however, that this phrase may include parties to the proceedings or even court officials.

\(^{70}\) S 158(2)(a), (b), (d) and (e) of the South African Criminal Procedure Act.
ascribed to the fact that this section pertains to vulnerable witnesses and not to child witnesses only and a stringent requirement such as “it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testified at such proceedings” is therefore not necessary.\textsuperscript{71} Section 158A of the Namibian Criminal Procedure Act appears to be much more child-friendly than section 170A of the South African Criminal Procedure Act as there are far fewer hurdles for a child to overcome in order to testify in an informally arranged setting out of sight of the accused despite the fact that it is not aimed at the child witness specifically.

### 2.4.4 Matters for consideration

Section 158A(7) of the Namibian Criminal Procedure Act provides a list of matters which a court must take into account when considering an order for special arrangements. In each matter, the court should consider the interest of the state in adducing the complete and undistorted evidence of the witness.\textsuperscript{72} In addition the courts must consider the interests and well-being of the vulnerable witness, as well as the interests of justice in general.\textsuperscript{73} It is submitted that in all likelihood this means that the courts must ensure that the needs of the vulnerable witness are met without compromising the accused’s right to a fair trial.\textsuperscript{74} The courts must also consider the availability of the necessary equipment and locations. This in effect means that even when a child witness is likely to suffer undue stress owing to fear of having to face the accused, if the court building is not equipped with special rooms or one-way mirrors, the court may have to resort to other special arrangements. These may include the use of a screen or the rearrangement of the furniture in the courtroom to lessen the impact for the child witness of having to face an accused.\textsuperscript{75}

\textsuperscript{71} S 170A(1) of the South African Criminal Procedure Act.
\textsuperscript{72} S 158A (7)(d) of the Namibian Criminal Procedure Act.
\textsuperscript{73} S 158A(7)(b) and (d) of the Namibian Criminal Procedure Act.
\textsuperscript{74} A 12 of the Constitution of Namibia affords every accused the right to a fair trial.
\textsuperscript{75} S 158A (2)(a) and (b) of the Namibian Criminal Procedure Act.
Although the legislature thus proposes, through the application of section 158A, to ameliorate the disadvantages suffered by child witnesses, in the Namibian criminal justice system the effective protection of vulnerable witnesses is subject to the availability of the necessary resources. Schwikkard, in commenting on the special arrangements in section 158A, also expressed her concern about the availability of the necessary resources by stating that “the effective protection of vulnerable witnesses will have significant resource implications, and it will be interesting to see how frequently these protections materialise”.

As far as could be established, victim-friendly courts are only available at the High Court in Windhoek, the High Court in Oshakathi, the Katutura Magistrate’s Court and the Walvis Bay Magistrate’s Court. This clearly indicates a significant shortage of victim-friendly courts. This shortage has been attributed to a lack of funding on the part of the Namibian government and an over-dependency on donors. In his address on the occasion of the inauguration of the High Court Vulnerable Witness Project, the Judge-President of the High Court of Namibia Justice PT Damaseb admitted the following with regard to the facilities at the Windhoek High Court:

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76 In terms of s 158(7) of the Namibian Criminal Procedure Act, when considering whether an order under this section should be made a court also has to consider the availability of equipment. The lack of adequate financial resources may therefore seriously affect the implementation of child-friendly legislation and is also the reason why the 2004 Criminal Procedure Act has not been implemented. Refer to para 2.3 above.


78 Information provided by the Chief Registrar High and Supreme Court of Namibia to the writer of this thesis in an email dated 02/07/2015.

79 Hubbard Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project 432-433.


Without the [Aus Rotary] Club’s general’s financial assistance, this project would probably not have seen the light of day. This project is yet another shining example of the complementarity of the state and civil society to promote the proper administration of justice, which is a *sine qua non* of the rule of law.

Although this is to some extent understandable in a developing country with limited human and financial resources, what is alarming is that it seems that even where such facilities are available for child victims they are underutilised. A study conducted in 2005 by Theron\(^2\) involving an in-depth examination of seven cases of child abuse, reported that the Windhoek Woman and Child Protection Unit revealed that despite the existence of an elaborate child-friendly courtroom in Windhoek this facility was not utilised. She reported as follows:\(^3\)

All of the children in the study had to give evidence in the presence of the accused. This created immense difficulties for the children. Child 4 ran out of the court when he saw the accused. Screens were only used in one case, but only after child 5 had refused twice to talk in the presence of the accused. Court officials then decided to have the whole proceedings at the Woman and Child Protection Unit and that court officials should not wear black gowns … Child 2 had to stand on a chair because she was too short, and that made her feel more exposed. None of the children were permitted the use of the child-friendly courts. Some parents did not even know of such a facility.

Disturbingly, when the prosecutor in one of these cases was asked why the trial had not taken place in the child-friendly courtroom, she replied: “We’ll see how it goes and if it is too difficult for her, we can use the victim-friendly court.”\(^4\)

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\(^3\) Theron *The Impact of the Namibian Judiciary System on the Child Witness* 70.

\(^4\) Theron *The Impact of the Namibian Judiciary System on the Child Witness* 85.
As part of a study on rape in Namibia conducted by Hubbard in 2006, prosecutors, legal aid lawyers and magistrates were interviewed as to the manner in which they had utilised any of the provisions for vulnerable witnesses that were introduced by the 2003 Criminal Procedure Amendment Act in the rape cases they had handled since the introduction of the Act. Many indicated that they had utilised some of the provisions, particularly regarding the use of support persons, having the presiding officer restate questions to the complainant, moving furniture or dispensing with robes to make the atmosphere less intimidating for the vulnerable witness. Where facilities allowed, screens and testimony via CCTV had been employed. The lack of appropriate equipment was cited by the interviewees as a limiting factor in many regions. In the Katimo Mulilo region it was stated for example that “[w]e don’t even have a screen for her testimony … The courtroom should have things like screens to separate the accused and the victim from each other during trial” while at Swakopmund it was reported that “I haven’t used the screen yet, we are not that advanced and it’s not available. The complainants still have to face the perpetrators and that’s difficult.”

It is disheartening to note that despite proper legislation being in place, Namibian child victims and child witnesses still find themselves in court having to face their alleged perpetrators. During a workshop on child witnesses Theron was reported to have remarked that “[w]e [Namibia] have very progressive and even exciting legislation in place, but there are many gaps in implementing it, and we still have a very far way to go”. According to Hubbard this may be attributed to the fact that no one seems to be quite sure whose responsibility it is to initiate the vulnerable witness arrangements. Although social workers would, in her opinion, be the most suitable

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85 Hubbard Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project 430-433.
86 Hubbard Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project 431.
88 Hubbard Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project 431.
people to inform vulnerable witnesses of the possibility of special arrangements, the reality is that many complainants will not even meet a social worker.\textsuperscript{89} She therefore suggests that ultimately the prosecutor should take primary responsibility for suggesting special arrangements. She also recommends that court rules should require that the record of the case involving a child below the age of eighteen years should indicate what provisions for vulnerable witnesses were used, and the reasons for using or not using the potential special arrangements. This would ensure that the vulnerable witness options are given adequate consideration.\textsuperscript{90}

\textbf{2.5 Amendment of section 166 of the Namibian Criminal Procedure Act}\textsuperscript{91}

In terms of section 166 of the Namibian Criminal Procedure Act any witness for the defence or a co-accused may be cross-examined by an accused or the prosecutor.\textsuperscript{92} This exposes vulnerable witnesses to severe difficulties when having to face cross-examination in the presence of an accused or even by an accused. Section 166 was amended by subsections (3), (4), (5) and (6) of the 2003 Criminal Procedure Amendment Act to help improve the way vulnerable witnesses give evidence in criminal courts. These sections provide as follows:

\begin{quote}
(3)(a) If it appears to the court that any cross-examination contemplated in this section is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, the court may request the cross-examiner to disclose the relevance of any line of examination and may impose reasonable limits on that cross-examination regarding the length thereof or regarding any particular line of examination.
\end{quote}

\textsuperscript{89} Hubbard \textit{Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project 431.}
\textsuperscript{90} \textit{Op cit at 434-436.}
\textsuperscript{91} As amended by the Criminal Procedure Amendment Act 24 of 2003.
\textsuperscript{92} S 166(1) and (2) of the Namibian Criminal Procedure Act.
(b) The court may order that any submission regarding the relevancy of the cross-examination be heard in the absence of the witness.

(4) Notwithstanding the provisions of subsections (1) and (2) or anything to the contrary in any other law contained but subject to subsection (5), the cross-examination of any witness under the age of thirteen years shall take place only through the presiding judge or judicial officer, who shall either restate the questions put to such witness or, in his or her discretion, simplify or rephrase such questions.

(5) The court may allow the cross-examination of a witness referred to in subsection (3) to occur through a person other than the presiding officer if –

(a) that person has the qualifications determined by the Minister by notice in the *Gazette*; and

(b) that person is immediately available when the witness concerned gives evidence.

(6) If the person referred to in subsection (5) is not in the full time employ of the state, the relevant provision of section 191 shall apply to that person as if he or she is giving evidence for the party for which the witness concerned gives evidence.

Subsection (3) gives a presiding officer the right to place strict limitations on the use of irrelevant cross-examination to harass or intimidate any witness. In addition subsection (3) also empowers a presiding officer to curtail unreasonably protracted cross-examination. The presiding officer may then ask the cross-examiner to show the relevance of the line of questioning before such cross-examiner is allowed to proceed. Reasonable restrictions may also be placed on certain lines of questioning. This will ensure that equitable cross-examination takes place.
Subsection (4) determines that the cross-examination of any witness under the age of thirteen years may only be conducted through the presiding officer or judicial officer. The presiding officer may restate the questions put to such witnesses or if deemed necessary simplify or rephrase such questions.

Subsection (5) makes provision for the use of an intermediary. Although the subsection refers to “a person other than the presiding officer” it is generally accepted that the person referred to in subsection (5) is in fact an intermediary. An intermediary is a person who has the qualifications determined by the Minister by notice in the Gazette for this purpose and should be immediately available to assist the witness with the giving of evidence. No such notice could unfortunately be found. It is assumed, however, that the Minister may approve social workers or psychologists as intermediaries. The intermediary may restate questions, or simplify or rephrase a question if necessary. The essential meaning of the question may not be changed, however.

It should be noted that subsection (5) permits the use of an intermediary during the cross-examination of a witness. No age restriction is set in the said subsection. This means in effect that the use of an intermediary is not restricted to children under the age of thirteen years but that intermediaries may also be used for older children. Children under the age of thirteen years must therefore be cross-examined by either the presiding officer or an intermediary whereas children above the age of thirteen

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93 The reason for the age of thirteen is unclear as the age of fourteen is the operative age for other provisions, namely when children are presumed to have the capacity to know right from wrong for the purposes of criminal liability and the age of consent in the Combating of Rape Act 8 of 2004.
94 Hubbard Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project 147.
95 S 166 (5)(a) and (b) of the Namibian Criminal Procedure Act.
96 Hubbard Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project 147.
97 Ibid.
98 Note that s 166 (4) states that the cross-examination of any witness under the age of thirteen years may be conducted “subject to subsection (5)”. 

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years (or even adults) may at the discretion of the court be cross-examined by an intermediary.

The following is a comparison between section 166 of the Namibian Criminal Procedure Act and section 170A of the South African Criminal Procedure Act:

<table>
<thead>
<tr>
<th>Section</th>
<th>170A of the South African Criminal Procedure Act</th>
<th>166 of the Namibian Criminal Procedure Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discretion of trial court to appoint an intermediary</td>
<td>Court has a discretion to appoint an intermediary in all instances where a child under the biological or mental age of eighteen years would be exposed to undue mental stress or suffering.</td>
<td>Children under the age of thirteen must be cross-examined by the presiding officer or an intermediary.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Children above the age of thirteen years may be cross-examined by an intermediary.</td>
</tr>
<tr>
<td>Application</td>
<td>Witnesses under the biological or mental age of eighteen years</td>
<td>No age restriction</td>
</tr>
<tr>
<td>Prerequisites</td>
<td>Subject thereto that the witness will suffer “undue mental stress or suffering” if such witness testifies at such proceedings</td>
<td>Subject thereto that an intermediary is immediately available</td>
</tr>
</tbody>
</table>
An evaluation of the abovementioned table reveals that the application of section 166 of the Namibian Criminal Procedure Act, in comparison to section 170A of the South African Criminal Procedure Act, appears to be significantly less stringent for child witnesses. Whereas the court has a discretion in terms of section 170A of the South African Criminal Procedure Act in all instances to appoint an intermediary, in terms of section 166 of the Namibian Criminal Procedure Act child witnesses under the age of thirteen years must be cross-examined by either the presiding officer or an intermediary. In order for section 170A of the South African Criminal Procedure Act to find application, the witness must be under the biological or mental age of eighteen years, whereas no age restriction is set in section 166 of the Namibian Act. In addition, the application of section 170A of the South African Criminal Procedure Act is subject thereto that the witness will be exposed to “undue mental stress or suffering” if such witness testifies at the proceedings, whereas the application of section 166 of the Namibian Criminal Procedure Act is only subject to the availability of an intermediary.

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100 S 166(4)-(5) of the Namibian Criminal Procedure Act.
101 S 170A of the South African Criminal Procedure Act.
102 S 170A of the South African Criminal Procedure Act.
103 S 166(5) of the Namibian Criminal Procedure Act.
Namibia has progressive child-friendly legislation in place, but there is a serious lack of implementation. As stated above, the provision of intermediary services is based entirely on their availability. This prerequisite appears to have become the justification for failure to implement this provision. It should be noted that under section 166(5) the Namibian courts are under no obligation to provide intermediary services, even to deserving vulnerable witnesses. The indications are that where witnesses under the age of thirteen years have to be cross-examined by either the presiding judge or judicial officer or in the alternative by an intermediary, the courts choose to cross-examine the witness through the presiding officer. In her 2006 study on rape in Namibia, which included a discussion of the implementation of the vulnerable witness provisions, Hubbard reports that prosecutors, legal aid lawyers and magistrates, when asked about the utilisation of the provisions for vulnerable witnesses, indicated that in most instances the presiding officer questioned the minor witnesses. The comments included the following:

In one case we have the magistrate as an intermediary for the questions.

We use presiding officers [to restate questions] when we have children under the age of thirteen.

In some instances probation officers or social workers are used to assist with questions to child witnesses. It is quite common for a child under 12 to be questioned through the presiding officer, especially in Otjiwarongo.

In one case, the [unrepresented] accused was very aggressive and I told him not to ask questions directly to the child, so it was done through the interpreter and then me [magistrate]. So, the accused asked the questions to the interpreter who

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104 Hubbard Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project 430.
105 Op cit at 430-431.
articulated it to me, and I asked the child. This was the only time I’ve used an intermediary, because we don’t have anyone trained for that …

The focus appears to have shifted towards the provision of a support person who accompanies the child witness while testifying, with the questioning of the child witness being left to the presiding officer. The following statements confirming this position were recorded in Hubbard’s report:\textsuperscript{106}

We let mothers sit with the kids, block the accused and request the magistrates to be tender.

The support person sits close to the victim while he or she is testifying …

There was one case where a 14 year girl would be accompanied by her auntie whenever she had to testify.

[The] victim used to stand in the witness stand but we see that they feel isolated because they are not standing with the guardians. Now the guardian and prosecutor sit next to them and it has been helpful.

For example, young people are very shy. I have allowed their parent/guardian to stand next to them when testifying so they can feel confident …

More than nine years later this still appears to be the position. Although it could not be established how many intermediaries currently act as such in the Namibian

\textsuperscript{106} Ibid.
The intermediary system in Namibia

criminal justice system, the indications are that while support persons are often used, intermediaries are seldom employed.\(^{107}\)

Although the use of support persons is welcomed, it should be noted that the role of the support person is restricted to the lending of physical comfort to the witness. The support person may in no way assist with the giving of evidence.\(^{108}\) The questioning of a child witness through a presiding officer is not recommended as research has shown that this does not elicit the best possible evidence from child witnesses.\(^{109}\) The effective questioning of a child witness is a highly specialised task that requires an understanding by the interviewer of child development in three critical domains, namely the linguistic, cognitive and emotional domains, as well as an appreciation of the use of appropriate questions specific to a child’s level of development.\(^{110}\) Very few presiding officers have these specialised skills and many find it difficult to communicate effectively with children. In *Director of Public Prosecutions v Minister of Justice and Constitutional Development*\(^{111}\) the South African Constitutional Court alluded to this problem as follows:

> [T]he manner in which the child is questioned is crucial to the enquiry. It is here where the role of an intermediary becomes vital. The intermediary will ensure that questions by the court to the child are conveyed in a manner that the child can comprehend and that the answers given by the child are conveyed in a manner that the court will understand. As pointed out earlier, questioning a child requires a special skill. Not many judicial officers have the skill ... This illustrates the importance of using intermediaries when young children are called upon to testify. They have particular skills in questioning and communicating with children.

\(^{107}\) Information provided by the Prosecutor-General of Namibia, Adv Imalwa, to the writer of this thesis in an email dated 07/08/2015. The fact that a list of persons qualified to act as such in terms of s 166(5) of the Namibian Criminal Procedure Act has not been determined by the Minister by notice in the *Gazette* lends support to this notion.

\(^{108}\) S 158A(2)(c) and 158A(4):(5) of the Namibian Criminal Procedure Act.


\(^{110}\) Schumann, Bhala & Lee “Developmentally appropriate questions for child witnesses” 1999 *Queens LJ* 251-304. Refer also to ch 5 para 3.4 for more on the functions of an intermediary.

\(^{111}\) 2009 (2) SACR 130 (CC) at paras [167] and [168].
Intermediaries possess the necessary skills to fulfill this unique function, namely to convey the meaning of questions to the child witness in a manner which is understandable to the child, thereby enabling the child to answer the questions properly. Although much has been done by the Namibian government to enhance the position of child witnesses through the vulnerable witness provisions, the failure to use intermediaries is clearly not in the interests of child witnesses and may even result in a total failure of the implementation of the Namibian intermediary system. This warrants renewed action from the Namibian government to reinvigorate the implementation of section 166(5) of the Namibian Criminal Procedure Act.

2.6 The 2004 Criminal Procedure Act

The 2004 Criminal Procedure Act was promulgated by the Namibian government in 2004, but the Act has not come into operation due to the fact that the Namibian government lacks adequate resources to fully implement it.\(^ {112}\) This Act is meant to replace the 1977 Namibian Criminal Procedure Act. Despite its coming into operation being indefinitely suspended, it is necessary to examine the 2004 Criminal Procedure Act as it may still (subject to some review) be instated,\(^ {113}\) and in addition it contains elaborate provisions on the use of intermediaries. Section 193 of the 2004 Criminal Procedure Act in particular makes special reference to the use of intermediaries in the protection of child witnesses when interfacing with the criminal justice system.

2.6.1 Section 193 of the 2004 Criminal Procedure Act

\(^ {112}\) Schwikkard 2007 Namibian Law Journal 5.
\(^ {113}\) Information provided by the Prosecutor-General of Namibia, Adv Imalwa, to the writer of this thesis in an email dated 07/08/2015.
Section 193 of the 2004 Criminal Procedure Act provides as follows:

(1) When criminal proceedings are pending before a court and it appears to the court that it would expose a witness under the age of 18 years to undue mental stress or suffering if that witness testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary to enable that witness to give his or her evidence through that intermediary.

(2) (a) Notwithstanding section 187(1) and (2) or anything to the contrary in any other law contained, no examination, cross-examination or re-examination of a witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, may take place in any manner other than through that intermediary.

(b) The intermediary so appointed may, unless the court directs otherwise, convey the general purport of any question to the witness concerned.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the witness concerned gives his or her evidence at any place -

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the proceedings in question to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

(4) (a) The Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.
(b) An intermediary who is not in the full-time employment of the State must be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister, in consultation with the Minister responsible for finance, may determine.

(5)  

(a) No oath, affirmation or admonition that has been administered through an intermediary in terms of section 186 is invalid and no evidence that has been presented through an intermediary is inadmissible solely on account of the fact that the intermediary was not competent to be appointed as an intermediary in terms of a notice under subsection (4)(a) at the time when that oath, affirmation or admonition was administered or that evidence was presented.

(b) If in any criminal proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of the appointment, was not competent to be appointed as an intermediary in terms of a notice under subsection (4)(a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence with due regard to -

(i) the reason why the intermediary was not competent to be appointed as an intermediary, and the likelihood that that reason will affect the reliability of the evidence so presented adversely;

(ii) the mental stress or suffering which the witness in respect of whom that intermediary was appointed will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

(6) Nothing in subsection (5) contained is to be construed as preventing the prosecution from presenting anew any evidence that was presented through an intermediary referred to in that subsection.
An evaluation of section 193 clearly illustrates that the Namibian government borrowed from the pre-amended section 170A of the South African Criminal Procedure Act. Section 193 closely resembles South Africa’s section 170A(1) to (6) before its amendment by the Criminal Law (Sentencing) Amendment Act.\textsuperscript{114} This explains why section 193(1) of the Namibian Criminal Procedure Act does not refer to witnesses under the \textit{biological or mental} age of eighteen years and does not contain subsections (7), (8), (9) and (10) as the aforementioned amendment and subsections were inserted into the South African Criminal Procedure Act through the Criminal Law (Sentencing) Amendment Act in 2007. Since section 193 of the Namibian Criminal Procedure Act is similar to the previously discussed section 170A(1) to (6), the provisions of section 193 will not be examined.\textsuperscript{115}

Suffice it to say that although section 193 of the 2004 Criminal Procedure Act provides more detailed provisions regarding the use of intermediaries, the removal of the mandatory requirement for examination of young witnesses is a considerable weakening of the 1977 Namibian Criminal Procedure Act.\textsuperscript{116} In terms of the 1977 Act, children under the age of thirteen \textit{must} be questioned through the presiding officer or an intermediary and an intermediary may be used for children under the age of eighteen years. In terms of the 2004 Act, intermediaries \textit{may} be used for witnesses under the age of eighteen years \textit{but only} if “it appears to the court that it would expose a witness under the age of 18 years to undue mental stress or suffering if that witness testifies at such proceedings”. The implementation of section 193 of the 2004 Criminal Procedure Act would clearly significantly disadvantage child witnesses and would be a backward step in the advancement of the rights of Namibian child witnesses. Serious consideration should accordingly be given to the re-evaluation of section 193 of the 2004 Criminal Procedure Act by the Namibian legislature before the 2004 Criminal Procedure Act comes into force.

\textsuperscript{114} Act 38 of 2007.
\textsuperscript{115} Refer to ch 5 above.
\textsuperscript{116} Compare s 166(4)-(5) of the Namibian Criminal Procedure Act with s 193 of the 2004 Criminal Procedure Act.
3 CONCLUSION

As indicated in the introduction to this chapter, the aim of this chapter is to evaluate child victims and child witnesses’ rights in the Namibian criminal justice system with a view to comparing the position in Namibia with that of South Africa.\textsuperscript{117}

The Namibian judicial system is historically analogous to that of South Africa. Like South Africa, Namibia adopted a new Constitution in the early 1990s founded upon the principles of democracy, the rule of law and justice for all. The Constitution of Namibia promotes and protects children’s rights albeit indirectly in some instances. Apart from the general fundamental rights provided for in the Constitution of Namibia, article 15 specifically refers to children’s rights. Article 15 corresponds to a certain degree to section 28 of the Constitution of South Africa.\textsuperscript{118} However, unlike the Constitution of South Africa, article 15 does not define a “child” nor does it include the principle of the “best interests of the child”. The Namibian legislature rectified this lacuna through the Child Care and Protection Act.\textsuperscript{119} It is submitted that the Act gives adequate content to the principle of the best interests of the child, thereby enhancing the rights of children.

Moreover, the evaluation of the Namibian criminal justice system revealed that, like the South African system, the Namibian criminal justice system is accusatorial in nature and for some time even resembled the South African Criminal Procedure Act to a significant extent.\textsuperscript{120} Namibian children, akin to South African children, suffered severe trauma and emotional distress during the court processes up until the early

\textsuperscript{117} See a 1(1) and (6) of the Constitution of Namibia.
\textsuperscript{118} Compare a 15 of the Constitution of Namibia with s 28 of the Constitution of South Africa.
\textsuperscript{119} See ss (1) and 3(1) of the Child Care and Protection Act.
\textsuperscript{120} Horn “International human rights norms and standards: The development of Namibian case and statutory law” available at http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/horn.pdf\textsuperscript{141} (accessed 03/07/2015) at 150.
twenty-first century. Only with the amendment of the Namibian Criminal Procedure Act through the enactment of the 2003 Criminal Procedure Amendment Act did the position change for child victims and child witnesses within the Namibian criminal justice system.

In comparison to section 170A of the South African Criminal Procedure Act, the application of section 158A is more child-oriented in that there are fewer obstacles to overcome to be able to make use of the special measures.\textsuperscript{121} In addition, section 166 of the Namibian Criminal Procedure Act prescribes as a \textit{standard norm} that children under the age of thirteen must be cross-examined by the presiding officer or an intermediary, whereas children under the age of eighteen may at the discretion of the trial court testify with the aid of an intermediary.\textsuperscript{122} In terms of section 170A of the South African Criminal Procedure Act the court has a discretion in \textit{all instances} to appoint an intermediary. In South Africa child victims and child witnesses under the age of thirteen years do not have the right to demand that they be cross-examined by an intermediary. It is submitted that South African children will likewise greatly benefit from such a position and that serious attention should be given to the implementation of comparative legislation in South Africa. Further, there are no pre-requisites for section 166 of the Namibian Criminal Procedure Act to find application other than that an intermediary should be immediately available. In comparison, its South African counterpart (s 170A) does not find application unless failure to apply it would expose the child witness to undue mental stress or suffering. However, the application of section 166 of the Namibian Criminal Procedure Act proves to be more child-oriented in this regard. The wording of section 166 and section 158A of the Namibian Criminal Procedure Act is therefore preferred to that of section 170A in that it affords child witnesses enhanced protection. In this regard the Namibian experience could act as an example and impetus for South Africa to introduce changes within its juristic system.

\textsuperscript{121} Refer to para 2.4.3 above.
\textsuperscript{122} S 166(4)-(5) of the Namibian Criminal Procedure Act, emphasis added.
Regrettably, while Namibia may be complimented on their advanced child-friendly legislation, they are open to criticism for their grave lack of implementation. As far as could be established Namibia has a significant shortage of child-friendly courts, and even where such facilities are available they are underutilised.\(^{123}\) This leaves children exposed to the adverse effects of the normal adult accusatorial judicial system. In addition to this dilemma, although it could not be established how many intermediaries currently act as such in the Namibian criminal justice system, the indications are that intermediaries are seldom used.\(^{124}\) This role is usually performed by the presiding officer.\(^{125}\) By failing to utilise intermediaries, Namibia chooses to ignore a vast amount of research and knowledge signifying the importance of the questioning of a child witness by a skilled interviewer who is specifically trained for this purpose and who has an understanding of a child’s linguistic, cognitive and emotional development. Very few presiding officers have these specialised skills or have been trained to perform this task.\(^{126}\) Intermediaries possess these skills and by drawing on them while questioning child witnesses they not only elicit more accurate and reliable evidence from child witnesses but also lessen the impact of the trial on child witnesses.\(^{127}\) It should be kept in mind that the whole object of the creation of the persona or function of an intermediary is to protect a child witness from the adverse effects of confrontation and cross-examination typical of an accusatorial system.\(^{128}\) The re-traumatisation of child witnesses as a result of inappropriate questioning or aggressive cross-examination is only partially addressed by the special arrangement measures.

Namibia and South Africa, as signatories to important international and human rights instruments such as the CRC and the African Children’s Charter, carry the same obligations as a result of their endorsement of the said instruments to uphold the

\(^{123}\) Refer to para 2.4.5 of ch 6 above.

\(^{124}\) Refer to para 2.5 of ch 6 above.

\(^{125}\) Hubbard Rape in Namibia: Assessment of the Operation of the Combating of Rape Act 8 of 2004: Gender Research and Advocacy Project 431.

\(^{126}\) DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC) at paras [167]-[168].

\(^{127}\) DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC) at paras [167]-[168].

\(^{128}\) DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC) at paras [93]-[99].
rights of child victims and child witnesses within their criminal justice systems. In terms of the CRC it is States Parties’ duty to ensure that local legislation adheres to the principles and provisions of the CRC in the protection of children from all forms of physical or mental violence, injury, abuse or neglect as well as in the protection and realisation of children’s best interests. As signatories to these instruments, countries should not only enact child-friendly legislation to assist child witnesses in line with their international obligations but should also invest in the implementation of such legislation. Owing to the aforementioned shortcomings it appears that the Namibian government has not fully discharged its obligations to provide sufficient protection for child witnesses interfacing with the Namibian justice system. Although this can be attributed in part to Namibia’s unfortunate financial constraints, it is submitted that the rights of child witnesses should not be weighed in Namibian dollars and cents.

In conclusion, although Namibia has made some progress along the long and difficult road towards the realisation of child witnesses’ rights, it still has a way to go in its efforts to make the country a better place for its children.

129 Arts 3 & 13 of the CRC.
CHAPTER 7

The intermediary system in New Zealand

It disturbs me that AUT's [Auckland University of Technology] research found that 30 per cent of children wept while testifying, more than 70 per cent of them did not understand a question posed by a defence lawyer, and that 65 per cent were accused of lying, [the then Justice Minister] Mr Power said.

We simply must do better to ensure that the estimated 750 children who give evidence in criminal courts each year - the majority of them complainants in sexual offending cases - are not re-brutalised by their participation in the process. They are in the criminal justice system through no fault of their own and they deserve special protection.¹

1 INTRODUCTION

The position of child victims and child witnesses in New Zealand in some respects resembles that of South African children. New Zealand children also have to face the difficulties associated with high levels of crime, for example, in that it is estimated that around 2000 or more children appear in New Zealand criminal courts as complainants or witnesses every year.² Like South Africa, New Zealand has an

² According to the issue paper of the New Zealand Ministry of Justice Alternative Pre-Trial and Trial Processes for Child Witnesses in New Zealand's Criminal Justice System Issues Paper (2011) available at http://justice.govt.nz/publications/global-publications/a/altemative-pre-trail-and (accessed 07/09/2015), in 2009/2010 over 2000 child complainants were involved in cases before the courts and even more children were involved in court cases as witnesses.
The intermediary system in New Zealand

adversarial criminal justice system. This entails that witnesses have to appear at trial to give oral evidence and be subjected to cross-examination. In this regard New Zealand child witnesses and child victims historically suffered similar hardship to South African children when they had to testify in criminal proceedings. Up to the early 1990s the position of most child witnesses and child victims in New Zealand, as in most of the common law world with an adversarial criminal justice system, was extremely bleak in that children were required to give evidence in the witness box in the same manner as adults while facing the additional hurdle of their evidence being regarded as inherently suspect.

Over the past twenty years the position of child witnesses and child victims within the New Zealand criminal justice system has, like that of South African child witnesses and child victims, been affected by the increasing concern expressed about the failure of the criminal justice process to meet the needs of child witnesses and gather adequate evidence from them. The criminal process for child witnesses and child victims in New Zealand has accordingly seen considerable reform through the enactment of the New Zealand Evidence Amendment Act 1989 and the New Zealand Evidence Act 2006, which provide for a range of alternatives to conventional testimony, including recording a child’s evidence-in-chief, the use of live links, and the use of intermediaries to assist in questioning children.

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5 Pipe & Henaghan in Bottoms & Goodman International Perspectives on Child Abuse and Children’s Testimony: Psychological Research and Law 145 at 146.
8 The New Zealand Evidence Amendment Act 104 of 1989 inserted ss 23C-23I into the New Zealand Evidence Act 56 of 1908.
9 The New Zealand Evidence Act 69 of 2006.
10 While the New Zealand Evidence Amendment Act 1989 provides for the use of an intermediary in s 23E(4), the New Zealand Evidence Act 2006 does not specifically refer to intermediaries but mentions communication assistance. See s 80 of the Evidence Act 2006.
This chapter consists of a discussion of the position of the rights of child victims and child witnesses in the New Zealand criminal justice system. The historical development of the rights of child victims and child witnesses in the New Zealand criminal justice system will also be referred to where relevant. These discussions are important because, as will be pointed out, owing to similarities between the two countries South Africa and New Zealand can learn from one another in this regard. Much is therefore to be gained from a comparative perspective on how New Zealand has improved its criminal justice system over the past twenty years to enhance the protection of the rights of child victims and child witnesses within their system. Such a comparison is beneficial to both countries in order to identify possible shortcomings as well as valuable features in the respective criminal justice systems.

It is nevertheless important to remember that there are both similarities and differences between New Zealand and South Africa with regard to the rights to protection of child victims and child witnesses. New Zealand is a parliamentary democracy and a constitutional monarchy. Because it is a constitutional monarchy the Queen of the United Kingdom, as head of state, is the source of legal authority in New Zealand. The Queen, together with her representative the Governor General, acts on the advice of the democratically elected Government in all but the most exceptional circumstances. New Zealand is also one of only three countries in the world (the others being Britain and Israel) without a full and entrenched written constitution. New Zealand's constitution in this regard differs from the constitutions of most other countries in that most modern countries, including South Africa, have a well-established constitution which is the supreme law and is compiled in a single document or a small number of documents comprising the elements which determine how public power is to be exercised and implemented within a specific state. The sources of the constitution of New Zealand conversely include the prerogative powers of the Queen, various statutes with constitutional significance.

Despite these constitutional differences, New Zealand and South Africa can still learn from one another. Like South Africa, New Zealand is a signatory to important international human rights instruments such as the Universal Declaration of Human Rights and the United Nations Convention on the Rights of the Child (CRC). It will be informative to see how New Zealand meets its international obligations regarding the protection of child victims and child witnesses within its criminal justice system.

2 THE RIGHT TO PROTECTION OF THE NEW ZEALAND CHILD VICTIM AND CHILD WITNESS

2.1 The Convention on the Rights of the Child

As stated previously, New Zealand is a signatory to and has ratified the CRC. In so doing New Zealand has committed itself to fulfilling its obligations in terms of the provisions pertaining to child victims and child witnesses within the said instrument.

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13 Act 114 of 1986.
16 New Zealand ratified the CRC on 6 April 1993 subject to the following reservations: “Nothing in this Convention shall affect the right of the Government of New Zealand to continue to distinguish as it considers appropriate in its law and practice between persons according to the nature of their authority to be in New Zealand including but not limited to their entitlement to benefits and other protections described in the Convention, and the Government of New Zealand reserves the right to interpret and apply the Convention accordingly. The Government of New Zealand considers that the rights of the child provided for in article 32(1) are adequately protected by its existing law. It therefore reserves the right not to legislate further or to take additional measures as may be envisaged in article 32(2). The Government of New Zealand reserves the right not to apply article 37(c) in circumstances where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable; and further reserves the right not to apply article 37(c) where the interest of other juveniles in an establishment require the removal of a particular juvenile offender or where mixing is considered to be of benefit to the persons concerned.”
Three principles of the CRC, together with the General Comments developed by the Committee on the Rights of the Child on the principles, are of particular importance, namely the best interests of the child (article 3), the right of the child to be heard (article 12) and the right of the child to freedom from all forms of violence (article 19). In terms of the three principles New Zealand as a State Party to the CRC has to ensure that the child’s best interests are taken into account as a primary consideration in all actions or decisions that concerns the child, in both the public and the private sphere. In addition the Government of New Zealand should afford every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child, which views should be given due weight in accordance with the age and maturity of the child. The Government of New Zealand is also obliged to introduce measures for the protection of children from all forms of violence. Such protective measures should include a range of interventions, namely legislative, administrative, social and educational measures as well as proactive prevention against the experience of violence and treatment for those that have been the victims of violence.

As a signatory to the CRC, New Zealand, like other parties to the convention, is obliged under article 44 of the CRC to report on progress made with its implementation. In its 2015 report on New Zealand’s progress on the implementation of the CRC and the two Optional Protocols the Government of New Zealand reported with regard to inter alia the protection of child witnesses.

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17 Note that although the right to be free from violence may not normally be associated with court proceedings, it is submitted that a case can be made out that exposing a child in open court to aggressive cross-examination by the alleged perpetrator or legal representative may amount to (secondary) violence. Refer also to ch 4 above for a comprehensive discussion of the right of the child to be free from violence in terms of the Constitution of the Republic of South Africa. This is equally true for children residing in New Zealand. Children are also afforded the right to be free from violence in terms of s 9 of the New Zealand Bill of Rights Act. Refer to ch 4 above for a comprehensive discussion on aa 3, 12 and 9 as well as the General Comments of the Convention on the Right of the Child on the articles.


20 At paras 250 and 251 of the report.
and victims of crime that the following progress has been made towards the fulfilment of its obligations:

250. The protective services offered to child victims and witnesses are outlined in paragraphs 89 to 106 of New Zealand’s Initial Report under OPSC.22

251. Following the 2013 New Zealand Law Commission’s review of the Evidence Act 2006 a number of reforms to make appearing in court less traumatic for child witnesses [have been proposed]. These include creating a legislative presumption that all witnesses under the age of 18 use alternative ways to give their evidence. This involves the use of pre-recorded evidence, audio-visual link, closed-circuit television and the use of witness screens in court.

The Evidence Act 2006 as well as the reviews of the Evidence Act 2006 with regard, specifically, to the protection afforded to child witnesses and child victims will be discussed below. The extent to which these reforms realise the rights enshrined in the CRC will be highlighted.

2.2 New Zealand Bill of Rights Act 1990

As mentioned previously, the sources of the Constitution of New Zealand include various statutes with constitutional significance and in particular the New Zealand Bill of Rights Act.23 The New Zealand Bill of Rights Act (although not having the

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22 This includes aspects such as the interviewing of child witnesses by a specialist trained interviewer from the New Zealand Police, training of the judiciary on how best to question and cross-examine child witnesses, support, counselling and other treatment programmes for victims as well as budgetary reviews of specialist sexual violence services. See the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography: Initial Report by the Government of New Zealand 2014 available at https://www.msd.govt.nz/about-msd.../optional-protocols.html (accessed 25/10/2015).

status of supreme law\textsuperscript{24}) serves to affirm, protect and promote the rights and freedoms contained in the New Zealand Bill of Rights Act and applies to acts performed by the legislative, executive or judicial branches of the Government of New Zealand.\textsuperscript{25} In this regard the New Zealand Bill of Rights Act corresponds to some degree with the Bill of Rights of the Constitution of the Republic of South Africa, 1996.\textsuperscript{26}

The New Zealand Bill of Rights Act also promotes and protects children’s rights, albeit implicitly. Everyone, including children, is afforded the right to life\textsuperscript{27} as well as the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment.\textsuperscript{28} Section 27 of the New Zealand Bill of Rights Act affords every person, and hence also children, the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person’s rights, obligations or interests as protected or recognised by law.

The New Zealand Bill of Rights Act affords an accused certain special rights, namely the right to: a) a fair and public hearing;\textsuperscript{29} b) be present at the trial and to present a defence;\textsuperscript{30} and c) examine the witness for the prosecution.\textsuperscript{31} This has been affirmed in the Evidence Act 2006, which provides that any judicial decision to modify the ordinary manner of witness testimony set out in section 83(1) of the Evidence Act 2006 must take the aforementioned rights of the accused into account.\textsuperscript{32} No similar rights are afforded to witnesses in the New Zealand Bill of Rights Act.

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\textsuperscript{24} See s 4 of the New Zealand Bill of Rights Act.
\textsuperscript{25} See ss 2 and 3 of the New Zealand Bill of Rights Act.
\textsuperscript{26} Hereinafter the Constitution of South Africa.
\textsuperscript{27} S 8 of the New Zealand Bill of Rights Act.
\textsuperscript{28} S 9 of the New Zealand Bill of Rights Act.
\textsuperscript{29} S 25(a) of the New Zealand Bill of Rights Act.
\textsuperscript{30} S 25(e) of the New Zealand Bill of Rights Act.
\textsuperscript{31} S 25(f) of the New Zealand Bill of Rights Act.
\textsuperscript{32} Mahoney et al \textit{The Evidence Act 2006: Act and Analysis} 3 ed (2014) EV 83.02.
\end{flushleft}
In addition, unlike the Bill of Rights of the Constitution of South Africa, which specifically provides for children’s rights, the New Zealand Bill of Rights Act makes no such provision. There is also no equivalent to the best interests of the child principle as set out in section 28(2) of the Bill of Rights of the Constitution of South Africa. This may perhaps be attributed to the fact that the New Zealand Bill of Rights Act was enacted in part to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights. The latter document does not contain any specific reference to children’s rights either.

It is accordingly argued by the writer hereof that in comparison with the South African Bill of Rights, the New Zealand Bill of Rights Act is underutilised as a tool for the protection of children’s rights. The only reference to the best interests of the child principle can be found in the New Zealand Care of Children Act (sections 4 and

33 See s 28 of the Constitution of South Africa.
34 Act 90 of 2004.
and the New Zealand Children, Young Persons, and Their Families Act\textsuperscript{36} (section 6\textsuperscript{37}) respectively. An analysis of sections 4 and 5 of the New Zealand Care of Children Act reveals that these sections do not extend the right to the protection of their best interests to child victims and child witnesses. This is understandable as the focus of the New Zealand Care of Children Act is not on child victims and child witnesses within the criminal justice domain but on the promotion of children’s welfare and best interests by ensuring that appropriate arrangements are in place for their guardianship and care. The principle of the paramountcy of the welfare and interests of children or young persons as stated in section 6 of the New Zealand Children, Young Persons, and Their Families Act has to do with matters relating to the administration or application of the latter Act and as such does not afford child victims and child witnesses any protection either. Protection for child victims and

\textsuperscript{35} Sections 4 and 5 state as follows:

4(1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration-
(a) in the administration and application of this Act, for example in proceedings under this Act; and
(b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.

(2) Any person considering the welfare and best interests of a child in his or her particular circumstances-
(a) must take into account-
(i) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child’s sense of time; and
(ii) the principles in section 5; and
(b) may take into account the conduct of the person who is seeking to have a role in the upbringing of the child to the extent that that conduct is relevant to the child’s welfare and best interests”.

5 The principles relating to a child’s welfare and best interests are that-
(a) a child’s safety must be protected and, in particular a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child’s family, family group, whānau, hapū and iwi;
(b) a child’s care, development, and upbringing should be primarily the responsibility of his or her parents and guardians;
(c) a child’s care, development, and upbringing should be facilitated by on-going consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order;
(d) a child should have continuity in his or her care, development, and upbringing;
(e) a child should continue to have a relationship with both of his or her parents, and that a child’s relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened;
(f) a child’s identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

\textsuperscript{36} Act 24 of 1989.

\textsuperscript{37} Section 6 states as follows:

“In all matters relating to the Administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the welfare and interest of the child or young person shall be the first and paramount consideration, having regard to the principles set out in sections 5 and 13.”
child witnesses is however found in international instruments, in particular the CRC as stated previously, as well as in other domestic law.

2.3 Reforms to the New Zealand law of evidence before 1989

Prior to the enactment of the New Zealand Evidence Amendment Act 1989, the successful prosecution of child sexual abuse cases in New Zealand was relatively rare. This was mainly due to the stringent evidentiary law requirements for children, based on society’s adherence at the time to the myth that children are prone to invention, fantasy and a distortion of reality.\(^{38}\) Research in the early 1980s, however, produced contrary results on the credibility of children and a shared concern in the common law world regarding the failure of criminal justice processes to meet the needs of child witnesses. These concerns led to discussions among stakeholders on the possibility of reforming criminal evidence law and procedure, with a view to removing barriers to children’s effective participation in criminal trials.\(^{39}\)

The New Zealand Government shared this concern. Reforms to the criminal justice process for New Zealand child witnesses were accordingly initiated. In 1984 and 1985, the legislature enacted major changes to the law of evidence and procedure relating to rape complainants. These changes gave child complainants in sexual criminal matters their first real protection.\(^{40}\) The requirement that the evidence of complainants in sexual offence trials had to be corroborated was abolished.\(^{41}\) Rape complainants were furthermore excused from appearing at oral committal

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\(^{38}\) Ball “The law of evidence relating to child victims of sexual abuse” 1995 Waikato LR 1.

\(^{39}\) Henderson in Spencer & Lamb Children and Cross-Examination: Time to Change the Rules? 1 at 114.

\(^{40}\) Henderson in Spencer & Lamb Children and Cross-Examination: Time to Change the Rules? 1 at 114.

\(^{41}\) S 23AB of the New Zealand Evidence Act 56 of 1908, inserted by s 3 of the New Zealand Evidence Amendment Act 2 of 1985.
proceedings and child victims obtained the right to be accompanied by support persons in court.

2.4 New Zealand Evidence Amendment Act 1989

At the end of 1989, the New Zealand Parliament passed the New Zealand Evidence Amendment Act 1989 (hereinafter the Evidence Amendment Act), which came into force on 1 January 1990. The Evidence Amendment Act was introduced in an attempt to change attitudes towards child witnesses, to make the process of testifying less traumatic for children and to remove the traditional scepticism towards children’s evidence. In order to achieve this the Evidence Amendment Act introduced a series of alternative methods through section 23 by which a child complainant under the age of seventeen years testifying in sexual cases could give evidence, namely via a pre-recorded video interview, closed circuit television (CCTV), from behind a screen, through one-way glass, or from behind a wall or partition, constructed in such a manner and of such materials as to enable those in the courtroom to see the complainant while preventing the complainant from seeing them, the evidence of the complainant being given through an appropriate audio link.

Where a trial was one to which section 23 of the Evidence Amendment Act applied the prosecution was required to apply for directions as to how a child complainant was to give evidence. Judges had a discretion as to whether they wished to use

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42 S 185C of the New Zealand Summary Proceedings Act 87 of 1957.
43 S 375A(2)(h) and (3)(b) of the New Zealand Crimes Act 43 of 1961 inserted by s 5 of the New Zealand Crimes Amendment Act 3 of 1985.
44 The New Zealand Evidence Amendment Act 104 of 1989 inserted ss 23C-23I into the New Zealand Evidence Act 56 of 1908.
45 S 23E(1) of the Evidence Amendment Act.
46 S 23D(1) of the Evidence Amendment Act.
any of the alternative modes. However, in exercising this discretion they were subject to a mandatory requirement to have regard for the need to minimise stress on the complainant while ensuring a fair trial for the accused.\textsuperscript{47} In exercising this discretion a judge could direct that “any questions to be put to the complainant shall be given through an appropriate audio link to a person, approved by the Judge, placed next to the complainant, who shall repeat the questions to the complainant”.\textsuperscript{48} This in effect allowed for the use of an “intermediary”. The role of an intermediary in terms of section 23E(4) was however in essence restricted to that of an “amplifier”. In \textit{R v Accused}\textsuperscript{49} the New Zealand High Court in characterising the role of an intermediary explained that the function of an intermediary was to responsibly and fairly put questions as asked by counsel to the child. If the child did not appear to understand the question, it would be for counsel to rephrase the question or to approach the matter from another angle.\textsuperscript{50}

The legislative changes also allowed for expert evidence regarding the intellectual attainment, mental capacity and emotional maturity of the complainant, the general developmental level of children of the same age group as the complainant as well as the extent to which the child’s behaviour was consistent with having been sexually abused.\textsuperscript{51} In addition it restricted the defendant’s right to personally cross-examine children where a judge considered such questioning to be intimidating or overbearing.\textsuperscript{52}

The Evidence Amendment Act furthermore legislated against the previously standard practice of warning the jury about the reliability of a child witness. It statutorily abolished the judicial practice of requiring corroboration of children’s

\textsuperscript{47} S 23D(4) of the Evidence Amendment Act.
\textsuperscript{48} S 23E(4) of the Evidence Amendment Act.
\textsuperscript{49} T 91/92 HC Wellington (05/03/1993).
\textsuperscript{50} T 91/92 HC Wellington (05/03/1993) at 5.
\textsuperscript{51} S 23G of the Evidence Amendment Act.
\textsuperscript{52} S 23F(1) of the Evidence Amendment Act.
evidence and in fact required a judge to instruct the jury not to draw any adverse conclusion from the way in which the child complainant’s evidence was given.\(^{53}\)

Although the Evidence Amendment Act was specific as to the nature of crimes (crimes of a sexual nature) and the witness with whom the modes could be used (a child complainant), the New Zealand courts extended the modes to other crimes and other child witnesses besides the complainant on the basis of their “inherent jurisdiction”.\(^ {54}\)

The changes introduced by the aforementioned legislation were seen at the time as “remarkably radical legislation” exceeding “similar legislation in comparable commonwealth jurisdictions such as South Africa, Canada Australia and the UK”.\(^{55}\)

A general perception furthermore prevailed in New Zealand that “cases involving a child witness were now more likely to reach court and to result in a defendant being found guilty than was the case prior to the introduction of the new procedures”.\(^{56}\)

The use of the forensic interview video as evidence-in-chief, with the child appearing at trial to be cross-examined using live links or screens, quickly became standard procedure for child witnesses in New Zealand criminal courts. Regrettably, within a very short period of time, the other alternatives offered by the Evidence Amendment Act were overlooked. These included the use of intermediaries. Henderson\(^ {57}\) reports that an investigation conducted by the author into the use of intermediaries after the implementation of the Evidence Amendment Act uncovered only three instances where intermediaries were used, only one of which resulted in evidence being put to the jury. In the first of the other two cases, proceedings were withdrawn before

\(^{53}\) S 23H of the Evidence Amendment Act.


\(^{55}\) Henderson in Spencer & Lamb *Children and Cross-Examination: Time to Change the Rules?* 1 at 117.

\(^{56}\) Pipe et al “Perceptions of the legal provisions for child witnesses in New Zealand” 1996 NZLJ18.

\(^{57}\) Henderson in Spencer & Lamb *Children and Cross-Examination: Time to Change the Rules?* 1 at 117.
trial and in the second instance proceedings stopped when the child could not explain the meaning of “truth”. Henderson\textsuperscript{58} suggests that the failure of the use of intermediaries could be attributed to a failure by the New Zealand government to invest in the infrastructure, training and organisation necessary for such reforms to succeed.

Further, an evaluation of the overall treatment of child witnesses by the criminal justice system undertaken in the mid-1990s revealed that while the forensic interviewing standards were adequate, the rest of the criminal justice system was uncoordinated and flawed. Delays had increased and serious concerns had been expressed about lawyers’ developmentally inappropriate questioning of child witnesses (especially in cross-examination) and judicial reluctance to intervene. The applications for videotaped evidence-in-chief and live links for children protected by the Evidence Amendment Act also proved problematic as they were usually made only for children below the age of twelve years, while older children were generally only offered screens.\textsuperscript{59} Thus, as pointed out by Henderson,\textsuperscript{60} “child abuse trials continued to be ‘confusing, frustrating and ultimately disempowering for many participants’”. Fortunately proposals for reform materialised in 1996 through the actions of the New Zealand Law Commission (hereinafter the Law Commission) and the New Zealand Working Party of the Court Consultative Committee (hereinafter the Working Party).

\subsection{2.5 1996 Law reform}

In 1996 the Law Commission and the Working Party released proposals for further reform. The Working Party focused on infrastructure, while the Law Commission

\begin{footnotes}
\item[58] Henderson in Spencer & Lamb \textit{Children and Cross-Examination: Time to Change the Rules?} 1 at 118.
\item[59] Henderson in Spencer & Lamb \textit{Children and Cross-Examination: Time to Change the Rules?} 1 at 120.
\item[60] \textit{Ibid.}
\end{footnotes}
focused on evidence law. The recommendations of the Working Party included practical measures for fast-tracking cases involving child witnesses as well as the development of a national court program for children. The Law Commission recommended that the competency tests for children be abolished and that everyone, including children, be deemed eligible to testify. The Law Commission furthermore recommended reintroducing pre-recordings as well as providing all complainants with a support person. The Law Commission also suggested that expert witnesses be appointed to advise the court and counsel on the most appropriate way to question witnesses with communication or comprehension difficulties. The Law Commission proposed that the role of intermediaries be extended to allow them to “rephrase questions to assist witness comprehension”. It should be noted that this recommendation received overwhelming governmental and community support, with a number of people describing it as “the best in the paper”. The Law Commission retained most of its original recommendations when delivering its final proposals in 1999. However, while the Law Commission recommended “communication assistance” in its final document, it withdrew its recommendation for the use of intermediaries. The Law Commission cited divided views within the profession as well as the existence of three unfavourable research articles from the United States of America, as justification for its stance.

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view, the above-mentioned articles do not lend support to the claims made by the Law Commission at the time. The articles related to “facilitated communication”, a specific type of communication assistance for persons with a physical or intellectual disability, and focused primarily on remedying problems associated with expressive disorder in the context of severely disabled adult witnesses. Although severely disabled adults are not excluded from the use of intermediaries, the focus for the use of intermediaries in the discussion paper was on assisting child witnesses to understand questions posed to them in order to elicit accurate information. In my view research pertaining to child witnesses should rather have been consulted.

2.6 New Zealand Evidence Act 2006

The Evidence Act 2006 (hereinafter the Evidence Act) codified New Zealand’s evidence law. This Act replaced all pre-existing legislation and, together with the New Zealand Evidence Regulations 2007, governs the way in which witnesses, including child witnesses, give evidence in proceedings today.

In terms of the Evidence Act every person, and thus also children, is eligible to testify and the common law competency rule for children is excluded. If the characteristics of a witness invite concern as to his or her reliability (for example if the witness is a very young child), the Evidence Act makes allowances for the mitigation rather than the exclusion of such witness’s evidence. Witnesses aged twelve years and over must take an oath or make an affirmation before giving evidence. Child witnesses under the age of twelve years may give evidence without

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71 A child is defined in the Evidence Act as a person under the age of eighteen years.

72 S 71 of the Evidence Act.

73 S 8 of the Evidence Act. See also R v Tanner [2007] NZCA 391 at [24] where the Court of Appeal held that if a young child is unable to give coherent evidence a judge still retains a discretion to exclude the testimony under s 8 of the Evidence Act.
taking an oath or making an affirmation, provided they have been informed by a judge of the importance of telling the truth and not lying and they promise to tell the truth before giving evidence.\textsuperscript{74}

Ordinarily, evidence is to be presented by a witness orally in a courtroom in the presence of the judge or, if there is a jury, the judge and jury and the parties to the proceedings.\textsuperscript{75} The Evidence Act, however, allows any witness to depart from the ordinary manner of giving evidence and instead give evidence in an alternative manner provided certain requirements are met.\textsuperscript{76}

2.6.1 Alternative ways of giving evidence

The evidential rules governing the use of alternative modes of giving evidence are set out in sections 102 to 107 of the Evidence Act.\textsuperscript{77} Section 103 of the Act sets out the directions for alternative ways of giving evidence and can be regarded as the primary empowering provision regulating the use of alternative ways of giving evidence. Section 105 defines the nature of directions that may be given by a judge, and sections 104 and 106, pertaining respectively to the requirement of a hearing in chambers and the use of video recordings, relate to procedural aspects. Section 107 regulates the manner in which child complainants in criminal proceedings are to give evidence.

Section 103 reads as follows:

\textsuperscript{74} S 77(2) of the Evidence Act.
\textsuperscript{75} S 83 of the Evidence Act. See also \textit{Sing v R} [2010] NZCA 144 at [6] where the Court of Appeal emphasised the importance of section 83(1) of the Evidence Act.
\textsuperscript{76} S 103(1) of the Evidence Act.
\textsuperscript{77} S 102 of the Evidence Act is a reminder that when a witness in question fits within one of the three listed categories, namely child complainant, undercover police officer or anonymous witness, the specified provisions of the Act relating to each case must be followed.
(1) In any proceeding, the Judge may, either on the application of a party or on the Judge’s own initiative, direct that a witness is to give evidence-in-chief and be cross-examined in the ordinary way or in an alternative way as provided in section 105.

(2) An application for directions under subsection (1) must be made to the Judge as early as practicable before the proceeding is to be heard, or at any later time permitted by the court.

(3) A direction under subsection (1) that a witness is to give evidence in an alternative way, may be made on the grounds of—

(a) the age or maturity of the witness:

(b) the physical, intellectual, psychological, or psychiatric impairment of the witness:

(c) the trauma suffered by the witness:

(d) the witness’s fear of intimidation:

(e) the linguistic or cultural background or religious beliefs of the witness:

(f) the nature of the proceeding:

(g) the nature of the evidence that the witness is expected to give:

(h) the relationship of the witness to any party to the proceeding:

(i) the absence or likely absence of the witness from New Zealand:

(j) any other ground likely to promote the purpose of the Act.

(4) In giving directions under subsection (1), the Judge must have regard to—

(a) the need to ensure—

(i) the fairness of the proceeding; and

(ii) in a criminal proceeding, that there is a fair trial; and
(b) the views of the witness and—

(i) the need to minimise the stress on the witness; and

(ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and

(c) any other factor that is relevant to the just determination of the proceeding.

2.6.1.1 Application

Section 103 applies to any proceeding and affords any witness, thus also children, a right to apply for alternative ways of giving evidence. Directions may be made on the application of any party to the proceedings or on a judge’s own initiative. Section 103 uses the words “a Judge may”, implying that an application for alternative ways is not automatic. However, it is mandatory in terms of section 107 for the prosecution to apply for directions where the complainant in a criminal proceeding is a child. This does not apply to non-complainant child witnesses and raises the question of whether mandatory applications about alternative ways of giving evidence should be extended either in terms of section 103 or section 107 to child witnesses who are not complainants. Whilst the discretionary nature of section 103 is understandable as the section provides for all witnesses, the application of the discretionary nature of section 103 to child witnesses may become the exception

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78 Refer to s 5 of the Evidence Act for a definition of the concept “proceedings” as governed by the Act.
79 S 103(1) of the Evidence Act.
80 S 107(1) of the Evidence Act.
rather than the norm. It is thus submitted that it will be more effective to extend the mandatory mode of evidence application to section 107 so as to include all child witnesses.

An extension of the mandatory mode of evidence application to all child witnesses will ensure that there is no arbitrary differentiation between child complainants and other child witnesses. Cleland\(^{81}\) arguing in favour of the mandatory application for directions as to modes of evidence for all child witnesses, points out that it should be remembered that the effects of stress on recall and ability to recount events is not restricted to complainants or a particular event and non-complainant child witnesses may experience similar distress to complainants in giving evidence in the courtroom in front of the defendant. Such a reform will furthermore improve both the child’s experience of the process and the evidence presented to court.\(^{82}\)

It is imperative that the law should be adapted to the needs of child witnesses. It is submitted that section 107 of the Evidence Amendment Act would be more effective if it were amended to require courts to consider directions on alternative ways of giving evidence for all children below the age of eighteen years. A court should only be excused from doing so where it is clear that the child witness would not be traumatised when testifying in the ordinary way and does not need to give evidence in an alternative way.

Cleland\(^{83}\) emphasises that research into jurors’ perceptions suggest that they regard children as less reliable than adults. Although evidence is mixed, removing children from the courtroom may have a negative impact on how children’s testimony is perceived by jurors. For example, some of the witness behaviours which jurors associate with credibility, such as emotional distress, are exactly the behaviours

\(^{81}\) Cleland “Hearing and understanding? Child witnesses and the Evidence Act” 2008 NZLJ 425 at 426.
\(^{82}\) Cleland 2008 NZLJ 426.
\(^{83}\) Cleland 2008 NZLJ 426.
which the alternative modes of evidence aim to prevent. Children may thus appear more calm and composed than the juror as layperson might expect. This problem is acknowledged by the Evidence Act, which provides that unless there is expert evidence to support the direction, a judge must not instruct the jury that there is a need to scrutinise children’s evidence with special care. The Regulations pertaining to the Evidence Act go even further by providing that, where a witness is under the age of six years, the judge may direct the jury that even young children can remember accurately and report things although not in the same manner as adults. Cleland furthermore points out that because of the dangers of jurors' incorrect perceptions it “would be best to ‘normalise’ modes of evidence so that there is less scope for juries to suspect that the child is somehow less credible because of the way in which its evidence is delivered”. According to her it would therefore be logical for applications for directions as to modes of evidence to be mandatory for all child witnesses, irrespective of whether they are complainants or not.

Proposals for a mandatory mode of evidence application for all child witnesses were put forward by the New Zealand Ministry of Justice in 2011. Unfortunately, in its report on the review of the Evidence Act the Law Commission stated in 2013 that it does not consider it appropriate to specify that child complainants should give evidence in any particular way and recommended that a decision of whether to apply for directions on alternative ways should be based on the needs of the individual witness rather than on the fact that they belong to a particular category (such as child witnesses).

85 S 125(2) of the Evidence Act.
87 Cleland 2008 NZLJ 426.
88 Cleland 2008 NZLJ 426.
89 New Zealand Ministry of Justice Alternative Pre-Trial and Trial Processes for Child Witnesses in New Zealand's Criminal Justice System Issues Paper (2011) at section 2A.
An application for directions must be made at the earliest possible time before the proceedings or at any later time permitted by the court. Directions are allowed for the use of alternative modes of giving evidence-in-chief and during cross-examination. No specific standard of proof for the ordering of the use of alternative ways is included in the Evidence Act. Furthermore, no explicit presumption in favour of either the “ordinary way” or an “alternative way” or any express balancing act can be found in the phraseology employed. Courts are only required to “have regard to” the matters in sections 103(4) and 107(4). No particular matter is given more weight than another. In *R v Shone* the Court of Appeal stated with regard to sections 103 and 107 that the Evidence Act “should not be read down by introducing ‘presumptive positions’, so long as proper regard is had to the fairness of the proceedings.” Despite this, several High Court judges have been inclined to follow a presumption “in favour of evidence being given in the usual manner” or preferring a balancing exercise “whereby the ground(s) established and other applicable factors from s103(4) will be considered”. However, in relation to child complainants, the Court of Appeal has clearly set out a contrary view, namely that the standard practice is for child complainants to give evidence is through the use of video record, unless exceptional circumstances prevail. Proposals for a

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92 S 103(2) of the Evidence Act.
93 S 103(1) of the Evidence Act.
94 McDonald & Tinsley “Evident Issues” 2011 Canterbury LR 123 at 124.
95 Mahoney et al *The Evidence Act 2006 Act and Analysis* EV 103.07.
96 [2008] NZCA 313 at [28].
98 *Deutsche Finance New Zealand Limited v Commissioner of Inland Revenue* (2007) 18 PRNZ 710 (HC) at [24].
99 *R v E* (CA308/06) [2007] NZCA 404, *R v M* (CA 590/09) [2009] NZCA 455. In both the cases the courts respectively refer (at paras [56] and [17]) to the use of videotapes or DVDs as the mode to be used for the child witness’s evidence-in-chief. It is, however, submitted that the other alternative methods provided for in s 105 of the Evidence Act may also be used. Mahoney et al *The Evidence Act 2006: Act and Analysis* EV 105.05 point out that there is no prioritisation of the different ways in which evidence may be given in terms of section 105, but that the focus will no doubt remain on what measure is most effective to ensure that the witness gives the best evidence and that the truth-finding process is enhanced. They emphasise that the evidence of younger children may be more reliable when recorded as soon as practicable after the event.
presumption in favour of alternative ways for all child witnesses have recently been put forward by both academics and the New Zealand Government.\textsuperscript{100}

Section 103(3) sets out a broad range of grounds upon which a mode direction may be made and includes aspects such as the age, physical, intellectual or psychological impairment of the witness as well as the trauma suffered by the witness and the nature of the proceedings.\textsuperscript{101} In considering the grounds the judge must also have regard to the matters covered in section 103(4), which include: the need to ensure the fairness of the proceedings; that there is a fair trial; the views of the witness; the need to minimise the stress on the witness; the need to promote the recovery of a complainant and any other factor that is relevant to the just determination of the proceedings.\textsuperscript{102} Mahoney et al\textsuperscript{103} point out that courts have noted a lack of legislative guidance as to whether the grounds must be determined subjectively or objectively. Pointing, however, to the need for a fair trial and the mandatory consideration of the matters in section 103(4), courts have preferred to make an objective assessment of the grounds.\textsuperscript{104}

Subsections 6(a) to (f) of the Evidence Act clarify how the “just determination of proceedings” is to be secured. Factors listed include the recognition of the importance of the New Zealand Bill of Rights Act, promoting fairness to the parties and witnesses, and enhancing access to the law of evidence. The interests of both the defendant and the child witness must accordingly be considered.\textsuperscript{105} This corresponds to the courts’ interpretation of section 103(4)(a)(i) (“fairness of the

\textsuperscript{100} Hanna et al Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy at 116, New Zealand Ministry of Justice Alternative Pre-Trial and Trial Processes for Child Witnesses in New Zealand’s Criminal Justice System Issues Paper (2011) section 2A. Refer to para 2.7 below for a further discussion on the issue.

\textsuperscript{101} S 103(3) of the Evidence Act.

\textsuperscript{102} S 103(4) of the Evidence Act.

\textsuperscript{103} The Evidence Act 2006: Act and Analysis EV 103.08.

\textsuperscript{104} Mahoney et al The Evidence Act 2006: Act and Analysis EV 103.08.

\textsuperscript{105} R v Hetherington CA 14/2014 [2015] NZCA 248 at [22].
proceedings”) and (ii) (“a fair trial”)\textsuperscript{106} in that the Court of Appeal in \textit{R v M}\textsuperscript{107} held that “fairness of the trial includes fairness to all parties”.

As was alluded to above, New Zealand statutory law does not contain a requirement in trial proceedings equal to the best interests of the child provision in section 28(2) of the Constitution of South Africa. It is thus submitted that although section 103(4) does not pertain to children alone, it is particularly important in the case of children to have regard to the factors listed in section 103(4) when directions regarding alternative ways of giving evidence are considered. Consideration of factors such as the age of the witness, any physical, intellectual or psychological impairment of the witness, the trauma suffered by the witness, the views of the witness and the need to minimise stress on the witness and to promote the recovery of the complainant are of particular significance to child witnesses and may go some way towards ensuring their protection.

2.6.1.2 The alternative ways of giving evidence

Section 105 describes alternative directions that may be given by a judge and reads as follows:

\textsuperscript{106} Limited judicial comments exist on the difference between the two concepts. Mahoney et al \textit{The Evidence Act 2006: Act and Analysis} EV 103.09 highlight that it is difficult to understand the need for the inclusion of both concepts. They point out that the Evidence Code which preceded the Evidence Act only provided (at 234) that a judge had to ensure the fairness of the proceedings and in particular that the defendant had a fair trial. Cleland points out that as the Evidence Act refers to both a fair trial and fairness of the proceedings the two concepts should be regarded as distinct. According to her the concept of a fair trial encompasses the accused’s right to hear and test evidence against him or her. The fairness of the proceedings must therefore, according to her, refer to fairness to participants other than the accused (see Cleland 2008 \textit{NZLJ} 426). This corresponds with available case law on the subject. In \textit{R v Simi} [2008] NZCA 515 the Court of Appeal held (at para [28]) that the fairness of the proceedings “can properly include the need to be fair to a complainant”. In \textit{R v Kahui} HC AK CRI 2006-057-1135 10/07/2007 the court held at para [15] that “[i]t remains to be said that in the determination to ensure our criminal trial process is as fair as possible, fairness to all accused should predominate … But fairness to an accused is not the only criterion. The fairness of a criminal trial is fairness on all its bearings, including fairness to a complainant.”

\textsuperscript{107} (CA 590/09) [2009] NZCA 455 at [40].
A Judge may direct, under section 103, that the evidence of a witness is to be given in an alternative way so that—

(a) the witness gives evidence—

(i) while in the courtroom but unable to see the defendant or some other specified person; or

(ii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere; or

(iii) by a video record made before the hearing of the proceeding:

(b) any appropriate practical and technical means may be used to enable the Judge, the jury (if any), and any lawyers to see and hear the witness giving evidence, in accordance with any regulations made under section 201:

(c) in a criminal proceeding, the defendant is able to see and hear the witness, except where the Judge directs otherwise:

(d) in a proceeding in which a witness anonymity order has been made, effect is given to the terms of that order.

If a video record of the witness’s evidence is to be shown at the hearing of the proceeding, the Judge must give directions under section 103 as to the manner in which cross-examination and re-examination of the witness is to be conducted.

The Judge may admit evidence that is given substantially in accordance with the terms of a direction under section 103, despite a failure to observe strictly all of those terms.

In terms of section 105, three deviations from the ordinary way of giving evidence are available to a witness, provided the defendant is able to hear and see the witness. A witness may testify while in the courtroom, screened from the defendant, from an appropriate place outside the courtroom with the aid of CCTV, for example,
or by a pre-recorded video. The Evidence Act does not prioritise or prescribe the various ways in which the evidence should be presented. The most effective choice between the three options would accordingly depend on the particular circumstances.\(^{108}\)

It should be noted that although the Evidence Act does not include the overt option of full pre-recording of a child witness’s evidence,\(^{109}\) it is theoretically possible to allow a pre-recorded videotape of a child’s *evidence-in-chief and cross-examination* to be admitted as the child’s entire evidence at trial. A judge must, if a video record is to be shown in terms of section 105(2) of the Evidence Act, give directions under section 103 as to the manner in which the cross-examination and re-examination of the witness is to be conducted and these directions may include a pre-recording of a child’s entire evidence at trial.\(^ {110}\)

Relying on the breadth of the aforementioned provisions, the Crown Solicitor for Auckland began applying them to fully pre-record children’s evidence.\(^ {111}\) However, in *M v R*\(^ {112}\) the Court of Appeal held that while accepting that the Evidence Act permits pre-trial cross-examination recordings, such an order would in its view have substantial disadvantages for both the defendant and the witness. It therefore limited its use to extreme situations, stating that it would require a compelling case and unusual circumstances (such as where a witness was dying) before such a directive could be given. It therefore seems that although pre-recorded cross-examination may be available under sections 103 and 105 of the Evidence Act, the admission of such evidence is currently unlikely. A proposal for the introduction of a legislative presumption in favour of pre-recordings of the entire evidence of children under the

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\(^{108}\) Mahoney et al *The Evidence Act 2006: Act and Analysis* EV105.05.

\(^{109}\) S 105 (1)(a)(iii) only refers to “a video record made before the hearing of the proceeding”.


\(^{111}\) *R v Sadlier* unreported, Auckland District Court, CRI-2010-044-4165 (07/12/2010) per Wade J as cited by Henderson in Spencer & Lamb *Children and Cross-Examination: Time to Change the Rules?* 1 at 128.

\(^{112}\) *M v R* [2011] NZCA 303; [2012] 2 NZLR at para [41].
age of twelve was put forward by the Ministry of Justice in 2011.\textsuperscript{113} However, this proposal has been rescinded by the New Zealand Government.\textsuperscript{114}

2.6.1.3 Directions concerning child complainants’ evidence

Section 107 of the Evidence Act provides directions about the way child complainants are to give evidence in criminal proceedings and reads as follows:

(1) In a criminal proceeding in which there is a child complainant, the prosecution must apply to the court in which the case will be tried for directions about the way in which the complainant is to give evidence in chief and be cross-examined.

(2) An application for directions under subsection (1) must be made to the court as early as practicable before the case is to be tried, or at any later time permitted by the court.

(3) When an application is made for directions under subsection (1), before giving any directions about the way in which the complainant is to give evidence in chief and be cross-examined, the Judge—

(a) must give each party an opportunity to be heard in chambers; and

(b) may call for and receive a report, from any persons considered by the Judge to be qualified to advise, on the effect on the complainant of giving evidence in the ordinary way or any alternative way.

(4) When considering an application under subsection (1), the Judge must have regard to—

\textsuperscript{113} New Zealand Ministry of Justice \textit{Alternative Pre-trial and Trial Processes for Child Witnesses in New Zealand's Criminal Justice System Issues Paper} (2011) section 2A.

(a) the need to ensure—

(i) the fairness of the proceeding; and

(ii) that there is a fair trial; and

(b) the views of the complainant and—

(i) the need to minimise the stress on the complainant; and

(ii) the need to promote the recovery of the complainant from the alleged offence; and

(c) any other factor that is relevant to the just determination of the proceeding.

Section 107 broadens the requirements previously contained in section 23D of the New Zealand Evidence Act 1908 by requiring the prosecution to apply for directions as to the way in which a child complainant is to give evidence, not only in sexual cases, but in any criminal proceedings. As was mentioned previously, some commentators are of the view that directions should be sought in all cases concerning child witnesses.¹¹⁵

When applying to the court for directions about the way in which child complainants are to give evidence, prosecutors must do so as early as is practicable before the proceedings are to be heard, or if this is not possible, at any later time as permitted by the court.¹¹⁶ In terms of the guidelines for prosecutors¹¹⁷ “prosecutors will have to consider whether a particular mode of evidence is appropriate and would improve the quality of the evidence”. Furthermore, when seeking such directions prosecutors should “confirm the views of the victim; inform the victim of the directions made (if


¹¹⁶ S 107(1) & (2) of the Evidence Act.

any), or explain why it is not considered appropriate to apply for a direction”. It is submitted that as this practice corresponds to the principle of “just determination of the proceedings” referred to in sections 6 and 103(4) of the Evidence Act it will contribute to the fairness of the proceedings to child witnesses.

Once an application is made for directions under section 107 of the Evidence Act, the judge, when deciding on directions, must give each party an opportunity to be heard in chambers and may call for and receive a report from a person considered by the judge to be qualified to advise the judge on the effect on the complainant of giving evidence in the ordinary way or any alternative way. Apart from information on the stress likely to be suffered by the child complainant, this could include expert evidence on the cognitive and linguistic abilities of children of the complainant’s age and stage of development as well as of the abilities of the particular child complainant.

In terms of the general provisions of section 103 of the Evidence Act, the judge must have regard to the following: the need to ensure the fairness of the proceedings; that there is a fair trial; the views of the witness; the need to minimise the stress on the witness; the need to promote the recovery of a complainant as well as any other factor that is relevant to the just determination of the proceedings. Unlike the general provisions of section 103, section 107 does not include a list of grounds (such as the age, physical, intellectual psychological or other impairment of the witness, trauma suffered by the witness, linguistic or cultural background of the witness etc) on which a direction may be made. It has accordingly been argued that there is a different threshold for applications for child complainants as opposed to other witnesses. However, one may argue that the aforementioned grounds may

118 New Zealand Crown Law Office Victims of Crime: Guidance for Prosecutors (05/03/2012) at [23].
119 S 107(3) of the Evidence Act.
120 Cleland 2008 NZLJ 425 at 427.
121 Refer to fn 106 above for a discussion on the difference between the two concepts.
122 S 107(4) of the Evidence Act.
be included and considered under a broad interpretation of the words “any other ground likely to promote the purpose of the Act”\textsuperscript{124} or “any other factor that is relevant to the just determination of the proceedings”.\textsuperscript{125} Cleland\textsuperscript{126} maintains that by making a direction mandatory where the child is a complainant, the Evidence Act accepts by implication that the factors in section 103(3) that would be relevant to child witnesses are regarded as automatically operating in respect of child complainants.

### 2.6.2 Support person

In terms of section 79 of the Evidence Act, complainants\textsuperscript{127} are *entitled* to a support person while other witnesses *may* apply for a support person to be near the witness when testifying. The differentiation between child complainants and child witnesses cannot be justified. As was mentioned before, non-complainant child witnesses may experience similar distress to complainants when having to present their evidence and may likewise require the aid of a support person. A study conducted on the advantages of having a support person present in court demonstrated that child complainants were able to answer more of the prosecutors’ questions, appeared less fearful of the defendant, were less likely to provide inconsistent testimony, were more consistent about peripheral details and were less likely to recant on the identity or actions of the perpetrator.\textsuperscript{128} This may be equally true for child witnesses. Hanna

\textsuperscript{124} S 103(3)(j) of the Evidence Act.
\textsuperscript{125} S 107(4)(c) of the Evidence Act.
\textsuperscript{126} Cleland 2008 NZLJ 425 at 426.
\textsuperscript{127} “Complainant” has been held to refer to the person involved in the offence, the alleged victim, who did or could have complained. It is not restricted to children but may include adult complainants (see Mahoney et al *The Evidence Act 2006: Act and Analysis* EV 79.01).
\textsuperscript{128} Goodman et al “Testifying in criminal court: emotional effect on child sexual assault victims”1992 *Monographs of the Society for Research in Child Development* 1 at 85.
et al\textsuperscript{129} emphasise that section 79 would be more effective if it was amended to allow for all child witnesses to have a support person present when they had to testify. A court should only be excused from appointing such a support person where the child witness prefers not to have a support person present or it is clearly not necessary to have one present. A proposal to ensure that all child witnesses under the age of eighteen years have an automatic right to a support person when giving evidence in court has recently been put forward by the New Zealand Government.\textsuperscript{130}

The Evidence Act places no restriction on the persons who may be appointed as support persons for child witnesses. In most instances this function is performed by family members, counsellors or social workers. According to Henderson it is important, however, that the child witness is familiar with or has a close relationship with this person, as the child derives strength from the proximity of the support person.\textsuperscript{131}

The role of the support person is not defined in the Evidence Act, other than that the Evidence Act determines that a judge may give directions regulating the conduct of the support person.\textsuperscript{132} It is, however, assumed that the support person will most probably be instructed by the presiding judge not to assist the witness with the answering of questions and to refrain from doing anything which might interfere with the evidence presented. Although the use of a support person is welcomed, it should be remembered that the role of the support person is restricted to the lending of physical comfort and does not address the problems associated with the effective

\textsuperscript{129} Hanna et al \textit{Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy} 56.


\textsuperscript{131} Henderson in Spencer & Lamb \textit{Children and Cross-Examination: Time to Change the Rules?} 1 at 124.

\textsuperscript{132} S 79(5) of the Evidence Act.
questioning of child witnesses. The use of an intermediary may prove useful in this regard.

2.6.3 Communication assistance

The Evidence Act does not explicitly provide for intermediary services other than those referred to as “communication assistance”.\(^{133}\) This communication assistance is provided by an interpreter.\(^{134}\) Mahoney et al\(^{135}\) emphasise, however, that the Law Commission noted that the wide definition of communication assistance means that the term interpreter has an \textit{extended meaning} and includes anyone who enables or facilitates communication in any way.\(^{136}\) Section 80(3) of the Evidence Act\(^{137}\) provides for communication assistance to witnesses, including child witnesses, in civil and criminal proceedings who do not have sufficient proficiency in English to understand the court proceedings or to give their evidence or who may have a communication disability.\(^{138}\) A child witness who does not have sufficient proficiency in English, does not have the sophistication to understand the court proceedings, or

\(^{133}\) Communication assistance is defined as follows in s 4 of the Evidence Act: “Communication assistance means oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication with a person who—

(a) does not have sufficient proficiency in the English language to—

(i) understand court proceedings conducted in English; or

(ii) give evidence in English; or

(b) has a communication disability.

According to Mahoney et al \textit{The Evidence Act 2006: Act and Analysis} EV80.01 the use of intermediaries could fall under the definition of communication assistance in s 4(1).

\(^{134}\) An interpreter is defined in s 4 of the Evidence Act as including “a person who provides communication assistance to a defendant or a witness”.

\(^{135}\) Mahoney et al \textit{The Evidence Act 2006: Act and Analysis} EV 4.24.01. Own emphasis added.

\(^{136}\) This definition of interpreter means that a person who provides communication assistance of any kind must take an oath or make an affirmation (see ss 80 and 78 of the Evidence Act).

\(^{137}\) S 3 of the Evidence Act reads as follows: “A witness in a civil or criminal proceeding is entitled to communication assistance in accordance with this section and any regulations made under this Act to enable that witness to give evidence.” At the date of writing this thesis the regulations have not been enacted.

\(^{138}\) Communication disability is not defined in the Act. According to Mahoney et al \textit{The Evidence Act 2006: Act and Analysis} EV80.01 fn 2507 the definition is likely to cover any disability that restricts the ability to communicate orally, for example hearing impairment or autism. According to Mahoney et al authority for the latter stance can be found in \textit{Laumalili v S} [1994] NZFLR 413 (DC), where the District Court accepted evidence given of disclosures made by an autistic child who was assisted in communicating by pressing or pointing to letters on a keyboard.
who may have a communication disability such as a hearing impairment or autism may thus qualify for communication assistance.

An application for communication assistance can be made by the witness, a party to the proceedings or on the judge’s own initiative.\textsuperscript{139} The granting of such assistance is, however, subject to the judge’s discretion.\textsuperscript{140} Section 81(2) of the Evidence Act allows a judge to refuse communication assistance to a witness if the judge considers that the witness can sufficiently understand questions put orally and can adequately respond to them. There is no guidance in the Evidence Act as to what level of understanding would be sufficient or what would constitute an adequate response. This leaves the judge with the task of deciding on these issues in the light of the circumstances and the nature of the trial.\textsuperscript{141}

In exercising discretion the judge may direct what kind of communication assistance is to be provided for the witness and this may include translation services and oral, written, technological or other assistance.\textsuperscript{142} In order to determine the kind of assistance required, a judge may obtain expert evidence about the nature and extent of the witness’s communication difficulties and need for special assistance.\textsuperscript{143}

The Evidence Act does not prescribe who should be appointed to perform the role of communication assistant. The judge may accordingly also issue a direction as to the person who should provide the communication assistance, such as a teacher or

\begin{footnotesize}
\begin{enumerate}
\item S 80(4) of the Evidence Act.
\item In terms of s 81(2) of the Evidence Act communication assistance need not be provided to a witness if the judge considers that the witness can sufficiently understand questions put orally and can adequately respond to them.
\item Mahoney et al \textit{The Evidence Act 2006: Act and Analysis} EV 81.01. Note however that in terms of s 25(g) of the New Zealand Bill of Rights Act 1990, such assistance is a right for defendants in criminal proceedings. Note also that the provisions of ss 80 and 81 of the Evidence Act are subject to the Māori Language Act 1987. Where a person wishes to speak Māori in court, the provisions of the latter Act apply (allowing for an interpreter) even if the te reo speaker can also communicate in English (Mahoney et al \textit{The Evidence Act 2006: Act and Analysis} EV 4.05.01). It is submitted that although a similar provision is not available to witnesses in general, s 6(c) of the Evidence Act, which is aimed at securing the just determination of the proceedings by promoting fairness to the parties and witnesses, lends support to the presumption that judges will not discharge this discretion frivolously.
\item S 81(3) of the Evidence Act.
\item R v Hetherington CA 14/2014 [2015] NZCA 248 at [21].
\end{enumerate}
\end{footnotesize}
speech-language therapist, depending on the nature of the witness’s communication difficulties or disabilities.\textsuperscript{144}

In rendering communication assistance the communication assistant, apart from rendering the aforementioned oral, written or technological assistance, is entitled to interrupt cross-examination when incomprehensible to the witness and to request frequent breaks.\textsuperscript{145} The communication assistant may also indicate to the judge whether the witness is able to understand questions because of the words used or the structure of the sentence or the concepts within the sentences.\textsuperscript{146}

The communication assistant accordingly enables the witness to communicate in a way which best serves the witness’s evidence. In \textit{R v Hetherington}\textsuperscript{147} the New Zealand Court of Appeal highlighted that this is key to a fair trial and stated as follows:\textsuperscript{148}

\begin{quote}
The accused’s right to a fair trial is a keystone of our criminal justice system. It is not the only keystone. People with intellectual difficulties and challenges should be able to come to our Courts and present their evidence in a way that is tailored to their needs to ensure that the trier of fact, whether it be a Judge or a jury, can be as confident as possible that the answers are true answers, that it is [a true reflection] as to what occurred, rather than the witness being confused and challenged by the questions being asked.
\end{quote}

\textsuperscript{144} In \textit{R v Hetherington CA 14/2014 [2015] NZCA 248} the complainant was a girl with Down’s Syndrome who was thirteen years of age at the time the alleged incidents were committed against her. At the first trial she gave her evidence with the assistance of her teacher. At the re-trial she gave her evidence with the assistance of a speech-language therapist per the further pre-trial directions, as the judge recognised that given the complainant’s special difficulties the experience, training and qualifications of the speech-therapist would be better suited to assisting the complainant. See paras [10], [11] and [23].

\textsuperscript{145} \textit{R v Hetherington CA 14/2014 [2015] NZCA 248} at para [27].

\textsuperscript{146} \textit{R v Hetherington CA 14/2014 [2015] NZCA 248} at para [23].

\textsuperscript{147} \textit{CA 14/2014 [2015] NZCA 248} at para [22].

\textsuperscript{148} \textit{CA 14/2014 [2015] NZCA 248} at para [21].
The intermediary system in New Zealand

The Court of Appeal\textsuperscript{149} furthermore drew attention to the dual purpose of the communication assistance, namely “[t]o ensure, as far as possible, that [the complainant] understood what she was being asked and to help us [the court], where necessary, to understand what [the complainant] was saying”.

This communication assistance may be equally crucial for child witnesses who do not necessarily have a communication disability but may have difficulty in understanding the questions asked in the normal way because of age and who in turn are misunderstood by the court. Available research on child development and language acquisition clearly illustrates that the way questions are put to a child witness, for example leading questions, repetitive questions, disclosures, use of negatives, multi-faceted questions or specialised language, plays a significant role in dis-enabling children to give evidence.\textsuperscript{150} This raises the question whether the concept of communication assistance would be broadly interpreted so as to include these difficulties as sufficient reason for a child witness to qualify for communication assistance.

This may prove to be problematic owing to the fact that, as pointed out above, there are no guidelines on the meaning of the concepts “sufficiently understand” and “adequately respond” in section 81(2) of the Evidence Act, nor are the concepts defined in the Act. These concepts are by their very nature vague, complex and difficult to define and are thus open to interpretation by the New Zealand courts.\textsuperscript{151} This may lead to inconsistency in the meaning assigned to these terms, with some

\textsuperscript{149} \textit{R v \textit{Hetherington}} CA 14/2014 [2015] NZCA 248 at para [27].


\textsuperscript{151} Mahoney et al \textit{The Evidence Act 2006: Act and Analysis} EV81.01.
courts placing a narrow meaning on the term whereas others may not, thereby resulting in inconsistent application and injustices. In recognition of some of these concerns, a proposal for the amendment of the definition in section 4 of “communication assistance” to specifically include assistance with understanding questions for witnesses who do not have a communication disability, but may find it difficult to comprehend questions, was made by the Law Commission, who commented as follows:152

An amendment should be made to the definition of “communication assistance” in section 80 of the Evidence Act in order to allow for assistance in the process of answering questions for a wider group than just witnesses with a “communication disability”. This would allow for an incremental and careful approach to the introduction of intermediaries, who could assist with the phrasing of questioning in an appropriate way. Their primary initial role would be to assist with the communication and questioning issues rather than actually questioning witnesses.

The mere fact that the Law Commission expressed the opinion that the definition should be broadened to provide for child witnesses who have difficulties with comprehension suggests that the courts may be following a narrow rather than a broad interpretation of section 4, thereby excluding child witnesses from its use.

It should furthermore be kept in mind that although the function of a communication assistor may be compared to that of an intermediary, the two roles should not be equated. This is underscored by the fact that, despite section 80 of the Evidence Act being in force, the introduction of specialist trained intermediaries as a means of improving the way child witnesses are questioned has nonetheless been widely advocated.153


The aforementioned proposal of the Law Commission to broaden the definition provided in section 80 did not materialise with the 2013 review of the Evidence Act.\textsuperscript{154} The application of section 80 of the Evidence Act would possibly be more effective as a means of ensuring that the best evidence of child witnesses was elicited if child witnesses were allowed to testify with the help of communication assistance as a standard practice, unless there were cogent reasons for not making use of communication assistance.

In 2011 the New Zealand Cabinet announced its intention of introducing specialist trained intermediaries to improve the way child witnesses are questioned in court.\textsuperscript{155} The New Zealand Cabinet, however, despite conceding that the way children are questioned in court is sometimes inappropriate, particularly during cross-examination, and that accurate and reliable evidence is unlikely to be obtained from them if they do not understand the questions, rescinded the New Zealand Cabinet's earlier decision in 2013.\textsuperscript{156} This is regrettable, as gaining the most accurate and complete testimony from a child witness is critical to the quality of justice delivered in court.

In view of the fact that intermediaries will not be introduced into the New Zealand criminal justice system for the foreseeable future, the use of intermediaries in terms of section 170A of the South African Criminal Procedure Act can only be compared for the purposes of this thesis with that of communication assistance (provided it is broadly interpreted to include child witnesses who have difficulties with

\textsuperscript{156} New Zealand Cabinet Paper Amendments to the Evidence Act 2006 (12/11/2013) at paras [25], [32], [33], and [39]-[42].
Sections 80 and 81 of the New Zealand Evidence Act may be compared to section 170A of the South African Criminal Procedure Act in the following manner:

<table>
<thead>
<tr>
<th>Section</th>
<th>170A of the South African Criminal Procedure Act</th>
<th>80 and 81 of the New Zealand Evidence Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discretion of trial court to appoint an intermediary</td>
<td>Court has a discretion to appoint an intermediary in all instances.</td>
<td>Court has a discretion to allow communication assistance.</td>
</tr>
<tr>
<td>Application</td>
<td>Witnesses under the biological or mental age of eighteen years</td>
<td>No age restriction – all witnesses are entitled to apply.</td>
</tr>
<tr>
<td>Prerequisites</td>
<td>Subject thereto that the witness will suffer “undue mental stress or suffering” if such witness testifies at such proceedings.</td>
<td>Subject thereto that the witness does not have sufficient proficiency in English to understand court proceedings or to give evidence, or has a communication disability.</td>
</tr>
<tr>
<td>Qualifications of intermediary/communication assistant</td>
<td>As determined by the Minister in the Gazette</td>
<td>No qualifications are set out in the Act.</td>
</tr>
</tbody>
</table>

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157 Read together with s 81 of the Evidence Act.
<table>
<thead>
<tr>
<th>Questioning of witness</th>
<th>Convey the general purport of the question.</th>
<th>As directed by the court: may include oral or written interpretation of the language, written assistance, technological assistance or any other assistance that enables or facilitates communication.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedural provisions</td>
<td>Provided: for example what to do if a court discovers after the fact that an intermediary appointed in good faith was in fact not competent to be appointed as such.</td>
<td>Not provided.</td>
</tr>
</tbody>
</table>

An evaluation of the abovementioned table reveals that the requirements for the application of section 80 of the Evidence Act, in comparison to section 170A of the South African Criminal Procedure Act, appear to be less stringent for child witnesses. In order for section 170A of the South African Criminal Procedure Act to find application, the witness must be under the biological or mental age of eighteen years, but no age restriction is laid down in section 80 of the Evidence Act. In addition, the application of section 170A of the South African Criminal Procedure Act is subject thereto that the witness will be exposed to “undue mental stress or suffering” if such witness testifies at the proceedings whereas the application of

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158 S 170A of the South African Criminal Procedure Act.
159 See s 80 of the Evidence Act which refers to “a witness”.
160 S 170A of the South African Criminal Procedure Act.
section 80 read together with section 81(2) of the Evidence Act is only subject thereto that the witness is not able to sufficiently understand questions put orally and to adequately respond to them.\textsuperscript{161}

Despite the aforementioned differences, New Zealand and South African criminal courts face an analogous difficulty in that the concepts “sufficiently understand” and “adequately respond” in section 81(2) of the Evidence Act, like the concept of “undue mental stress or suffering” used in section 170 of the South African Criminal Procedure Act, are not defined in the respective Acts and are thus open to interpretation by the New Zealand and South African courts respectively.

Section 80 of the Evidence Act provides for a variety of forms of communication assistance, which may include oral or written interpretation of the language, written assistance, technological assistance or any other assistance that enables or facilitates communication.\textsuperscript{162} In performing communication assistance the communication assistant, apart from rendering the aforementioned assistance, is entitled to interrupt cross-examination when incomprehensible to the witness and to indicate to the judge whether the witness is able to understand questions because of the words used or the structure of the sentence or the concepts within the sentences.\textsuperscript{163} In terms of section 170A of the Criminal Procedure Act, an intermediary is only allowed to convey the general purport of the question to the child witness. Section 80 of the Evidence Act, in comparison to section 170A of the Criminal Procedure Act, hence affords the communication assistant more freedom to assist a child witness than is permitted to an intermediary in the South African criminal justice system.

2.6.4 Concerns about the child witness system in terms of the Evidence Act 2006

\textsuperscript{161} Ss 80 and 81(2) of the Evidence Act.
\textsuperscript{162} S 81(3) of the Evidence Act.
\textsuperscript{163} \textit{R v Hetherington} CA 14/2014 [2015] NZCA 248 at [23].
In response to concerns about the treatment of child witnesses in the New Zealand criminal justice system, a study\textsuperscript{164} of the application of the provisions of the Evidence Act was conducted by Dr Hanna, a linguist, Dr Davies, a psychologist, together with other researchers of the Auckland University of Technology (hereinafter AUT). The purpose of the study was to determine what improvements had been made in addressing concerns raised in the 1990s and the extent to which measures adopted to ameliorate conditions for children had achieved their purpose. This study considered two groups of criminal cases involving child witnesses under the age of seventeen years over the period 2008-2009. The first group included 46 trials involving 71 children.\textsuperscript{165} The second group consisted of pre-trial applications on behalf of 134 children for directions allowing the use of special measures for upcoming criminal trials. Transcripts of eighteen children’s forensic interviews and courtroom examinations by either the defence or prosecutors were also analysed.\textsuperscript{166}

The study revealed a number of significant problems with the situation of child witnesses in the New Zealand criminal justice system. A few of the problems identified by the researchers are highlighted:

- Although police investigations were completed reasonably quickly, compared to the position in 1993, instead of a decrease in time a significant increase in court processing time was noted.\textsuperscript{167}

- Regardless of the fact that there is no presumption in the Evidence Act that forensic interviews and CCTV are appropriate for younger children only, the data analysed

\textsuperscript{164} Hanna et al Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implication for Policy.
\textsuperscript{166} Hanna in Hanna et al Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implication for Policy 58-60.
suggested a pattern indicating that CCTV was used for younger children and screens for older children.\footnote{168}

- Although the Evidence Act states that it is mandatory for the courts to consider the views of witnesses when issuing directions about alternative ways of giving evidence, the study found that 60% of children in the trial sample were not consulted about their preferred choice of ways of giving evidence.\footnote{169}

- Although the Evidence Act states that complainants are entitled to and other witnesses may apply for a support person, the study revealed that 30% of the children had no such support person.\footnote{170}

- The questioning of child witnesses by lawyers in particular proved to be very problematic. Lawyers often continued to use inappropriate modes of questioning, which included leading questions, double negatives and complex vocabulary. Also, lawyers did not adjust their questioning styles and techniques to accommodate the age of the child being questioned. According to the authors of the study, this suggests that lawyers’ understanding of how to accommodate children’s language competencies is not adequate, or that this understanding is not translated into practice.\footnote{171}

- A significant percentage of children exhibited signs of distress during cross-examination in court: 35% of the children below the age of twelve years wept while 25% of the children between the ages of thirteen and seventeen years wept. Disturbingly, 80% of the children below the age of twelve years indicated that they had not understood the questions posed by the defence, and 71% of children between the ages of thirteen and seventeen years told the defence lawyer they had not understood some of the questions. Furthermore, the defence accused 65% of the younger and older children in the study sample respectively of lying.\footnote{172}

\footnote{168} Hanna in Hanna et al \textit{Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implication for Policy} 42.


\footnote{171} Hanna in Hanna et al \textit{Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implication for Policy} 70-82.

• The study also found that although the frequency of judicial interventions had increased since the mid-1990s, these interventions were still far too infrequent to control the full extent of problematic questioning. Many complex questions were not challenged.\textsuperscript{173}

In their conclusion Hanna et al set out certain recommendations, which included legislative reform as well as two procedural reforms or innovations. The legislative reform proposals are the following:\textsuperscript{174}

• Amend the provisions of sections 102 to 107 of the Evidence Act to include pre-recording of a child witness’ entire evidence, including re-examination and cross-examination.

• Amend legislation to a presumption in favour of video-recorded forensic interviews and CCTV or live audio-visual links for all child witnesses.

• Strengthen legislation so that the use of specialist child examiners becomes routine practice.

• Amend section 106(4)(a) of the Evidence Act and the Evidence Regulations 2007 so that video-recorded forensic interviews are once again not allowed to be removed from police premises (save for court purposes alone).

With regard to the procedural reforms, Hanna et al suggested that the practice of pre-recording children’s entire evidence before trial in order to deal with the problem of delays, as well as the introduction of some type of intermediary system to alleviate problems with conventional cross-examination, should be considered.\textsuperscript{175} In considering the introduction of a system of intermediaries, several jurisdictions were


\textsuperscript{175} Hanna in Hanna et al Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implication for Policy 168.
evaluated, including South Africa. The Norwegian system was preferred as this system integrates both pre-recording and specialist child examiners according to best practices within a trial process similar to that of New Zealand. According to Hanna et al the use of such a system would simultaneously address delays and inappropriate cross-examination.

These proposals were met with approval by the New Zealand Government. In early 2011 the then Minister of Justice, Simon Power, released an issue paper on child witnesses investigating alternative pre-trial and trial processes that may improve the way child witnesses are treated within the criminal justice system, for targeted consultation. The paper outlined various reform options, including a presumption in favour of alternative ways of giving evidence, a mandatory mode of evidence application for all child witnesses, the pre-recording children’s entire evidence and the use of intermediaries. Not surprisingly, both the Children’s Commissioner and the New Zealand Psychology Society strongly supported the reform proposals. With regard to intermediaries in particular, the New Zealand Psychology Society emphasised that the use of intermediaries would not only improve the quality of children’s evidence but also alleviate the level of stress that children experienced in the present system. This is particularly true where cross-examination and re-examination are conducted by practitioners whose background, education and experience do not readily equip them with the skills required to elicit complete, accurate and reliable evidence from child witnesses. The New Zealand Law

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178 New Zealand Ministry of Justice Alternative Pre-trial and Trial Processes for Child Witnesses in New Zealand’s Criminal Justice System Issues Paper (2011). Written submissions were received from lawyers, judicial groups, counsellors, psychologists and psychotherapists, academics and non-governmental agencies, government agencies and members of the public.

179 New Zealand Children’s Commissioner Children’s Commissioner Submission to the Ministry of Justice (21/02/2011); Seymour, Blackwell & McDougall Submission on Behalf of the New Zealand Psychology Society (21/02/2011).

180 Seymour, Blackwell & McDougall Submission on Behalf of the New Zealand Psychology Society (21 February 2011) 1 at 5.
Society also endorsed an increase in the use of alternative ways of giving evidence as well as the use of pre-recordings, although commenting that the use of pre-recordings should be the usual, but not mandatory, method of proceeding. The use of intermediaries was also supported. The New Zealand Law Society expressed the view that the intermediary should be a person who possesses the skills to put the questions asked by counsel into suitable language. This would give the intermediary the right to determine the nature of the question. However, the New Zealand Law Society commented that the trial judge should have an overriding discretion to require the intermediary to put questions in a particular form, if it can be demonstrated by counsel that this is necessary.\textsuperscript{181}

As a result of the positive feedback the New Zealand Cabinet approved certain reforms in October 2011.\textsuperscript{182} These reforms fell into three categories and included eight proposals:\textsuperscript{183}

a) Reducing the impact of time delays

- Introduce a legislative presumption that all children under the age of twelve give their evidence via their evidential interview by video record or CCTV.

- Introduce a legislative presumption in favour of pre-recording a child under the age of twelve’s entire evidence, including cross-examination and re-examination, at a pre-trial hearing conducted in an age-appropriate setting. This presumption would apply unless there was good justification why a child should not give evidence in this way.

\textsuperscript{181} New Zealand Law Society Submission to Ministry of Justice on behalf of the New Zealand Law Society (21/02/2011) 1-4. The New Zealand Law Society does not indicate in what form the question should be formulated or when this discretion would be exercised. It is assumed however that this would be the case when a question no longer represents a true reflection of the original question posed by counsel.

\textsuperscript{182} New Zealand Cabinet Domestic Police Committee Minutes of Decisions: Child Witnesses in the Criminal Courts: Proposed Reforms Dom Min (11) 10/1.

\textsuperscript{183} New Zealand Cabinet Domestic Police Committee Minutes of Decisions: Child Witnesses in the Criminal Courts: Proposed Reforms: Dom Min (11) 10/1 at 1-2.
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- Introduce a requirement, in regulation, to hold pre-recording evidence hearings within a specified timeframe.\(^{184}\)

- Clarification and improvements to legislation to support an increased use of pre-recordings.\(^{185}\)

b) Improving the questioning of child witnesses

- Introduce specialist intermediaries trained in the cognitive development and language comprehension of children, to improve the questioning of child complainants under the age of eighteen in court. The exact nature of the model was to be developed by the Minister of Justice in consultation with a working group of legal and judicial professionals and other stakeholders.

- Improve the availability of guidance, education and training for the judiciary and lawyers on how best to question and cross-examine child witnesses.

c) Other enhancements relating to child witnesses and the evidence

- Extending the automatic right to have a support person present while giving evidence to all child witnesses.\(^{186}\)

\(^{184}\) The New Zealand Cabinet Domestic Police Committee proposed (in their Minutes of Decisions: Child Witnesses in the Criminal Courts: Proposed Reforms Dom Min (11) at 6) that a timeframe should be set that will significantly reduce the average time children have to wait to give evidence at court, potentially to less than six months. This will ensure that the central purpose of pre-recording of evidence, namely to reduce the time children wait to testify, is achieved.

\(^{185}\) The New Zealand Cabinet Domestic Policy Committee highlighted (in their minutes Minutes of Decisions: Child Witnesses in the Criminal Courts: Proposed Reforms Dom Min (11) at 7) that the provisions relating to pre-recording were ambiguous. They accordingly proposed to clarify the law in the following manner:

- amending ss 103-107 of the Evidence Act to clarify that all witnesses can give evidence, including evidence in cross-examination and re-examination, at a pre-trial hearing where the visual and audio evidence is recorded and replayed at trial;
- amending the Evidence Regulations 2007 to outline any necessary requirements around the pre-recording of witnesses’ entire evidence at a pre-trial hearing;
- explicitly providing that a witness may be recalled for further questioning, on application of counsel, but with a very high threshold (ie where it would be contrary to the interests of justice to reject the application); and
- allowing video records, whether evidential interview video records or records made at a pre-trial hearing, to be used at re-trials instead of recalling the witness (unless the order for a retrial following appeal is based upon a deficiency in the way in which the evidence was elicited).

\(^{186}\) In terms of the proposal the use of a support person was to be extended as an automatic right to all witnesses and not only to complainants. Also, the use of a support person was to be utilised in addition to the services of an intermediary.
• Introducing a new judicial direction to juries relating to the demeanour of child witnesses who give evidence by an alternative mode.\textsuperscript{187}

With regard to specifically improving the questioning of child witnesses, the New Zealand Minister of Justice, Simon Power, stated that he believed that the introduction of specialist trained intermediaries would be the best way to improve the questioning of children at court.\textsuperscript{188} He also highlighted some of the benefits of utilising intermediaries, namely to mitigate the impact of inappropriate questioning, to elicit more accurate and reliable evidence, and to take into account cultural considerations in children’s communication and especially the needs of Maori children, who are substantially overrepresented as victims of crime.\textsuperscript{189}

The New Zealand Minister of Justice furthermore stressed that while some members of the legal profession might be concerned that intermediaries could interfere with the defence’s ability to challenge a witness’s evidence, with the development of clear rules, any risk that the defendant’s rights might be affected would be minimised, and any other practical concerns could be resolved during the implementation process.\textsuperscript{190} The Minister of Justice accordingly proposed that the Ministry phase in intermediary services over a period of two years to ensure that the needs of child victims are met and to resolve any issues prior to full implementation. He also proposed an amendment to the Evidence Act to enable regulations to be made on the use of intermediaries in court proceedings.\textsuperscript{191} These changes were to

\textsuperscript{187} Alternative modes of evidence are designed to reduce stress for children when testifying. Children may accordingly appear more calm or dispassionate when testifying with such a mode. This may lead jurors to believe that the child is less credible. The New Zealand Cabinet Domestic Policy Committee therefore proposed to introduce a direction that juries should not draw any inference from the demeanour of a child witness when testifying by an alternative mode. In terms of the proposal the judicial discretion should be mandatory as the opinion is held by the committee that it will lower the risk of perceived bias and reinforce the principle that demeanour is not an accurate way of assessing truth.

\textsuperscript{188} New Zealand Cabinet Domestic Police Committee Minutes of Decisions: Child Witnesses in the Criminal Courts: Proposed Reforms: Dom Min (11) 10/1 at 9-10

\textsuperscript{189} New Zealand Cabinet Domestic Police Committee Minutes of Decisions: Child Witnesses in the Criminal Courts: Proposed Reforms: Dom Min (11) 10/1 at 9-10.

\textsuperscript{190} New Zealand Cabinet Domestic Police Committee Minutes of Decisions: Child Witnesses in the Criminal Courts: Proposed Reforms Dom Min (11) 10/1 at 9-10.

\textsuperscript{191} New Zealand Cabinet Domestic Police Committee Minutes of Decisions: Child Witnesses in the Criminal Courts: Proposed Reforms Dom Min (11) 10/1 at 10.
be introduced by way of an Evidence Amendment Bill, which was expected to be presented to the New Zealand Parliament in 2012. However, in 2013 the New Zealand Government rescinded the New Zealand Cabinet’s 2011 decision.\textsuperscript{192}

In the meantime, a further study exploring the viability of different intermediary models in the New Zealand context was conducted in 2011 by members of the same research team of AUT that produced the study about the treatment of child witnesses in the New Zealand criminal justice system referred to above.\textsuperscript{193} The purpose of this exploratory study was to investigate the potential risk and benefits of intermediary systems in general, and perceptions of each specific model as a means of identifying key issues that would need to be taken into consideration in developing a suitable model for New Zealand. In so doing, three models were considered,\textsuperscript{194} namely the full intermediary model,\textsuperscript{195} the question-by-question model\textsuperscript{196} and the topic-by-topic model.\textsuperscript{197} A series of mock trials were held using each of the aforementioned models. The mock trials were conducted in a courtroom with a district court judge, prosecutors and a defence lawyer fulfilling their respective roles, while the “child” witness was role-played by an adult and the intermediary role was shared principally between a forensic interviewer and a speech-language therapist. The trials were observed by members of the judiciary (including three

\textsuperscript{192} New Zealand Cabinet Paper \textit{Amendments to the Evidence Act 2006} (12/11/2013) at paras [25], [32], [33], [39]-[42].

\textsuperscript{193} Davies et al \textit{Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models}. Refer to Davies et al \textit{Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models} for a detailed discussion of each of the models.

\textsuperscript{194} In terms of this model, the intermediary is briefed by counsel before trial on the aspects of the child’s testimony they want explored and tested. At trial the intermediary takes responsibility for putting the requested exploration and testing into question form, including determining how questions are phrased and the order in which the questions are presented to the child (refer to Davies et al \textit{Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models} 6).

\textsuperscript{195} In terms of this model, counsel determines the questions and poses them one at a time to the intermediary, who translates the question into developmentally appropriate language for the child (refer to Davies et al \textit{Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models} 6).

\textsuperscript{196} In terms of this model, the intermediary is briefed as per the full intermediary model, but counsel breaks the questions up into topics, based on the area of challenge or exploration. At trial there is an interactive process whereby the intermediary questions the child on the first topic, then refers back to the lawyer for further instructions, before moving on to the next topic (refer to Davies et al \textit{Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models} 6).
judges) and other interested professionals. The mock trials were followed by facilitated discussions with the participants.\textsuperscript{198} The mock trials revealed that the participants’ perceptions of the full intermediary and question-by-question models were generally poor.\textsuperscript{199} The full intermediary model, with the intermediary taking responsibility for conducting the examination, from beginning to end, was perceived to place too much responsibility on the intermediary, while limiting counsel’s right to demand further exploration of any inconsistency.\textsuperscript{200} The need for the intermediary to “translate” the questions one-by-one, with an inevitable delay between the child’s last response and hearing the next question, resulted in the question-by-question model being perceived as “clunky” and “stop-start”. It was moreover feared by the participants that the child might lose focus as a result of the poor flow of the question and answer sequence. Concerns were also raised as to what language-related issues intermediaries would be permitted to address – would they be allowed only to rephrase complex language into simpler language or would they also have the freedom to rephrase closed and leading questions whenever possible?\textsuperscript{201}

The topic-by-topic model was perceived by the participants to be more effective than the other two models considered. The anticipated benefits of the topic-by-topic model cited by the participants included:

- better quality evidence from children through better developmentally and appropriately sequenced questions;
- improved pre-trial preparation by counsel;
- clearer evidence for the fact-finders to assess;

\textsuperscript{198} Davies et al Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models 6-9.
\textsuperscript{199} The participants included judges, defence lawyers, prosecutors, legal scholars, pediatricians, forensic interviewers and language therapists.
\textsuperscript{200} Davies et al Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models 22.
\textsuperscript{201} Davies et al Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models 22-23.
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- neutralising negative perceptions of the defence;
- increasing counsel’s and judges’ understanding of appropriate questioning for children;
- allowing the child breaks in the testimony.

Nonetheless, the participants agreed that regardless of the model utilised the intermediary needs to be highly skilled in communicating with children and has to be informed of court procedure and the law of evidence. A pre-trial assessment of a child’s communicative competencies should form part of any chosen model.\(^{202}\)

Finally, there has to be a clear delineation of an intermediary’s role, including clarity surrounding the circumstances in which an intermediary can refuse to carry out counsel’s instructions.\(^{203}\)

Reflecting on the mock trials and the participants’ views of the intermediary models, the authors proposed certain steps towards enhancing the court’s facilitation of eliciting the best evidence from children. These included the following:\(^{204}\)

1. The creation of a legislative presumption in favour of pre-recording children’s entire testimony;
2. The development of training programs for the judiciary and counsel on communication with children, particularly during cross-examination;
3. The establishment of a multidisciplinary child witness working group with terms of reference over an extended period of time to:

\(^{202}\) Davies et al *Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models* 7.

\(^{203}\) Davies et al *Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models* 36.

\(^{204}\) Davies et al *Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models* 8.
- communicate research findings on children’s language, including problems on poor communication in order to improve the quality of evidence for children;

- draft guidelines to depict best practices in cross-examining of children;

- explore the possibility of mandatory training for judges and counsel on best practices with children;

- develop an intermediary model for New Zealand, including:
  - framing the roles and responsibilities of the intermediary and counsel;
  - developing a code of conduct for intermediaries;
  - specifying the core components of a training package for intermediaries; outlining pre-trial processes of engagement between the intermediary and other parties;
  - establishing protocols for courtroom practice; and
  - determining criteria for children’s access to an intermediary.

- contribute advice on legislation.

The study clearly highlighted the benefits of intermediary systems in general, and the perceptions of each specific model as a means of identifying key issues that would need to be taken into consideration in developing a suitable model for New Zealand. New Zealand would then be able to develop its own intermediary system for the criminal justice system, building on the insight gained from the aforementioned studies.

2.7 Proposed reform
Section 202 of the Evidence Act places a responsibility on the Minister of Justice to periodically review the operation of the Evidence Act.\textsuperscript{205} In line with this provision and following the 2011 New Zealand Cabinet decisions on child witnesses giving evidence, the then Minister of Justice, Judith Collins, requested the Law Commission in 2012 to carry out a review of the operation of the Evidence Act. The Law Commission subsequently delivered their report, \textit{The 2013 Review of the Evidence Act 2006}, in February 2013.\textsuperscript{206} The Law Commission made the following recommendations with regard to child witnesses – recommendations which ran counter to previous recommendations:

- \textit{Communication assistance}

The Law Commission stated that although they remained of the view that amending section 80 of the Evidence Act (to specifically include assistance with understanding questions for witnesses who do not have a communication disability, but who might have difficulty in comprehending questions, for example because of age) could be a useful avenue to allow for the use of intermediaries, consideration of the merits of

\textsuperscript{205} S 202 of the Evidence Act states the following:
(1) The Minister must, as soon as practicable after 1 December 2011 or any later date set by the Minister by notice in the Gazette, and on at least 1 occasion during each 5-year period after that date, refer to the Law Commission for consideration the following matters:
(a) the operation of the provisions of this Act since the date of the commencement of this section or the last consideration of those provisions by the Law Commission, as the case requires:
(b) whether those provisions should be retained or repealed:
(c) if they should be retained, whether any amendments to this Act are necessary or desirable.
(2) The Law Commission must report on those matters to the Minister within 1 year of the date on which the reference occurs.
(3) The Minister—
(a) may not set a date later than 1 December 2011 for the commencement of the initial periodic review of this Act under subsection (1) unless the Minister is satisfied that, because of the limited number of cases concerning the provisions of this Act decided by the superior courts of New Zealand or for any other reason, it is appropriate to defer the date of the initial periodic review; and
(b) must not set a date later than 1 December 2014 under subsection (1).

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doing so would in their view involve a number of substantive policy issues.\textsuperscript{207} An amendment of section 80 of the Evidence Act to broaden the definition of communication assistance was accordingly not recommended.

- \textit{Alternative ways of giving evidence}

The Law Commission indicated that they held the view that the decision of whether to apply for directions on alternative ways should be based on the needs of the individual witness rather than on the fact that they belonged to a particular category. Mandatory applications concerning alternative ways of giving evidence were hence not supported.\textsuperscript{208}

- \textit{Pre-recording of evidence}

The Law Commission stated that they remained of the view that although the pre-recording of evidence had some merit, for example where expediting of a trial was not possible, this area raised a number of significant policy and practical issues that would need to be fully explored. According to the Law Commission this statutory review was not the appropriate platform for such an enquiry.\textsuperscript{209}

Following the Law Commission’s 2013 Review of the Evidence Act the then Minister of Justice, Judith Collins, presented certain recommendations to the New Zealand

\textsuperscript{207} New Zealand Law Commission \textit{The 2013 Review of the Evidence Act 2006 - Report 127} at 1.48. The New Zealand Law Commission unfortunately does not indicate what these substantive policy issues involve.


\textsuperscript{209} New Zealand Law Commission \textit{The 2013 Review of the Evidence Act 2006 - Report 127} at 11.79.
Cabinet on the amendment of the Evidence Act in November 2013.\textsuperscript{210} The recommendations included the progression of certain decisions while rescinding some of New Zealand’s 2011 Cabinet decisions. The following progressions were recommended:

- \textit{Alternative ways of giving evidence-in-chief}

The introduction of a legislative presumption that witnesses under the age of eighteen give their evidence-in-chief via the video record of their evidential interview where available, or via one of the alternative ways of giving evidence set out in the Evidence Act, was proposed. This legislative presumption would remove the need for prosecutors to apply to the court to use alternative ways of giving evidence. This proposal extends the scope of the New Zealand Cabinet’s 2011 decision regarding the pre-recording of the evidence-in-chief from witnesses under the age of twelve years to all child witnesses, in other words to all persons under the age of eighteen years.\textsuperscript{211}

- \textit{Support person in court}

The progression of the automatic right to have a support person present while giving evidence to all child witnesses was also proposed.\textsuperscript{212}

- \textit{Improving guidance and training for the judiciary and lawyers on questioning child witnesses}

\textsuperscript{210} New Zealand Cabinet Paper \textit{Amendments to the Evidence Act 2006} (12/11/2013).
\textsuperscript{211} New Zealand Cabinet Paper \textit{Amendments to the Evidence Act 2006} at paras 28-30.
\textsuperscript{212} New Zealand Cabinet Paper \textit{Amendments to the Evidence Act 2006} at para 31.
The improvement of the availability of guidance, education and training for the judiciary and lawyers on how best to question and cross-examine child witnesses in consultation with the judiciary and the New Zealand Law Society was furthermore proposed.\textsuperscript{213}

The following rescissions of New Zealand’s 2011 Cabinet decisions were recommended:

- **Pre-recording of children’s entire evidence**

In 2011 Cabinet agreed to the introduction of a legislative presumption in favour of pre-recording the *entire* evidence of children under the age of twelve years in criminal proceedings. A rescission of this Cabinet decision was recommended. The reasons cited for the rescission of the proposal were: a lack of funding; a Court of Appeal decision, namely *R v M*,\textsuperscript{214} concluding that pre-recording should only be used in compelling cases and unusual circumstances; and concern about the effect pre-recording could have on a defendant’s right to a fair trial.\textsuperscript{215}

- **Intermediaries to assist with questioning of child witnesses**

In 2011, Cabinet agreed to the introduction of specialist trained intermediaries as a means of improving the way child witnesses are questioned in court. Cabinet noted

\begin{itemize}
\item \textsuperscript{213} New Zealand Cabinet Paper *Amendments to the Evidence Act 2006* at paras 32-33.
\item \textsuperscript{214} [2011] NZCA 303.
\item \textsuperscript{215} New Zealand Cabinet Paper *Amendments to the Evidence Act 2006* at paras 35-38.
\end{itemize}
that extensive policy work would need to be undertaken to develop the exact nature of the model along with the necessary training and qualifications before the intermediary’s decision could be implemented. This decision was not supported by the Minister of Justice on both policy and practical grounds. The Minister of Justice held the view that it would be difficult to use intermediaries in New Zealand. According to the Minister of Justice intermediaries were better suited to an inquisitorial criminal justice process than the New Zealand adversarial process. Concern was also expressed as to who would fulfil the role of an intermediary as this role would require knowledge of child development, linguistics and the evidential processes. According to the Minister of Justice, New Zealand may not have enough suitably qualified people. A rescission of Cabinet’s 2011 decision to implement intermediaries was hence proposed.\(^\text{216}\)

- **Judicial direction relating to the demeanour of child witnesses**

In 2011, Cabinet agreed to the introduction of a new judicial direction relating to child witnesses. This judicial direction would advise jurors not to draw inferences from the demeanour of child witnesses when giving evidence by an alternative mode as concern existed that jurors might take a child’s lack of distress while giving evidence as a sign that they had not been victimised in the way alleged. This decision was not supported by the Minister of Justice as she expressed concern that jurors would not understand that judicial directions are standard and that in her opinion they could be confused by the direction and think that the judge was providing them with clues as to his or her view of the case. The Minister of Justice also considers the demeanour of a witness to be a relevant consideration when evaluating the witness’s evidence. A rescission of Cabinet’s 2011 decision was hence proposed.

The New Zealand Cabinet approved the aforementioned recommendations and rescinded the Cabinet decision of 2011. These changes have been incorporated

\(^{216}\) New Zealand Cabinet Paper *Amendments to the Evidence Act 2006* at paras 39-42.
The intermediary system in New Zealand

into the Evidence Amendment Bill 2015 (hereinafter “the Evidence Amendment Bill”).\(^\text{217}\) The Evidence Amendment Bill accordingly proposes to introduce a legislative presumption that all child witnesses in criminal proceedings are entitled to give their evidence in one or more of the alternative ways of giving evidence set out in the Evidence Act.\(^\text{218}\) The Evidence Amendment Bill also intends to provide all child witnesses with an automatic right to have a support person present when giving evidence.\(^\text{219}\)

In introducing the Evidence Amendment Bill during the first Parliamentary Debate on the Bill on 2 July 2015, the Minister for Land Information, Louise Upston, acting on behalf of the Minister of Justice, emphasised that the changes set out in the Evidence Amendment Bill aim to make the criminal trial process easier and less damaging for child witnesses. She also pointed out that as applications for the use of alternative methods vary across different regions of New Zealand, the Evidence Amendment Bill will align standard practice and help to ensure that all children in criminal trials are protected as much as possible, while still allowing for the method of giving evidence to be tailored to the specific case and child. The importance of the extension of the right to a support person from complainants only to all child witnesses was also underlined by Minister Upston.\(^\text{220}\) The Evidence Amendment Bill was very well received by Parliament.\(^\text{221}\)

\(^{217}\) Evidence Amendment Bill 2015. The Bill will come into force as an Act on the earlier of the following dates: (a) a date appointed by the Governor-General by Order in Council (and 1 or more orders may be made bringing different provisions into force on different dates) or (b) 1 July 2017.


\(^{219}\) S 79 is to be amended as follows: “After section 79(1), insert: (1A) A child witness, when giving evidence in a criminal proceeding, is entitled to have 1 person, and may, with the permission of the Judge, have more than 1 person, near him or her to give support.” (see Evidence Amendment Bill 2015 available at http://www.legislation.govt.nz/bill/government/2015/0027/latest/DLM6488707.html (accessed 12/06/2016)).


\(^{221}\) New Zealand Parliament Evidence Amendment Bill - First Reading.
The amendments proposed to the Evidence Act through the implementation of the Evidence Amendment Bill will help to improve the situation for child witnesses within the criminal justice system in New Zealand. It is, however, perhaps unfortunate that the New Zealand Cabinet decided to rescind some of its 2011 decisions and especially the decision to implement the use of intermediaries.\textsuperscript{222} It is also unfortunate that the broadening of the section 4 definition of “communication assistance” in the Evidence Act to specifically include assistance with understanding questions for witnesses who do not have a communication disability, but may nevertheless find it difficult to comprehend questions, was not included in the Evidence Amendment Bill. This still leaves the New Zealand courts with the difficulty of having to decide whether a child witness’s communication abilities entitle the child to communication assistance within the current definition and may result in a child ending up without such assistance.\textsuperscript{223}

3 CONCLUSION

The aim of this chapter is to evaluate the rights of child victims and child witnesses in the New Zealand criminal justice system with a view to comparing the position in South Africa with that in New Zealand.

The evaluation of the New Zealand judicial system showed that historically New Zealand children, like South African children, suffered severe trauma during the court process up and until the late 1980s. Only with the introduction of the Evidence


\textsuperscript{223} The former Minister of Justice, Simon Power, points out that a considerable body of literature shows that the strategies used in adversarial cross-examination do not obtain the most accurate and reliable evidence from children and that great evidential safety can be achieved by specialist questioning. This is also the case for child witnesses in New Zealand in that the AUT report found that a high level of inappropriate and unsafe questioning of child witnesses, particularly during cross-examination, takes place. The introduction of intermediaries is recommended by Minister Power as a possible solution to the problem (see the New Zealand Cabinet Domestic Police Committee *Minutes of Decisions: Child Witnesses in the Criminal Courts: Proposed Reforms*: Dom Min (11) 10/1 at 9).
Amendment Act of 1989 and the subsequent enactment of the Evidence Act 2006 did their position improve within the New Zealand criminal justice system. The Evidence Amendment Act introduced a series of alternative methods by which a child complainant under the age of seventeen years testifying in sexual cases could give evidence, such as via pre-recorded video interviews, via CCTV, from behind a screen or one-way glass, or through an appropriate audio link at the discretion of the judge. These methods, in effect, allowed for the use of an “intermediary” although their role was quite restricted as the appointment of intermediaries was not explicitly mentioned as one of the alternative methods.

The legislative changes furthermore allowed for expert evidence regarding the intellectual attainment, mental capacity and emotional maturity of the complainant, the general developmental level of children of the same age group as the complainant, and the extent to which the child’s behaviour was consistent with having been sexually abused. It also restricted the defendant’s right to personally cross-examine children where a judge considered such questioning to be intimidating or overbearing and legislated against the previously standard practice of warning the jury about a child witness’s reliability. The changes brought about by the Evidence Amendment Act were seen at the time as remarkably radical legislation.

Regrettably, although the use of the forensic interview video as evidence-in-chief with the child appearing at trial to be cross-examined using live links or screens quickly became standard procedure for child witnesses in New Zealand criminal courts, within a very short period of time the other alternatives offered by the

224 S 23 of the Evidence Amendment Act 1989.
226 S 23G of the Evidence Amendment Act.
227 S 23F(1) of the Evidence Amendment Act.
228 S 23H of the Evidence Amendment Act.
229 Henderson in Spencer & Lamb *Children and Cross-Examination: Time to Change the Rules?* 1 at 117.
Evidence Amendment Act were overlooked. These included the use of intermediaries.\textsuperscript{230}

In 1996 the Law Commission released further proposals for reform which included the re-introduction of pre-recordings, the provision of all witnesses with a support person and the extension of the role of intermediaries to allow them to rephrase questions to assist with witness comprehension.\textsuperscript{231} Conversely, while the Law Commission recommended "communication assistance" in its final document, it withdrew its recommendation for the use of intermediaries.\textsuperscript{232}

The introduction of the Evidence Act in 2006 further improved the position of child witnesses within the New Zealand criminal justice system. This Act allows child witnesses to give evidence in an alternative way, provides child complainants with a right to a support person and makes allowances for communication assistance.\textsuperscript{233}

The Evidence Amendment Bill of 2015 promises to continue to improve the standing of child witnesses within the New Zealand criminal justice system. It allows a presumption that all witnesses may give evidence in an alternative way\textsuperscript{234} and provides child complainants and child witnesses alike with a right to a support person.\textsuperscript{235}

\begin{itemize}
\item \textsuperscript{230} Henderson in Spencer & Lamb \textit{Children and Cross-Examination: Time to Change the Rules?} 1 at 117.
\item \textsuperscript{231} New Zealand Law Commission \textit{The Evidence of Children and Other Vulnerable Witnesses: A discussion paper} at para 173.
\item \textsuperscript{232} New Zealand Law Commission \textit{Evidence: Reform of the Law} at paras 368-369. The Law Commission cited divided views within the profession, as well as the existence of three disapproving research articles from the United States of America, as justification for its standpoint.
\item \textsuperscript{233} See respectively ss 103-107, 79 and 80 of the Evidence Act.
\item \textsuperscript{234} Unless the witness chooses not to and the judge is satisfied that the witness fully appreciates the effect of his or her doing so (see s 107A of the \textit{Evidence Amendment Bill 2015} available at \url{http://www.legislation.govt.nz/bill/government/2015/0027/latest/DLM6488707.html} (accessed 12/06/2016)).
\item \textsuperscript{235} See s 79(1A) of the \textit{Evidence Amendment Bill 2015} available at \url{http://www.legislation.govt.nz/bill/government/2015/0027/latest/DLM6488707.html} (accessed 12/06/2016).
\end{itemize}
While New Zealand can be complimented on the advancements made with regard to child-friendly legislation for child witnesses, such as alternative ways of giving evidence and pre-recordings, the New Zealand Government can be criticised for their decision to rescind the implementation of the use of intermediaries. This means that children are exposed to the adverse effects of the normal adult accusatorial judicial system, especially since the use of communication assistance is not guaranteed. By failing to utilise intermediaries, the New Zealand Government has chosen to ignore a vast body of research and knowledge signifying the importance of the questioning of a child witness by a skilled interviewer who has been specifically trained for this purpose and who has an understanding of a child’s linguistic, cognitive and emotional development. Very few presiding officers or lawyers have these specialised skills or have been trained to perform this task. Intermediaries have acquired these skills and it has been found that if child witnesses are questioned with the benefit of such an understanding not only is more accurate and reliable evidence elicited from child witnesses but the adverse impact of the trial on child witnesses is also lessened. The use of alternative ways of giving evidence is only part of the solution and may not fully obviate the re-traumatisation of child witnesses due to inappropriate questioning or aggressive cross-examination. Alternative ways of giving evidence, coupled with a distinctive intermediary model tailor-made for New Zealand’s situation with specialist trained intermediaries who focus on the proper questioning of child witnesses within the criminal justice system, may also benefit New Zealand child witnesses.

However, the hope is expressed that New Zealand will continue with reform efforts in order to enhance its criminal justice system for child victims and child witnesses and that this will include reconsidering the introduction of an intermediary system.

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237 Plotnikoff et al *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (2015) 1 at 282. See also DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC) at paras [167]-[168].
CHAPTER 8

Concluding remarks and recommendations

Speak up for those who cannot speak for themselves, for the rights of all who are destitute. Speak up and judge fairly; defend the rights of the poor and needy.¹

1 INTRODUCTION

The purpose of the research was to investigate whether child witnesses and child victims of crime are afforded adequate protection and support in the South African criminal justice system when called upon to testify. The historical development of the protection for child witnesses and child victims in the criminal justice system was taken as the starting point; this was followed by an interrogation of the positive law on the protection of children as witnesses and victims in criminal proceedings. International instruments and the impact of the resolutions on the position of the child witness and victim in the criminal justice system were discussed. Comparative research on the protection of child witnesses and child victims in the criminal justice systems of Namibia and New Zealand contributed to the conclusions and recommendations. The final recommendations are informed by the conclusions reached by the researcher on the basis of her research. These recommendations are submitted in the expectation that they will be instrumental in enhancing the position of the child witness and child victim in the South African criminal justice system.

¹ Proverbs 31: 8-9 Holy Bible New International Version.
2 CONCLUDING REMARKS

A large number of children are either exposed to physical and sexual violence or witness criminal acts which led to them having to testify in courts of law to the atrocities they have witnessed.\(^2\) Owing to their developmental shortcomings and lack of maturity, child victims and child witnesses find the criminal justice process particularly intimidating and onerous.\(^3\) The purpose of this research was therefore to determine whether a balance can be found between the accused’s right to a fair trial and the protection of the rights of the child witness and child victim.

It is common knowledge that the rights of children have not been adequately recognised in the past and that many legal systems have failed to fulfil this objective. The historical overview of the development of South Africa’s criminal justice system in chapter 2 illustrates some of the past failures.\(^4\) Conversely, the overview also illustrates a significant evolution in the treatment of child victims and child witnesses within the criminal justice system, from early systems such as Germanic law where children were regarded as *pars domus*, in other words the mere objects of the *domus* of the family,\(^5\) to the present-day system that acknowledges the significance of child victims and witnesses in the criminal justice system.\(^6\)

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\(^2\) Department of Social Development, Department of Women, Children and People with Disabilities and UNICEF *Violence Against Children in South Africa* (2012) 1 at 3.

\(^3\) Ovens, Lambrechts & Prinsloo “The child witness in the criminal justice system” 2001 *Acta Criminologica* 25.

\(^4\) For example, in terms of the 1917 Criminal Procedure Act if a child was deemed to be competent to give evidence at a trial, such evidence had to be given in the presence of the accused, before an all-male European jury, and the child had to remain in attendance throughout the trial unless excused by the court. Refer to para 2.4.3.4 of ch 2 above.

\(^5\) Wessels *The History of the Roman-Dutch Law* (1908) 423. See also para 2.1 of ch 2 above.

\(^6\) See for example *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC) at paras [72]-[74] (hereinafter referred to as *DPP v Minster of Justice and Constitutional Development*). See also ch 5 above.
Regrettably, history shows that the increase in children’s involvement in the judicial system has been coupled with some injustices. In this regard the accusatorial system has proved to be extremely hostile towards children.\(^7\) An evaluation of the elements of the accusatorial system, especially those of oral presentation of evidence, confrontation and cross-examination, as was conducted in chapter 3, clearly illustrates that children still find it significantly problematic to give evidence in criminal cases.\(^8\) These difficulties, combined with the anxiety experienced by children, sometimes lead to their testimony being “inaccurate” as they may confuse events and details or “forget” essential information.\(^9\) This in turn affects their credibility as witnesses dramatically and sometimes leads to the generalisation that children are unreliable witnesses.\(^10\) It is precisely for this reason that an inquisitorial approach is widely thought to be more advantageous to child witnesses and has been suggested as a possible solution to the problems experienced in the adversarial system.\(^11\) This approach, as was illustrated in chapter 3, is nonetheless not immune from criticism since the presiding officer inter alia has to fulfil the roles of both prosecutor and adjudicator.\(^12\) It is submitted that the solution to the problem may be found in the development of a novel system, tailor-made for child witnesses and victims, that combines inquisitorial elements with accusatorial elements while allowing a child victim to testify with the help of a “go between” or intermediary. An example of such a system can be found in the Norwegian model outlined in chapter 3.\(^13\) This system protects the child witness against rigorous and inappropriate cross-examination while retaining the two-party character of adversarial proceedings as well as the right of the accused to challenge evidence.\(^14\)

\(^7\) See ch 3 above.
\(^8\) See ch 3 above. See also for example *DPP v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC) at para [1].
\(^9\) Müller & Tait “A prosecutor is a person who cuts off your head: children’s perceptions of the legal process” 1997 *SALJ* 593.
\(^10\) Müller & Tait 1997 *SALJ* 593.
\(^12\) See para 2.1 of ch 3 above.
\(^13\) See para 3 of ch 3 above.
\(^14\) Myklebust “The position in Norway” in Spencer & Lamb (ed) *Children and Cross-examination: Time to Change the Rules?* (2012) 147-159. See also paras 3.1.4-3.1.6; 3.4 and 4 of ch 5 above.
The study of the protection of child victims and witnesses under the Constitution of the Republic of South Africa, 1996, and international instruments, conducted in chapter 4, revealed a steadfast awareness of the importance of the protection of children and the progress that has been made in this regard in South Africa. The post-constitutional system is welcomed in that it not only recognises children’s vulnerabilities but also affords child victims and child witnesses protection, as illustrated in chapter 4 of this thesis. In this regard the Bill of Rights affords special protection to children in section 28 and serves inter alia to guarantee child victims and child witnesses the right to respect for their human dignity, privacy, equality, freedom and security of the person (which includes the right to be free from violence), and freedom of expression. The Constitution also advocates a criminal procedure that is tailored to the individual needs of children. The legal jurisprudence relating to these rights discussed in chapter 4 demonstrates a real commitment by the courts in recognising children as the independent rights holders of these fundamental rights and contributes to the realisation of these rights in practice. In *DPP v Minister of Justice and Constitutional Development*, for example, the Constitutional Court inter alia held the following:

Each child must be treated as a unique and valuable human being with his or her individual needs, wishes and feelings respected. Children must be treated with dignity and compassion. In my view these considerations should also inform the principle that the best interests of the child are of paramount importance in all matters concerning the child as envisaged in s 28(2) of the Constitution.

The research has also demonstrated that an awareness of the rights and best interests of child victims and child witnesses lies at the heart of international and

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15 See ss 10, 14, 9, 12 and 16 of the Constitution. See also paras 2.2-2.3 of ch 4 above.
16 See for example s 28(2) of the Constitution as well as aa 2, 3, 6 and 12 of the CRC.
17 See for example *S v M* 1999 (2) SACR 548 (SCA); *Director of Public Prosecutions v S* 2000 (2) SA 711 (T); *S v M (Centre for Child Law as amicus curiae)* 2007 (2) SACR 539 (CC); *Prinsloo v Bramley Children’s Home* 2005 (5) SA 119 (T); *DPP v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC); *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (1) SACR 327 (CC). See also para 2 of ch 4 above.
18 2009 (2) SACR 130 (CC) at para [79].
Concluding remarks and recommendations

regional instruments such as the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child.\textsuperscript{19} Documents relating to some of these instruments, for example, the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, provide a valuable framework for assisting Member States, including South Africa, to enhance the protection of child victims and witnesses in their criminal justice systems.\textsuperscript{20} The Guidelines have also provided direction to South Africa in drafting relevant national legislation, policies and protocols involving child victims and witnesses in accordance with the Guidelines and other international instruments, such as the CRC. The National Programme of Action for Children outlines the actions government intends to take to realise its commitment towards children in accordance with these principles.\textsuperscript{21} The Constitution, as well as the international and regional instruments and their related documents, has undoubtedly proved to be a powerful tool in enhancing the lives of child victims and child witnesses in South Africa.

It has been pointed out that the protection of child victims and child witnesses in the aforementioned documents only forms part of the solution; it is also necessary to transcend the rhetoric of international and national documents and proceed to implement them, thereby making the rights of child victims and witnesses a practical reality. Notably, one such legislative procedural advance at national level, central to the theme of this study, relates to the function or persona of an intermediary.\textsuperscript{22}

The application of the intermediary system in terms of the South African criminal procedure was analysed in chapter 5. The historical background to the introduction and role of the intermediary in the South African criminal justice system was discussed.\textsuperscript{23} Aspects such as the appointment, role and functions of an intermediary and the categories of people qualified to act as such as well as the problems

\textsuperscript{19} See paras 4 and 5 of ch 4 above.
\textsuperscript{20} See para 4.4 of ch 4 above for more on the Guidelines.
\textsuperscript{21} See para 6.3 of ch 4 above.
\textsuperscript{22} See ch 5 above.
\textsuperscript{23} See para 2 of ch 5 above.
experienced within the intermediary system were analysed. The study clearly revealed the importance of the role of intermediaries in the criminal justice system. Not only do intermediaries provide access to justice for child victims who may previously have been excluded from the trial process owing to their developmental shortcomings but they also facilitate the reception of the best evidence of child witnesses in criminal proceedings. They ensure that questioning is developmentally appropriate and hence contributes to the fairness of the trial process while not imposing on the defendant’s right to a fair trial.

However, an in-depth interrogation of the utilisation of intermediaries revealed that the efficacy of the South African intermediary system is dependent on certain factors, such as the clarity and ease with which enabling legislation can be interpreted by judicial officers; the sensitisation of the courts to children’s rights and limitations; the acceptance of the importance of the role of an intermediary, and finally government’s commitment towards the proper implementation of enabling legislation. Despite the fact that the study revealed an increase by the higher courts, prosecutors and other stakeholders in support of the intermediary system, as well as an intensified commitment by government towards the successful realisation of the intermediary system, there are still some systemic challenges within our criminal justice system. These include aspects such as the discretionary threshold for eligibility, the limited role of intermediaries and the financial and

24 See para 3 of ch 5 above.
25 K v Regional Court Magistrate 1996 (1) SACR 434 (E); S v Mokoena 2008 (2) SACR 216 (T); DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC).
26 K v Regional Court Magistrate 1996 (1) SACR 434 (E); S v Mokoena 2008 (2) SACR 216 (T); DPP v Minister of Justice and Constitutional Development 2009 (2) SACR 130 (CC).
27 See ch 5 above.
28 See for example an improvement in the progressive appointment of intermediaries, together with increased establishment of intermediary facilities and the development of a job description for intermediaries. See also para 3.2-3.5 of ch 5 above.
29 In terms of s 170A of the Criminal Procedure Act the appointment of an intermediary is subject to the discretion of a judicial officer presiding over a criminal proceeding. The judicial officer has to determine whether the services of an intermediary are required based on an assessment of whether the child would suffer undue mental stress or suffering if the child testified at such proceeding. This test or threshold for eligibility has been criticised for being too vague, too stringent and excluding many who might benefit, such as a complainant showing little stress but with serious communication difficulties. See S v Mokoena 2008 (2) SACR 216 (T) at para [79]; Muller & Tait 1999 THRHR 247-248. See also para 3.1.4 of ch 5 above.
30 See para 3.4 of ch 5 above.
logistical problems that even extend to the availability of intermediaries and intermediary facilities.\textsuperscript{31} Some concerns and shortcomings that need to be addressed to develop the current intermediary system have been highlighted and proposals on how to address these concerns have been made.\textsuperscript{32} These include the appointment of an intermediary as a standard norm, the pre-trial assessment of a witness and the setting of ground rules.\textsuperscript{33}

The application of the intermediary systems in Namibia and New Zealand was examined with a view to determining whether lessons could be learned from other jurisdictions which could alleviate the plight of child victims and witnesses within the criminal justice system of South Africa.

The evaluation of the Namibian system revealed that the Namibian judicial system is comparable in many ways to that of South Africa. Like South Africa, Namibia adopted a new Constitution in the early 1990s, which constitution promotes and protects children’s rights albeit indirectly in some instances.\textsuperscript{34} Furthermore, the evaluation of the Namibian criminal justice system revealed that, like the South African system, the Namibian criminal justice system is accusatorial in nature and for some time even resembled the South African Criminal Procedure Act to a significant extent.\textsuperscript{35} Up to the early twenty-first century, Namibian children faced some of the same challenges as South African children during court processes. Only with the amendment of the Namibian Criminal Procedure Act through the enactment of the 2003 Criminal Procedure Amendment Act did the position change for child victims and child witnesses within the Namibian criminal justice system.

\textsuperscript{31} Unfortunately, despite the increase in the progressive appointment of intermediaries and the establishment of intermediary facilities this remains problematic.

\textsuperscript{32} See para 4 of ch 5 above.

\textsuperscript{33} See para 4 of ch 5 above.

\textsuperscript{34} See para 2.1 of ch 6 above.

\textsuperscript{35} Horn “International human rights norms and standards: The development of Namibian case and statutory law” available at http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/horn.pdf\textsuperscript{141} (accessed 03/07/2015) at 150. See also para 2.3 of ch 6 above.
However, despite these similarities the evaluation of the criminal justice system of Namibia revealed that the legislation of the Namibian criminal justice system sanctioning the special treatment of child victims and child witnesses appears to be more child-friendly than South African legislation. For example, the conditions for the application of section 158A of the Namibian Criminal Procedure Act that allow for special measures where child witnesses are present are much less stringent than those of its South African counterpart. Section 166 of the Namibian Criminal Procedure Act, in addition, prescribes as a standard norm that children under the age of thirteen must be cross-examined by the presiding officer or an intermediary, whereas South African children under the age of thirteen years do not have a similar right to demand that they be cross-examined by an intermediary. Also, there are no pre-requisites for section 166 of the Namibian Criminal Procedure Act to find application other than that an intermediary should be immediately available. In comparison, its South African counterpart (s 170A) requires that to find application it must be established that the child witness would be exposed to undue mental stress or suffering if this section were not applied. In addition, witnesses are granted the right to have a support person present when having to testify. No such right is afforded to South African child witnesses in the South African Criminal Procedure Act. It is submitted that South African children would likewise greatly benefit from similar legislative provisions and that serious attention should be given to the implementation of comparative legislation in South Africa.

Nevertheless, while Namibia may be complimented on their advanced child-orientated legislation, the country is seriously in need of proper implementation. As far as could be established, Namibia has a significant shortage of child-friendly courts and the indications are that intermediaries are seldom used. Although this can be attributed to Namibia’s unfortunate financial constraints, inter alia, this clearly illustrates that enabling legislation in itself is not sufficient, but must be followed up by meaningful implementation. Both these aspects are equally important to ensure

36 See paras 2.4.1 - 2.4.3 of ch 6 above.
37 S 166(4)-(5) of the Namibian Criminal Procedure Act, emphasis added.
38 S 158A (2) of the Namibian Criminal Procedure Act. See also para 2.5 of ch 5 above.
39 See para 2.4.4 of ch 6 above.
40 See para 2.5 of ch 6 above.
that the rights of child victims and child witnesses are effectively protected. South Africa as a Third World country faces similar fiscal challenges. It is submitted, however, that with proper financial planning and commitment by the South African government, South Africa will be able to rise to this challenge.\textsuperscript{41}

The New Zealand legal system appears to share some characteristics with its South African counterpart. The New Zealand criminal justice system is accusatorial in nature and up to and until the late 1980s New Zealand children suffered severe trauma during the court process, just as South African children did.\textsuperscript{42} Positive reform only came about with the introduction of the Evidence Amendment Act of 1989 and the subsequent enactment of the Evidence Act of 2006.\textsuperscript{43} As was highlighted in chapter 7, the Evidence Amendment Act introduced a range of alternatives to conventional testimony,\textsuperscript{44} including the use of intermediaries. This resulted in the process being less traumatic for children and proved valuable in questioning children.\textsuperscript{45}

Unfortunately, although some of these alternatives, such as the use of the forensic interview video as evidence-in-chief with the child appearing at trial to be cross-examined using live links or screens, quickly became standard procedure for child witnesses in New Zealand criminal courts, the other alternatives provided by the Evidence Amendment Act were overlooked and soon fell into disuse. These included the use of intermediaries.\textsuperscript{46}

\textsuperscript{41} See ch 5 above for more on the South African government’s commitment towards the progressive appointment of intermediaries and the provision of intermediary facilities.

\textsuperscript{42} See para 2.3 of ch 7 above.

\textsuperscript{43} See paras 2.4 and 2.6 of ch 7 above.

\textsuperscript{44} For example, via pre-recorded video interviews, CCTV, from behind a screen or one-way glass, or through an appropriate audio link at the discretion of the judge. See s 23 of the Evidence Amendment Act 1989.

\textsuperscript{45} S 23E(4) of the Evidence Amendment Act 1989.

\textsuperscript{46} Henderson “Child witnesses in New Zealand” in Spencer & Lamb Children and Cross-Examination: Time to Change the Rules? (2012) 1 at 117. See also para 2.5 of ch 5 above.
Concluding remarks and recommendations

Despite initial proposals by the New Zealand Law Commission\(^{47}\) for the re-introduction of intermediaries, coupled with support from various stakeholders,\(^{48}\) intermediaries have not been re-introduced up to the time of writing this thesis. Further reform to the position of child witnesses did, however, materialise with the introduction of the Evidence Act in 2006 which, apart from making provision for child witnesses to give evidence in alternative ways, provides for “communication assistance” in section 80 of the Act.\(^{49}\) An evaluation of section 80 of the Evidence Act revealed that the requirements for the application of section 80, in comparison with section 170A of the South African Criminal Procedure Act, appear to be more favourable to child witnesses.\(^{50}\) For example, in order for section 170A of the South African Criminal Procedure Act to apply, the witness must be under the biological or mental age of eighteen years,\(^{51}\) whereas no age restriction is set in section 80 of the Evidence Act.\(^{52}\) Furthermore, the application of section 170A of the South African Criminal Procedure Act is subject to the condition that the witness will be exposed to “undue mental stress or suffering” if such witness testifies at the proceedings,\(^{53}\) although the application of section 80 read with section 81(2) of the Evidence Act is only subject thereto that the witness does not have sufficient proficiency in English to understand court proceedings or questions put orally and to adequately respond to them.\(^{54}\)

However, although the legislation allowing for communication assistance in terms of the New Zealand criminal justice system may be preferred to section 170A of the South African Criminal Procedure Act, as reported in chapter 7, the study revealed some serious concerns about the very guarantee of the use of communication


\(^{49}\) See respectively ss 103-107, 79 and 80 of the Evidence Act.

\(^{50}\) See para 2.6.3 of ch 7 above.

\(^{51}\) S 170A of the South African Criminal Procedure Act.

\(^{52}\) See s 80 of the Evidence Act, which refers to “a witness”.

\(^{53}\) S 170A of the South African Criminal Procedure Act.

\(^{54}\) Ss 80 & 81(2) of the Evidence Act.
assistance for child witnesses.\textsuperscript{55} Although the use of communication assistance may come to the rescue of some child witnesses, others may still be left out in the cold.\textsuperscript{56} It has already been pointed out that despite the fact that the Evidence Act provides for the use of alternative ways of giving evidence, this is only part of the solution. A system that does not guarantee the use of either communication assistance or an intermediary may not fully obviate the re-traumatisation of child witnesses due to inappropriate questioning or aggressive cross-examination.\textsuperscript{57}

Conversely, New Zealand promises to improve the standing of child witnesses within their criminal justice system through the Evidence Amendment Bill. It allows a presumption that all child witnesses may give evidence in an alternative way\textsuperscript{58} and provides child complainants and child witnesses alike with a right to a support person.\textsuperscript{59} It is submitted that serious attention should be given to the implementation of similar legislation in South Africa as this would also improve the position of child witnesses in South Africa.

In conclusion it is submitted that, in comparison with Namibia and New Zealand, the protection afforded to child witnesses and child victims and especially the role fulfilled by intermediaries in the South African criminal justice system may by and large be regarded as highly advanced. However, it is submitted that the South African criminal justice system could be further enhanced through the following recommendations.

\textsuperscript{55} See paras 2.6.3 and 2.6.4 of ch 7 above.
\textsuperscript{56} As was highlighted in chapter 7, uncertainty exists as to the very availability of communication assistance for child witnesses who do not necessarily have a communication disability but may have difficulty in understanding questions asked in the normal way because of age. See para 2.6.3 of ch 7 above.
\textsuperscript{57} See para 2.6.3 of ch 7 above.
\textsuperscript{58} Unless the witness chooses not to and the judge is satisfied that the witness fully appreciates the effect of his or her doing so (see s 107A of the Evidence Amendment Bill 2015 available at http://www.legislation.govt.nz/bill/government/2015/0027/latest/DLM6488707.html (accessed 12/06/2016)).
3 RECOMMENDATIONS

The recommendations are divided into four main categories: The first recommendation comprises the introduction of a hybrid approach to accommodate the child witness and child victim, and is based on a blend of principles from both the accusatorial and the inquisitorial systems. This is presented as the most effective option for addressing the protection of the child witness and child victim. However, as this would be a time-consuming project, an alternative approach is suggested, namely to amend the existing intermediary system as suggested in a proposed general amendment Act. This recommendation is followed by some recommendations in respect of pre-recording of evidence-in-chief and lastly some recommendations with regard to the support person.

3.1 Novel intermediary system/model

As previously highlighted, the presentation of testimony in an accusatorial criminal justice system has proved to be extremely difficult for child witnesses. The question was thus asked whether more could be done to reform the current South African system or whether the answer lies in following a different system or model.

60 An example of an approach comprising both accusatorial and inquisitorial elements can be found in ss 112 and 115 of the Criminal Procedure Act. It is submitted that a similar method may be followed to realise the introduction of a hybrid approach to accommodate the child witness and child victim.

61 See ch 3 above.

62 See ch 3 above. The different intermediary models include the full intermediary model, the question-by-question model, and the topic-by-topic model. In the full intermediary model, the intermediary is briefed by counsel before trial on which aspects of the child’s testimony are to be explored and tested. At trial, the intermediary takes responsibility for putting the requested exploration and testing into question form, including determining how questions are phrased and the order in which they are put. In the question-by-question model, counsel determines the questions and poses them one at a time to the intermediary, who translates the question into developmentally appropriate language for the child. In the topic-by-topic model, the intermediary is briefed as in the full intermediary model, but counsel breaks the questions up into topics, based on the areas of challenge or exploration. At trial there is an interactive process whereby the intermediary questions the child on the first topic, then refers back to counsel for further instructions (eg to put a question differently or to pick up on any
As was highlighted above, it is submitted that the model currently utilised in South Africa can be equated to the question-by-question model. Counsel determines the questions and puts them one at a time to the intermediary, who “translates” the question into developmentally appropriate language for the child. This system is limited, however, as was pointed out above, in that the intermediary does not have the right to point out that the questions posed (such as repetitive questioning, sudden shifts between subjects, multifaceted questions or closed questions) are likely to produce unreliable answers, or to suggest that alternative questioning styles should be used.

Although proposals for reform to the current model have been set out it is submitted that child witnesses and child victims will benefit even more from a novel system or model. The implementation of a novel system or model that combines inquisitorial elements with accusatorial elements, such as the Norwegian topic-by-topic model outlined in chapter 3, is therefore recommended. This system or model allows special examiners to question children according to their professional judgement and skills, but also gives defence counsel the opportunity to direct the examiner to explore issues of concern to the defence. This accusatorial-inquisitorial model combines elements of both systems. It is submitted that in the South African context the application of the topic-by-topic model would play out as follows:

- That the questioning be conducted via CCTV or by another electronic means in exactly the same manner as that envisaged by section 170A(3) of the Criminal Procedure Act. In other words that the questioning of the witness be conducted from any place informally arranged to set the witness at ease

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63 See para 3.4 of ch 5 above.
64 See para 3.4 of ch 5 above.
65 See para 3.2 below.
66 See para 3 of ch 3 above.
while outside the sight and hearing of any person whose presence might upset the witness.

- That the defence may view the child’s demeanour and hear the child either directly or through the medium of any electronic or other device while the child is being questioned by the intermediary.

- The main difference is that the examination of the evidence is only conducted by an intermediary.

- The intermediary accordingly plays a far more active role in the questioning of the witness in that the intermediary:
  - determines how questions are phrased; and
  - the order in which the questions are put.

- To allow the intermediary to do so, counsel provides the intermediary with questions broken up into topics based on the areas of challenge or exploration.

- The intermediary questions the child on the first topic in accordance with his or her professional skills and when he or she considers the interview complete, refers back to counsel for further instructions/topics to be explored before moving on to the next topic. The defence and the court therefore retain the right to raise any matter that has not been covered in the evidence already given or that may have appeared inconsistent.67

- This process continues until the presiding officer and counsel are satisfied that all areas have been sufficiently covered through the interview.

- The whole process is recorded and the interview is transcribed.

- The video and transcript are accepted in court as evidence-in-chief.

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• If necessary the child can be re-interviewed, in which case the same process will be followed.

The evidence of a child witness is therefore still fairly and thoroughly tested without having to rely upon a *direct* examination by counsel.  

### 3.2 Implementation of reform proposals

Proposals to reform the current intermediary system have already been referred to and are repeated below as it is submitted that these proposals will significantly improve the intermediary system in South Africa. The following proposals should be implemented to address the shortcomings in present legislation as far as the appointment of intermediaries, the function of intermediaries and aspects incidental thereto are concerned:

• That the appointment of an intermediary becomes mandatory in all cases in which the witness is under the biological or mental age of eighteen years, unless the child witness chooses not to use the services of an intermediary or cogent reasons exist not to appoint an intermediary.

• That if a child witness under the biological or mental age of eighteen years so wishes or cogent reasons exist not to appoint an intermediary, such reasons be placed on record before the commencement of the proceedings. In order to give effect to these proposals it is submitted that section 170A(1) of the Criminal Procedure Act should be amended by way of an Amendment Act to read as follows:

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69 See para 4 of ch 5 above.
Whenever criminal proceedings are pending before any court and the witness is under the biological or mental age of eighteen years the court must, subject to subsection (4), unless the witness chooses not to use an intermediary or cogent reasons exist not to appoint an intermediary, appoint a competent person as an intermediary to enable such witness to give his or her evidence through that intermediary. In the event that an intermediary is not appointed, the court shall provide reasons for not appointing an intermediary and such reasons shall immediately be entered into the records of the proceedings.

- That if the legislature does not amend section 170A to make the appointment of an intermediary mandatory unless reasons not to do so exist, the test for the appointment of an intermediary, namely that of “undue mental stress or suffering”, be substituted with that of “it appears to be in the interests of justice”. Section 170A(1) should then be amended by way of an Amendment Act to read as follows:

Whenever criminal proceedings are pending before any court and the witness is under the biological or mental age of eighteen years and it appears to such court to be in the interests of justice, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

- That the directives with regard to the application of section 170A (setting certain criteria to be used and circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary) as contemplated in section 66(2)(a) of the Amendment Act be amended to include both sexual and non-sexual cases.

- That all witnesses under the biological or mental age of eighteen years, irrespective of whether the services of an intermediary are used or not, be allowed to testify in a room separate from the courtroom or in any other suitable place through the medium of any electronic or other device. In order to give effect to these proposals, section 170A(3) of the Criminal Procedure Act should be amended by way of an Amendment Act to read as follows:
Concluding remarks and recommendations

[If a court appoints an intermediary] The court may direct that a witness under the biological or mental age of eighteen years shall give his or her evidence at any place—

(a) which is informally arranged to set the witness at ease;

(b) which is so situated that any person whose presence may upset that witness is out of sight and earshot for that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

- That a pre-trial assessment of the communication competencies of all witnesses under the biological or mental age of eighteen years be conducted. That the questioning during the trial be conducted in accordance with the pre-determined competencies. That the pre-trial assessment be taken into account when “ground rules” for the questioning of a child witness are set.

- That “ground rules” as to the way in which the examination of a child witness is to be conducted be set with all the parties concerned prior to each trial.

- That the function or persona of an intermediary be placed on a professional footing by the requirement of a relevant accredited qualification. This qualification could include aspects of child development, child communication patterns and styles, psychology of abuse, knowledge of the legal framework, terms and terminology and specialised training in the interviewing of child witnesses.

- That the functions of an intermediary be broadened to include the duties set out in the Draft Discussion Document on Intermediaries of 2008 and the Draft Job Description for Court Intermediaries drafted by the Department of Justice and Constitutional Development.70

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70 See para 3.4 of ch 5 above.
• That the Minister by notice in the Government Gazette include professional speech and language therapists in its list of competent persons to be appointed as intermediaries.\(^{71}\)

• That an official register containing information and statistical data on intermediaries be set up and maintained by the Department of Justice and Constitutional Development.

• That the Department of Justice and Constitutional Development continue in its efforts towards the realisation of intermediary services by progressively appointing intermediaries and by converting the \textit{ad hoc} posts into permanent intermediary posts.

• That a regulatory body within the Department of Justice and Constitutional Development be established to address the management, training, supervision and monitoring of intermediaries.

• That the Department of Justice and Constitutional Development continue in its efforts to provide intermediary facilities such as a special room where witnesses can testify, a private waiting room for child witnesses and CCTV systems.

• That the Minister of Justice, with the concurrence of the Minister of Finance, annually determine the amounts to be paid as travelling and subsistence and other allowances in respect of the services rendered by an intermediary who is not in the full-time employment of the state as set out in section 170A(4)(b) of the Criminal Procedure Act. That this amount be stipulated annually in the budget speech presented to Parliament by the Minister of Finance.\(^{72}\) In order to give effect to this proposal, section 170A(4)(b) of the Criminal Procedure Act should be amended by way of an Amendment Act to read as follows:

\(^{71}\) Communication is part of the core skills of speech and language therapists, which makes them particularly suitable as intermediaries. Countries such as England and Wales already make extensive use of speech and language therapist as intermediaries. See para 3.2 of ch 5 below for more on this aspect.

\(^{72}\) It is submitted that this could be done in a similar fashion to the way social grants are determined annually by the Minister of Finance in consultation with the Minister of Social Development. See s 4 of the Social Assistance Act 13 of 2004.
Concluding remarks and recommendations

An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence allowance and other allowances in respect of the services rendered by him or her as the Minister, with the concurrence of the Minister of Finance, may annually determine out of moneys appropriated by Parliament for that purpose.

3.3 Pre-recordings of evidence-in-chief

The delays before trials are a related practical difficulty attached to the accusatorial system.73 Delays cause major issues for children in terms of both their psychological welfare and the quality of their evidence.74 In some instances intermediaries have indicated that owing to numerous court postponements they would no longer be available, with the consequence that the courts were unable to function due to a lack of competent intermediaries or else children had to testify without the aid of an intermediary.75 An alternative solution to this problem is to pre-record children’s evidence.76 The introduction of a legislative presumption in favour of the pre-recording of children’s evidence is therefore recommended. This presumption should apply unless good reasons exist why a child should not give evidence in this way.

73 See para 2.2 of ch 3 above. The difficulties caused by delays were recently alluded to by the Public Protector Adv Thuli Madonsela speaking at the launch of the Child Witness Foundation, in that she related a heart-breaking story of a minor who was gang-raped and had to endure the further trauma of her court case being postponed 48 times and drawn out for nine years. The Office of the Public Protector investigated the matter and “red-carded” the entire judicial process – from the police to the courts. See “Public Protector Thuli Madonsela calls for disaggregated data to help fight child abuse” available at http://www/goc/za/speeches/public-protector-calls-disaggregated-data-help-fight-child-abuse (accessed on 07/09/2016).

74 See para 2.2 of ch 3 above.


76 See para 2.2 of ch 3 above for a discussion of the benefits of pre-recording, such as that it eliminates the need for multiple interviews, alleviates problems with delays, guards against later memory lapses on the part of the child and may even prompt a guilty plea from the accused.
Furthermore, this evidential interview should be conducted in an age-appropriate setting in the manner described in paragraph 2.2 above. The interview should then be transcribed and the pre-recorded video together with the transcription should be accepted as evidence-in-chief. The child witness need not attend court. If further evidence is required the child should be re-interviewed using the process described above. Experience indicates that this happens only in exceptional cases.\textsuperscript{77}

3.4 Support person

The comparative component of the study of the protection of child victims and child witnesses in Namibia and New Zealand respectively highlighted the value and importance of the role of a support person.\textsuperscript{78} South African child victims and child witnesses would benefit equally from the presence of a support person when having to testify. The introduction of a legislative provision into the Criminal Procedure Act allowing for all child witnesses and victims to have a support person present when giving evidence in court is therefore recommended.

4 CONCLUSION

It can be authoritatively concluded that a criminal justice system that not only recognises the vulnerabilities of children but also affords them comprehensive protection is vital to the protection of child victims and child witnesses. This is applicable to the South African criminal justice system but also to criminal justice systems universally. South Africa will only be able to adhere fully to the principles and standards set out in the Constitution and international instruments when the criminal justice system is amended in the manner proposed above.


\textsuperscript{78} See respectively para 2.4.2 of ch 6 and para 2.6.2 of ch 7 above.
These amendments are imperative if we do not want to fail child victims and child witnesses, for in the words of our late president Nelson Mandela “[h]istory will judge us by the difference we make in the everyday lives of children”.\(^79\)

ANNEXURE A

PROPOSED JOB DESCRIPTION: COURT INTERMEDIARY

INDEX

A.  Job information summary
B.  Job purpose
C.  Main objectives
D.  Outputs and competency profiles
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      D.1.1.  Customers
   D.2.  Competency profiles
      D.2.1  Job knowledge description
      D.2.2.  Skills description
      D.2.3.  Personal attributes description
      D.2.4.  Learning fields
      D.2.5.  Learning indicators
E.  Progression to next higher salary range
F.  Promotion to next higher post
   F1.  Next higher post
   F2.  Nature of work for next higher post
G.  Job description agreement

Note some editorial changes have been made to the proposed job description.
JOB DESCRIPTION:

A. JOB INFORMATION SUMMARY

JOB TITLE: Court Intermediary

CORE: Administrative line function and support personnel

POST LEVEL: To be determined by JE

DATE: April 2014

LOCATION:

COMPONENT:

POST REPORTS TO: Regional Intermediary

POSITION IN THE ORGANISATION: (attach the organogram where available)

B. JOB PURPOSE

TO ACT AS AN INTERMEDIARY BY FACILITATING COURT PROCEEDINGS WHERE CHILDREN UNDER THE BIOLOGICAL OR MENTAL AGE OF 18 YEARS AND MENTALLY DISABLED WITNESSES ARE INVOLVED

C. MAIN OBJECTIVES

1. Provide intermediary services for vulnerable witnesses, where an application is granted in court
   - Inform the court at all times about changes/observations regarding the witness’s physical, emotional and mental behaviour.
   - Provide emotional and psychological support to child witnesses before, during and after testimony.
• Supply and maintain the intermediary tools (i.e. the sets of anatomical dolls, intermediary toolkits, first-aid crayons and pencils, black paper for drawing, plastic glass and jug of good quality and tissues) that might assist a witness to the court.

• Orientate the child witness with regard to court processes, roles and procedures as applicable to intermediary duties.

• Participate in community outreach activities.

• Recommend referral of child witnesses for counselling when necessary.

2. **Provide specialised child language services**

• Make proper arrangements with qualified individuals in cases where witnesses have a language dialect and/or communication need that the intermediary cannot assist with.

• Convey the general purport of questions to the witness in age-appropriate language.

• Orientate the child witness with regard to court processes, roles and procedures that are applicable to intermediary duties.

3. **Maintain intermediary room**

• Maintain the condition of equipment (CCTV camera) and report faults where necessary.

• Monitor cleanliness of the intermediary room.

• Monitor audibility of the system on both sides and report faults to the court.
4. **Render administrative support services in courts**

- Complete and maintain official registers and intermediary information and statistical files.

- Compile monthly intermediary reports for submission to the direct supervisor.

- Liaise with court clerk (stenographer) with regard to arrangements with qualified individuals to meet the needs of the said witness.

- Assist with case flow management functions and liaise with judicial officers when necessary.

D. **OUTPUT AND COMPETENCY PROFILES**

D1. **OUTPUT PROFILES**

**D.1.1. KEY CUSTOMERS AND STAKEHOLDERS**

<table>
<thead>
<tr>
<th>Stakeholders/customers</th>
<th>Stakeholder/customer requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Managers</td>
<td>• Reporting and statistics submission</td>
</tr>
<tr>
<td>CJS</td>
<td>• Liaise, support and communicate</td>
</tr>
<tr>
<td>Interpreters and court clerks</td>
<td>• Liaise, support and communicate court proceedings</td>
</tr>
<tr>
<td>Court Manager/ Judge/ Magistrate and Prosecutors</td>
<td>• Liaise, support and communicate</td>
</tr>
<tr>
<td>Court Preparations Officer</td>
<td>• Liaise, support and communicate</td>
</tr>
<tr>
<td>Parents and caregivers</td>
<td>• Liaise, support and communicate</td>
</tr>
<tr>
<td>Any witness under the biological or mental age of 18 yrs</td>
<td>• Support, guide and communicate</td>
</tr>
</tbody>
</table>

## D.2 COMPETENCY PROFILES

### D.2.1 Job knowledge, skills and personal attributes description

Knowledge of legislation and regulations pertaining to the Public Service and Administration, specifically the following:

- The Public Service Act and Regulations
- Basic Conditions of Employment Act
  and knowledge of:
- Section 170A, ss 158 and 153 of the Criminal Procedure Act;
- Intermediary training manual
- Intermediary Policies, Procedures and Norms and Standards
- Children’s Act
- Sexual Offences Act

- Knowledge of trauma and developmental stages of witnesses
- Up-to-date knowledge of new work-related developments
- Knowledge and understanding human rights
- Knowledge of children’s and mentally disabled communication patterns and styles
- Knowledge of legal terms and terminology
- Knowledge of relevant prescripts, policies and practices
- Ability to apply technical/professional knowledge and skills
- Ability to communicate on a child’s level
- Ability to engage with all vulnerable witnesses
- Ability to co-operate well with supervisors, colleagues and other managers
- Ability to demonstrate a sound and healthy attitude when interacting with others
- Ability to provide containment skills when required during the intermediary
<table>
<thead>
<tr>
<th>Session</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Ability to execute functions as instructed and within agreed time frames, including punctuality</td>
</tr>
<tr>
<td>• Administrative skills</td>
</tr>
<tr>
<td>• Communication skills</td>
</tr>
<tr>
<td>• Customer focus and responsiveness</td>
</tr>
<tr>
<td>• Excellent working relations</td>
</tr>
<tr>
<td>• Problem-solving and decision-making skills</td>
</tr>
<tr>
<td>• Computer literacy, i.e.</td>
</tr>
<tr>
<td>- MS Office</td>
</tr>
<tr>
<td>- MS Word</td>
</tr>
<tr>
<td>- Excel</td>
</tr>
<tr>
<td>- Outlook</td>
</tr>
</tbody>
</table>

D.2.4 Learning fields

• Teaching or Social work or Child Care and Youth Development, Pediatrics, Psychiatry, Clinical, Counseling and Educational Psychology and Family Counselling.

D.2.5 Learning indicators

• Senior Primary Teacher’s Diploma with three years’ experience in teaching

• Clinical, Counselling or Educational Psychologists who are registered under the Health Professional Act, 1979

• Family Counsellors who have been appointed under section 3(1) of the Mediation in Certain Divorce Matters Act, 1987

• Social workers who are registered in terms of section 17 of the Social Service Professions Act 1978 and have two years’ experience in social work, three years’ post matriculation education qualification in Child or
Youth Care with three years’ experience in child or youth care

- Medical Practitioners with specialisation in Pediatrics or Psychiatry [and]
  who are registered in terms of section 17 of the Health Professions [Act].

E. PROGRESSION TO NEXT HIGHER SALARY RANGE

The Code of Remuneration and the Public Service Regulations provide guidelines.

F. PROMOTION TO NEXT HIGHER POST

F1. Next higher post:

F2. Nature of work for next higher post

G. JOB DESCRIPTION AGREEMENT

Parties agree to the contents of the job description.

______________________________________________________________________________

Signature of post incumbent

Signature of Supervisor

Date: Date:
ANNEXURE B

PROPOSED DRAFT JOB DESCRIPTION: REGIONAL INTERMEDIARY

INDEX

A. Job information summary
B. Job purpose
C. Main objectives
D. Outputs and competency profiles
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      D.1.1. Customers
   D.2. Competency profiles
      D.2.1. Job knowledge description
      D.2.2. Skills description
      D.2.3. Personal attributes description
      D.2.4. Learning fields
      D.2.5. Learning indicators
E. Progression to next higher salary range
F. Promotion to next higher post
   F1. Next higher post
   F2. Nature of work for next higher post
G. Job description agreement

2 Note some editorial changes have been made to the proposed job description.
JOB DESCRIPTION:

A. JOB INFORMATION SUMMARY

JOB TITLE: Regional Intermediary

CORE: Management support personnel

POST LEVEL: To be determined by JE

DATE: April 2014

LOCATION:

COMPONENT:

POST REPORTS TO: Director: Court Operations

POSITION IN THE ORGANISATION: (attach the organogram where available)

B. JOB PURPOSE

TO MANAGE AND COORDINATE THE WORK OF COURT INTERMEDIARIES IN THE RESPECTIVE REGION

C. MAIN OBJECTIVES

1. Manage and coordinate intermediary services in the Region
   - Manage and control court intermediary services in the respective Region.
   - Manage and coordinate the work of intermediaries.
   - Develop and manage the intermediary service business plan and operational plan
   - Manage special projects of intermediary services.
• Manage and control the victim support feeding scheme within the Region.

• Provide inputs for policy formulation.

• Make recommendations on financial expenditure of the Region.

• Coordinate feeding schemes for child witnesses within the Region.

• Monitor recommendations on child witness counselling referrals and referrals to places of safety.

2. **Manage operational efficiency of intermediary services in the Region.**

• Conduct regular court visits in the Region.

• Identify intermediary services gaps and regional interventions.

• Develop innovations for continuous improvement.

• Provide necessary and sufficient intermediary resources within the Region.

• Approve participation of court/area intermediaries in community outreach activities.

• Liaise with relevant stakeholders on intermediary matters.

• Facilitate the rendering of case flow related services

3. **Coordinate and consolidate regional intermediary service information and statistics and reports**

• Manage the provision of intermediary information and statistics within the Region.

• Analyse and consolidate regional intermediary services reports in line with the prescribed format.
• Quality-assure and authorise intermediary reports and business cases.

• Manage the maintenance of a database for all intermediaries, ad hoc and other victim support services for the area.

4. Facilitate and coordinate training and development of ad hoc court intermediaries and court intermediaries.

• Identify, analyse and recommend training needs for inclusion in the workplace skills plan.

• Arrange and conduct capacity-building workshop for court intermediaries in the area.

• Mentor, coach and support court intermediaries on relevant skills and responsibilities for area-related activities for the team.

• Recommend ethical guidelines and render advice on language matters specifications.

5. Monitor the maintenance of equipment in both courts and the intermediary rooms and the audible status of the system on both sides.

• Monitor the maintenance of intermediary rooms and all resources in the Region.

• Monitor the condition of equipment in intermediary rooms (CCTV cameras) and report any faults.

6. GENERIC FUNCTIONS:

• Manage human resources in the Region.

• Build capacity of court intermediaries within the Region.

• Respond to audit reports for the Region.
- Provide budgetary inputs in terms of prescripts.
- Facilitate compliance with internal policies and legislative requirements.
- Manage performance of court intermediaries.
- Coordinate EAP and related services and programmes in the Region.
- Report writing and consolidation
- Policy formulation and analysis

D. OUTPUT AND COMPETENCY PROFILES

D1. OUTPUT PROFILES

D.1.1. KEY CUSTOMERS AND STAKEHOLDERS

<table>
<thead>
<tr>
<th>Stakeholders/customers</th>
<th>Stakeholders/customers requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manager</td>
<td>• Reporting and rendering advice on intermediary-related matters</td>
</tr>
<tr>
<td>CJS</td>
<td>• Submission of consolidated statistics for the Region</td>
</tr>
<tr>
<td></td>
<td>• Liaise, support and communicate</td>
</tr>
<tr>
<td>National Office DOJ &amp; CD</td>
<td>• Liaise, support and communicate</td>
</tr>
<tr>
<td>Interpreters and court clerks</td>
<td>• Liaise, support and communicate</td>
</tr>
<tr>
<td>Court Manager/Judge/ Magistrate and Prosecutor</td>
<td>• Liaise, support and communicate</td>
</tr>
<tr>
<td>Court preparations</td>
<td>• Liaise, support and communicate</td>
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<td>---------------------</td>
<td>----------------------------------</td>
</tr>
<tr>
<td>Non-Government Organisation (NGO)</td>
<td>• Render training, source <em>ad hoc</em> intermediary</td>
</tr>
<tr>
<td>Other departments (SAPS, Correctional Services and Social Development)</td>
<td>• Liaise, support and communicate (collaboration)</td>
</tr>
</tbody>
</table>

### D.2 COMPETENCY PROFILES

#### D.2.1 Job knowledge, skills and personal attributes description

Knowledge of legislation and regulations pertaining to Public Service and Administration, specifically the following:

- The Public Service Act and Regulations
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  And knowledge of:
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- Intermediary training manual
- Intermediary Policies, Procedures and Norms and Standards
- Children’s Act
- Sexual Offences Act

- Knowledge of trauma and developmental stages of witnesses
- Up-to-date knowledge of new work-related developments
- Knowledge and understanding of human rights
- Knowledge of children’s and mentally disabled persons’ communication patterns and styles
- Knowledge of legal terms and terminology
- Knowledge of relevant prescripts, policies and practice
- Ability to apply technical/professional knowledge and skills
- Ability to communicate on a child’s level
| Ability to engage with all vulnerable witnesses |
| Ability to co-operate well with supervisors, colleagues and managers |
| Ability to demonstrate a sound and healthy attitude when interacting with others |
| Ability to provide containment skills when required during the intermediary session |
| Ability to execute functions as instructed and within agreed time frames, including punctuality |
| Administrative skills |
| Communication skills |
| Customer focus and responsiveness |
| Problem-solving and decision-making skills |
| Computer Literacy: MS Office, MS Word, Excel and Outlook |

**D.2.4 Learning fields**

- Teaching or Social Work or Child Care and Youth Development, Pediatrics, Psychiatry, Clinical Psychology, Counselling, Educational Psychology and Family Counselling.

**D.2.5 Learning indicators**

- Senior Primary Teacher’s Diploma with three years’ experience in teaching
- Clinical, Counselling or Educational Psychologists who are registered in terms of the Health Services Professions Act, 1979
- Family Counsellors who are appointed under section 3(1) of the Mediation in Certain Divorce Matters Act, 1987
- Social workers who are registered in terms of section 17 of the Social Service Professions Act, 1978, with two years’ experience in social work
- Three years’ postmatriculation education qualification in Child or Youth Care with three years’ experience in child or youth care
- Medical practitioners who [specialise] in Pediatrics or Psychiatry [and] who are registered in terms of section 17 of the Health Professions [Act].

E. PROGRESSION TO NEXT HIGHER SALARY RANGE

The Code of Remuneration and the Public Service Regulations provide guidelines.

F. PROMOTION TO NEXT HIGHER POST

F1. Next higher post:

F2. Nature of work for next higher post

G. JOB DESCRIPTION AGREEMENT

Parties agree to the contents of the job description.

________________________________________________________________________

Signature of post incumbent                                      Signature of Supervisor

________________________________________________________________________

Date:                                                          Date:
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