Pre-Recorded Videotaped Evidence of Child Witnesses

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ABSTRACT

The South African Law Commission recently rejected the proposal that pre-recorded videotaped evidence of child witnesses be used in the trial process as a way of protecting the child from further trauma and assisting the court in its truth seeking function. This article examines whether the Law Commission's position is well founded. It analyses the problems attendant on the present system with regard to child witnesses, arising chiefly from its adherence to the adversarial system and the focus on aggressive cross-examination of the child witness, and suggests videotaped evidence as a possible solution. The main potential barriers to implementing such a procedure, namely the traditions of orality and the rules against hearsay, as well as the Constitutional argument regarding the right to a fair trial, are examined. It is concluded that such issues could be successfully overcome, provided the necessary safeguards are in place in order to protect the rights of the accused. The only real problem attendant on this procedure seems to be one of implementation and lack of resources. However, it is questioned whether this is a sufficiently strong argument against allowing a procedure that could potentially hold such significant benefits.

Introduction

According to s 28 of the Constitution,[1] 'a child's best interests are of paramount importance in every matter concerning the child'.[2] Furthermore, it provides that a child is 'to be protected from maltreatment, neglect, abuse or degradation'.[3] These provisions reflect society's belief that children are vulnerable and in need of protection and also emphasise the importance with which they are regarded.

However, in spite of this, it seems that this sentiment is often neglected in cases where a child comes into contact with the criminal justice system, especially in cases where his/her rights conflict with those of an accused. In the present system, where the adversarial procedural model rules supreme and ideas of due process and the rights of the accused are prioritised, the rights of the child are often neglected.

As long ago as 1925 a British departmental committee reached the conclusion that the existing criminal procedure and rules of evidence,

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1 The Constitution of the Republic of South Africa Act 108 of 1996.

2 Section 28(2) of The Constitution of the Republic of South Africa Act 108 of 1996.

3 Section 28(c) of The Constitution of the Republic of South Africa Act 108 of 1996.

with particular regard to child witnesses, made it exceedingly difficult to obtain a conviction against child abusers.[4] It seems that not much has changed over the years and the experience seems to be the same in South Africa today. As a result of problems regarding the rules of evidence, guilty child abusers are often not convicted and are free to possibly commit further crimes against children.[5]

In 1989, the South African Law Commission (as it then was called) concluded that the normal adversarial trial procedure, with its strong emphasis on cross-examination, was insensitive and unfair to child witnesses.[6] Recently the legislature has gone some way towards dealing with the problem by making provision for use in certain cases of mechanisms such as closed circuit television links, one-way screens and intermediaries. It is questioned whether these procedures go far enough in protecting the child witness from further trauma and assisting the court in its truth seeking function.[7] In addressing the inadequacies of the system in light of past reforms, the South African Law Commission (hereafter referred to as the 'SALC') examined a number of possible proposals, including that of pre-recorded videotaped evidence of child witnesses. Interestingly, the SALC recently rejected the proposal that videotaped interviews of the child be used in the trial process. This article examines whether the Law Commission's position is well founded.

The law as it stands

Underpinning the law of evidence in South Africa is the principle of orality. Generally, evidence for either party must be given orally by the witnesses in the presence of the parties.[8] The rationale for this is based on the fact that we think that the adversarial system is the best way to get at the truth. It is believed that parties should have an opportunity to confront the witnesses who testify against them, and should be able to challenge the evidence by questioning.[9] However, there are certain exceptions to the rule that evidence must be given orally.[10]

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4 South African Law Commission Working Paper 28 (Project 71) 'Protection of the Child Witness' (1989) at 9.

5 Op cit (n 4) at 10.

6 PJ Schwikkard, A Skeen and SE Van der Merwe *Principles of Evidence* (1997) 244.

7 PJ Schwikkard 'The abused child: A few rules of evidence considered' 1996 *Acta Juridica* 148 at 156. See also JR Spencer 'Child witnesses, video technology and the law of evidence' 1987 *Crim LR* 76; J McEwan 'Child evidence: More proposals for reform' 1988 *Crim LR* 813; PJ Schwikkard 'The child witness: Assessment of a practical proposal' (1991) 4 *SACJ* 44.

8 Section 161 of the Criminal Procedure Act 51 of 1977.

9 Schwikkard, Skeen and Van der Merwe op cit (n6) 232.

10 See for example s 53 of the Magistrates Court Act 32 of 1944, s 32 of the Supreme Court Act 59 of 1959, ss 171 and 214 of the Criminal Procedure Act 51 of 1977.

Section 158 of the Criminal Procedure Act[11] sets out the general rule that all criminal proceedings must take place in the presence of the accused, subject to exceptions created by other law. One of these exceptions is created in s 158(2). This provides that the court can order a witness to testify by means of closed circuit television or similar electronic media. The conditions that must exist for such an order to be made are set out in s 158(3). First, the facilities must be available or easily obtainable. Then, one must consider a list of factors which must all co-exist.[12] Such an order must prevent unreasonable delay, save costs and be convenient. Furthermore, it must either be in the interest of security of state or public safety or in the interests of justice or the public; or it must prevent the likelihood that prejudice or harm will result to the witness.

Section 170A of the Criminal Procedure Act[13] deals specifically with child witnesses, and provides for the use of an intermediary through whom evidence is given where the child witness is under 18 years of age and would suffer undue stress or suffering if made to testify in open court. All questioning takes place through the intermediary, including examination, re-examination and cross-examination. At no stage in the proceedings may the parties question the witness directly. Only the court may question the child directly without going through the intermediary. The intermediary is allowed to question the child in more child-appropriate language, provided that s/he retains the general purport of the questions asked by the parties. Where an intermediary is appointed, the witness is placed in another room and does not hear the questions asked by the prosecution or defence counsel. The witness may give evidence in an informal setting, out of the presence of the accused, provided that the court and the parties involved are able to observe the child. This allows for the use of closed circuit television or one-way mirrors, thereby enabling the court and parties to observe the demeanour of the witness throughout questioning. The obvious purpose of this section is to protect a child witness from aggressive cross-examination and questioning in legalistic jargon (which is often misunderstood by children) as well as the trauma of testifying in open court in the presence of the accused.

Problems with the present system regarding child witnesses

One of the most often repeated complaints about the present system is its adherence to the adversarial system and everything that this brings with it, particularly the aggressive cross-examination of the child witness. Just about all researchers refer to the brutal cross-examination children have to

[11] 51 of 1977.
[12] According to *S v F* 1999 (1) SACR 571(C) all these factors must co-exist.
[13] 51 of 1977.

endure at the hands of attorneys and advocates appearing for the accused, as a means of apparently getting to the truth of the matter.[14]

There are four main problems that emerge when considering the present position regarding child witnesses in the adversarial system. First, there is the problem of secondary victimisation of the child and the trauma and stress the child faces when testifying in the ordinary manner. Secondly, it is very common for there to be a considerable time delay between the laying of charges and the trial. Thirdly, the child is usually subjected to multiple interviews before s/he testifies in court, which can be problematic. Finally, there is a low rate of convictions in cases where a child is the main witness due to the fact that people are not reporting cases as they are afraid of the court process, or because the child breaks down and is unable to give evidence.

The problem of secondary victimisation of the child witness is considered first. This is the most commonly voiced complaint against the present adversarial system when child witnesses are involved.[15] It is argued that the experience of testifying can be a harmful experience for the child due to the fact that s/he will be subjected to examination and cross-examination in unfamiliar and possibly frightening surroundings. Furthermore, s/he will usually have to re-live the experience in court, giving details of terrifying or shameful experiences, which might cause embarrassment or may frustrate the healing process that has taken place either through therapy or simply through the passing of time. This trauma will be exacerbated where the child is required to give such evidence in the presence of the accused.[16] The object of cross-examining is to show that the child is lying, which is why it is often done so aggressively or in a manner which is intended to confuse the child or catch him/her out. When the examination is conducted by the accused, the effect on the child can be even more terrifying.[17]

Apart from cross-examination, another factor that may increase the trauma suffered by the child is the court room itself. There is extensive evidence that the traditional court room and the juxtaposition of the

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[14] Op cit (n4) at 11. See for example JJA Key 'The Child Witness and the Battle for Justice' January 1998 *De Rebus* 54 in South African Law Commission 28 op cit (n4) at 11-12.

[15] Op cit (n4) at 13 where WGM van Zyl, former Regional Court President of Natal, summed up the numerous problems that are encountered when dealing with child witnesses in the adversarial system.

[16] Scottish Law Commission Discussion Paper 75 'The Evidence of Children and Other Potentially Vulnerable Witnesses' (1988) at 21-22.

[17] Op cit (n4) at 12. The cross-examiner is not limited by the rule against asking leading questions. The child may simply agree with questions put to him/her by the accused for fear of punishment if s/he disagrees, especially where the accused is known to the child, possibly a family member. See also South African Law Commission op cit (n4) at 14-15 where it is noted that research has shown that where the accused is present, the child witness may water down his/her evidence against the accused or change it completely merely to escape the unpleasant experience.

presiding officer, the accused, the legal representatives of the accused and the prosecutor result in the child being afraid, uncertain and confused.[18] Wilson J, in the case of *S v Basil Simons*,[19] stated that he felt it was time for consideration to be given to a change in the manner of conducting criminal trials arising out of sexual abuse of young children.[20]

The second problem that arises when dealing with child witnesses is the time delay between the laying of charges and the trial. Since trials often take place many months, or even years, after an event, many witnesses, and perhaps particularly children, may have difficulty in recalling the details of the event with accuracy by the time of the trial.[21] Where there is a major pre-trial delay there is a serious risk of long-term memory fade. This will result in vagueness, confusion and inconsistency in the child's testimony.[22]

The third problem encountered is that of multiple interviewing of the child. When a child is required to testify in court proceedings many months after the alleged event has occurred, s/he will usually have undergone several interviews prior to the giving of evidence. These could be conducted by doctors, the police, prosecutors, defence lawyers, psychologists and possibly members of his/her own family as well. This could further increase the trauma suffered by the child.[23] But apart from that, with each interview there is a risk that the child's version of events may be distorted.[24]

Finally, it seems as though all the problems attached to the present trial procedure are turning people away from the court process and result in very few convictions. Many cases of child abuse are either not prosecuted at all, or have to be abandoned midway through the proceedings when child witnesses break down and are unable to continue. The non-prosecution or the abandonment of such cases may be due to the fact that prosecutors or family members wish to spare children from the stress

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18 Op cit (n4) at 14.

19 Durban and Coast Local Division 1988-06-13 CC 84/88 in South African Law Commission op cit (n4) at 14.

20 Op cit (n4) at 14. While he was not suggesting any substantial changes, he said that it would be desirable to evolve a system that when a child is called upon to give evidence s/he would not be required to do so in a large austere looking court room before judicial officers sitting on a bench above him/her. Circumstances which are completely strange to the child would, he said, cause a great deal of stress and tension. Rather, he suggested, provision should be made for a child to testify in circumstances that are not strange to him/her, so that s/he is not subjected to more traumatic experiences than are absolutely necessary. He was of the opinion that this would be fairer both to the state and the defence.

21 Op cit (n16) at 25.

22 LS McGough *Child Witnesses – Fragile Voices in the American Legal System* (1994) 191-2.

23 Op cit (n16) at 22.

24 LS McGough op cit (n22) at 192.

and trauma of testifying.[25] It has been argued that many people are opting not to prosecute at all just to keep their children out of the courtroom.[26] It is clear that apart from the interests of the child, such consequences are clearly not in the public interest or the interests of justice.

The shortcomings of s 170A in addressing these problems

Section 170A has been introduced in order to protect the child witness from some of the problems set out above. However, it has been argued that this section does not go far enough in attempting to overcome the problems encountered when dealing with child witnesses. It is clear that the use of an intermediary would counter one of the most apparent problems encountered by the child witness in the adversarial system, namely the secondary victimisation of and trauma suffered by the child witness. The child would be questioned in an informal environment and would not be subjected to legalistic, aggressive cross-examination by the defence counsel. But what about the other problems? The intermediary model does nothing to counter the problem of time delay as it would be no different to the ordinary trial procedure in respect of timing. The intermediary would be used as a substitute for the ordinary mode of examination and cross-examination that would take place during the trial, which could be many months after the abuse had occurred. Furthermore, the intermediary model does not provide a mechanism that renders it unnecessary to conduct several preceding interviews with the child witness. Therefore, the problem of multiple interviews is not dealt with.

Section 170A is discretionary and the court may only appoint an intermediary when it is apparent that a witness under 18 years will be exposed to 'undue mental stress or suffering if he testifies at such proceedings'. While the discretionary nature of the section is advantageous in countering arguments regarding the infringement of the accused's right to challenge evidence, this can in fact be disadvantageous to the child witness and can result in many children being unprotected.[27]

Section 170A has been subject to various other criticisms for not fully addressing the problems encountered by child witnesses. The child is still required to re-live the experience when testifying through the intermediary. The trial may take place long after the alleged incident, with the result that the healing process may be delayed if the child is required to testify (and consequently re-live the experience) at the time of the trial.[28] The events of the incident will not be fresh in the mind of the child, certain details

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[25] Op cit (n16) at 22.

[26] N Seijas *The child witness in the adversarial justice system – a proposal for reform* (1988) in South African Law Commission op cit (n4) at 13.

[27] Schwikkard op cit (n7) 159-160.

[28] Schwikkard op cit (n7) 48.

may be forgotten and others may have been planted in the child's mind by accidental or deliberate prompting by adults.[29] Where the witness is extremely young, the intermediary model would not be helpful at all, in that the very young may be able to give an account of the incident shortly after it occurs, but will be unable to recall or clearly communicate such evidence at a later stage.[30]

It is clear that while the introduction of s 170A goes some way towards improving the problems faced by child witnesses, the situation has by no means been adequately solved by this section.

Videotaped evidence as a possible solution

Models of videotaped evidence

It has been suggested that the use of pre-recorded videotaped evidence of children could provide a means of protecting children from the negative effects of testifying in courts and could also possibly improve the chances of getting to the truth of the matter by ensuring a better quality of evidence than that achieved in the traditional courtroom setting. There are primarily two models of using videotaped evidence which have been employed in certain foreign jurisdictions: the recorded statement model and the deposition model.

The recorded statement model

The recorded statement model refers to interviews which take place out of the context of criminal proceedings. They are not authorised or ordered by a court but take place naturally in the course of an investigation into suspected abuse or other similar suspected crimes. At the time when such an interview occurs there may have been no criminal charges brought against anyone. In fact, the primary purpose of the interview may be to establish whether criminal offences have been committed at all and, if so, by whom. Alternatively the purpose of the interview may be therapeutic.[31]

Generally the interview is conducted by a juvenile social worker or a police officer and is videotaped. At the outset of the interview the interviewer elicits from the child that s/he understands the importance of giving an accurate and truthful account. The only other persons present are the camera operator and the child's parent (or parents) as silent observers, there principally for moral support.[32] These interviews are conducted without the presence of the defendant, defence counsel or judge, as often these parties have not been identified at this stage. The

[29] Spencer op cit (n7) 82.
[30] Schwikkard op cit (n7) 160.
[31] Op cit (n16) at 50.
[32] LS McGough op cit (n22) 190.

videotaped interview could then be introduced at trial in place of live testimony from the child. However, the child must be available to testify so that the accused can call him/her to the stand after the prosecution rests and cross-examine him/her as an adverse witness.[33]

The deposition model

With the deposition model, the child's testimony is elicited by formal examination and cross-examination of the child in advance of the trial and the process is video-recorded for subsequent presentation at the trial.[34] The deposition therefore takes the place of the child having to testify and be cross-examined in court. This model is similar in certain respects to the South African procedure of taking evidence on commission.[35]

In terms of this model, the child is interviewed at as early a stage as possible by a person skilled in appropriate interviewing techniques.[36] The interview, which would be video recorded, would take place in a room which was of a size, and which was furnished in a manner, likely to put the child at ease. During the interview the child might be accompanied by a parent or other supportive adult, but the interviewer would be entitled to ask that person to leave if that seemed likely to make the child speak more freely.[37] One wall of the room would be fitted with a one-way screen and the accused and his lawyer would be entitled to view the interview from behind that screen. The accused's lawyer would be able to communicate with the interviewer through a microphone and ear speaker so that

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[33] J O'Brian 'Television trials and fundamental fairness: The constitutionality of Louisiana's Child Shield Law' (1986) 61 *Tulane LR* 145-6 and 168.

[34] Op cit (n16) at 100. This model is based upon a possible solution to the problems encountered when dealing with child witnesses proposed several times by Professor Glanville Williams.

[35] A procedure based on the deposition model has been introduced in Scotland. Section 271 of the Criminal Procedure (Scotland) Act 1995 provides for video evidence on commission to be used in criminal trials involving child witnesses. In terms of this procedure, the court appoints a lawyer, who acts as the 'Commissioner', to take the evidence of the witness. In practice, both sides involved in the case will send their lawyers along to question the witness in the normal way, with the Commissioner assuming the role of judge. The Act does not prohibit the Commissioner from carrying out the questioning him/herself. The accused is not normally permitted to be present but must be able to watch and listen by some means while the witness's evidence is taken, for example by way of a live television link. The proceedings are recorded on videotape which can then be played back at trial.

[36] Professor Glanville Williams envisaged that such a person might be a psychiatrist, psychologist or a social worker. However, in practice, the interviewer is either a judge or a lawyer, not necessarily involved in the case, rather than a person with no legal training.

[37] Op cit (n16) at 88-9.

the interviewer could be asked to put to the child particular questions requested by the accused.[38]

Advantages and disadvantages in respect of trauma and truth seeking

The idea that an acceptable way could be found to put the evidence of a child witness before a court without the need for the child to give that evidence in person and in formal surroundings is clearly an attractive one. This would obviously benefit young or traumatised children, but could also have other advantages.[39] There are several compelling reasons for trying to find a way in which admissible evidence can be obtained from a child at an early stage and in non-threatening surroundings. However, any technique designed to achieve that must also respect the rights of the accused. The competing interests of the child and the accused are not easily reconciled.[40] It is therefore necessary to weigh up the advantages and disadvantages of the two models of pre-recorded videotaped evidence.

Several arguments have been raised as to whether or not the use of pre-recorded videotaped evidence of a child does in fact improve the quality of evidence placed before the court and reduce trauma suffered by the child witness. A general argument against the use of pre-recorded videotaped evidence (whatever model is employed) is that it is an unfair procedure as it is possible that the children's testimony was extracted by leading questions or other unfair interviewing techniques. This argument fails to recognise that interviews can be conducted fairly as well as unfairly, and that interviewers can be trained to interview fairly and effectively. The fact that it is possible to conduct a bad interview is no reason for a rule which requires us to reject a good one.[41]

It has been argued that there is a risk that videotapes distort the impact of the evidence. According to some critics, juries tend to give videotaped evidence too much weight because of an effect called 'status enhancement'. However, on the other hand, juries tend to give such evidence too little

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[38] Op cit (n16) at 89. Professor Williams's proposal envisages that, in some cases, an interview of the kind which he suggests may take place even before an accused has been arrested and charged. In such a case, the accused would, following arrest and charge, be entitled to see the recording of the earlier interview and would then be entitled to request a second interview so that questions by him might be put to the child. This is not in fact the general practice in jurisdictions that make use of the deposition model. The reason for this is that it could create confusion between the investigation of the crime and the securing of testimony which can at a later stage be used in place of testimony in court. It would in fact result in the procedure being more similar to the recorded statement model, where the interview often occurs before the accused has been arrested and charged.

[39] Op cit (n16) at 87.

[40] Op cit (n16) at 88.

[41] JR Spencer and RH Flin *The Evidence of children: The law and psychology* (1993) 191-2.

weight because it seems unreal to them. Whether or not either of these arguments are true, they are not particularly strong objections if it would not be feasible to get the child in question to give live evidence, and the choice is between hearing the child on videotape or not hearing the child at all.[42] Furthermore, in South Africa where we no longer have a jury system, such an argument seems to be obsolete.

The recorded statement model

Looking specifically at the recorded statement model, there are several advantages of using this model as a means of securing the evidence of children. Firstly, it enables the court to hear what the child was saying about the incident at the time it first came to light. This would guard against the problems of memory-fade or distortion, which occur due to multiple interviewing of the child and the passing of time. As well as telling us exactly what the child said, an early tape would tell us how s/he said it. In the course of being questioned, children often pick up the adult words for sexual acts. They then use these when giving evidence in court, which often leads to the suggestion that they have been coached.[43]

A tape of an early interview will tell us how the child was questioned as well as what the answers were. Early interviews may have been conducted in such a way as to put answers in the child's mouth, which are then incorporated into the child's later testimony. A videotape of an early interview would reveal whether or not this had occurred. Conversely, when a child eventually comes to court under present conditions, it is likely that s/he will have been asked the same questions several times by a number of different people, with the result that the evidence in court may be given in a dull parrot-like way, creating the false impression that the child has been coached. Seeing an early interview on tape would correct this impression.[44]

A suspect can be shown a videotape of an interview with a child witness in the course of an investigation, when s/he cannot so easily be confronted with the child him/herself. If s/he is innocent, an early sight of the videotape gives him/her an earlier and better opportunity to contest the accusations and produce counter-evidence than s/he has under the present rules governing advance disclosure of the prosecution case. If s/he is guilty, on the other hand, seeing the videotape may precipitate an admission, probably followed by a plea of guilty.[45]

If a videotape of an early interview can be used in evidence, this can supplement the evidence of a child who is inarticulate or forgetful at

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[42] Spencer and Flin op cit (n41) 194.
[43] Spencer and Flin op cit (n41) 196.
[44] Spencer and Flin op cit (n41) 197.
[45] Ibid.

the trial. If a child is questioned in relaxed surroundings, this is likely to produce a fuller story than the child is able to tell in open court.[46]

An argument that has been raised against this model is that videotapes may preserve a series of interviews in the course of which the child told conflicting stories. This could make a prosecution harder where the only evidence is a live child in the witness stand. However, while this may be true, if a child has told contradictory stories during the investigation surely this is information that the court should know? Although it might be a drawback as far as the prosecution is concerned, it is clearly in the interests of justice for such information to come to light.[47]

It has been said that this process might have the effect of lengthening criminal trials. If there is a videotape of the child's early statements as well as live evidence from the child, the process will possibly take longer, and in the case of a young child particularly, it is possible that the interview may be considerably longer than the child's evidence in court. However, it should not matter that contested cases take longer if the greater availability of videotaped evidence result in a larger proportion of guilty pleas or convictions. Such an argument is a weak one if the reason that the trial takes longer is that more useful information is put before the court and that information is reliable and useful.[48]

Although this model holds clear advantages for justice and obtaining the best evidence, it does not actually benefit the child in any real way, apart from the fact that it may result in a greater number of convictions. The child is still required to suffer the trauma and anxiety of giving evidence at trial, as well as the stress of waiting for the trial. Furthermore, it is possible that such a procedure could result in cross-examination being even more stressful for the child as the defence would be able to question him/her on the videotape as well.

The deposition model

The deposition model shares most of the advantages of the recorded statement model, apart from the fact that it is not made as soon after the incident occurs. However, a deposition would still take place much sooner after the incident comes to light than the actual trial would occur, and would also therefore effectively deal with the problems of memory fade and distortion that occur over time.

One of the greatest attractions of this model is that it does go a significant way to reducing the trauma and stress suffered by child witnesses. The tape of the deposition is shown as a substitute for producing the child in court. The child therefore doesn't have to face the accused or undergo

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46 Spencer and Flin op cit (n41) 198.
47 Spencer and Flin op cit (n41) 193-4.
48 Spencer and Flin op cit (n41) 195.

aggressive cross-examination at the hands of the defence in a formal and intimidating courtroom. Furthermore, the child is able to deal with the offence and obtain therapy or be encouraged to forget the details soon after it occurs, without having to wait for months before coming to court where s/he will have to relive the experience.

Another advantage of this procedure is that it is possible to examine a video deposition of a child telling a story much more closely than it is possible to study a child giving live evidence in a witness box. A tape can be replayed, or made to pause while a particular detail or nuance is carefully studied. This is obviously impossible when dealing with a live witness.[49]

The deposition model offers a practical means of putting before the court the evidence of a very young or highly traumatised child, which the court would otherwise be unable to hear at all. At present, if a child is abused, a combination of the competency assessment, the hearsay rule and the rigours of open court often ensure that a court is forced to decide a case without hearing the child's version of events, even where the child was the only witness to the offence.[50]

There are a few problems that have been raised with the deposition model. Firstly, the deposition would take place at a later stage than the recorded statement model. However, as mentioned above, it would still occur considerably sooner than the actual trial. Another argument is that the procedure is more formal and adversarial in nature and this could possibly result in the child not giving as accurate an account as possible. It has been said that 'children are more accurate witnesses when their memories are skilfully elicited in a non-adversarial mode'.[51] Although this is undoubtedly true, the possible reason for the use of a slightly more formal procedure is to deal with the problem of prejudice to the accused and his/her right to a fair trial. Furthermore, the process is still far less formal and adversarial in nature than the traditional trial procedure.

Barriers to the use of videotaped evidence

According to the case of *S v Baleka*,[52] videotaped evidence is admissible as real evidence in South Africa. Therefore, all that needs to be established in order for a videotape to be admitted is that the evidence has probative value. Once it has been admitted the court will look at other factors to determine what weight should be attached to it.[53] However, there have been several judgments by the Natal Provincial Division that treat videotaped

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[49] Spencer and Flin op cit (n41) 199.
[50] Spencer and Flin op cit (n41) 200.
[51] McGough op cit (n22) 227.
[52] 1986 (4) SA 1005 (T).
[53] Schwikkard, Skeen and Van der Merwe op cit (n6) 257.

evidence as documentary evidence.[54] Because of this it must be established that what is presented to the court is the original recording and it must be identified by the person who made it. It must also be established that there is no reasonable possibility of interference with the videotape.[55]

Despite the fact that there seems to be some confusion in our law whether videotaped evidence is real or documentary evidence, this should not be problematic for the admission of pre-recorded videotaped evidence, in either the recorded-statement form or the deposition form. If such evidence is to be regarded as documentary evidence, there will be certain requirements that will need to be fulfilled in order for the evidence to be admitted, but these are not particularly onerous requirements in the circumstances. Furthermore, it seems likely that in any event such evidence will be treated as real evidence, in line with *S v Baleka*.[56]

As the issue of real or documentary evidence does not seem to be a problem, there are two main grounds upon which the admissibility of videotaped evidence can be challenged. First, there is a possibility that such evidence would fall foul of the rule against hearsay evidence. Secondly, it is possible that such evidence would infringe the right to a fair trial, in particular the right to adduce and challenge evidence.

Hearsay

According to s 3(4) of the Law of Evidence Amendment Act,[57] hearsay is defined as 'evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence'.

There are various explanations for the rule against hearsay, but the best reason seems to be that it is unreliable as there is no opportunity for cross-examination. As with the rule that evidence must be given orally, this reflects the belief that the adversarial system is the best method to get to the truth. The purpose of cross-examination is to challenge the witness and thereby show that s/he is untruthful or mistaken. It also attempts to elicit points that are favourable to the cross-examiner's case. With hearsay evidence, this testing of evidence is not possible.[58]

Although there is a general rule against hearsay evidence, the court has now been given a discretion to admit such evidence in terms of the Law of Evidence Amendment Act.[59] According to s 3 of the Act, hearsay as defined in s 3(4) is inadmissible unless certain requirements are met. Hearsay may be admitted by agreement or where the person upon whose credibility

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54 *S v Ramgobin* 1986 (4) SA 117 (N); *S v Singh* 1975 (1) SA 330 (N).
55 Schwikkard, Skeen and Van der Merwe op cit (n6) 256-7.
56 *S v Baleka* supra (n52).
57 Law of Evidence Amendment Act 45 of 1988.
58 Schwikkard, Skeen and Van der Merwe op cit (n6) 156.
59 45 of 1988.

the probative value of such evidence depends him/herself testifies at such proceedings.[60] Section 3(1)(c) confers a discretion on the court to admit hearsay evidence in the interests of justice. In doing so it must take into account the nature of proceedings, the nature of the evidence, the purpose for which the evidence is tendered, the probative value of the evidence, the reason why the evidence is not 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, finally, any other factor which in the opinion of the court should be taken into account.[61] The court therefore has to engage in a weighing up of all the circumstances in each case and is given what could be called a guided discretion to admit hearsay evidence.[62]

The hearsay objection to the use of videotapes is a very weak one because several exceptions have already been made to it in the interests of justice. The hearsay rule is defensible in so far as it forbids the use of a second-hand account of an incident when a more reliable first-hand account is available. But in so far as it prevents second-hand accounts being given when they are likely to be more reliable than first-hand accounts, or when no first-hand account is available, the hearsay rule seems irrational and there can be no reason for refusing to make an exception to it.[63] One of the main reasons for the rule against hearsay is the risk that the declarant never actually said what the person giving the hearsay proposes to tell the court that s/he said. However, where there is a videotape of the declarant making the statement, which enables us to see and hear him/her in the very act of saying it, such a risk no longer seems to exist.[64]

According to s 3(1)(b) of the Law of Evidence Amendment Act,[65] hearsay evidence will be admitted where 'the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings'. Therefore, the recorded statement model would not infringe the hearsay rule as the child is required to testify at trial.

The deposition model might, however, be problematic in this respect as the child does not have to attend court proceedings at all during the trial. The videotaped deposition completely replaces the presence of the child at trial. In order to determine whether such evidence would be admissible, one needs to examine the factors which are set out by the Act in s 3(1)(c). The essence of this section is that hearsay evidence will be inadmissible unless the interests of justice require that it is admitted. The factors that are laid out simply guide the court in deciding whether or

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60 Section 3(1)(b).
61 Section 3(1)(c).
62 Schwikkard, Skeen and Van der Merwe op cit (n6) 159.
63 Spencer op cit (n7) 80.
64 Spencer and Flin op cit (n41) 173.
65 Act 45 of 1998.

not it would be in the interests of justice to admit such evidence. In light of the above discussion and all the benefits of videotaped depositions, a strong argument could be made that it would be in the interests of justice to admit such evidence.

A case that may be useful in dealing with this issue is the judgement of *S v Ndhlovo*.[66] In this case Cameron J dealt with the admissibility of hearsay evidence and the argument that the hearsay provisions of the Law of Evidence Amendment Act[67] are unconstitutional as they infringe the constitutional right to challenge evidence. It is true that the admission of hearsay evidence by definition denies an accused the right to cross-examine, since the declarant is not in court and cannot be cross-examined. However, Cameron J could not accept that the use of hearsay evidence by the state violates the accused's right to challenge evidence, if it is meant that the inability to cross-examine the source of a statement in itself violates the right to challenge evidence. He goes on to say that the Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination, but rather the right to challenge evidence. Where that evidence is hearsay, the right entails that the accused can challenge its admissibility and scrutinise its probative value, including its reliability. But where the interests of justice require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant.[68]

Constitutional barriers

The above principles regarding oral evidence and hearsay reflect our adherence to the adversarial system as a means of discovering the truth. A further instance where this idea manifests itself, which is linked to the above two principles, is an accused's right to cross-examine witnesses and to face-to-face confrontation with witnesses. These rights could be seen as acquiring constitutional status by virtue of s 35(3) of the Constitution, which provides for the broad right to a fair trial and in particular the right to challenge evidence. However, the implication of *S v Ndhlovu*[69] is that this is not so and that cross-examination is not the only way of fulfilling the right to challenge evidence.

Nevertheless, as the right to cross-examination is the traditionally accepted way of guaranteeing the right to challenge evidence, it is useful

66 2002 (6) SA 305 SCA.
67 45 of 1998.
68 At para 24.
69 *S v Ndhlovo* supra (n66).

to consider what inroads the use of videotaped evidence might make on cross-examination.[70]

According to the traditional approach, the right to challenge evidence includes:

> 'the right to have the fullest opportunity of cross-examining meaningfully and effectively. Where the cross-examiner's questions are substituted by another person and the examination does not take place within the physical presence of the examiner, there is a *prima facie* limitation of the right when given its broadest adversarial meaning.'[71]

This clearly has implications for videotaped evidence. However, in light of *S v Ndhlovu,*[72] it does not seem that this position is as entrenched as was previously thought.

The recorded statement model seems to present less of a restriction on the accused's ability to cross-examine because according to this model the child must be available to testify at trial and can be cross-examined by the defence in the normal way. The only possible objection is that the accused is prejudiced due to the fact that s/he could not cross-examine the child at the time the recorded statement was actually made. However, it does not actually seem likely that the accused will suffer any prejudice due to delayed cross-examination of the child and therefore this cannot be seen as making significant inroads on the accused's ability to cross-examine.[73]

The deposition model would possibly be more problematic when dealing with the accused's ability to cross-examine the child. The accused does have the opportunity to cross-examine the child at the time the deposition occurs, but his/her questioning will take place through some kind of intermediary. This use of an intermediary, which prevents the accused from face-to-face confrontation and might change the wording of the accused's questions, could constitute a curtailment of cross-examination. In terms of the traditional approach, such a procedure would be regarded as a *prima facie* infringement of the accused's right to challenge evidence. However, in light of *Ndhlovu*, it must be recognised that cross-examination is not an essential component of the right to challenge evidence. Therefore, one needs to consider whether despite this restricted cross-examination, the accused has adequate opportunity to challenge the evidence.

The issue here would essentially be the same as with the use of intermediaries under s 170A of the Criminal Procedure Act.[74] While it is not the intention of this article to examine the intermediary procedure in

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[70] Steytler *Constitutional Criminal Procedure* (1998) 346. In the American case of *Douglas v Alabama* 380 US 415 (1965), the court held that the primary interest of the confrontation clause in the Sixth Amendment is the right of cross-examination.

[71] Steytler op cit (n70) 348.

[72] *S v Ndhlovo* supra (n66).

[73] Schwikkard 'The abused child: A few rules of evidence considered' op cit (n7) 161-2.

[74] 51 of 1997.

any great detail as this is an area that has been extensively researched, it should be noted that the courts, particularly the High Courts, have seemed rather reluctant to apply this section, due to the fear of prejudice to the accused.[75]

In the case of *Klink v Regional Magistrate NO*[76] the court dealt with the constitutionality of s 170A. The court examined the problem of secondary victimisation of child witnesses and found that the ordinary procedures of the criminal justice system were inadequate to address the needs of child witnesses. The court held that the filtering of questions through an intermediary did not limit the right to cross-examine, as the intermediary was acting as an 'interpreter'.[77] The fact that the forcefulness and full benefits of cross-examination were denied in the circumstances was explained by balancing the rights of the accused against the rights of the child.[78] Furthermore, it was held that the court's control over the process ensured that the questions retained their integrity.[79] Finally, the court focussed on the importance of the truth-seeking function of the court and came to the conclusion that the accused's right has not been violated and therefore there was no need for a limitations analysis.

If it were to be held that the right to challenge evidence is infringed by the use of videotaped evidence, an important factor to be taken into account in determining whether the requirements of the limitations clause are met would be s 28(1)(d) and (i) of the Constitution.[80]

Safeguards provided in other jurisdictions

If videotaped evidence were to be admitted, it would need to be ensured that sufficient safeguards exist to protect the accused's right to challenge evidence. In this regard, it is helpful to look at the mechanisms provided in other jurisdictions that make use of videotaped evidence of child witnesses.

In the United Kingdom, Part II of the Youth Justice and Criminal Evidence Act 1999 makes a number of measures available to help witnesses who might otherwise have difficulty giving evidence in criminal proceedings or who might be reluctant to do so, including the use of both models of

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75 *S v Nkabinde* 1998 (8) BCLR 996 (N) at 1001B-E, where the court focussed on the right to confront one's accusers as being integral to the adversarial system, and praised this system. *S v Stefaans* 1999 (1) SACR 182 (C) where it was held that s170A made inroads into the right to challenge evidence and decreed that this be borne in mind when dealing with this section and *S v F* 1999 (1) SACR 571(C) where it was pointed out that the procedure encroached upon an accused's rights.

76 1996 (3) BCLR 402 (SE).

77 *Klink v Regional Magistrate NO* supra (n76) at 411.

78 *Klink v Regional Magistrate NO* supra (n76) at 412.

79 *Klink v Regional Magistrate NO* supra (n76) at 412-3.

80 Steytler op cit (n70) 349.

videotaped testimony. In terms of this Act, it is possible for a pre-recorded videotaped interview to be admitted as the child's evidence-in-chief, in which case the child will be required to appear in court to be cross-examined.[81] Provision is also made for such cross-examination to take place while the evidence-in-chief is being recorded and to be recorded and viewed at trial, in which case the child will not have to appear in court for cross-examination.[82]

Various safeguards have been included in the Act in order to ensure that the accused's right to challenge evidence is protected. First, only certain categories of people are eligible to apply for special measures to help them give evidence in court and, in determining whether a witness falls into any of these categories, the courts must also determine whether making such measures available to an eligible witness will be likely to improve the quality of evidence.[83] Furthermore, video-recordings may be excluded and edited if the interests of justice so require. In deciding whether to allow only an edited recording to be used in evidence, courts will have to consider whether the parts sought to be excluded are so prejudicial as to outweigh the desirability of using the whole recording.[84] Where a direction has been made for a recording to be shown to the court, the court can later exclude the recording if there is not enough information available about how and where the recording was made or if the witness who made the recording is not available for further questioning (whether by video, in court or by live link) and the parties to the case have not agreed that this is unnecessary. However, courts will retain the discretion to admit the recordings in these circumstances.[85]

Although the videotaped interview and cross-examination will form the whole of the witness's testimony, there may be circumstances in which the court can give permission for the witness to be asked further questions about matters not covered adequately in the videotaped interview or cross-examination. Courts are allowed to give such permission on their own initiative or on an application by one of the parties to the case, if that party can show that there has been a material change in the circumstances or if it is in the interests of justice to do so.[86]

In Canada s 715.1 of the Criminal Code, introduced in 1988 in the Bill C-15 reform and subsequently amended to extend its coverage, provides for the admissibility of videotaped statements made by child witnesses who were under the age of 18 years at the time the offence was committed. The

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[81] Section 27 of the Youth Justice and Criminal Evidence Act 1999.

[82] Section 28 of the Youth Justice and Criminal Evidence Act 1999.

[83] Section 17 of the Youth Justice and Criminal Evidence Act 1999. See also explanatory notes to this Act at para 21.

[84] Subsections 27(2) and (3) of the Youth Justice and Criminal Evidence Act 1999.

[85] Subsection 27(4) of the Youth Justice and Criminal Evidence Act 1999.

[86] Subsections 27(5)(b), 27(7), 28(5) and 28(6) of the Youth Justice and Criminal Evidence Act 1999.

videotape must have been made within a reasonable time after the offence and the child witness must adopt the contents of the videotape at trial.[87]

The Supreme Court of Canada has upheld the constitutionality of this provision in the case of *R v F*.[88] The court held that s 715.1 has built-in guarantees of trustworthiness and reliability.[89] First, there is the requirement that the statement must be made within a reasonable time. Secondly, the trier of fact can watch the entire interview, which provides an opportunity to observe the demeanour and to assess the personality and intelligence of the child. Thirdly, there is the requirement that the child attest that s/he was attempting to be truthful at the time the statement was made. Furthermore, the child can be cross examined at trial as to whether s/he was actually being truthful when the statement was made. In this way, the Court held that there were sufficient safeguards to ensure the reliability of the pre-recorded videotaped evidence.[90]

In the United States 33 states have introduced new legislation authorising, in certain circumstances, a pre-trial videotaped deposition in cases dealing with child witnesses. However, there are many differences between the various statutes. In some cases the statutes permit the accused to be present and in full view of the child while the deposition is being taken. In others, the court may exclude the accused from the deposition room but must permit him to hear and observe the child, possibly via closed circuit television or a one-way screen.[91] The statutes also differ as to whether or not the child will have to give evidence in court at the subsequent trial.

It has been observed that although pre-trial depositions could be regarded as hearsay, most American statutes regard them as the functional equivalent of testimony at trial. There have, however, been several challenges to the constitutionality of the deposition statutes on the grounds that they infringe the accused's right of confrontation conferred by the Sixth Amendment to the United States Constitution. It is interesting to note that in some cases the courts have upheld the constitutionality of statutes which preserve a right of cross-examination, albeit that the accused is excluded from the room where the deposition is being taken.[92]

As mentioned above, according to the Sixth Amendment, criminal defendants are given the right of confrontation. This right has generally been interpreted as requiring face-to-face, physical confrontation. However, it has also been interpreted more broadly as affording a criminal defendant

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87 Canadian Criminal Code, R.S.C., 1985, c. C-46, s 715.1.
88 *R v F* (C.C.) (1997) 3 S.C.R 1183.
89 *R v F* supra (n88) at para 40.
90 *R v F* supra (n88) at para 44.
91 Op cit (n16) at 44-45.
92 *S v Johnson* 729 P 2d 1169 (Kan 1986); *S v Cooper* 353 SE 2d 451 (SC 1987), as cited in Scottish Law Commission op cit (n16) at 46-47.

the right of cross-examination and, as such, has served as a constitutional limitation on the use of hearsay evidence.[93]

The rules against admission of hearsay evidence stem from a long line of Supreme Court cases establishing that cross-examination is the best mechanism for discovering the truth and that the most reliable statements come from the witness stand. However, there are several exceptions to the hearsay rule. There are two main reasons for allowing such exceptions. First, sometimes the reliability of certain hearsay statements can be assured without cross-examination of the original declarant. Secondly, it is sometimes necessary to admit hearsay evidence in cases where the original declarant is unavailable or dead.[94]

Pre-recorded videotaped statements are of course hearsay and there have been several Supreme Court cases dealing with the admissibility of such evidence. In the case of *Pointer v Texas*,[95] the Supreme Court held that preliminary hearing testimony could not be received at trial due to the confrontation clause. There was no opportunity for the defendant to cross-examine the witness at the preliminary hearing and therefore he was denied his Sixth Amendment right of confrontation. In a similar case, *Douglas v Alabama*,[96] the Supreme Court again held that the inability of an accused to cross-examine a witness whose prior testimony the prosecution sought to introduce denied him the right of confrontation.[97]

Following *Pointer*, the court decided a series of cases finding violations of the confrontation clause where the defendant was unable to effectively cross-examine the witness. These cases illustrate that the purpose of the confrontation clause, like that of the hearsay rule, is seen to be to preserve the right of cross-examination. However, the court then decided the case of *California v Green,*[98] which is more favourable to the admission of videotaped evidence. The court said that the confrontation clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend the statement, thus opening him/herself up to full cross-examination at trial.[99] Although this case seems to allow for the admission of pre-recorded videotaped evidence, there were certain conditions upon which the decision was based. First, the foundation for the allowance of prior testimony at trial was the court's belief that the witness is available at trial and will be subject to full, face-to-face cross-examination. Furthermore, the declarant was unavailable to give testimony when called to the stand

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93 J O'Brian op cit (n33) 168.
94 J O'Brian op cit (n33) 169-170.
95 380 US 400 (1965).
96 380 US 415 (1965).
97 J O'Brian op cit (n33) 170.
98 399 US 149 (1970).
99 Confirmed in *Crawford v Washington* 541 US 36 (2004) at 24.

during the trial, due to a lapse in memory. Finally, because the hearsay statement was from a preliminary hearing at which the defendant had the opportunity to cross-examine the witness, the hearsay had sufficient indicia of reliability.[100] In the case of *Tolbert v State*,[101] a Texas appellate court cited the case of *California v Green* and noted that the Sixth Amendment was satisfied if the witness is subjected to full and effective cross-examination.

Approach taken by the South African Law Commission

In 1991, the South African Law Commission dealt with the issue of pre-recorded videotaped evidence of child witnesses in its Report on the Protection of Child Witnesses.[102] In this report, the South African Law Commission referred to its working paper in which it had stated that the recording of a child's initial statement on video may be of much practical use to both the police and prosecutor, but that according to current rules of law such a recording would not carry any weight.[103] However, after receiving various comments on this matter, the commission amended its position and stated in its report that video recordings can in fact be proved to be admissible evidence.[104] The commission's initial opinion was not to recommend the admissibility of video recordings without reservations.[105] The commission stated in its report that in view of the fact that video recordings can be admissible evidence in court according to the existing rules of law, it was of the opinion that this proposal did not require any further statutory amendments. It expressed that video recordings do indeed have several advantages, but the commission's view as expressed in the report was that their use is a matter for the police.[106]

The issue of pre-recorded videotaped testimony was revisited by the South African Law Commission in respect of Project 107 on Sexual Offences. In its discussion paper,[107] the commission examined the various arguments that have been raised for and against the use of videotaped testimony of child abuse victims.[108] While the commission acknowledged the benefits of allowing such a procedure, in the end it was not convinced that current circumstances allow for the introduction of pre-recorded

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[100] J O'Brian op cit (n33) 172-4.
[101] 697 S.W. 2d 795 (Tex. Ct.App. 1985).
[102] South African Law Commission (Project 71) *Report on the protection of child witnesses* (February 1991).
[103] Op cit (n102) at 62.
[104] Op cit (n102) at 62-63.
[105] Op cit (n102) at 64.
[106] Op cit (n102) at 64.
[107] South African Law Commission Discussion Paper 102 (Project 107) *Sexual Offences: Process and Procedure* Volume 3 (2001).
[108] Op cit (n107) chp 25.

videotaped testimony as evidence during the trial.[109] One of the main issues seemed to be that of resources. It was felt that South Africa does not have the personnel resources with the necessary skills for the commission to be confident that videotaped interviews will be of a sufficiently high standard.[110] The other main reason for not recommending the use of videotaped testimony was that the commission felt that such a procedure would not actually effectively avoid the problem of exposing the child witness to the court process as, in all likelihood, such witnesses would still have to be cross-examined.[111] The commission was of the opinion that given the other protective measures suggested in the discussion paper, and the lack of interviewing skills, videotaped evidence would not protect victims in South Africa.[112] However, the commission did state that it felt that the subject of videotaping of evidence should be an investigation on its own with extensive consultation on the development of a memorandum to guide interviewers.[113]

In its Sexual Offences Report of December 2002, the commission came to the conclusion that videotaped evidence is an extremely complex issue which is deserving of more detailed research.[114]

Conclusion

It is clear from the above examination that the use of pre-recorded videotaped evidence holds several advantages for dealing with child witness in the criminal justice system. Apart from helping to alleviate the inevitable trauma suffered by children who come into contact with the justice system, this procedure may in fact hold advantages for justice and getting to the truth of the matter by obtaining the best evidence possible. Other jurisdictions have been persuaded of the good sense of admitting such evidence, given that satisfactory safeguards may be put in place.

Although such a procedure, on the face of it, seems to run contrary to the traditions of orality and the rules against hearsay, which are prioritised in our adversarial system, it seems that such issues may be successfully overcome. In light of the judgment in *S v Ndhlovu*,[115] where it was held that the constitutional right to challenge evidence does not in fact include the right to face-to-face cross-examination, it seems as though the constitutional argument against such a procedure could be overcome, provided the necessary safeguards are in place in order to protect the

[109] Op cit (n107) at 400.
[110] Op cit (n107) at 399.
[111] Op cit (n107) at 400.
[112] Op cit (n107) at 400-401.
[113] Op cit (n107) at 400.
[114] South African Law Commission (Project 107) *Sexual Offences Report* (December 2002) at 118.
[115] *S v Ndhlovo* supra (n66).

rights of the accused. However, even if it were to be found that such a procedure would infringe the accused's right to challenge evidence, it is probable that such a limitation would be justifiable in terms of a limitations analysis under s 36 of the Constitution[116].

It seems that the main problem attendant on this procedure is one of implementation and lack of resources. It is clear that the South African Law Commission does not think that there are available resources at this time to implement this procedure. However, the door has not been closed on this issue as the South African Law Commission has stated that there should be further research and investigation into the use of videotaped evidence. While it appears that our courts do have the technological resources to effectively implement such a procedure, a major concern is that there is a lack of skilled personnel who are effectively equipped to implement the procedure. However, we need to ask ourselves whether this is a good enough argument against allowing a procedure that could potentially hold such significant benefits. It seems as though what would be needed in order to implement this system would be the training of personnel as skilled interviewers. Such skilled interviewers should be available in any event in order to act as intermediaries under s 170A of the Criminal Procedure Act[117] and therefore it should not present too great a cost to train extra personnel in this way. Therefore, the costs of implementing this system seem to be clearly outweighed by the benefits and it appears that implementation would not in fact place too great a burden on the criminal justice system.

[116] Act 108 of 1996.
[117] 51 of 1977.