



SEXUAL VIOLENCE AGAINST CHILDREN IN SOUTH AFRICA: THE PROTECTION OF
CHILD VICTIMS IN THE CRIMINAL JUSTICE SYSTEM

BY

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SUBMITTED IN ACCORDANCE WITH THE REQUIREMENTS FOR THE DEGREE

OF

MASTER OF LAWS

SPECIALISING IN HUMAN RIGHTS LAW

PREPARED UNDER THE SUPERVISION OF DR JAMEELAH OMAR

THE FACULTY OF LAW

AT THE

UNIVERSITY OF CAPE TOWN, SOUTH AFRICA

DATE OF SUBMISSION

12 FEBRUARY 2024

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Abstract

The prevalence of sexual violence against children in South Africa continues to rise. Child victims experience further violation within the criminal justice system despite the comprehensive laws in place. The purpose of this study is to evaluate protective measures available in the legal system to protect children from secondary victimisation. Furthermore, critically analyse the existing legal framework, governing the further victimisation children experience in the criminal justice system. Due to their vulnerability and uniqueness, children must be protected by South African courts, and this protection can be achieved through upholding their legal rights. The aim is to examine the role of courts as a criminal justice actor in providing effective protection for children. This study will use a desktop based qualitative research and will be based on available literature and jurisprudence on the subject.

Key terms:

sexual violence, children's rights, Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, victimisation, violation, Protection of child victims and child witnesses, South African criminal justice system, constitutional protection of child victims and child witnesses, children's rights, section 170A of the Criminal Procedure Act and intermediaries.

Acknowledgements

I would like to give thanks to God for carrying me through this journey.

I am indebted to my supervisor, Prof Jameelah Omar, for her unwavering support. Thank you for your patience and encouraging me to go on. I am most grateful for your meaningful academic input and involvement.

To my parents, thank you for your support. It's been a very challenging journey and I wouldn't have been able to make it without you. Because of you, I know unconditional love.

To my siblings, thank you for being the best in the world. You are our parent's greatest gift to me, you truly light up my life.

To my friends, especially Azile komanisi, Sinazo Mbobo and Yolanda Joloza, thank you for the laughs, the moment of comfortable silence, wiping my tears and encouraging me to go on when I felt like I couldn't carry on anymore. Because of you, I know what friendship is.

To Kuhle Rafu, thank you for always listening and your continuous support.

I also wish to thank my editor, Magaret, for editing this thesis. I truly appreciate your effort.

To the people I met along this journey, thank you for your kindness.

Lastly, I would like to thank myself. I am glad I persevered and pushed through the hurdles. It's been a difficult journey, and I am grateful that I made it to the end.

'It may seem low in coming but wait for it; it will certainly take place and it will not be delayed'
Habakkuk 2:3.

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Child victims of sexual abuse are faced with very unsettling difficulties. Statistics show that about 60 children are raped every day in South Africa. However, what raises more concern is the fact that only 6 to 7 percent of reported rape cases against children get prosecuted successfully. One might assume that the high prevalence of sexual violence is the main problem, looking at how it is inherently difficult it is for courts to prosecute sexual offence cases. Complexities arise in securing a conviction in such cases due to various evidential and procedural issues.	43
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CHAPTER 1

INTRODUCTION AND BACKGROUND

1 INTRODUCTION

1.1 Background to the study

Sexual violence against children is not a new phenomenon in South Africa. Despite well-formulated laws, the surge of sexual violence against children remains high. According to the South African Optimus Study, 36.8% of boys and 33.9% of girls experienced sexual abuse of some kind in their childhood phase.¹ Overall, 35.4% of adolescents - or one in three - reported having been sexually abused at some point in their life.² These statistics may not be an actual representation of real incidents as some go unreported.³

It is incomprehensible that in the current environment, where people are aware of their rights, children continue to experience sexual abuse every day.⁴ Victims of sexual abuse usually approach the criminal justice system after the fact in the hope of receiving protection. Owing to their vulnerability, it is important that the criminal justice system protect child victims and child witnesses.⁵ Unfortunately child victims are further violated and subjected to secondary victimisation by the system. Psychological and emotional scars that come with their experience of the system, will most likely plague child victims well into adulthood despite several attempts to shield victims of rape from what is frequently described as a horrific and stressful courtroom experience.⁶ Section 28(1)(d) of the Constitution prescribes that every child has the right to be 'protected from maltreatment, neglect, abuse or degradation',⁷ and section 28(2) prescribes that a child's best interest is of paramount importance in every matter concerning the child'.⁸

¹ Artz, Lillian 'The prevalence of child sexual abuse in South Africa: The Optimus Study South Africa' (2018) 108 *South African Medical Journal* 791-792.

² Ibid.

³ Joy Cole 'The negative and damaging effects of sexual violence on children' (1994) 7 *Acta Criminologica: African Journal of Criminology & Victimology* 25-30.

⁴ Desan Iyer and Lonias Ndlovu 'Protecting the child victim in sexual offences: Is there a need for separate legal representation?' (2012) 33 *Obiter* 182.

⁵ Mildred Bekink 'The Constitutional protection afforded to child victims and child witnesses while testifying in criminal proceedings in South Africa.' (2019) 22 *PELJ* 1-50.

⁶ Ibid at 4

⁷ The Constitution of the Republic of South Africa, 1996.

⁸ Ibid at 7.

While there is an array of children's rights, this study focuses on the protection of children who are victims of sexual violence in the criminal justice system. However, in spite of comprehensive laws put in place, children continue to be mistreated.

This thesis therefore evaluates the legal framework for protecting child victims of sexual violence in the South African criminal justice system. It argues that child victims of sexual violence are further violated in the criminal justice system. This thesis will further evaluate protective measures available in the legal system to protect children from secondary victimisation. There is a need to address the gap in the protection of sexual violence laws.

1.2 Protection available to children in South African courts

South African courts make use of the adversarial system. In an adversarial system the state bears the onus of proving the accused's guilt beyond a reasonable doubt.⁹ Cross-examination and confrontation are hallmarks of an adversarial system.

Children may find it difficult to comprehend the legal language used in court proceedings because of the aggression of cross-examination employed.¹⁰ Courts create an uncomfortable environment for complainants in sexual offence cases.¹¹ The protection of child victims and witnesses in the criminal justice system is of vital importance. The Constitution prioritises the best interests of the child in all matters involving children.¹² Every child is guaranteed protection against abuse, neglect, mistreatment and degrading treatment. Due to their vulnerability and uniqueness, children must be protected by South African courts, and this protection can be achieved through upholding their legal rights.

The Bill of Rights includes the rights of children, making the need to protect children a priority. In doing so, the Constitution acknowledges that children require special protection since they are particularly susceptible to rights violations. Section 28 states that children have the right to be protected from maltreatment, abuse, neglect and degradation.¹³

⁹ Carly Verrier 'Things fall apart in the criminal court room' (2012) *DE REBUS*.

¹⁰ *Klink v Regional Court Magistrate* 1996 (3) BCLR 402 (SC).

¹¹ Karin Chinnian 'Gender construction in sexual offences cases; A case for fully reviving the Sexual Offences Courts' (2020) *Acta Juridica* 135-163.

¹² *Ibid* at 4.

¹³ The Constitution.

This section read together with section 12 of the Constitution provides that, everyone, including children, has the right to be free from all forms of violence from either public or private sources.¹⁴ Children also have the right not to be treated or punished in a cruel or degrading manner.¹⁵ Children are severely traumatised by adversarial criminal procedures. The South African Law Commission, in an attempt to lessen the impact of the accusatorial system on child witnesses, introduced the use of an intermediary in the criminal justice process.¹⁶ Section 170A of the Criminal Procedure Act gives authority to the function of an intermediary in protecting children against harsh cross-examination.¹⁷ Section 170A(2)(b) sets out the functions of an intermediary. The intermediary bears the responsibility to translate inquiries of the court, prosecution and defence to the child.¹⁸ This must be done in a language that a child will understand.¹⁹

Although the basic norm is that court procedures must take place in public, the court has the authority to operate in private when required.²⁰ Section 153 of the Criminal Procedure Act makes provision for instances where criminal procedures may not be held in an open court.²¹ If it is in the interest of the administration of justice, the public will not be allowed in such proceedings.²² Additionally, a court may order an in camera hearing at the request of the victim or if the victim is a minor.²³

1.3 Legislative developments to combat sexual violence against children

South Africa has adopted a vision of seeing women and children free from gender-based violence. The Republic is obliged by a number of international legal instruments to combat and eventually eradicate abuse and violence against women and children, including the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979) and the United Nations Convention on the Rights of the Child (1989).²⁴

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ The South African Law Commission (SALC) project 107.

¹⁷ Section 170A of the *Criminal Procedure Act* 51 of 1997.

¹⁸ Section 170A(2)(b) of the *Criminal Procedure Act*.

¹⁹ Ibid.

²⁰ Ibid at 16.

²¹ *Criminal Procedure Act* 51 of 1977.

²² S153 of the *Criminal Procedure Act*.

²³ Ibid at 16.

²⁴ Preamble of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

In response to the surge of sexual violence against children, there have been several legislative developments. A number of significant pieces of legislation, including the Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Children's Act, were passed to give expression to certain sections of the Constitution and international agreements. The Children's Act, the Criminal Procedure Act, and the Domestic Violence Act,²⁵ among others, have all been in effect for a while with the aim of safeguarding the interests and wellbeing of the child at all times.

To strengthen child protection and align the country's policy framework with both the constitution and international prescripts, South Africa underwent a legislative reform process.²⁶ The Criminal Law (Sexual Offences and Related Matters) Amendment Act hereinafter referred to as SORMA, which came into effect on December 16, 2007, recognises in its preamble that:

The South African common law and statutory law do not deal adequately, effectively and in a non-discriminatory manner with many aspects relating to or associated with the commission of sexual offences, and a uniform and co-ordinated approach to the implementation of and service delivery in terms of the laws relating to sexual offences is not consistently evident in Government; and thereby which, in too many instances, fails to provide adequate and effective protection to the victims of sexual offences thereby exacerbating their plight through secondary victimisation and traumatisation.²⁷

With the elimination of some common law sexual offences and the creation or amendment of comprehensive statutory offences for sexual offences against minors and vulnerable people, SORMA sought to address these problems.²⁸ Due to their vulnerability and uniqueness, children must be protected by South African courts, and this protection can be achieved through upholding their legal rights.²⁹ The creation of a criminal justice system built on the principles of the best interest of children was recommended by the South African Human Rights Commission. The Commission recommends that, 'all decisions made by the Commission (and

²⁵ Ibid at 24.

²⁶ Mpatheni Mandlenkosi Richard 'Sexual abuse of children and handling of sex offenders by South African criminal justice system' (2022) 20 *GENDER AND BEHAVIOUR*.

²⁷ Preamble of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

²⁸ Ibid.

²⁹ Sachs J, delivering the majority judgment in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) 244.

all other authorities) should always have the best interest of the child in mind.³⁰ The Commission discovered that while dealing with children who had been sexually assaulted, the police are more often than not unaware of the psychological state of children.³¹ This in turn has led to child victims of sexual abuse being further violated within the criminal justice system.

1.4 Research problem

The criminal justice system is the only legal mechanism that can bring justice to the increasing rate of sexual violence against children. The term ‘secondary victimisation’, frequently referred to as ‘the second rape,’ describes the lack of or inappropriateness of professional responses to sexual assault survivors that results in emotions of re-victimisation.³²

Children’s innocence and fragility are threatened in various ways by the criminal justice system.³³ Cross-examination tactics that are brutal, and secondary victimisation by justice system actors further violates and traumatises them.³⁴ Services for victims of child sexual abuse are provided by various professionals, including prosecutors, doctors, child protection, and forensic social workers.³⁵ They also include police officers working in the Family Violence, Child Protection and Sexual Offences unit (FCS) of the South African Police Services (SAPS).

The Constitution demands that a child witness who has been a victim of a sexual attack be protected against undue stress, and any form of emotional or psychological harm. The reality is that the competency of key players in the criminal justice system and courtroom proceedings that the child victim is subjected to, can have a significant impact on the accused's guilt or innocence.³⁶

Despite the progress in addressing the myths and views about it still exist in the criminal justice system. Which can affect the outcomes for victims and survivors.³⁷ This is due to the political and social system that favours men over women.³⁸

³⁰ Human Rights Commission 69-70.

³¹ Human Rights Commission 61.

³² Dheerendra Kumar Baisla ‘Secondary victimization under the criminal justice system’ 2 *JOURNAL OF LEGAL STUDIES AND RESEARCH*.

³³ Hellen Connelly ‘Children exposed to violence: criminal justice resources’ (1999) *OVC BULLETIN*.

³⁴ *Ibid* at 32.

³⁵ *Ibid* at 32.

³⁶ *Ibid* at 4.

³⁷ *Ibid* at 4

³⁸ *Ibid*.

The justice system can be very challenging for women and children who have experienced a violent crime, and can prevent them from seeking help from the point of reporting a crime until sentencing.³⁹ This is why it is important that the government and society work together to ensure that children are protected at all costs.⁴⁰

The system allows men to perpetrate violence against women and children with impunity.⁴¹ Children feel less protected when the legal system perpetuates re-victimisation. This is further explored in this thesis in order to understand and evaluate the existing legal framework that protects children within the criminal justice system.

1.5 Research aim and objectives

At the heart of this research is the objective to evaluate the protection in the legal system in South Africa of children who are victims of sexual violence. The aim is to examine the role of courts as a criminal justice actor in providing effective protection for children. This study seeks to:

Critically analyse the existing legal framework, governing the further victimisation children experience in the criminal justice system.

1.6 Research hypothesis

This study will argue that child victims of sexual violence are further violated in the criminal justice system. This thesis will evaluate protective measures available in the legal system to protect children from secondary victimisation. There is a need to address the gap in the sexual violence protection laws. The study will show that the criminal justice system still needs to adopt effective ways to protect child victims against sexual violence. Throughout the study it will be shown that deficiencies in the system in this regard have the potential to negatively affect child victims.

1.7 Research question

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

The main question in this study is, to what extent does the existing legal framework in South Africa protect children who are victims of sexual violence during the criminal process? In answering the question, the study will answer the following sub-questions:

- i. What is the legal framework governing the protection of laws against sexual violence of children?
- ii. How do children experience secondary victimisation in the criminal justice system?
- iii. Demonstrate the benefit and need to improve the standard of protection of the laws in place.
- iv. This study will use a desktop based qualitative research and will be based on available literature and jurisprudence on the subject. First, this study will make use of primary resources, which include but not limited to relevant treaties, protocols and case law. Secondly, secondary resources will be also utilised, including books, journal articles and publications relevant to sexual violence.

1.8 The structure of the paper

Chapter 1 provides the introduction and background to the study. The chapter also outlines the research methodology that will be employed, research questions and the statement of the research problem.

Chapter 2 discusses existing legislative developments in the criminal justice system that protect child victims of sexual violence. This Chapter will focus primarily on available literature regarding challenges faced by child sexual offence victims in accessing the South African criminal justice system. The focus is on relevant constitutional provisions such as section 28(2) which maintains that ‘a child’s best interests are of paramount importance in every matter concerning the child and legislation such as the Children’s Act⁴² and SORMA.⁴³

Chapter 3 presents the significance of the courts as a crucial pillar to engage the protection of child victims of sexual violence in the legal system during the court proceedings.

Chapter 4 focuses on the implementation of legislation. The chapter seeks to understand whether cross-examination is fair, while highlighting the gaps in the South African

⁴² Children’s Act 38 of 2005

⁴³ Act No. 32, 2007

criminal justice system when it comes to safeguarding the interests of the minor complainant during the criminal process.

Chapter 5 consists of the conclusion of the study and recommendations to pave the way forward.

CHAPTER 2

EXISTING LEGISLATIVE DEVELOPMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT PROTECT CHILD VICTIMS OF SEXUAL VIOLENCE

2.1 Introduction

In South African society today, which is controlled by deeply ingrained patriarchal beliefs towards the role of women in society, violence endures from apartheid and still reverberates strongly, making violence against women and children seem like an accepted social phenomenon.⁴⁴ The clear inadequacies of the criminal justice system reflected in the rates of sexual violence against women and children suggest an undeclared gender civil war.⁴⁵ To address this violence, the South African government has developed several laws to ensure substantive protection of children in the criminal justice system.

Children who are witnesses or victims in court procedures are at risk of becoming secondary victims. The phrase ‘secondary victimisation’ describes the extra suffering brought on by the legal system itself, such as callous treatment and added psychological pain.⁴⁶ It is unlikely that a child victim of sexual violence will have a positive experience in court.⁴⁷ This has an impact on the child’s wellbeing in the future.⁴⁸

In so far as the enactment of child protection laws are concerned, the provisions can be traced back to the Bill of Rights enriched in the Constitution.⁴⁹ Children’s rights as reflected in section

⁴⁴ Andrea Durbach ‘An essential intervention: Civil society responses for redressing and preventing violence against women in post-apartheid South Africa’ (2016) 202 *ACTA*.

⁴⁵ Helen Moffett ‘These women, they force us to rape them; Rape as a narrative of social control in post-apartheid South Africa’ (2006) 32 *Journal of Southern African Studies* 129-144.

⁴⁶ Bernd Schunemann ‘Protection of children and other vulnerable victims against secondary victimisation: making it easier to testify in court’ (2009) *ERA* 387-397.

⁴⁷ Meda Couzens ‘The best interest of the child and the constitutional court’ (2019) *Constitutional Court Review* 9(1) 363-386.

⁴⁸ *Ibid* at 47.

⁴⁹ The Constitution.

28 of the Constitution state that the best interests of a child are paramount, and as the cornerstone of child protection which is given effect to by legislative developments, most notably the Children's Act.

Nonetheless, concerns endure on whether child victims of sexual abuse are adequately protected in the criminal justice system. It is against this background that this chapter will analyse comprehensive developments in legislation, demonstrating the commitment of the criminal justice system to create a safer environment for children. It will also highlight legal provisions, guidelines and best practices that ensure that children's rights, well-being and dignity are protected throughout the judicial process. To achieve this, the paper will thoroughly analyse the SORMA and the Children's Act. It will also further examine how children are treated as victims in the criminal justice system.

2.2 The Constitution and the rights of children

Section 12 of the Constitution provides for the right to security and freedom of persons.⁵⁰ Children benefit from this provision under the rights guaranteed under section 12(1)(c) of the Constitution, namely the right to be free from violence, as well as those guaranteed in section 12(1)(e), namely the right not to be treated or punished in a cruel, inhuman or degrading way.⁵¹ Exposing children to harsh cross-examination may amount to secondary violence or degrading treatment.⁵² Thus, sections 12(1)(c) and 12(1)(e) protect children from aggressive secondary victimisation in the criminal justice system, although both sections may not be directly linked to court proceedings.⁵³

In support of this argument, the Constitutional Court in *DPP v Minister of Justice and Constitutional Development*⁵⁴ admitted that in most cases, children experience undue suffering when they describe abusive acts perpetrated upon them in an open court in the presence of the accused.⁵⁵ This becomes magnified when the child is exposed to intensive and brutal cross-examination by the accused.

⁵⁰ The Constitution.

⁵¹ Ibid.

⁵² Mildred Bekink 'The Constitutional protection afforded to child victims and child witnesses while testifying in criminal proceedings in South Africa' (2019) *Potchefstroom Electronic Law Journal* 1-50.

⁵³ Ibid.

⁵⁴ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 2 SACR 130 (CA) (Hereinafter referred to as *DPP v Minister of Justice and Constitutional Development*).

⁵⁵ Supra note at *DPP v Minister of Justice and Constitutional Development*.

Additionally, the Constitutional Court highlights that this experience is ‘as traumatic and as damaging to the emotional and psychological wellbeing of the child complainant as the original abusive act’ or may even expose the child to further victimisation, possibly as damaging as the trauma caused by the crime itself.⁵⁶

Furthermore, section 12(1)(c) guarantees the right to be protected against invasion of an individual's personal security, whether by the state or private individuals.⁵⁷ Thus, the state has the duty to protect individuals both negatively by itself refraining from such invasion of rights and positively, by restraining private individuals from any invasion.⁵⁸ In *S v Mokoena*, Judge Bertelsmann emphasises that, while no constitutional injunction can separate children from the shocks and peril of harsh family and neighbourhood circumstances, the law can create conditions that safeguard children from abuse.⁵⁹

The State has an obligation to protect children from further trauma, create conditions for children to testify in a child-friendly environment that is conducive to recovery,⁶⁰ and to refrain from exposing the child to further risk such as requiring the child to testify in the presence of the accused.⁶¹ Section 28 of the Constitution provides for the fundamental rights of children, including the right to dignity, the right to bodily and psychological integrity, and the right to individual autonomy.⁶² The children's rights jurisprudence of the South African Constitutional Court is extensive.⁶³ This Court's thorough jurisprudence on the best interests of the child has made a substantial contribution to the advancement of children's rights.⁶⁴

The definition of the best interests of the child has expanded with the inclusion of the concept in human rights instruments such as the Committee on the Rights of the Child (CRC). Article 3(1) of the CRC provides a substantive right which it defined as:

The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision

⁵⁶ *Supra* note at *DPP v Minister of Justice and Constitutional Development*.

⁵⁷ The Constitution.

⁵⁸ *Ibid* at 56.

⁵⁹ *S v Mokoena; S v Phaswane* 2008 5 SA 578(T).

⁶⁰ M Bekink ‘The Constitutional protection afforded to child victims and child witnesses while testifying in criminal proceedings in South Africa’ (2019) *Potchefstroom Electronic Law Journal*.

⁶¹ *Ibid*.

⁶² Section 28 of the Constitution.

⁶³ Meda Couzens ‘The best interest of the child and the Constitutional Court: A critical appraisal’ (2019) 9 *Constitutional Court Review* 363-386.

⁶⁴ *Ibid*.

on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general.⁶⁵

Section 28(2) of the Constitution provides that ‘a child's best interests are of paramount importance in every matter concerning the child’.⁶⁶ This is an independent right which means it has precedence over the child's more narrowly defined rights as stated in section 28(1).⁶⁷ Section 28(2) raises the paramountcy principle alongside the two functions: the interests of children who may be affected receive sufficient attention and to give appropriate attention in each case to which the law attaches the highest value, namely, the interests of children who may be concerned.⁶⁸ The court must be informed about how its decision will affect children in order to fulfil its duty to take the interests of the children into account.⁶⁹

To protect children's rights to equality and assure equal outcomes, it is important to treat children differently than everyone else. Section 9(2) of the equality clause recognises this sort of differentiation, stating that legislation and other actions meant to protect or advance persons or categories of persons disadvantaged by unjust discrimination may be implemented in order to promote equality.⁷⁰

It is important for parties in the proceedings to have an equal standing for cross-examination to be fair.⁷¹ When children are exposed to brutal cross-examination by adults, children may find it difficult to protect themselves as they would be in a position unequal to that of the adults.⁷²

Section 10 of the Constitution stipulates that ‘everyone has inherent dignity and the right to have their dignity respected and protected’.⁷³ Therefore, under the protection of section 28 of

⁶⁵ CRC Committee General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) CRC/C/GC/14 part I.A (General Comment 14).

⁶⁶ The Constitution.

⁶⁷ *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (7) BCLR713 (CC).

⁶⁸ *M v S (Centre for Child Law Amicus Curiae)* 2007 ZACC 18.

⁶⁹ *Ibid* at 58.

⁷⁰ *Ibid*.

⁷¹ M Bekink ‘The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa’ (2019) 22 *Potchefstroom Electronic Law journal* 1-50.

⁷² *Ibid*.

⁷³ Section 10 of the Constitution.

the Constitution, child witnesses should be shielded from violations of their right to dignity and psychological integrity because of the constitutional protections.⁷⁴

Section 14 of the Constitution stipulates that everyone has the right to privacy.⁷⁵ All proceedings involving children as witnesses, including interviews, must be conducted in a manner that is respectful of their right to privacy.⁷⁶

2.3 Criminal Law (Sexual Offences and Related Matters) Amendment Act no.32 of 2007

While it is understood that the provisions of the SORMA, can only address a portion of factors contributing to the prevalence of sexual violence against children, it makes a significant contribution to the general acknowledgment and recognition of the status of rape victims.⁷⁷ It is an extensive piece of legislation that is brimming with provisions safeguarding victims' rights against sexual violence. This Act emphasizes the gradual creation of a victim-centered, accommodating, and compassionate criminal justice system.⁷⁸

Most importantly, it gives the necessary legal weight to the problem of secondary victimisation within the criminal justice system. The Act was brought into force to strengthen child protection and mitigate sexual offences against minors and vulnerable people. Child sexual abuse is the sexual action that means engaging in sexual activity with a child.⁷⁹ The intent is to be sexually abusive towards the child. Section 15(1) of SORMA states that a person who commits an act of sexual penetration with a child who is 12 years of age or older but under the age of 16 years is, despite the consent of the child to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.⁸⁰

⁷⁴ Rene Koraan, Rongedzayi Fambasayi 'Intermediaries and the international obligation to protect child witnesses in South Africa' (2018) 21 *PELJ*.

⁷⁵ Section 14 of the Constitution.

⁷⁶ United Nations Guidelines para 14.

⁷⁷ Lukas Muntingh, Zain Satardien 'Sexual violence in prisons – part 2: The Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007) – its implications for male rape in prisons and the Department of Correctional Services' (2011) *South African Journal of Criminal Justice* 24.

⁷⁸ National Policy Framework Management of Sexual Offences Matters of June 2012.

⁷⁹ 'Sexual abuse and the impact on the child in the middle childhood' *University of Pretoria*.

⁸⁰ SORMA.

A systematic protective approach to children who have been victims of sexual abuse is long overdue,⁸¹ and there is obviously an urgent need to effectively address child abuse in general.⁸² If SORMA encourages the prompt and effective prosecution of sexual abuse cases, this will contribute immensely towards creating an environment receptive and supportive of the culture of children's rights as envisioned by the Constitution and the United Nations Convention on the Rights of the Child.⁸³ SORMA 'empowers courts to provide specialised victim-support services in order to militate against secondary victimisation or traumatisation, reduce case handling time and improve conviction rates'.⁸⁴

The cautionary rule in relation to children's testimony is an evidentiary rule that has a significant impact on child victims and child witnesses. This rule arose from presiding officers' practice of cautioning the jury against specific types of witnesses, most notably accomplices, complainants in sexual situations and minor witnesses.⁸⁵ The intention of the rule is that the court may not rely on the testimony of children without corroborating evidence proving its reliability.⁸⁶ However, Section 60 of SORMA states that a court should not treat evidence of a victim with caution when the nature of the offence in question is sexual violence.⁸⁷

The cautionary rule originates from the practice of warning the jury against specific witnesses such as accomplices, complainants in sexual cases and children.⁸⁸ The cautionary rule mandates that the court should always be cautious when considering evidence, that practice has taught that should it be viewed with suspicion, and that the court must find ways to avoid the possibility of making a wrong decision because of the evidence in question.⁸⁹

It is important to note that applying the cautionary rule will not have an impact on the standard of proof.⁹⁰ In criminal proceedings, the most crucial question is whether the state has proven its case beyond a reasonable doubt.⁹¹ Thus, the test of proof beyond a reasonable doubt should

⁸¹ Jacqui Gallinetti, Daksha Kassin 'Children and Sexual Offences' Chapter 7 of the Rape Law Reform in South Africa (2008) *JUTA* 147.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ N Sibanda-Moyo, K Eleanor & Maame Kyerewaa Brobbey 'Violence against women in South Africa: a country in crisis' (2017) 2.

⁸⁵ Mildred Bekink 'Defeating the anomaly of the cautionary rule and children's testimony – S v Haupt (2018) (1) SACR 12 (GP)' (2018) *SAFLII* 51 2 318-328

⁸⁶ *Ibid.*

⁸⁷ SORMA.

⁸⁸ *Ibid* at 85.

⁸⁹ PJ Schwikkard, SE Van De Merwe 'Principles of evidence' (2015) *JUTA*.

⁹⁰ *Ibid.*

⁹¹ *Ibid* at 81.

not be replaced by the cautionary rule. Judicial officers are obligated to assess evidence correctly and impartially.⁹²

Prior to the introduction of the SORMA, sexual abuse of children was defined in terms of the common law offences such as rape, incest and indecent assault.⁹³ SORMA is the outcome of a process that attempted to, inter alia, attend to the grievances of victims of sexual violence to address secondary victimisation within the criminal justice system.⁹⁴ SORMA intends to achieve the provision of services to specific victims of sexual offences, and attempts to eliminate secondary victimisation, therefore building on constitutional principles of privacy and dignity.⁹⁵

The new sexual offences legislation's objective is to ascertain that victims of sexual offences are provided with the most comprehensive and least-traumatising protection that the law can provide.⁹⁶ These legislative developments are perceived as a determined effort to ensure that minors are effectively protected in various aspects of criminal law and procedure.⁹⁷ To achieve this goal, the SORMA clearly stipulates, among other things, that complainants and their families must be protected from secondary victimisation and traumatising, and that victims' needs must be met with effective, prompt and non-discriminatory investigation and prosecution.⁹⁸

Moreover, the provision of specific services to reduce or prevent secondary traumatising, as stated in SORMA, is the true goal of the law.⁹⁹ In order to prosecute and judge sexual offences, it is also necessary to provide processes, defences and evidence.¹⁰⁰ SORMA acts as a defence for women and children who are extremely vulnerable and are more prone to become victims of sexual offences¹⁰¹ as well as the elimination of 'secondary victimisation' through the implementation of new laws that expressly address children and proper protection against

⁹² Ibid.

⁹³ Louise P Aucamp, Marie M Steyn & Esme van Rensburg 'A critical analysis of legislation pertaining to sexual abuse of children' *Child Abuse Research in South Africa* 13.

⁹⁴ Mandy Smith *Causes of secondary victimisation of child sexual abuse victims* (Published thesis, North West University, 2018).

⁹⁵ Ibid.

⁹⁶ Preamble of the Sexual Offences Act

⁹⁷ Jacqui Gallinetti, Daksha Kassan 'Children and Sexual Offences' Chapter 7 of the Rape Law Reform in South Africa (2008) *JUTA* 146.

⁹⁸ Section 2 of the Sexual Offences Act.

⁹⁹ Preamble of the SORMA.

¹⁰⁰ Charl Jonan Marais *Shortcomings of the Criminal Law (Sexual Offences and Related Matters) Amended Act 32 of 2007* (Published LLM thesis, Nelson Mandela University 2018).

¹⁰¹ Ibid at 26.

sexual offences.¹⁰² Lastly, it ensures that sexual offences are dealt with in an unbiased and effective manner while also taking into account the rights provided by the Constitution, especially the principle of prioritising the best interests of a child.¹⁰³

SORMA in much clearer and broader terms defines sexual offences against children while addressing underlying dynamics of sexual abuse such as grooming of a child. This is addressed for the first time by legislation.¹⁰⁴ An act of sexual penetration or a sexual violation is referred to as a sexual act.¹⁰⁵ Sexual penetration is defined as:

Any act which causes penetration to any extent whatsoever by- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or (c) the genital organs of an animal, into or beyond the mouth of another person.¹⁰⁶

Policies such as the National Policy Framework on Management of Sexual Offences that have been reflected in comprehensive laws designed to provide for the upbringing and care of children, particularly those who have experienced trauma.

2.4 The National Policy Framework on the Management of Sexual Offences

The legislature decided to pass SORMA to address sexual offences specifically called for the implementation of the National Policy Framework (the NPF). The Minister is required to implement a national policy framework pertaining to all matters covered by this Act after consulting with the cabinet members in charge of safety and security, correctional services, social development, and health, as well as the National Director of Public Prosecutions.¹⁰⁷ The purpose is to provide guidance for the implementation, enforcement, and administration of this Act; ensure that all government departments and institutions take a uniform and coordinated approach when handling matters pertaining to sexual offenses; and improve the provision of services as outlined in this Act by creating a plan for the progressive realization of services for victims of sexual offenses within the constraints of available resources.¹⁰⁸

¹⁰² Ibid at 26.

¹⁰³ Ibid at 26.

¹⁰⁴ Ibid at 92.

¹⁰⁵ Section 1 of SORMA.

¹⁰⁶ Ibid.

¹⁰⁷ Section 62(1) of the National Policy Framework (NPF).

¹⁰⁸ Ibid.

A committee named the Inter-sectoral Committee for the Management of Sexual Offence Matters is created.¹⁰⁹ The National Commissioner of the South African Police Service, the National Commissioner of Correctional Services, the Director-General of Social Development, the Director-General of Health, and the National Director of Public Prosecutions make up the Committee. The Director-General of Justice and Constitutional Development will serve as the committee's chairperson.¹¹⁰

The Committee is obliged to develop a national framework that ensures the monitoring the NPF's and this SORMA's implementation, monitoring the priorities and strategies included in the national policy framework.¹¹¹ Tracking the progress made toward achieving the framework's objectives, and making sure the various state organs fulfil the primary and supporting roles and responsibilities assigned to them under the terms of the national policy framework and this Act.¹¹²

This policy guarantees a 'victim-centered approach to sexual offences,' implementing multidisciplinary and inter-sector responses, offering specialized assistance in these cases, and ensuring 'equal and equitable access to quality services' are the cornerstones of the NPF.¹¹³

The NPF offers some fresh initiatives that could enhance how current laws and policies are carried out.¹¹⁴ First of all, it acknowledges a number of variables that heighten victims' susceptibility, 'due to gender power imbalances, age, disability, sexuality, and cultural dynamics'.¹¹⁵ Secondly, in order to keep an eye on this and guarantee that enough resources are provided, budgetary allotments and spending on sexual offences must be tracked separately.¹¹⁶

Furthermore, it enacts a plethora of new, targeted crimes to better address sexual assault against people, especially minors and those with impairments.¹¹⁷ NPF works to make sure that all government agencies and other relevant criminal justice actors are guided jointly when it comes

¹⁰⁹ Section 63 of the NPF

¹¹⁰ Ibid.

¹¹¹ Section 65 of the NPF

¹¹² Ibid.

¹¹³ 'Court support workers speak out: Upholding children's rights in the criminal justice system' (2014) *SA Crime Quarterly*.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid at 73.

to putting the Act into practice, enforcing its provisions, managing its affairs, and keeping an eye on it.¹¹⁸

2.5 The Children's Act

The preamble of the Children's Act provides that children rights provided for in section 28 of the Constitution, which speaks to the importance of upholding the best interests of children at all times.¹¹⁹ Section 9 of the Act reiterates the paramountcy of children's rights. The Act also instructs that the state must fulfil, protect, respect and promote these rights. Gives special observation to the vulnerability of children and places responsibility to pay extensive attention and care for them.¹²⁰

Violence against children is a violation of children's human rights under Section 28 of the Constitution, as well as a number of regional and international rights conventions that the country has ratified.¹²¹

The Children's Act gives effect to specific child rights and to establish guidelines for the care and protection of children.¹²² Section 6 of the Act sets out guiding principles the rights of children:

The implementation of all legislation applicable to children, including this Act; and all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general, all proceedings, actions or decisions in a matter concerning a child must, respect the child's inherent dignity; treat the child fairly and equitably; protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child; recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and recognise a child's disability and create an enabling environment to respond to the special needs that the child has.¹²³

¹¹⁸ Ibid.

¹¹⁹ Children's Act 38 of 2005

¹²⁰ Children's Act 38 of 2005.

¹²¹ Children's Act 38 of 2005.

¹²² Children's Act 38 of 2005.

¹²³ Section 6 of The Children's Act.

If properly implemented, the Children's Act will give South African children the legal protection they need to prevent the infringement of their human rights and to advance their general wellness and safety.¹²⁴

The Children's Act encodes the right of child protection in very rigorous and detailed ways and, in doing so, mandates a standard of child protection stronger than in many countries of the industrialised north.¹²⁵ This term covers employing a child in sexual activities or exposing him or her to pornography, encouraging, inciting, or compelling a child to be used for another person's sexual enjoyment, and participating in or assisting in the commercial sexual exploitation of a child.¹²⁶

2.6 The Criminal Procedure Act

The Criminal Procedure Act (the CPA) entails a section that specifically addresses the protection of child victims in the criminal justice system. Section 170A of the CPA makes the appointment of intermediaries compulsory when dealing with cases involving child victims of sexual violence.

Section 170 of the Criminal Procedure Act recognises the circumstances in which a child complainant or child witness has to testify.¹²⁷ It acknowledges that giving testimony in court carries with it a degree of mental stress or suffering for the child. Its objective is to minimise the amount of stress experienced by the child and to create a favourable environment that is conducive to encourage the child to speak freely about the incidents leading to the offence perpetrated against the child.¹²⁸ This environment is facilitated by the intermediary for the child. Therefore, it may be argued that in order to guarantee full realisation of the right to freedom of expression, the environment plays a vital role.¹²⁹

Consequently, child victims of sexual offences are protected from being in direct contact with the perpetrator while testifying, giving them the opportunity to testify in a room with a closed-circuit television (CCTV) when presenting evidence to the court of law.¹³⁰ Intermediaries serve

¹²⁴ Muhammed Imran Ali 'The legislative developments in the criminal justice of South Africa addressing child sexual abuse: a lesson for other developing countries' (2017) *Child Abuse Research in South Africa* 97.

¹²⁵ Ibid.

¹²⁶ Chapter 1 of the Children's Act.

¹²⁷ Criminal Procedure Act.

¹²⁸ Supra note at *DPP v Minister of Justice and Constitutional Development* para 96.

¹²⁹ *S v Mokoena; S v Phaswane* 2008 5 SA 578(T) para 79.

¹³⁰ Ibid.

the purpose of facilitating the testimony of the child during court proceedings, while also helping create a favourable environment for the child.¹³¹ It is critical to provide a child-friendly environment in which victims and multi-agency teams can collaborate to establish systems that reduce secondary victimisation and maximise child protection while placing children's voices and wellbeing at the heart of the system.

2.7 International law's approach to the redress of child abuse legal framework

2.7.1 Convention on the Rights of the Child

South Africa is a signatory to both the African Charter on the Rights and Welfare of Children and the Convention on the Rights of the Child (hereafter CRC).¹³² As a result, the South African government is required to implement appropriate steps to protect all children inside its boundaries, not only those who are citizens of South Africa.¹³³ For the purpose of advancing a children's rights agenda, the children's and human rights sector of civil society must be alert and track the government's performance in terms of meeting international obligations.¹³⁴

The Human Rights Commission acts as a monitor to ensure that society has sufficient access to information to hold the government accountable on its obligations under international law relating to children's rights.¹³⁵

The CRC's primary and most thorough conceptualisation of the protection of children against all types of violence is encapsulated in Article 19 of the CRC.¹³⁶ It imposes an obligation on State Parties to the CRC to put policies in place to protect children from all forms of violence.

CRC further states that '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.'¹³⁷ The Committee on the Rights of the Child acknowledges in its comments on article 19, that child witnesses and victims find the legal system to be burdensome.¹³⁸ The Committee also draws attention to the fact that, in order to

¹³¹ Ibid.

¹³² Thomas Hammarberg 'The UN Convention on the Rights of the Child and how to make it work' (1990) *Human Rights Quarterly* 12(1) 97-105

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ The Convention on the Right of the Child.

¹³⁷ Article 19 of the CRC.

¹³⁸ The Committee on the Rights of the Child.

avoid potential trauma that may arise from their involvement in the criminal justice system, child victims and witnesses require special protection and support appropriate to their age and level of maturity.¹³⁹

In the absence of a thorough implementation strategy tied to specific services based on identified demand, there may not be enough information regarding the coordination and management of the system for children's protection.¹⁴⁰ The CRC emphasises the importance of international cooperation in protecting children from sexual violence. Article 43 of the CRC requires governments to cooperate with each other and with international organisations to ensure that the right of children are protected and that their best interests are promoted.¹⁴¹

2.8 Conclusion

This chapter has provided an overview of the South African legal system as it relates to child sexual offences. It has discussed the legislation in place such as SORMA, the Children's Act, the National Policy Framework which gives guidelines to SORMA. Although thorough and in many ways sufficient, there are logistical flaws, the fact that child victims are not required to go through intermediaries in court. There are also some minor flaws, mostly in the way the law is put into practice. The following chapter will discuss this in great detail.

¹³⁹ Ibid at 66.

¹⁴⁰ Ibid.

¹⁴¹ Convention on the Rights of Children

CHAPTER 3

THE PROTECTION OF CHILDREN THROUGH THE CRIMINAL JUSTICE SYSTEM

3.1 Introduction

When a child is a victim of sexual violence, the criminal justice system provides several mechanisms to ensure their protection. The first step is for the child to report the crime to the police. The police will then investigate the crime and gather evidence. The child will be referred to a victim support centre or a social worker who will provide emotional and psychological support to the child and ensure that their needs are met.¹⁴² This support is crucial for children who have suffered sexual violence as it helps them recover from the trauma of the experience.¹⁴³

When the case goes to court, the child's protection is paramount. Several measures are put in place by South African courts to ensure that the child is protected and that they feel safe during the court proceedings. The measures include the use of intermediaries, closed-circuit television and the use of screens to prevent the child from having to face the accused directly. Intermediaries are trained professionals who help the child communicate with the court and legal representatives. This helps the child to understand questions being asked and ensure that the child's answers are accurately recorded. The protection of children is a high priority in the country, and this is reflected in legislation and court procedures as discussed in chapter 2.

To respond to this alarming trend, the South African criminal justice system has taken significant steps to protect children from sexual violence, with the courts playing a central role in this effort.¹⁴⁴ Through a combination of legal reforms, increased resources, and a proactive approach to prosecution, the courts in South Africa have become a powerful force in safeguarding the rights and well-being of children who are victims of sexual abuse.¹⁴⁵

¹⁴² Samantha van Niekerk, Laetieta Coetzee 'Secondary victimisation of children in the criminal justice system' (2020) 21 *Child Abuse Research in South Africa- A South African Journal* 20-31.

¹⁴³ Ibid.

¹⁴⁴ Mphatheni Mandlenkosi Richard 'Sexual abuse children and handling of sex offenders by South African criminal justice system' (2022) 20 *Gender & Behaviour* 20 19399-19404.

¹⁴⁵ Ibid.

This chapter gives an overview of secondary victimisation of children when accessing legal platforms. It will explore how courts have become an effective tool in the fight against child sexual violence. In the end, the chapter highlights challenges that victims of sexual abuse encounter in the criminal justice system.

3.2 Sexual Offences Courts

In an effort to address the high rate of sexual offences and lessen the secondary victimisation experienced by the victims of sexual violence in the criminal justice system, Sexual Offences Court was established in South Africa in 1993 at the Wynberg Regional Court in Cape Town.¹⁴⁶ The desired results of this special court were to improve the investigation and prosecution of sexual offence cases, reduce trauma for the victim by using a victim-centered approach, and adopt a coordinated and integrated approach among role-players involved in these cases.¹⁴⁷

Sexual Offences Courts were designed to handle trials involving only sexual offences.¹⁴⁸ They included the need to assign magistrates assigned to hear cases in these courts, victim aids, case managers, and personnel in charge of court preparation. Victims of sexual offences have bad experiences with the criminal justice system, which are referred to as secondary victimisation and traumatisation.¹⁴⁹ On the other hand, a purposeful attitude, procedure, action, or omission on the part of an individual who has been the victim of a traumatic situation is known as secondary victimization.¹⁵⁰

Sexual Offences Court are designated specifically for the handling of sexual offences such as rape.¹⁵¹ It offers survivors of rape and other witnesses particular services.¹⁵² The objectives of this court are to: lessen the trauma experienced by survivors; expedite cases so they are finished swiftly; render better decisions or judgements because the judges and staff are highly skilled and experienced; secure more convictions and send more of the offenders to jail; and instil

¹⁴⁶ Sexual Offences Court: National Strategic Plan (2020)) *Department of Justice and Constitutional Development*.

¹⁴⁷ Ibid

¹⁴⁸ Loraine Townsend, Samantha Waterhouse, Christina Nomdo 'Court support workers speak out: Upholding children's rights in the criminal justice system' (2014) 48 *SA Crime Quarterly* 74-88.

¹⁴⁹ National Policy Framework Management of Sexual Offences Matters of June 2012.

¹⁵⁰ Ibid.

¹⁵¹ Sexual violence: calling the system to account *Shukumisa*

¹⁵² Ibid at 140.

confidence in the public that reporting rape will result in positive outcomes, which will motivate more survivors to report their cases to the police.¹⁵³

They are developed to meet the demand for specialised skills in a specific field in order to handle cases more quickly and effectively.¹⁵⁴ The availability of a main courtroom and a testifying room connected by closed-circuit television equipment is one of a Sexual Offences Court's most important features.¹⁵⁵ Adults and children who must testify must have access to a separate waiting area outside of the courtroom.¹⁵⁶ A key tenet of a court model for sexual offences is to limit direct contact between the offender and the victim as much as possible.¹⁵⁷

Attending court includes confrontation and animosity, especially in South Africa where the criminal justice system uses an accusatorial style.¹⁵⁸ When a witness testifies in court, they frequently face harsh questioning. The majority of witnesses find giving a testimony in court to be daunting, especially vulnerable populations like children. When the child must testify in open court about terrible events that occurred during sexual abuse, the court experience is more intimidating.¹⁵⁹ The question that remains is whether sexual offences courts provide adequate protection for child victims of sexual violence.

Unlike other courts, two prosecutors are assigned in sexual offences court. This is done to give prosecutors sufficient time to study and understand the case, while also allowing for more in depth consultations with witnesses on out-of-court days.¹⁶⁰ This aids empathy on the prosecutor's side. Additionally, in sexual offences courts the same prosecutor appointed to the case deals with the matter from the start to the finish line without change of hands.¹⁶¹ Thus, prosecutors must be correctly sought out. It is important that these prosecutors have an interest in sexual offences considering the sensitivity and vulnerability of the victims.¹⁶²

This suggests that assigned prosecutors dedicate most of their time to the difficult work of properly prosecuting instances involving child sexual abuse, this is an advantage of having two

¹⁵³ Ibid at 143.

¹⁵⁴ Ibid at 138.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ LTC Harms 'Demystification of the inquisitorial system' (2011) 14 *PELJ* 1-7.

¹⁵⁹ *Klink v Regional Court Magistrate NO and Others* 1996 (3) BCLR 402 (E) 403

¹⁶⁰ JM Reyneke, HB Kruger 'Sexual Offences Courts: Better justice for children' (2006) 31 *Journal for Juridical Science* 71-107.

¹⁶¹ Ibid.

¹⁶² Ibid.

prosecutors. It also benefits the child victim when the prosecution is handled by a well-trained prosecutor that has the necessary skills and understands the needs of victims of sexual abuse.¹⁶³

The interplay between sexual assault victims and the criminal justice system frequently leads to secondary victimisation and additional trauma for the victim.¹⁶⁴ Sexual Offences Courts are developed to offer specific facilities, trained people, and pertinent services to victims and witnesses of sexual assaults to prevent further victimisation.¹⁶⁵

3.3 The best interests of the child: protecting child victims appearing in court

The best interests of the child as enshrined in the Bill of Rights in Section 28(2) of the Constitution, are regarded as being of the utmost significance in all situations pertaining to the child.¹⁶⁶ The phrase ‘all matters concerning the child’ is inclusive of anything that a child does or experiences, including child witnessing.¹⁶⁷ The right protected by section 28(2) of the Constitution must be read together with the best interests concept in section 9 of the Children's Act.

In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development (DPP v Minister of Justice)*¹⁶⁸ the court recommended that whenever a child is called as a witness, the courts must take into account whether it would be reasonable to appoint an intermediary.¹⁶⁹ The appointment of an intermediary must be in the best interests of the child and in line with the objectives of the Constitution.¹⁷⁰

Factors that have to be considered include the principle of the best interest of the child as set out in section 28(2) thereof, and the objectives of section 170A(1), namely, to prevent the child from exposure to undue stress that may arise from giving evidence in court.

¹⁶³ Ibid.

¹⁶⁴ Sexual Offences Courts: National Strategic Plan *Department of Justice and Constitutional Development*.

¹⁶⁵ Ibid.

¹⁶⁶ Section 28(2) of the constitution.

¹⁶⁷ R Fambasayi and R Koraan ‘Intermediaries and the obligation to protect child witnesses in South Africa’ (2018) 12 *PELJ* 1-30.

¹⁶⁸ Supra note at *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*.

¹⁶⁹ Supra note at *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*.

¹⁷⁰ Supra note at *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*.

The prosecution of criminal cases involving child victims are complicated,¹⁷¹ especially in cases of sexual abuse. This leads to the system failing to consider and protect the welfare of child victims.¹⁷²

Any progressive justice system must take into account the vulnerability of children, it therefore necessitates a lenient interpretation of the rules governing testimony.¹⁷³ The best interest of the child is a primary consideration in a rule of procedure that should be applied in cases concerning children.¹⁷⁴

Making sure that victims of sexual offences receive the best and least-traumatic protection possible under the law is one of the main goals of the sexual offences legislation.¹⁷⁵ SORMA expressly states, among other things, that in order to achieve this goal, complainants and their families must be shielded from secondary victimisation and traumatisation, and that victims' needs must be taken into account through prompt and non-discriminatory investigation.¹⁷⁶

To achieve the objectives of section 28(2) of the Constitution and section 170A(1) of the CPA, a court representative has a responsibility to examine whether the child needs an intermediary to be appointed. The court in *DPP v Minister of Justice* provided that, the best interest of the child standard outlined in section 28(2) of that act must be taken into account, and the objective of section 170A(1) of protecting the child from the potential stress associated with testifying in court. A child complainant has no experience in court, so the court official or intermediary must prepare the child by explaining various roles that will be played there.¹⁷⁷ Insensitive treatment from criminal justice actors counts as secondary victimisation, being subjected to harsh cross-examination is also recognised as a cause of secondary victimisation.¹⁷⁸

¹⁷¹ Johan Prinsloo 'In the best interest of the child: The protection of child witnesses in the South African Criminal Justice System' (2008) 9 *Child Abuse Research in South Africa* 49-64.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Article 3(1) of Convention on Rights of the Child.

¹⁷⁵ Artz, L & Smythe, D (Eds) 'Should We Consent?' (2008) *Rape Law Reform in South Africa* 268.

¹⁷⁶ Ibid.

¹⁷⁷ Bathabile Mandisi Maureen Ngubane *Challenges facing child victims in South African courts: An overview of the South African legal framework and the protection of such children with a specific focus on courts in Durban, Kwazulu Natal* (Published thesis UKZN).

¹⁷⁸ Ibid.

3.4 Functions of intermediaries

Acknowledging the vulnerability of children, respective developments have been identified to improve the experience of child victims during criminal court proceedings. The addition of section 170A(1) to the Criminal Procedure Act, which creates the role of an intermediary, is one of the more significant measures in relation to the protection of child victims and witnesses.¹⁷⁹

S170A of the Criminal Procedure Act makes the appointment of intermediaries compulsory when dealing with cases of child victims. Section 170A explicitly states that it is strictly applicable to children, and for the purpose of this discussion, vulnerable witnesses.¹⁸⁰ Section 170A(1) provides that:

Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witnesses 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.¹⁸¹

As previously stated, children find it challenging to protect themselves when exposed to brutal cross-examination in court proceedings. Due to their vulnerability, it is important to protect children and to make sure that their rights are respected. The introduction of an intermediary is an effort to reduce the effect of direct confrontation between a child and the accused.¹⁸² An intermediary is a person who is specially trained to enable communication between the court and a child in a technique that is both age-appropriate and understandable to a child.¹⁸³ The intermediary serves as a ‘barrier or shield’ between the formal legal system and the child, taking

¹⁷⁹ Criminal Procedure Act 51 of 1977 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.

¹⁸⁰ Section 170A of the Criminal Procedure Act.

¹⁸¹ Ibid.

¹⁸² Ibid at 66.

¹⁸³ Supra note at *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*.

into account the child's cognitive and developmental abilities when explaining the meaning and contents of the court's questions to the child.¹⁸⁴

Fundamentally, section 170A(3) gives the child an opportunity to testify through an intermediary away from the perpetrator, and to provide evidence in a more calming environment.¹⁸⁵ This section further guarantees that the child and the intermediary can be seen and heard by the court through the use of an electronic device and other equipment.¹⁸⁶

The subsection was passed to prevent child complainants in sexual offence cases from going through unnecessary emotional pain as an outcome of testifying in court.¹⁸⁷ Thus, the best interests of children are given priority in cases of child witnesses.

The SORMA preamble, which emphasises that children are among the most vulnerable members of our community, makes this clear.¹⁸⁸ Although perhaps more significantly, the preamble acknowledges that 'the Bill of Rights in the Constitution of the Republic of South Africa... enshrines the rights of all people in the Republic of South Africa, including... the rights of children... to have their best interests considered to be of paramount importance'.¹⁸⁹

The State has a responsibility to safeguard children from additional trauma, to create an environment that is child-friendly and supportive of recovery, and to avoid putting the child in danger by, for example, making them testify in front of a suspected perpetrator.¹⁹⁰ Section 170A(1) of the Criminal Procedure Act specifically aims to prevent this secondary trauma.

In the case *DPP v Minister of Justice*, the court accepted that it causes a child complainant unwarranted suffering when testifying in an open court.¹⁹¹ Harsh cross-examination on child complainants clearly shows this. It is evidently crucial that child victims not only receive

¹⁸⁴ Supra note at *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*.

¹⁸⁵ Section 170(3) of the CPA.

¹⁸⁶ Section 170A(3)(C) of the CPA.

¹⁸⁷ Supra note at *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*.

¹⁸⁸ The Sexual Offences Amendment Act 23 of 1957.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid at 66.

¹⁹¹ Supra note at *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*.

compassion and empathy in their treatment, but also avoid degrading cross-examination.¹⁹² Thus, intermediaries prove to be helpful in carrying this out.

According to section 170A(2)(a) of the Criminal Procedure Act, no witness who has had an intermediary appointed may be examined, cross-examined, or re-examined in any other way except through an intermediary.¹⁹³ This means that the witness cannot be directly questioned by the parties involved in the case.¹⁹⁴ An exception to this is that the court may question the witness directly, for example by rephrasing the initial question in a way it deems appropriate.¹⁹⁵ However, the court is not permitted to cross-examine the witness.¹⁹⁶

Section 170A(2)(b), states that the said intermediary may communicate to the child witness the general intent of any question, unless the court orders otherwise.¹⁹⁷ In order for the child to correctly respond to the questions posed by the prosecution or the defence, the intermediary's role is to explain the overall or broad content and meaning of the questions to the child in a manner that is understandable to the child.¹⁹⁸ This allows an intermediary to moderate questions that, if directed at the child witness directly, may have been harsh and frightening.¹⁹⁹ Any slang, jargon, or speech particular to the witness's age or social context may be used by the intermediary to ask the child witness's questions in a language that is comfortable for the child.²⁰⁰ The intermediary's role in this duty is to both protect the child witness from hostile cross-examination and to help the child understand the questions that are being asked.²⁰¹

In *DPP v Minister of Justice* the Constitutional Court emphasised the following:

The 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

¹⁹² Ibid at 66.

¹⁹³ Section 170A(2)(a) of CPA.

¹⁹⁴ Steph E Van der Merwe 'Cross-examination of the (sexually abused) child witness in the constitutionalized adversarial system: is the South African intermediary the solution?' (1995) *OBITER* 195-214.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Section 170A(2)(b) of the CPA.

¹⁹⁸ Ibid at 185.

¹⁹⁹ Mildred Bekink *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* (published Doctor of law thesis, University of South Africa 2016).

²⁰⁰ Ibid.

²⁰¹ Ibid at 199.

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 children are called upon to testify. They have particular skills in questioning and communicating with children.²⁰²

While carrying out the aforementioned responsibilities and providing the child with emotional support throughout the trial, it is crucial that the intermediary maintains objectivity.²⁰³ The rationale for this is that the intermediary neither acts on behalf of the prosecution against an accused party nor represents the child.

3.5 South African Police Services (SAPS)

The Constitution of the Republic of South Africa's 1996 makes provision for the duty of the state to safeguard its inhabitants in Section 198(a).²⁰⁴ Therefore, the government places a high importance on the police and security services.

The legal framework was constructed to monitor and regulate the care and protection of children.²⁰⁵ Thus, the South African Police Service (hereafter referred to as SAPS) has the legal obligation to ensure protection and care of children.²⁰⁶ The National Commissioner of the SAPS 'gave an instruction to provide clear direction to members on how to provide the necessary assistance and protection to children.'²⁰⁷ As per this instruction, members of the SAPS are obligated to take action where the interest of a child may demand.²⁰⁸

SAPS classifies crimes against children as ones that require priority attention, and prioritises their prevention.²⁰⁹ Nevertheless, despite having a progressive Constitution and new laws that safeguard the rights of women and children, South Africa still has high rates of violence against its women and children.²¹⁰

²⁰² Supra note at *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*.

²⁰³ Ibid at 190.

²⁰⁴ The Constitution

²⁰⁵ Johan Van Graan 'The quality service of the Family Violence, Child Protection and Sexual Offences Unit of the South African Police Service, post 2010' (2012) 13 *Child Abuse Research in South Africa*.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

SAPS crime statistics and official South African statistics do not expressly include sexual offences against children.²¹¹ These numbers do not accurately reflect the level of violence experienced in the society because they only include crimes that were reported to SAPS.²¹² Thus, they can never be an accurate reflection of the extent of violence experienced in South African.²¹³

3.6 Hearsay evidence

The court has the discretion to admit hearsay evidence if doing so would be in the interests of justice under section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.²¹⁴ Section 3 defines hearsay evidence as ‘evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.’²¹⁵ The court must be satisfied that it would be in the interests of justice to accept hearsay testimony of a child who has filed a complaint in a criminal case but is thereafter unable to appear in person.²¹⁶

The Criminal Procedure Act²¹⁷ (CPA) addresses procedural issues relating to a child witness such as s170A which includes the child's right to testify without having to be present in the same room as the accused.²¹⁸ However, evidential standards that must be met to evaluate the child's testimony are the same regardless of the witness' age.

Because hearsay is not ordinarily permitted in court, a child who is unable to testify because, for example, they do not pass the competency test, will not be able to rely on someone else to relate their side of the story.²¹⁹

Three substantial exceptions to the prohibition against hearsay are found in Section 3 of the Law of Evidence Amendment Act.²²⁰ According to this section, hearsay may be admitted by

²¹¹ Ibid

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.

²¹⁵ Law of Evidence Amendment Act 45 of 1988.

²¹⁶ Ibid.

²¹⁷ Criminal Procedure Act 51 of 1977.

²¹⁸ Ibid.

²¹⁹ K D Muller, IA Van Der Merwe ‘Hearsay evidence and the child witness’ (2002) 27 *Journal for Juridical Science* 33-46.

²²⁰ Ibid at 205.

consent if the person whose credibility and probative value of the criminal process depends on testifies or if the court determines that such evidence should be admitted in the interests of justice.²²¹

Thirdly, due to being deemed incompetent or being too terrified, a child may not be able to testify at a trial. If the child relayed the incident to the mother, guardian, social worker, or police officer the evidence is hearsay and is not admissible as evidence.²²² Thus, in accordance with the three exceptions, such a report may be admitted if the other party consents, the child testifies during the trial, or the court deems it appropriate.

The court has authority to accept hearsay evidence under Section 3(1)(c) if it is within the interests of justice. 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 provided by the person whose credibility the probative value of such evidence depends, any prejudice to a party which the admission of such evidence might entail, as well as any other factors, must all be taken into account by the courts when weighing the interests of justice and determining how much weight should be given to hearsay evidence.²²³

3.7 The court's treatment of child's evidence

3.7.1. *Buso v State*²²⁴

In light of child victims as witnesses, identification plays an important role.²²⁵ The likelihood of the witness' identification being accurate slightly increases if he or she knows the individual well or has seen him frequently in the past.²²⁶ Testing the degree of previous knowledge and the possibility of a right identification is crucial, taking into account the context in which it was made.²²⁷

²²¹ Ibid.

²²² *S v T* 1973 (3) SA 794 (A).

²²³ Ibid At 205.

²²⁴ *Buso v S* A256/2021 (2022) ZA 404.

²²⁵ *R v Dladla and others* 1962 (1) SA 7.

²²⁶ Supra note at *R v Dladla*.

²²⁷ Supra note at *R v Dladla*

In *Buso v The State* the appellant was convicted of raping a female minor.²²⁸ He was charged with contravening Section 3 of the SORMA, read with s 51(1)(a) and schedule 2 of the Criminal Law Amendment Act.²²⁹

The issue in this appeal is whether the trial court erred in accepting the evidence of the complainant and rejecting the appellant's (alibi) evidence, and whether there were any significant and compelling circumstances that might affect the minimum life sentence for the rape of a minor.²³⁰ The complainant acknowledged during the chief evidence that she was familiar with the accused's name and residence.²³¹ Under cross-examination, she was asked how she learned the identity of the defendant, and she responded that her sister had told her.²³² The appellant contends that the evidence of the complainant regarding her sister cannot be considered since the state failed to contact the sister to confirm that she informed the complainant that the person who sexually assaulted her was the appellant.²³³

The alibis for the appellant explained in great detail that they were with the accused at the time of the incident.²³⁴ Mr Kekai for the defence, testified that the appellant was fixing his car from as early as 07:00 o'clock that morning.²³⁵ His neighbour also testified that the appellant was in the driveway next door while she was doing laundry from her house.²³⁶ She further specified that the accused was fixing the car until 'past seven' in the evening.²³⁷

The prosecution questioned why and how they remembered every specific detail of that detail and they couldn't answer the question.²³⁸

The magistrate did not accept the evidence of the appellant and the alibi witnesses.²³⁹ It was clear that their intentions were to protect the appellant. The trial court found the evidence of the appellant and his alibis to be improbable as they also failed to substantiate it.²⁴⁰ The

²²⁸ Supra not at *Buso v S*.

²²⁹ Supra note at *Buso v S*.

²³⁰ Supra note at *Buso v S*.

²³¹ Supra note at *Buso v S*.

²³² Supra note at *Buso v S*.

²³³ Supra note at *Buso v S*.

²³⁴ Supra note at *Buso v S*.

²³⁵ Supra note at *Buso v S*.

²³⁶ Supra note at *Buso v S*.

²³⁷ Supra note at *Buso v S*.

²³⁸ Supra note at *Buso v S*.

²³⁹ Supra note at *Buso v S*.

²⁴⁰ Supra note at *Buso v S*.

defendant also failed to provide an explanation for how the victim might identify the appellant if he had done nothing to her.²⁴¹ In South African law, there is no set age for testimonial competence.²⁴² If the court is of the view that a child ‘can understand what it means to tell the truth’ then that child will be found competent.²⁴³ Each time, the judge or magistrate must be certain that the minor is aware of what it means to tell the truth.²⁴⁴ This court accepted that the complainant could identify the accused accurately, even if she only found out his name after the rape.²⁴⁵ Other issues raised by the defence included conflicting testimony regarding the dates on which she told her mother about the rape.²⁴⁶

According to the definition of evidence given by section 3 of the Law of Evidence Amendment Act,²⁴⁷ ‘evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence’.²⁴⁸ Her evidence was supported by her mother and doctor.²⁴⁹ The trial court accepted the victim's statement as accurate. Despite highlighted discrepancies, the victim was deemed to be confident and her testimony was without any exaggerations.²⁵⁰

It is clear that when the court admitted the evidence, it considered the best interests of justice, taking into account the nature of the evidence and the probative value of the mother and doctor who also gave supporting evidence. Thus, the presiding officer has the discretion to admit hearsay evidence.²⁵¹ Admissibility of evidence in cases involving child witnesses depends on the facts of each case.

3.8 Challenges faced by complainants of sexual abuse in the criminal justice system

There is no doubt that experiencing sexual violence is a very horrific and traumatic experience for a child which requires equipped criminal justice officials to assist them.²⁵² The fact is that

²⁴¹ Supra note at *Buso v S*

²⁴² Ibid at 82.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Supra note at *Buso v S*

²⁴⁶ Supra note at *Buso v S*

²⁴⁷ Ibid at 205.

²⁴⁸ Ibid.

²⁴⁹ Supra note at *Buso v S*.

²⁵⁰ Supra note at *Buso v S*.

²⁵¹ Ibid at 190.

²⁵² Ibid.

the child did not consent to the act and that the child is often not yet mature enough to comprehend all the consequences of being sexually assaulted.²⁵³

In trial courts children often get asked really humiliating questions that insinuate that it is their fault they got raped. Degrading questions like ‘how short was your skirt’. The trial of Omotoso perfectly showed this. During the trial, Cheryl Zondi alleged that her pastor Omotoso raped her multiple times from a young age.²⁵⁴ The legal representative of Omotoso during cross-examination asked Zondi, ‘Why didn’t you scream’.²⁵⁵ Unfortunately, he did not stop there, he further invaded her and posed questions about the penis of the alleged perpetrator and how deep he penetrated her.²⁵⁶ Due to the brutality of the cross-examination by placing the blame on the victims and forcing them to relive their trauma, civil society condemned it as secondary victimisation.²⁵⁷

One of the negative impacts of secondary victimisation is that victims find it difficult to trust criminal justice actors.²⁵⁸ It does not end here, minor discomfort to severe psychological and emotional trauma which may lead to difficulties in social spaces.²⁵⁹ Thus, professional intervention whether good or bad has a pivotal impact on the well-being of victims.²⁶⁰ The harmful impact of the assault seemed to be lessened by supportive professional reactions, such as acknowledging and validating victims' experiences of sexual abuse.²⁶¹

Furthermore, to address the scourge, there has been an intention to align legislation with the complexity brought by sexual offences and under-reporting of these issues.²⁶² This is evident in the amendment of the Criminal Procedure Act. The Amendment Act²⁶³ allows victims to report their cases and the alleged perpetrators to be charged even after 20 years.²⁶⁴ This is because rape does not prescribe, the case of *Levenstein and others v Estate of the Late Sidney*

²⁵³ Ibid at 169.

²⁵⁴ Sensitising the legal arm to address sexual offences available at <https://www.sanews.gov.za/features/sensitising-legal-arm-address-sexual-offences>

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid at 169.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ Denov, M S ‘To a safer place? Victims of sexual abuse by females and their disclosure to professionals’ (2003) 27 *Child Abuse and Neglect* 47-61.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Criminal Procedure Amendment Act 16 of 2021.

²⁶⁴ Ibid.

*Lewis Frankel and others*²⁶⁵ confirms this. The court held that it is completely unreasonable for sexual offences to prescribe at 20 years when there is overwhelming body of data showing that these offences cause survivors to experience significant and ongoing distress.²⁶⁶

Trained criminal justice officials must attend to child victims of sexual offences to navigate the harrowing experience.²⁶⁷ In most cases you find that the child is not mature enough to understand what has happened to her. It is pivotal that the victims are handled with respect and empathy.²⁶⁸

All victims are impacted by secondary victimisation, but children are particularly traumatised. Children are not only more vulnerable than adults, but they are often abandoned and unprotected during court proceedings because family members may be the offenders.²⁶⁹ Thus, it is regrettably common for those who are supposed to protect children to harm them.²⁷⁰ The only body with the ability to assess evidence, particularly real evidence that can result in an accused person's conviction, is the court.²⁷¹

3.9 Conclusion

This chapter has explained that South African courts ought to prioritise the protection of children during court proceedings, using measures such as intermediaries, closed-circuit television, and screens to ensure their safety. The criminal justice system has taken steps to protect children from sexual violence, with courts playing a central role. Legal reforms, increased resources, and a proactive prosecution approach have made courts a powerful force in safeguarding the rights and well-being of victims.

The Sexual Offences Court was established in 1993 to address the high rate of sexual offences and reduce secondary victimisation experienced by victims. These courts aim to improve investigation and prosecution, reduce trauma, and adopt a coordinated approach among involved parties. They provide services to survivors of rape, expedite cases, render better

²⁶⁵ *Levenstein and others v Estate of the Late Sidney Lewis Frankel and others* 2018 (8) BCLR 921 (CC) para 13.

²⁶⁶ *Supra* note at *Levenstein and others v Estate of the Late Sidney Lewis Frankel and others*.

²⁶⁷ *Ibid* at 169.

²⁶⁸ *Ibid*.

²⁶⁹ *Ibid* at 169.

²⁷⁰ *Ibid* at 169.

²⁷¹ *Ibid*.

decisions, secure more convictions, and instil confidence in the public that reporting rape will result in positive outcomes.

The *Director of Public Prosecutions, Transvaal v Minister of Justice* case emphasises the importance of appointing an intermediary when a child is called as a witness, considering factors such as the best interest of the child and the Constitution's objectives to prevent undue stress from giving evidence in court.

A progressive justice system must prioritize the best interests of children, requiring lenient interpretation of testimony rules. S170A of the Criminal Procedure Act makes the appointment of intermediaries compulsory when dealing with cases of child victims. The introduction of an intermediary is crucial to protect children and ensure their rights are respected, reducing the impact of direct confrontation between the child and the accused.

In order to safeguard the interests of child complainants throughout the criminal process, the following chapter looks at the application and enforcement of laws, the fairness of cross-examination, and weaknesses in South Africa's criminal justice system.

CHAPTER 4:

IMPLEMENTATION OF LEGISLATION AND ENFORCEMENT OF PROVISIONS

4.1 Introduction

A significant percentage of children either experience physical and sexual abuse or witness crimes that require them to testify in court about the cruelty they witness.²⁷² Issues relating to child sexual abuse are still considered taboo in the rural areas. This often leads to secrecy around incidents of sexual violence that happen within families.²⁷³ In some cases, community members avoid going to police stations for help because of their lack of trust in the justice system.²⁷⁴ The lack of suitable resources to assist in dealing with sexual abuse in such areas contributes to the lack of information regarding their existence.²⁷⁵ Victims suffer secondary trauma at the hands of the SAPS and healthcare workers. This is frustrating considering that South Africa has one of the highest rates of rape in the world.²⁷⁶

Despite the lack of urgency from SAPS when handling sexual abuse, healthcare workers are equally responsible for poor efforts offered to victims.²⁷⁷ The reality for many children in South Africa is exacerbated by restrictions enforced by some healthcare professionals who have the misconception that rape victims must first lay a charge with the SAPS before referrals can be made to a nurse or doctor.²⁷⁸ This is appalling and unfair to the victims because regardless of the efforts to improve the criminal justice system, police are usually uninformed and do not express any empathy, considering the fact that they are the ‘first point of contact’ in the criminal justice system.²⁷⁹ It is against this background that this chapter focuses on the implementation of legislation and enforcement of provisions. The chapter seeks to understand whether cross-examination is fair, while highlighting the gaps in the South African criminal justice system when it comes to safeguarding the interests of the minor complainant during the criminal

²⁷² Department of Social Development, Department of Women, Children and People with Disabilities and UNICEF Violence Against Children in South Africa (2012).

²⁷³ Tlakale Nareadi Phasha ‘Researching child sexual abuse in South Africa: Complexities in the filed’ (2006) 16 *Journal of Psychology in Africa* 243-251.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Amanda Gouws ‘Rape is an endemic in South Africa. Why the ANC government keeps missing the mark’ *The Conversation* 2022 1.

²⁷⁷ K Naidoo ‘Rape in South Africa – A call to action’ (2013) 103 *South African Medical Journal* 210-211.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

process. It further explores holding the government responsible for gross human rights violations against children.

It also highlights that for redress to be sufficient, there is a need for resources and proper training of criminal justice actors when dealing with victims of sexual abuse.

4.2 Is cross-examination fair?

The foundation of the accusatorial system is cross-examination, which serves as the opposing party's 'weapon' in the conflict. Adversarial examination has implicitly been characterised as 'aggressive or confrontational'.²⁸⁰ The South African judiciary reaffirmed the significance of cross-examination in *K v The Regional Court Magistrate*,²⁸¹ asserting that it is a potent tool that can and frequently does influence a trial court's decision.²⁸²

In the Preamble of the Service Charter for Victims of Crime in South Africa (2004, the Victims' Charter),²⁸³ the government reaffirmed its commitment to victims' rights, suggesting that it is only through recognising, defending, and balancing the rights of both accused persons and victims can an equal criminal justice system be attained.²⁸⁴ However, for many victim-witnesses, the reality of the court process is fraught with secondary victimisation.²⁸⁵

Child victims are often exposed to a traumatic experience during court proceedings, especially if they take the stand.²⁸⁶ Some argue that they suffer more trauma through secondary victimisation by the criminal justice system, which is comparable to the abuse itself.²⁸⁷

You can imagine a child already suffering from the trauma of rape, and yet forced to relive the experience again in the court room. Some prosecutors are not equipped with the necessary skills and knowledge to help child victims of sexual abuse. In most cases, they come off as

²⁸⁰ T Volkmann-Schluck 'Continental European criminal procedures: true or illusive model?' (1981) 9 *American Journal of Criminal Law* 1-32.

²⁸¹ *K v Regional Court Magistrate* 1996 (1) SACR 434 (E).

²⁸² Supra note at *K v Regional Court*.

²⁸³ The Victims Charter.

²⁸⁴ The Preamble of the Victim's Charter.

²⁸⁵ Ibid at 140.

²⁸⁶ U Schiller and G M Spies 'Development of a training programme for state prosecutors address revictimization of the sexually abused child during forensic procedures' (2006) 7 *Child Abuse Research in South Africa* 36-47.

²⁸⁷ Ibid.

insensitive to the special needs of victims, and as a result, end re-victimising them again.²⁸⁸ Which leads to the question of whether cross-examination of children is fair?

The Constitution makes provision for the fundamental right to a fair trial,²⁸⁹ making cross-examination an important procedure. The testimony or evidence presented by opposing witnesses can be thoroughly examined and disputed by the accused during cross-examination.²⁹⁰ Prohibiting cross-examination may violate the fundamental right to a fair trial.²⁹¹

Cross-examination is the procedure by which an opponent's witness is questioned, and in contrast to examination-in-chief, cross-examination allows the interrogator to ask the witness leading questions.²⁹² Thus, the purpose of cross-examination is twofold: to obtain information that is advantageous to the party on whose behalf it is undertaken and to raise questions about the credibility of the main evidence presented against that party.²⁹³ Therefore, during cross-examination, which symbolises the process by which an opponent's witness is questioned, the core of any defence is introduced.²⁹⁴ Cross-examination is the primary way that the truth in any case comes to light, making it a vital component of the criminal justice system.²⁹⁵

As soon as a witness takes an oath or affirmation, the right to cross-examine opens up. Section 166 of the Criminal Procedure Act²⁹⁶ provides for the right to cross-examine a witness.²⁹⁷ It is enshrined in s35(3)(i) of the Constitution,²⁹⁸ which grants the accused the right to a fair trial, inclusive of the right to adduce and challenge evidence.²⁹⁹ Section 166 of the Criminal Procedure Act³⁰⁰ provides as follows:

²⁸⁸ Ibid

²⁸⁹ The Constitution

²⁹⁰ Cobus Kotze '5 reasons why cross-examination is important' available at

<https://www.gawielerox.co.za/blog/5-reasons-why-cross-examination-important>

²⁹¹ Ibid.

²⁹² Rachel Zajac 'Disorder in the courtroom? Child witnesses under cross-examination' (2012) 32 *Developmental Review* 181-204.

²⁹³ *K v Regional Court Magistrate* 1996 (1) SACR 434 (E) at 442.

²⁹⁴ Supra note at *K v Regional Court Magistrate*.

²⁹⁵ Ibid at Rachel Zajac

²⁹⁶ Ibid at 207.

²⁹⁷ Ibid.

²⁹⁸ S35(3)(i) of the Constitution

²⁹⁹ See s35(3)(i)

³⁰⁰ Ibid at 207.

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.³⁰¹

Section 166(3) of the Criminal Procedure Act places a limitation on the right to cross-examine (as this right is not absolute), including S170A.³⁰² The court may ask the cross-examiner to reveal the significance of any specific line of examination and has the authority to prohibit any questioning that is deemed oppressive, repetitive and improper.³⁰³

The judiciary, which frequently deals with instances involving sexual assault of children, refers to the issue as ‘a cancer’ in the South African society.³⁰⁴ Unfortunately, conviction rates continue to be low despite exceedingly high incidences of sexual violence against children.³⁰⁵ The incidence of sexual assault against children and the percentage of convictions show a humongous gap.³⁰⁶ The South African Law Commission reached the conclusion that the adversarial procedure that heavily relies on cross examination is insensitive and unfair on child victims.³⁰⁷ Because of the insensitivity of cross examination, the use of intermediaries in certain situations and the use of technological or other instruments to prevent face-to-face conflict was recommended.³⁰⁸

Child witnesses' testimony is covered by Section 170A. Through the use of an intermediary and closed-circuit television, the witness may testify. The accused can use technical tools to

³⁰¹ S166 of the Criminal Procedure Act.

³⁰² Ibid at 207.

³⁰³ Ibid.

³⁰⁴ G P Stevens and E C Lubaale ‘Behavioural science evidence in child sexual abuse prosecutions in South Africa: A jurisprudential and comparative insight’ (2015) 36 *OBITER*.

³⁰⁵ Ibid.

³⁰⁶ Ibid

³⁰⁷ Statistics South Africa titled Child Series Volume II

³⁰⁸ Fawzia Cassim ‘The rights of child witnesses versus the accused’s right to confrontation: a comparative perspective’ (2003) 36 *Comparative and International Law Journal of Southern Africa* 65-82.

observe the witness, but they cannot be utilised to observe the accused.³⁰⁹ In this method, confrontation between the accused and the witness is avoided.³¹⁰

This exclusion is made to lessen the trauma experienced by child witnesses as well as the strain and suffering associated with giving a testimony while the accused is present.³¹¹ As a result, Section 170A aims to safeguard child witnesses.

The ethical rules of the legal profession provide detailed guidance for cross-examination. The Code of Conduct: Uniform Rules of the Professional Ethics of the General Bar Council of South Africa.³¹² The rules provide that questions that undermine a witness' credibility by criticising his character and are otherwise irrelevant to the investigation should not be asked unless the cross-examiner has good reason to believe that the imputation made by the question is accurate or true.³¹³

Although in theory presiding officers are empowered to prohibit insulting, abusive, and degrading cross-examination, in practice carrying out this duty may prove challenging given that denying the right to cross-examination almost always results in a conviction being overturned on appeal.³¹⁴

As demonstrated above, cross examination significantly undermines fairness when applied to the child victims of sexual abuse. As a vulnerable population, they incur psychological trauma as a result of their experiences, making cross examination completely unfair.

In the matter of *M v S*,³¹⁵ the complainant was raped by her biological father. While the trial was still in progress, the victim and the accused were brought into contact by the accused's mother.³¹⁶ This was highly unfair on the victim and most likely to impact the victim negatively. Additionally, there was no evidence in the records showing that the victim was allocated to a

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² The Code of Conduct: Uniform Rules of the Professional Ethics of the General Bar Council of South Africa

³¹³ See rule 3.3 the Code of Conduct: Uniform Rules of the Professional Ethics of the General Bar Council of South Africa

³¹⁴ Ibid at 66; See *Omotoso v S* Ensuring that justice is not merely seen to be done but actually carried out is the first and most important responsibility of every adjudicating officer. Judge Makaula ensured that the cross-examiner does not unfairly discredit the witness (Cherly Zondi) and use strategies that will set the court up for failure.

³¹⁵ *M v S* 2019 ZAWCHC 101.

³¹⁶ Supra note at *M v S*.

social worker to help with the trial or offer trauma counselling.³¹⁷ Both measures would have been required as there is necessity for trauma counselling.

Judge Seale agreed that indeed this indicates a major failure on the part of the criminal justice system to provide the victim with the treatment that they are legally entitled to receive in order to prevent secondary victimisation from occurring to the victim as much as possible.³¹⁸ There can be no justification for failing to uphold minimum standards where the legislation has specifically mandated their maintenance.

The preamble to the Children's Act No.38 of 2005 states that:

It is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding.³¹⁹

The court in *Klink v Regional Court Magistrate*³²⁰ brought attention to the difficulties child witnesses of sexual offences face during court proceedings and the evaluation of their testimony.³²¹

The court confirmed that Child witnesses find it difficult to adduce evidence in an adversarial setting due to its traumatic nature.³²² This leads to a child witness under aggressive cross-examination by a proficient counsel to conceal information than to disclose it.³²³ The court in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*³²⁴ also provided that 'we must be careful ... in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development.'³²⁵

³¹⁷ Supra note at *M v S*.

³¹⁸ Supra note *M v S*.

³¹⁹ Children's Act No.38 of 2005

³²⁰ *Klink v Regional Court Magistrate* 1996 (3) BCLR 402 (E) 403

³²¹ Supra note at *Klink v Regional Court Magistrate* .

³²² Supra note at *Klink v Regional Court Magistrate*.

³²³ Supra note at *Klink v Regional Court Magistrate*.

³²⁴ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC).

³²⁵ Supra note at *Teddy Bear Clinic v Minister of Justice*.

Whether the CPA's provisions regarding the protections for minor complainants in criminal cases involving sexual offences are in line with s28(2) of the Constitution is the main matter at stake in these cases.³²⁶

Particularly provisions such as s170A(1) which speaks to testifying through an intermediary and ss 153(3) and (5), proceedings made via a camera. S28(2) of the constitution emphasizes that the child's best interest must be of importance when dealing with matters concerning children.

The issue of administration of justice then rises from whether the CPA provisions put in place to shield child witnesses from the psychological strain that comes with testifying in court are in compliance with the constitution.³²⁷ All superior courts have the obligation to look into any failure to implement these requirements which deprive child witnesses of the protection they are constitutionally entitled to, as soon as it is brought to the attention of the court.³²⁸

Children are prone to succumb to the aggressive nature questioning. Thus, they may further have difficulties asserting themselves effectively in communicating their experiences. The answer to the question of whether cross examination is fair, is a stern no – taking into account how child victims of sexual abuse are treated in court.

4.3 Holding the government accountable for the gross human rights violations against children

Child victims of sexual abuse are faced with very unsettling difficulties.³²⁹ Statistics show that about 60 children are raped every day in South Africa.³³⁰ However, what raises more concern is the fact that only 6 to 7 percent of reported rape cases against children get prosecuted successfully.³³¹ One might assume that the high prevalence of sexual violence is the main problem, looking at how it is inherently difficult it is for courts to prosecute sexual offence

³²⁶ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC).

³²⁷ *Supra* note at *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*.

³²⁸ *Supra* note at *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*.

³²⁹ HB Kruger & JM Reyneke 'Sexual Offences Courts in South Africa: Quo Vadis' (2008) *Journal for Judicial Science* 33(2) 32-75.

³³⁰ *Ibid.*

³³¹ *Ibid.*

cases.³³² Complexities arise in securing a conviction in such cases due to various evidential and procedural issues.³³³

In most instances, the violations take place in a more private setting, meaning there will most likely be no eyewitness available to corroborate the testimony of the complainant to further strengthen the case.³³⁴ In an effort to ensure effective prosecution and punishment, the needs of victims are often neglected, as seen in the case of *M v S*.³³⁵

As already discussed in the previous chapter, child victims fear and avoid contact with the criminal justice system because of the negative service they are often subjected to. Victims of sexual abuse experience a second form of trauma in the system as they get brutally ridiculed and victimised once more. This is seen mostly in the courtrooms.

Those who rarely or never report rape events cite the following reasons: The police (SAPS) provide scant to no cooperation or respond harshly when victims come forward.³³⁶ Sometimes dockets even vanish, which makes it challenging for the case to proceed.

Victims frequently fear that if they report the incident to the police, the offender may retaliate, making it difficult for them to participate in the legal process.³³⁷ Some respondents thought there would be no good reason to report certain cases to the police because they were only made aware of them after the fact; there was no tangible evidence to back up the child's complaint.³³⁸ The child and/or the victim's mother were too afraid of the consequences should the matter be reported to the police, including potential retaliation by the offender or the victim could be too scared to part-take in the judicial process.³³⁹

The victim may not always want to report the suspected offender to law enforcement. Victims hold the view that testifying in court is not always in a child's best interests.³⁴⁰ They also believe that they have the discretion to decide whether to report the case to the SAPS. This is because

³³² Ibid.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ L Davis and J Saffy 'Young witnesses: experiences of court support and court preparation officials' (2004) 17 *Acta Criminology: African Journal of Criminology & Victimology* 17-23.

³³⁶ Johan Van Graan 'The quality service of the Family Violence, Child Protection and Sexual Offences Unit of the South African Police Service, post 2010' (2012) 13 *Child Abuse Research in South Africa*.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Ibid.

³⁴⁰ Ibid.

they believe that social workers involved should still be consulted about these cases before they are referred to the SAPS for further investigation.³⁴¹ Furthermore, they hold the belief that reporting the incident will only harm the victim.³⁴²

Thus, prosecutors require specialised training to ensure that they are familiar with the child witness' developmental stage,³⁴³ the dynamics of sexual abuse, and its impact on child witnesses. Even with this knowledge, prosecutors frequently find it challenging to work with traumatised complainants,³⁴⁴ to prepare them for court, and ultimately to properly lead their evidence.³⁴⁵

Victims who are courageous enough to speak in court require support and respectful treatment to guarantee a fair trial.³⁴⁶ As a result, treating victims of sexual assault appropriately requires a victim-centred approach.³⁴⁷

But it is important to keep in mind that a victim-centred strategy takes time, and that capacity—in the form of people and other resources—is crucial.³⁴⁸ From the discussion, it is clear that the successful finalisation of sexual offence cases in court is a multifaceted and challenging undertaking. Sexual Offences Courts are perfectly suited to meet this challenge. These courts have achieved remarkable successes, yet a moratorium was placed on the establishment of additional courts.

4.4 Gaps in the South African criminal justice system

Although there have been recent advances in the introduction of innovative child legislation, it is unfortunate that these measures have largely been made ineffective by the criminal justice system's inability to properly aid in the child's healing process.³⁴⁹ Whether the police have the necessary resources and expertise needed to effectively assist victims of child rape is one of the major concerns.³⁵⁰ In 1998, The National Instructions for police (no 22/1998) on sexual

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Ibid at 317.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ M E Van Zyl and I Sinclair 'Silent victims of rape: police effectiveness in dealing with child rape cases' (2006) 7 *Child Abuse Research in South Africa* 4-13.

offences (Support to Victims and Crucial Aspects of the Investigation) came into place.³⁵¹ This policy furnishes guidelines that govern management of victims and investigations and places an obligation on police officials to adhere to these guidelines.³⁵²

According to the guidelines, police must respect victims and their families when questioning them and conducting an investigation, give them information about their cases and the criminal justice system, and further direct them to additional community resources for support.³⁵³ Adequate implementation of these instructions has not materialized. The police are aware of the aforementioned legal requirements, however, victims and the South African media present a different picture of how the police handle victims of sexual abuse.³⁵⁴

It is regrettable that the gap between policy and practice has led to ineffective protection of children's rights.³⁵⁵ The abuse that children face in the criminal justice system, which disregards their cognitive development, worsens tragic and lasting impacts of sexual assault on children.³⁵⁶ The prosecutor who originally takes on a case is required by the National Policy guidelines for specialist prosecutors to see it through to the trial stage and its resolution.³⁵⁷ This is due to the high turnover of experienced prosecutors.³⁵⁸ It negatively affects the quality of prosecution in the courts. This also validates the lack of experience in the prosecution of child sexual abuse cases.³⁵⁹

The development of a criminal justice system built on the principles of the best interests of children was suggested by the South African Human Rights Commission.³⁶⁰ According to the report, the commission discovered that while dealing with children who had been sexually assaulted, police were frequently unaware of the psychological state of the children.³⁶¹ The report also mentions that the complainant and family received very little information about how the investigation was going.³⁶² On another level, it is highlighted with worry that, when dealing

³⁵¹ National Instruction 3/2008 Sexual Offences.

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Ibid at 338.

³⁵⁵ Ibid at 4.

³⁵⁶ Ibid.

³⁵⁷ Nicole Paulsen and Lizane Wilson 'Caregivers' experience of the South African judicial system after reporting of child sexual abuse' (2013) *ResearchGate*.

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ Human Rights Commission 69-70.

³⁶¹ Human Rights Commission 61.

³⁶² Ibid

with child victims, the Department of Justice did not always oversee adherence to National Policy Guidelines.³⁶³ It is obvious that not all prosecutors have experience handling sexual abuse cases, and even fewer are familiar with how to take a child-friendly approach.³⁶⁴ The failure of the South African criminal justice system to appropriately protect children who complain, has recently drawn concern and was expressed by South African courts, as evidenced in the case of *M v S*.

4.5 Conclusion

Although several cutting-edge service delivery strategies have been put into practice recently, the criminal justice system's performance with regards to child victims is still largely underperforming.³⁶⁵

Without a doubt, the legislature has made an attempt to pass new legislation designed to safeguard the rights and interests of the child witness. It has not yet been determined whether these laws as a whole protect children's best interests.³⁶⁶ The preliminary conclusion is that the laws are insufficient or ineffective in reaching the desired outcome. In order to give complainants in sexual offenses the most comprehensive legal protection possible, the new Criminal Law (Sexual Offences and Related Matters) Amendment Act was introduced. There is no question that the legislature has made an attempt to establish new legislation to close the gap in the criminal justice system, but it appears that such actions have not had the desired impact.³⁶⁷ Protecting the interests of the child victim is still one of the 'critical systematic challenges' that the criminal justice system must overcome.³⁶⁸

³⁶³ Human Rights Commission 63.

³⁶⁴ Ibid at 4.

³⁶⁵ Ibid at 4.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

At the heart of this research is the advocacy for effective protection of children by the criminal justice system against sexual violence. The purpose of this research was to assess whether child victims and witnesses are adequately protected in the criminal justice system. The research objective was to critically analyse the available legal framework, governing the further victimisation children experience in the criminal justice system.

In achieving this it was necessary to investigate the role of the legislature in deepening effective protection. Chapter 2 focuses on the legislative framework of protection of children within the criminal justice system. This chapter sought to analyse the existing comprehensive developments in legislation, demonstrating the commitment of the criminal justice system to create a safer environment for children. An examination of the positive law on the protection of children as witnesses and victims in criminal proceedings came after the discussing the development of the protections for child witnesses and child victims in the criminal justice system. The outline also shows how the criminal justice system has significantly changed how it treats child witnesses and victims.

A firm understanding of the significance of child protection in South Africa was demonstrated by the chapter 2 research on the protection of child witnesses and victims under the South African Constitution. Section 28 of the Bill of Rights grants special protection to children, including the rights to privacy, equality and security of the person which includes the right not to be subjected to violence. Additionally, the Constitution supports a criminal justice system that is customised to meet the requirements of each child.

Chapter 3 followed with a detailed overview of the secondary victimisation children experience when called upon to testify and during the criminal justice procedures. This chapter argued that our courts have systems in place that strive to protect child victims of sexual offences from further victimisation, with intermediaries being at the forefront, most notably, in section 170A of the CPA. The criminal justice system has the obligation to protect children from secondary trauma.

The appointment of intermediaries caters for child witnesses who were preake it easier for child witnesses to offer their best evidence when testifying in court.³⁶⁹ Furthermore, the chapter outlined some of the challenges child victims encounter in the criminal justice system.

Lastly, in chapter 4, the paper focuses on the implementation of the legislation and enforcement of the provisions. The chapter seeks to understand whether cross-examination is fair, while highlighting the gaps in the South African criminal justice system when it comes to safeguarding the interests of the minor complainant during the criminal process.

5.2 Findings

For many child victim-witnesses, the reality of the court process is fraught with secondary victimisation.³⁷⁰ The criminal justice system is completely daunting and burdensome for child witnesses and victims because of their immaturity and developmental deficiencies. Without a doubt, the legislature has made an attempt to pass new legislation designed to safeguard the rights and interests of the child witnesses and child victims.

Children are given specific protection under section 28 of the Bill of Rights which serves among other things, to guarantee child victims and child witnesses the right to respect for their human dignity, privacy, equality, freedom and security which is inclusive of the right to be free from violence.³⁷¹

In the pre-trial phase, Norway's criminal justice system is comparable to the adversarial model as the police oversee the investigation and the prosecution determines whether to press charges or not.³⁷² The judge does not contribute significantly to the inquiry. According to the Norwegian model, children who are younger than sixteen have the right to testify through a forensic interview conducted under court supervision as a pre-trial deposition.³⁷³

Thus, the child's cross-examination and evidence-in-chief are replaced by this pre-trial deposition. The pre-trial deposition is done in a manner closely related to that stipulated in section 170A that the interviewer sits with the child in another room which is linked to the court via CCTV. In

³⁶⁹ Supra note at *K v Regional Court Magistrate*.

³⁷⁰ Ibid at 140.

³⁷¹ See ss 9, 10, 12 and 14 of the Constitution.

³⁷² Mykleburst 'The position in Norway' in Spencer and Lamb (ed) *Children and cross-examination: Time to change the rules?* (2012) 147-159.

³⁷³ Ibid.

contrast to the system used under section 170A, the Norwegian system requires the interviewer to conduct the interview in the first place using their professional judgement.

The intermediary model applicable in South Africa is closely related to the question-question model. Counsel selects the questions and presents them to the intermediate one at a time. The intermediary then translates each question into language that is suitable for the child's developmental stage. However, this technique has a limitation in that the intermediary lacks the authority to draw attention to the questions that are asked.

This dissertation clearly discussed the importance of the role of intermediaries in the criminal justice system. As much as the study has argued an increase by courts, prosecutors and other stakeholders in support of child protection, the criminal justice system's performance with regards to child victims is still largely underperforming and the intermediary system cannot improve the shortcomings of the criminal justice system alone.³⁷⁴ This speaks to the threshold for eligibility,³⁷⁵ the restricted function of intermediaries and the financial and logistical problems such as the availability of intermediaries and intermediary facilities.³⁷⁶

The preliminary conclusion is that the laws are ineffective in reaching the desired outcome. There is no question that the legislature has made an attempt to establish comprehensive legislation to close the gap in the criminal justice system, but it appears that such actions have not had the desired impact.³⁷⁷ As a result, child victims or sexual offences have little to no faith in the criminal justice system. They do not feel protected enough in court as they are often placed in a position where they have to testify in direct contact with the perpetrator. This further violates them and counts as secondary victimisation.

5.3 Conclusion and recommendations

A criminal justice system has the obligation to actively recognise the vulnerability of children and grant child witnesses and child victims' comprehensive protection.

Sections 170A(1) and 170A(3) of the CPA³⁷⁸ were passed in order to shield children from the potential stress and trauma associated with testifying in court. Courts are required under section

³⁷⁴ Ibid at 4.

³⁷⁵ *S v Mokoena* 2008 (2) SACR 216 (T).

³⁷⁶ Supra note at *S v Mokoena*.

³⁷⁷ Ibid.

³⁷⁸ See Sections 170A (1) and 170,4 (3) of CPA

28(2) of the Constitution³⁷⁹ to follow the concept that the child's best interests come first in all decisions involving them.

It is recommended that the existing intermediary system must be amended. The appointment of an intermediary must be compulsory in all cases involving children under the age of 18 unless a clear reason exists for the child victim or child witnesses to not elect an intermediary.

Thus, the application of a novel model that blends accusatorial and inquisitorial components is recommended as seen in Norway.

With the use of this model or system, special examiners can question children based on their professional judgement and expertise, but defence attorneys can also ask the examiner to look into matters that are important to them.³⁸⁰ Both aspects of the accusatorial-inquisitorial system are combined in this model.

That the interrogation be carried out in exactly the same way as described by section 170A(3) of the Criminal Procedure Act, either via CCTV or another electronic method. The primary distinction is that an intermediary is the only one who examines the evidence.

As a result, the intermediary participates in the witness interrogation more actively since they get to choose the questions to ask as well as their sequence.³⁸¹ Counsel gives the intermediary questions that are divided into subjects according to the areas of challenge in order to enable the intermediary to do so. Until the presiding officer and counsel are satisfied that every topic has been adequately covered during the interview, this process is repeated. The interview is transcribed, and the entire process is captured on camera.

Applying the principles of our criminal law and criminal procedure is the responsibility of everyone involved in the administration of justice.³⁸² This will shield child complainants in situations involving sexual offenses from potential secondary trauma that could result from testifying in court.³⁸³

³⁷⁹ S28(2) of the Constitution

³⁸⁰ Emma Davies, Emily Henderson, Kirsten Hanna 'Facilitating children to give best evidence: Are there better ways to challenge children's testimony?' (2015) *ResearchGate*.

³⁸¹ *Ibid*.

³⁸² *Mabalane v S* 2023 (CA41/19) ZANWHC 97.

³⁸³ *Supra* note at *Mabalane v S*.

Therefore, in applying the best interests of the child concept, judicial authorities must take into account how permitting the child complainant in a sexual crime case to testify without the assistance of an intermediary will infringe the child's rights and interests.³⁸⁴

It can be concluded that the criminal justice system offers child victims and child witnesses comprehensive protection and acknowledges the vulnerability of children. In order to improve the current intermediary system, the thesis has highlighted a few issues that need to be addressed which could relieve the circumstances of child victims in the criminal justice system.

³⁸⁴ *Supra* note at *Mabalane v S.*

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