# CHILDREN IN COURT:
## PROTECTING VULNERABLE WITNESSES

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# I. BACKGROUND

This paper was prepared by the Legal Assistance Centre at the request of the Law Reform and Development Commission. It proposes law reforms on vulnerable witnesses which can be further discussed by the Commission and by members of the public. It is expected that these proposals will be refined in the light of additional input from interested parties, and then prepared for introduction into Parliament. The research has been funded by the Democracy and Human Rights Fund of the United States Government and the Austrian North-South Institute for Development Co-operation.

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# II. INTRODUCTION

For many people, testifying in court may be a difficult or even terrifying experience. The surroundings are usually formal and unfamiliar, cross-examination can be unnecessarily aggressive and the witness may lack a thorough understanding of the courtroom procedure. The witness may also be afraid to testify in the presence of the accused in a criminal case, or in the presence of a hostile party in a civil case. These problems can be particularly acute for children, people with disabilities, victims of sexual offences or domestic violence or witnesses from cultural minorities. [1] These types of people are vulnerable witnesses.

The following statement was recently made by Advocate Suzette Schultz of the Office of the Prosecutor-General:

> *The current criminal justice system in Namibia leads to a second victimisation of the sexually abused woman or child. It is a standing rule that a complainant giving evidence must do so in the presence of the accused, despite her age. The complainant stands alone in the witness box and can be intimidated by the accused's presence, often a male parent or relative. The complainant becomes*

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[1] See *Child Witnesses in the Court Process: A Review of Practice and Recommendations for Change*, Report to the Courts Consultative Committee from the Working Party on Child Witnesses, New Zealand, 1996 (hereinafter "New Zealand Report").

*more anxious and forgets facts which make her testimony less reliable and valuable in the prosecution. The alien atmosphere of the court combined with other factors as mentioned above, have such an impact on the younger female witnesses that they are often reduced to silence which effectively wins the case for the defense. This is one of the most important reasons why cases of sexual abuse are not officially reported.* [2]

A cursory review of newspaper accounts of sexual offences demonstrates the difficulties experienced by child witnesses in this context alone. For example, in April, a 10-year-old girl testified while sitting across from her accused rapist, a man who had helped to raise her for six years, from the time she was three years old. In full view of the man whom she had regarded as a father, she testified that he had threatened to kill her "with a knife and an axe" if she told what he had done. According to the newspaper account of the trial:

*"I felt bad," was all the skinny girl said, speaking in a voice barely above a whisper, when asked by State Prosecutor Notemba Tjipueja how she felt when the accused was doing what he did.* [3]

Another rape case involving a 10-year-old girl had to be dismissed in May after the girl froze when she saw the accused rapist in court and was unable to answer even the customary introductory questions. [4] A similar situation occurred in June when a five-year-old child – allegedly raped when she was three – was unable to answer questions about the difference between right and wrong satisfactorily, while sitting only a few meters away from her alleged attacker. [5] In a case involving a hostel father accused of sodomising six young hearing-impaired boys, one of the youngsters, who was 12 years old at the time of the alleged offence, turned and bolted out of the court room on seeing his alleged attacker. He was eventually persuaded to return to the courtroom to give his testimony in sign language. [6]

These few examples show how the judicial process can end up victimising the victim, particularly in cases where that victim is young or otherwise vulnerable. Both the Office of the Prosecutor-General and a High Court Judge recently called attention to the need for procedures to make the court experience less traumatic for vulnerable witnesses – particularly for child rape victims (see Appendix 1). The Unit for Sexually Abused Children in Swakopmund has also made repeated pleas for reforms to reduce the trauma

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[2] Excerpt from a proposal for funding for training people working with rape victims, for publications and materials to be used in the prosecution of rapists, and for the establishment of networks for the exchange of information about violence against women and children with institutions outside Namibia, *The Namibian*, 3 April 1993.

[3] "Child rape victim faced death threats", *The Namibian*, 3 April 1998.

[4] "'Change the system!'", *The Namibian*, 1 June 1998.

[5] "Toddler's rape case thrown out", *The Namibian*, 8 June 1998.

[6] "Hostel father accused of sodomising 6 young boys", *The Namibian*, 29 May 1998.

of child sexual abuse victims in court (see Appendix 2). [7]

Although the fear and intimidation experienced by a young or otherwise vulnerable witness may be particularly acute in sexual offence cases, such emotions can occur in any legal proceeding. The New Zealand Law Commission put forward this motivation for addressing the problems of vulnerable witnesses broadly:

> *The rules governing how witnesses give evidence are intended to promote the rational ascertainment of facts. However, it is apparent that in the case of vulnerable witnesses these rules may actually hinder that process. Vulnerability in this sense may occur due to the characteristics of a witness, the relationship between the parties or the nature of the offence in a criminal case… It is the difficulty these witnesses may have in giving evidence in the ordinary way which may limit the amount of reliable evidence they can offer the court. For example*
>
> - *Some witnesses may be more affected than others by delays in the legal process. Extreme youth or old age, intellectual disability or mental disorder may disadvantage witnesses in terms of their powers of memory and communication, and this in turn may have a bearing on how others judge their credibility.*
>
> - *Witnesses with communication disabilities, or those who come from [minority language] backgrounds, may be misunderstood or simply unable to convey important facts. Cultural judgments based on myths and stereotypes may also have implications for decisions about credibility; for example, decisions based on demeanour may be unreliable cross-culturally.*
>
> - *Complainants in sexual cases may be embarrassed giving evidence in open court or experience distress in doing so in front of the [accused], making them unable to give a full and coherent account and therefore affecting the amount and quality of evidence available to the fact-finder.* [8]

This paper proposes reforms in the legal system which may help reduce the trauma of testifying in court for children and other vulnerable witnesses. Throughout the paper specific proposed legislation is printed in bold italics. In addition, all proposed provisions are contained in a draft bill which appears in Appendix 5.

# III. DEFINITION OF VULNERABLE WITNESS

Children are usually the focus when alternative methods of presenting evidence are considered. However, there are other individuals who fall into the category of vulnerable witnesses. These individuals should also be protected during the court process.

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[7] See USAC submissions to O'Linn Commission and the LRDC National Hearings, dated 1996.

[8] New Zealand Law Commission, *The Evidence of Children and Other Vulnerable Witnesses: A discussion paper* (Preliminary Paper 26), 1996 at 19-20.

In New Zealand, children and mentally handicapped witnesses may testify in alternative ways if they are complainants in sexual offence cases. [9] In Queensland (Australia) intellectual impairment and cultural differences are considered in order to determine whether a witness is vulnerable and should be afforded protection. In Western Australia, mental disability, cultural background, relationship to any party in the proceedings and nature of the subject matter of the evidence are factors used to determine whether a witness is vulnerable. In South Australia, the circumstances of the case or witness are considered. [10] A statute recently enacted in Zimbabwe (reproduced in Appendix 3) provides a broad approach to the definition of "vulnerable witnesses" in all criminal proceedings. [11]

There is no persuasive argument for arbitrarily limiting procedural protections against unnecessary trauma and intimidation to children, or to a particular category of case. The New Zealand Law Commission states:

> *We consider that many of the reasons for allowing children, or mentally disabled adults, to give evidence in alternative ways apply irrespective of whether the witness is a complainant and whatever the nature of the crime alleged… Categories of witness who could at least be considered eligible for extension of the alternative modes of giving evidence include people with communication disabilities (for example, deafness), people from linguistic and cultural minorities, elderly people and victims of traumatic offences such as sexual offending and violence, whether in the civil (eg family court hearings) or criminal context.* [12]

Any person who is terrified by the normal court experience will not be a satisfactory witness. Therefore, it would advance the cause of justice to provide mechanisms which will enable all such persons to give their evidence more calmly and thoroughly.

The proposed definition of vulnerable witness, which draws on the Zimbabwean model and recent New Zealand proposals, would apply to all children, and to adults in appropriate circumstances. The court would be responsible for considering the listed factors and determining whether the witness in question should be classified as a "vulnerable witness" Once a witness is determined to be a "vulnerable witness", the various procedural protections provided in the statute could be applied as necessary.

***Definition of Vulnerable Witness***

***(1) A "vulnerable witness" means a person who is giving or will give evidence in a civil or criminal proceeding and is -***

***(a) under the age of 18, or apparently under the age of 18;***

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[9] New Zealand Law Commission (n8) at 31.

[10] *Id*. at 32.

[11] Zimbabwe Criminal Procedure and Evidence Amendment Act 8 of 1997.

[12] New Zealand Law Commission (n8) at 32.

*(b) likely to suffer substantial emotional stress from giving evidence;*

*(c) likely to be intimidated, whether by the accused or a party to the proceeding or by any other person involved in the proceeding;*

*(d) likely to be intimidated by the nature of the proceeding;*

*(e) likely to be intimidated by the place where the proceeding is conducted.*

***(2) In determining whether a witness fits the definition of a vulnerable witness in terms of subsections (1)(b)-(e), the court shall give due regard to the following factors:***

*(a) the age of the witness;*

*(b) any physical, intellectual, or psychological disability of the witness;*

*(c) the linguistic or cultural background of the witness;*

*(d) the nature of the proceeding;*

*(e) the subject matter of the expected evidence;*

*(f) the relationship, if any, between the witness and any party to the proceeding;*

*(g) any views expressed by the parties to the proceeding; and*

*(h) the interests of justice.*

***(3) In determining whether a witness fits the definition of a vulnerable witness in terms of subsections (1)(b)-(e), the court may interview the witness concerned out of the sight and hearing of any party to the proceeding: Provided that the merits of the case shall not be canvassed or discussed at such an interview.***

***(4) Before making a determination that a witness fits the definition of a vulnerable witness in terms of subsections (1)(b)-(e), the court shall afford any party to the proceeding an opportunity to make representations in the matter.***

# IV. CRIMINAL AND CIVIL CASES

Most of the innovations proposed in this paper would apply to civil cases as well as criminal ones. A civil case may be related in subject matter to a criminal case. For example, a civil case requesting compensation for damages might stem from rape or child

abuse. Also, even in a civil case which is unrelated to any criminal offence, there could be many reasons why a child or another vulnerable witness may experience unusual fear or stress. For example, custody proceedings might be very frightening for a child.

It may be argued that there is a particular need for reform in criminal cases because the complainant, who will often be the vulnerable witness, does not have a legal representative with a focus on his or her welfare. While this is true, a legal representative in a civil case may not be focused on the welfare of individual witnesses. Furthermore, witnesses in both kinds of cases may be testifying on behalf of unrepresented parties.

It is recommended that reforms and procedures relating to vulnerable witnesses be available in both civil and criminal cases as necessary, and the proposed legal provisions are drafted accordingly.

When considering efforts to protect vulnerable witnesses in criminal proceedings, the potential conflict between the rights of the vulnerable witness and the accused is always an issue. Many rules of evidence were enacted to ensure that the accused is afforded a fair trial. There is always a need to prevent an accused from being convicted on the basis of unreliable evidence. [13] The suggestions made in this paper have considered the rights of the accused, and nothing suggested will unfairly impact on those rights.

In fact, as the New Zealand Law Commission points out, taking a broad approach to vulnerable witnesses would mean that the alternative methods proposed could even be employed for an accused in a criminal case. [14] Although this would be an unusual application of the principle, one can imagine cases in which it might be appropriate – for example, as a means to get thorough and candid evidence from a young accused who might feel intimidated by his or her co-accused.

# V. PRE-TRIAL CONSIDERATIONS

## Fast Tracking Cases

Domestic violence cases, sexual offense cases, and cases involving child complainants or witnesses should be heard as soon as possible. Although any person who is a victim of crime experiences difficulties with the court system, these difficulties are magnified for vulnerable witnesses.

In Namibia at present, long delays and postponements are not unusual. The following are some recent examples gleaned from press reports:

- A trial in a case of alleged rape of a three-year-old girl started 18 months after the

[13] *Ibid*.

[14] *Id* at 36.

incident. [15].

- A trial involving alleged sodomy of six young hearing-impaired boys started one year after the charge was laid. [16]

- A trial involving an alleged rape of a six-year-old girl started almost two years after the incident, prompting the presiding judge to condemn the time lag as being "inexcusable". [17]

- A trial involving a 12-year-old orphan allegedly raped by her adoptive mother's boyfriend in May 1997 was first scheduled to begin in April 1998, but had to be postponed because the investigating officer had failed to subpoena state witnesses and deliver them to court. According to the public prosecutor in the case, it is normal practice for investigating officers to ignore written requests from the Office of the Prosecutor-General that they should provide the Office with documents proving that subpoenas have been served well before the trial date. The trial finally began in November 1998, but was then postponed until January 1999, because of the unavailability of a witness for the prosecution. [18]

In New Zealand, the Working Party on Child Witnesses listed the reasons why cases involving child complainants should be heard as early as possible.

- The period of time before testimony may correspond to significant development in the child's abilities to express him or herself, giving rise to potential consistency issues once the case goes to court.

- For a child who may be an adolescent, the time period may correspond to great changes in their physical and emotional being.

- Vulnerable witnesses will not be able to put their particular experience behind them until the trial has been heard.

- Hearing the case quickly improves the quality of evidence presented to the court.[19]

The New Zealand Working Party recommended that the courts adopt a tracking system for cases involving vulnerable witnesses, develop time frames such as a specific plea date and a restriction on the number of postponements, and reserve court dates solely for cases

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[15] "Toddler's rape case thrown out", *The Namibian*, 8 June 1998.

[16] "Hostel father accused of sodomising 6 young boys", *The Namibian*, 29 May 1998.

[17] "Cops rapped as Christmas Day rape case of child, 6, unravels", *The Namibian*, 28 September 1998.

[18] "Bungling postpones child rape case", *The Namibian*, 15 April 1998; "'I was raped by soldier,' orphan, 12, tells court", *The Namibian*, 10 November 1998.

[19] New Zealand Report (n1) at 9.

involving vulnerable witnesses. [20]

The following provision is suggested for placing cases involving vulnerable witnesses on the "fast track" in Namibia. (It should be noted that a similar "fast track" provision has been suggested for domestic violence cases. [21] )

> ***Priority of cases involving vulnerable witnesses***
>
> ***(1) Cases involving vulnerable witnesses shall be given priority and be heard as quickly as possible.***
>
> ***(2) Cases involving vulnerable witnesses shall follow the prescribed time limits set forth in regulations promulgated in terms of this Act.***
>
> ***(3) Postponements in cases involving vulnerable witnesses shall not be allowed except on good cause shown.***

# Preparing for Court

If children and other vulnerable witnesses understand the court process as fully as possible and are not frightened by it, they will be better witnesses. In South Africa, Karen Muller and Mark Tait conducted two studies to determine how children perceive the court process. They concluded:

> *It is clear from the two studies that children under the age of 11 have very little knowledge of the role of personnel in the courtroom or of the procedures adopted in court. In addition, children have some serious misconceptions about certain aspects of the process, which can have dramatic implications as far as fear and stress are concerned if they have to give evidence in court.* [22]

Based on the studies they conducted, Muller and Tait found that it is crucial to prepare children before they testify in court.

Preparatory literature specifically targeting children and other vulnerable witnesses should be prepared for use in Namibia.. There are two publications in New Zealand for child witnesses: "Going to Court: Being a Witness" and "What Happens Next? A Young Person's Guide to Being a Witness." [23] In the United Kingdom, a comprehensive information packet for child witnesses was developed by government agencies working with various children's organizations. The Child Witness Packet contains three books:

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[20] *Id.* at 9, 10, 11.

[21] See Dianne Hubbard & Daina Wise, *Domestic Violence: Proposals for Law Reform*, Legal Assistance Centre, 1998 at 48.

[22] Karen Muller and Mark Tait, *"Are Children Beheaded and Fed to Wild Animals? A Study of the Perceptions of South African Children Relating to the Judicial Process"*, 114 *SALJ* 455 (1997).

[23] New Zealand Report (n1) at 15.

* “Let’s Get Ready for Court”, an activity book for child witnesses aged 5-9 years;
* “Tell Me More About Court”, a book for young witnesses aged 10-15 years; and
* “Your Child is a Witness”, with information and advice for parents and care givers. [24]

In addition to written materials, video tapes about the court process could be developed for children and other vulnerable witnesses.

Children and other vulnerable witnesses should visit the entry to the court, the courtroom and any other relevant locations in advance of the trial. These facilities should be shown to them by someone who is familiar with the operation of the court and the role of the witness.

In the United States, Canada and Australia, victim support programmes have been developed. Such a programme could be instituted in Namibia at a very low cost, staffed by volunteers with a single paid government employee (perhaps even a part-time employee) to coordinate training and logistics. [25] Volunteers from the program could be responsible for meeting vulnerable witnesses (even if they are not actually “victims”), explaining court procedure and arranging tours of the court facilities. It is imperative that accurate information be given and that the person meeting the witness be able to respond to questions accurately. Structured training could be provided to ensure that volunteers were prepared to fulfill these tasks. Volunteers involved in such a programme could also refer vulnerable witnesses to appropriate counselling and social welfare services as necessary.

The following legislative provision is suggested to establish the framework for a victim/witness support programme. It is envisaged that this programme would apply only to criminal cases. [26]

***Victim’s Advocate Programme***

***A Victim’s Advocate Programme shall be established in the Office of the Prosecutor General with the following aims and objectives in respect of criminal cases:***

***(a) to inform victims and witnesses of the progress of their cases;***

***(b) to communicate the needs and concerns of victims and vulnerable witnesses to appropriate persons in the criminal justice system;***

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[24] *Id*. at 16.

[25] Each prosecutor’s office in the US State of Oregon hires a victim’s advocate coordinator who is responsible for recruiting and training volunteers. The coordinator is the only person who is paid; all others provide their time free of charge. See Hubbard & Wise (n21) at 50.

[26] A similar proposal has been put forward in respect of domestic violence cases. See Hubbard & Wise (n21) at 50. A Victim Court Preparation Programme along these lines has also been proposed for all complainants in sexual offence cases in South Africa. Sharon Stanton, Margot Lochrenberg & Veronica Mukasa, *Improved Justice for Survivors of Sexual Violence?: Adult survivors’ experiences of the Wynberg Sexual Offences Court and associated services*, 1997 at 158.

***(c) to assist victims in recovering property damaged or stolen and in obtaining restitution or compensation for medical and other expenses incurred as a result of the criminal act;***

***(d) to prepare victims and vulnerable witnesses for pending court proceedings by informing them of procedures involved;***

***(e) to accompany victims and vulnerable witnesses to court proceedings;***

***(f) to involve victims, when possible, in decision-making processes pertaining to the offence in question;***

***(g) to assist victims and vulnerable witnesses with personal logistical problems related to court appearances;***

***(h) to develop community resources to assist victims of crime;***

***(i) to generally encourage and facilitate testimony by victims of and witnesses to criminal conduct.***

## Families/Care givers

Families or care-givers of vulnerable witnesses must also be well informed. The amount of reassurance given to the witness by such support people can determine whether the vulnerable witness's experience in court will be successful.

The New Zealand Working Party on Child Witnesses recommends four types of information which is important to support people:

- *Information about progress of the case.* Prosecutors and legal practitioners should make information regarding the court proceedings -- including information on anticipated court appearances and time frames -- available to witnesses and care givers.

- *Information about evidentiary issues.* Care givers may withhold support, or communication may be strained, because care givers do not want to "contaminate" the evidence. Again, the prosecutor or the legal practitioner should meet with the care giver to explain how to support the witness as much as possible without contaminating the evidence.

- *Information about the court process.* Written and/or video taped information should be developed to enlighten the care giver about the court process. Care givers should also be encouraged to accompany vulnerable witness on court visits in advance of the trial.

- *Practical information.* Care givers should be informed about where to

park, what to expect on the day of the court proceeding, where to enter the court, what type of dress is appropriate, what is available at the court and whether they should bring food or activities to help pass the time with them.[27]

The provision of information to families and care givers could be a function of volunteers working in the victim's advocate programme described above.

## Meeting with the Prosecutor

In the study on children's perceptions of court conducted by Muller and Tait, the authors found that the attitude of children towards the prosecutor was extremely negative. The prosecutor was described as the "'real bad guy'" and as a person "who kills people", "who insults other people", or "who chops off heads". At best, the prosecutor was described as "somebody who hurries people" and "doesn't give people enough time to think". Lawyers did not have a much more positive image. Children described a lawyer as a person "who changes the truth to lies", "who confused things", who "changes what you have done and says you did not do it," or "changes what is right and makes it wrong". [28]

Given such perceptions, it is important for the prosecutor to meet with the vulnerable witness in advance of a criminal trial. The prosecutor should meet the vulnerable witness at least a week in advance of the trial. Ideally, the prosecutor should meet with the vulnerable witness more than once. It is important for the prosecutor to develop a rapport with the vulnerable witness. The New Zealand Working Party on Child Witnesses lists several reasons why prosecutors should meet with the vulnerable witness well in advance of the trial:

- The prosecutor must gain the vulnerable witness's confidence.
- If the witness is a child, the prosecutor must gauge the child's maturity and development level to assist communication.
- The prosecutor must be able to use age-appropriate language.[29]

Referring to child witnesses, the New Zealand Working Party says, "Such meetings should result in the courtroom being a less threatening environment as children know someone in court, increasing children's comfort and contributing to their ability to give better evidence." [30] The same reasoning would apply to all vulnerable witnesses.

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[27] New Zealand Report (n1) at 18.

[28] Karen Muller and Mark Tait, *"'A Prosecutor is a Person Who Cuts Off Your Head': Children's Perceptions of the Legal Process",* 114 *SALJ* 593 (1997) at 601; Muller and Tait (n22) at 453-ff.

[29] New Zealand Report (n1) at 17.

[30] *Ibid*.

In civil cases, legal practitioners should meet with vulnerable witnesses in advance of the trial for the same reasons.

Although it is not suggested that this policy should be enshrined in legislation, it could be proposed as a policy measure to be adopted by the Office of the Prosecutor-General, the Law Society and the Directorate of Legal Aid.

# VI. THE TRIAL

## Children's Testimony

There is no specific legal requirement that the evidence of child witness must be corroborated in civil or criminal cases, but in practice courts have required substantial corroboration of the testimony of children, particularly in sexual abuse cases where the child is a victim. [31]

The following are some of the reasons that have been advanced in support of the view that the testimony of children is less reliable than that of an adult:

- (a) children's memories are unreliable;
- (b) children are egocentric;
- (c) children are highly suggestible;
- (d) children have difficult distinguishing fact from fantasy;
- (e) children make false allegations, particularly of sexual assault; and
- (f) children do not understand the duty to tell the truth. [32]

However, current research indicates that the testimony of a child is not inherently unreliable. [33] For example, recent research indicates that children are not prone to making false allegations:

> *Ironically, research indicates that the major problem with children's evidence is not the risk of a child making false allegations, although this is still a possibility. Rather the major problem is their significant level of false denials and retractions. While children can be encouraged to say that an event occurred knowing full well that it did not, this is difficult to do. When children do make false statements at the encouragement of others, the statements are often not very credible and these children rarely persist with their made up story. On the other*

[31] See, for example, P Zieff, "The child victim as witness in sexual abuse cases – a comparative analysis of the law of evidence and procedure", 4 *SACJ* 21 (1991) at 28-29; PJ Schwikkard, Andrew St Q Skeen & Steph E van der Merwe, *Principles of Evidence*, 1997 at 388.

[32] *S v S 1995* (1) SACR (ZS) at 54h-i, citing Spencer and Flin, *The Evidence of Children*, 1990 at 238. The case goes on to provide a critical discussion of these points in relation to the testimony of an 11-year-old in the case before it

[33] See, for example, Helene Combrinck, "Monsters under the bed: challenging existing views on the credibility of child witnesses in sexual offence cases", 8 *SACJ* 326 (1995) at 328; P Zieff (n31) at 24-ff.

*hand, to avoid punishment, to keep promises not to tell or to avoid revealing embarrassing information, most children will deny knowing information about an event that they know occurred.* [34]

The Ontario Law Reform Commission concluded in 1991:

*The behavioural science research conducted in the past twenty years has demonstrated that the traditional views about the unreliability of children's evidence have no empirical support. Children, as a class of witnesses, do not have poorer memories than adults and they do not have greater difficulty distinguishing fact from fantasy in the context of witnessed events. Moreover, studies show that adult witnesses are susceptible to distortions as a result of suggestions and post-event influences in their description of particular events. Finally, modern research has demonstrated that there is no foundation to the statement that a relationship exists between age and honesty – the testimony of a child is as trustworthy as the evidence furnished by an adult witness.* [35]

Similarly, the Australian Law Commission made the following statement in a 1997 report:

*Recent research into children's memory and the sociology and psychology of disclosing remembered events has established that children's cognitive and recall skills have been undervalued. At the same time other research has demonstrated that adult testimony is not always reliable, showing that mature witnesses' memories can be equally fragile and susceptible to the distorting influences of suggestion and misinformation. The presumed gulf between the reliability of evidence from children and that from adults appears to have been exaggerated.* [36]

In light of a more sophisticated understanding of the thought processes of children and adults, there is no need for automatic caution when children give evidence. Cautionary rules regarding the testimony of children have been repealed in Canada, Western Australia, New Zealand, England and all US states. [37]

It is suggested that a similar reform should be implemented in Namibia, by enacting legislation which prohibits a court from considering the testimony of children to be *inherently* unreliable. The proposed provision is as follows:

***Treatment of evidence of children***

***The evidence of a child is not inherently unreliable and shall be evaluated in the same manner as any other evidence.***

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[34] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Report No 84, 1997 at. 307.

[35] Ontario Law Reform Commission, *Report on Child Witnesses*, 1991 at 17-18.

[36] Australian Law Reform Commission (n34) at 305.

[37] In England, corroboration of a child's evidence ceased to be a requirement as a result of section 34 of the Criminal Justice Act 1988. All US states had repealed corroboration requirements for the testimony of child victims in sexual offence cases by 1987. Zieff (n31) at 29.

# Closed Circuit Television and Screens

*Closed circuit television*

Regarding a child's appearance in court, Mr. WGM van Zyl, Regional Court President of Natal says:

> *The assault that was already such a traumatic experience for the child is followed by interrogation by the Police which again revives the whole unpleasant experience. Now, after months, the child is asked to relate the whole story and go through everything in his or her mind. It may be expected that he or she will be afraid and upset; and if he or she is taken into a large court room with its exalted bench and other paraphernalia a measure of dread perhaps descends upon him. Besides his guardian he sees the accused who assaulted him and some other strangers in black robes. Can he then be blamed if he freezes and does not know what to say, or just says anything to escape from this situation as soon as possible? We must bear in mind that the tension rises in the presence of his assailant, who has probably threatened him with death should he dare tell what really happened.* [38]

Since 1987, several countries have permitted the use of closed circuit televisions when vulnerable witnesses are testifying in criminal cases. South Africa, Zimbabwe, Canada, the United Kingdom, New Zealand, Wales, at least 33 US states and several Australian jurisdictions (the Australian Capital Territory, New South Wales, Queensland and Victoria) have all enacted legislation allowing the use of closed circuit television. In New South Wales, it is *mandatory* for a child under the age of ten to give evidence by means of closed circuit television in criminal proceedings involving assault or abuse of the child, unless there is no available court equipped with the necessary facilities. [39] Saskatchewan (Canada) allows the use of closed circuit television, screens and similar devices for witnesses under the age of 18 in civil proceedings as well as criminal ones. [40] The Ontario Law Reform Commission and the Australian Law Commission have recommended that closed–circuit television be made available to child witnesses in civil proceedings as well as criminal cases, while the Scottish Law Commission has recommended that this mechanism be available to child and adult witnesses in both civil and criminal proceedings. [41]

In South Africa, a 1996 amendment to the Criminal Procedure Act provided that a court

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[38] South African Law Commission, *Sexual Offences Against Children*, Issue Paper 10, Project 108, 1997 at 13.

[39] New Zealand Law Commission (n8) at 26; Ontario Law Commission (n34) at 81.

[40] Sections 42-42.3, Saskatchewan Evidence Act, RSS 1978, c. S-16, as amended by the Saskatchewan Evidence Amendment Act, 1989, SS 1989-90, c. 57, section 4. See Ontario Law Reform Commission (n35) at 76.

[41] Ontario Law Reform Commission (n35) at 82-83; Australian Law Reform Commission (n34) at 342.

may order in any criminal proceeding that a witness or an accused may give evidence by means of closed circuit television or other electronic means. Such an order can be made at the initiative of the court, or on application by the public prosecutor or the witness or accused in question. The person who is to give evidence electronically must consent to the procedure. Such an order may be made only if the relevant facilities are readily obtainable and if it appears to the court that the technique would

> (a) prevent unreasonable delay
> (b) save costs
> (c) be convenient
> (d) be in the interest of the security of the State or of public safety or in the interests of justice or to the public; or
> (e) prevent the likelihood that prejudice might result to any person if he or she testifies or is present at such proceedings. [42]

Thus, in South Africa, the procedure could be used for any witness. (The purposes of this South African provision are obviously much broader than the goal of protecting vulnerable witnesses.)

Another South African provision makes it possible for the court to direct that any witness under the age of 18 may give evidence outside the sight and hearing of any person who may upset that witness, with the use of electronic or other devices. However, this mechanism can be triggered only by the appointment of an intermediary for the witness, who can convey questions to the witness in appropriate language and manner. [43]

In New Zealand, a pilot study was conducted in six trials involving child victims of sexual abuse. The researchers concluded that the use of closed circuit televisions was not unfair to either the accused or the prosecution. [44] The use of closed-circuit television is an excellent protective device for several reasons. First, the child is protected from the "anxiety-inducing courtroom 'full of strangers and rituals.'" [45] Second, the child does not have to physically confront the accused. Finally, the court is able to obtain a more detailed and accurate account of the events from the vulnerable witness.[46]

The disadvantages of closed circuit television are that the judge has no opportunity for direct contact with the witness. The trier of fact must, therefore, assess credibility from a television image which might be distorted or enhanced. It has also been argued that a vulnerable witness, particularly an adult or older child, who does not testify in open court will not experience any potential "therapeutic effect" from relating the story in court. [47] In order to address these two purported drawbacks to the use of closed circuit television,

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[42] Criminal Procedure Act 51 of 1977, section 158, as amended by section 78, Criminal Procedure Amendment Act 86 of 1996. The provision is re-printed in full in Appendix 4.

[43] Criminal Procedure Act 51 of 1977, section 170A, as amended by section 78, Criminal Procedure Amendment Act 135 of 1991. The provision is re-printed in full in Appendix 4.

[44] Australian Law Reform Commission (n34) at 307.

[45] Ontario Law Reform Commission, (n35) at 78.

[46] *Ibid.*

[47] *Id.* at 79.

Western Australia offers the following solution. The vulnerable witness testifies in the courtroom while the *accused* observes the witness from another room by use of a closed-circuit television link. [48]

In Namibia providing closed-circuit television equipment in all courtrooms would be expensive. Most serious crimes are heard in the High Court in Windhoek. It is therefore recommended that closed circuit television be introduced only in the High Court (and possibly in the Regional Magistrate's Court as well). It is also recommended that Namibia give the court the flexibility to follow the example of Western Australia in appropriate cases, by leaving the vulnerable witness in the room with the presiding officer and the legal representative of the accused (if there is one), allowing the accused to observe the testimony on closed circuit television. The choice of appropriate physical arrangements could be left to the discretion of the presiding officer and the prosecutor, depending on the particular needs of the witness.

*Screens*

Screens allow the vulnerable witness to be present in court while he/she testifies, but make it impossible for the witness to see the accused. The purpose of the screen is to make it harder for the accused to intimidate or unnerve the witness. Screens are used in criminal proceedings in Zimbabwe, South Africa, England, Wales and many U.S. states. [49] They are used in civil proceedings as well as criminal ones in Saskatchewan (Canada), and this has been recommended in several other jurisdictions. [50]

There are various types of screens -- solid mobile screens, including white boards, curtains or hinged panels covered with cloths, or one-way glass. [51] Screens are an inexpensive way to help a vulnerable witness feel more comfortable in the courtroom. It should be noted that many countries, such as Canada, make use of one-way screens which allow the accused to see the witness even though the witness cannot see the accused. This type of screen is preferable because it preserves the accused's ability to observe the witness's demeanour. However, the vulnerable witness should *not* be able to see the accused at all. [52] Some two way mirrors allow the witness to see a diffused outline of the accused. This must be avoided to accomplish the objective of making the vulnerable witness feel safe and comfortable.

Screens are inexpensive and do not involve any sophisticated technology. Also, this method of shielding the vulnerable witness leaves no danger that that an equipment breakdown in a remote area will undermine the objective of the device (as might be the case with more complex technology such as closed circuit television). It is suggested that

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[48] *Ibid*.

[49] Ontario Law Reform Commission (n35) at 73; Zimbabwe Criminal Procedure and Evidence Amendment Act 8 of 1997, Part XIVA, Protection of Vulnerable Witnesses, Section 319B(iii).

[50] See note 40 above.

[51] New Zealand Report (n1) at 23.

[52] New Zealand Law Commission (n8) at 30.

screens should be used to separate the vulnerable witness from the accused (or from an intimidating party to civil proceedings) in magistrate's courts.

The following legislative provision is proposed concerning closed circuit television and screens:

***Alternative methods of giving evidence***

***The court may—***

***(a) on its own initiative***
***(b) on the application of a party to the proceedings or***
***(c) on the application of the vulnerable witness***

***direct that a vulnerable witness shall give evidence in any position or place, whether in or out of the presence of the accused or any party to the proceedings, that the court considers will reduce the likelihood of the vulnerable witness suffering stress or being intimidated: Provided that such accused or such party to the proceeding and his or her legal representative (if any) must be able to see and hear the witness giving evidence, whether directly or indirectly through electronic or other devices.***

## Constitutional Issues Concerning Closed-Circuit Television and Screens

With respect to criminal cases, it may be argued that allowing witnesses to give evidence from behind a screen or out of court violates an accused's right to confront his or her accusers. Challenges of this nature have been considered by courts in various jurisdictions.

For example, the Sixth Amendment of the US Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him". In the 1990 US case of *Maryland v. Craig* [53] , the Supreme Court considered whether the use of closed circuit television for child testimony violated this constitutional right. The right of confrontation has previously been interpreted very strongly in the US, with a 1988 case holding that the Sixth Amendment guarantees the accused a face-to-face meeting with an opposing witness appearing before the trier of fact. [54] Nevertheless, a majority of the Court held that a child could testify by means of one-way closed circuit television if it was shown that the procedure was necessary in the circumstances of that particular case to protect the child from the trauma that would result from testifying in the presence of the accused.

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[53] 497 US 836 (1990).

[54] *Coy v Iowa*, 487 US 1012 (1988), which held that the use of a screen which prevented two child witnesses in a child abuse case from seeing the accused was unconstitutional because the exception to the general rule requiring face-to-face confrontation was not based on any particular findings about the witnesses in question but on a general "legislatively imposed presumption of trauma".

In reaching its decision the Court took into account the state's interest in furthering the important public policy of protecting the physical and psychological wellbeing of child abuse victims. It also noted that the procedure in question preserved the essence of effective confrontation by allowing for an oath, full opportunity for contemporaneous cross-examination and an opportunity for the trier of fact and the accused to observe the demeanour of the witness. The Court also noted that hearsay exceptions have not been considered a violation of the accused's right to confront witnesses. The Court concluded that the US Constitution does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, "ensures the reliability of the evidence by subjecting it to rigorous adversarial testing".

A similar challenge was considered by the Canadian Supreme Court in the 1993 case of *R v Levogiannis,* which involved allegations of child sexual abuse. [55] The Canadian Criminal Code provides that a judge may permit a complainant under the age of 18 to testify behind a screen in cases involving certain specified offences, if the judge is of the opinion that the use of a screen is necessary to obtain a full and candid account of the acts complained of (section 486(2.1)). The screen blocks the witness's view of the accused, without obstructing the accused's view of the witness. The Supreme Court considered whether this procedure violates the accused's right to a trial which is in accordance with the "principles of fundamental justice" (in terms of section 7 of the Canadian Charter of Rights), or the right to a "fair" hearing (in terms of section 11 of the Charter).

The Canadian Supreme Court followed a line of reasoning similar to that of the US Supreme Court. It held that accused's right to have an unobstructed view of the accused is an accepted tradition of the Canadian legal system, but not a fundamental or absolute right. The basic elements of confrontation remain in place when a one-way screen is used – the right to cross-examination, the ability to observe the witness as he testifies, and the subjection of the witness "to the rigours of the courtroom and cross-examination". The mechanism of the screen is aimed simply at enabling the child witness to recount the evidence more fully and candidly because of the more appropriate setting.

The Canadian Supreme Court pointed to precedents from other countries with similar holdings. The English Court of Appeal upheld the use of a screen which blocked child victims in a sexual abuse case from seeing the accused, as well as blocking the accused's view of the witnesses – all in the absence of any legislation specifically authorising such a procedure. The Court made the following remarks:

> *It had become apparent from experience that children in cases such as this, not surprisingly, were shown to be reluctant to give evidence at all. Again we are told that there had been cases which had collapsed simply because the child was unwilling or unable to speak as to the facts of which he or she was expected to speak. Consequently it seemed to the court… that steps ought to be taken in order if possible to remedy that situation, if that could be done without unfairness to the defendants.*
>
> …

[55] [1993] 4 SCR 475.

> *The learned judge has the duty on this and on all other occasions to see that justice is done. Those are high sounding words. What it really means is, he has got to see that the system operates fairly; fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies. He came to the conclusion that in these circumstances the necessity of trying to ensure that these children would be able to give evidence outweighed any possible prejudice to the defendants by the erection of the screen.* [56]

A New Zealand Court of Appeal case cited by the Canadian Supreme Court similarly involved the use of a screen to shield a 12-year-old victim of sexual assault during her testimony. In upholding the use of the screen, one of the judges remarked:

> *Confrontation in the sense of being in the presence of one's accusers is one thing; but confrontation merely to afford the opportunity to glower at and thereby intimidate witnesses is another. The sight of an accused person from whose actions a child has lived in terror in the past is very likely to intimidate that child in the giving of evidence about that accused, particularly when the evidence involves him in incidents of the most intimate and degrading kind.* [57]

The constitutionality of allowing child testimony via closed circuit television was also considered in the South African case of *K v Magistrate NO and Others.* [58] Here it was argued that the accused's right to a "public" trial was infringed if the accused and the witness were not in the same room. The court found that the right to a public trial is aimed at preventing secrecy and prejudice and at maintaining public confidence in the judicial system – but it does not guarantee the right of the accused and the witness to be physically present in the same room. [59] Citing the Canadian case of *R v Levogiannis,* the court went on to hold that the use of closed circuit television does not infringe any other constitutional right of an accused to a fair trial:

> *A proper balance between the protection of a child witness and the rights of an accused to a fair trial can, in my view, be achieved by permitting the witness to testify in congenial surroundings and out of sight of the accused.* [60]

The Namibian Constitution provides that all persons are presumed innocent until proven guilty and have the right to call witnesses and cross-examine those witnesses called against them. It also states that all persons shall be entitled to a "fair and public hearing" in the determination of their civil rights and obligations or any criminal charges against

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[56] *R v D.J.X.* (1989) 91 Cr App R 36 (Eng CA) at 39-41.

[57] *R v Accused (T 4/88)* [1989] 1 NZLR 660 (CA).

[58] 1996 1 SACR 434 (E).

[59] At 446-447, citing the US Supreme Court case of *Richmond Newspapers Inc v Commonwealth of Virginia* 65 L Ed 973.

[60] At 448d.

them. [61] The Namibian Constitution does not explicitly guarantee a right to confrontation, although the basic tenets of this concept are probably incorporated in the concept of "fair trial". [62]

Based on the decisions of courts in other jurisdictions, the use of screens and closed circuit television should survive a constitutional challenge in Namibia provided that the other elements of confrontation (testimony under oath, cross-examination and the opportunity to observe witness demeanour) remain intact.

The cases cited from other jurisdictions defending the use of screens and closed circuit television all concern criminal cases involving child sexual abuse. The proposal for Namibia would make it possible for a presiding officer to direct that screens or closed circuit television be used in appropriate civil cases as well. However, this would not seem to create a problem since the essentials of the right to confront witnesses are not undermined by such procedures, and since constitutional and case law standards in respect of criminal cases are generally stricter than those for civil cases.

## Intermediaries

The purpose of using a screen or closed circuit television may be undermined if the vulnerable witness must speak directly with an undefended accused (or the intimidating party in a civil proceeding). Furthermore, it may be desirable to use some form of intermediary to ensure that a vulnerable witness can understand questions clearly, and to protect the witness from unnecessarily intimidating cross-examination.

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[61] Article 12(1)(a), and (1)(d) which states " All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them."

[62] With respect to the concept of "confrontation", it should be noted that section 158 of Namibia's Criminal Procedure Act 53 of 1977 provides that all criminal proceedings in any court should take place in the presence of the accused except as expressly provided by law. Section 159 of the Act deals with certain circumstances in which a criminal trial may proceed in the absence of the accused. This is permitted when the accused conducts himself in a manner which makes his continued presence impracticable. It is also permitted where there are two or more accused and one of them is absent without leave or cannot be present because of his or her physical condition, or because of circumstances relating to the illness or death of a member of the family. In such cases, the trial may proceed if the court determines that postponement would cause "undue prejudice, embarrassment or inconvenience to the prosecution or any co-accused or any witness".

In construing a similar legislative provision, the South African decision of *S v Motlatla* 1975 (1) SA 814(T) at 815D-F. held the following regarding the meaning of "in the presence of the accused":

*... it means more than that an accused person must know what the State witness are saying or have said about him. It means even more than that he shall be able to hear them saying it. There must be a confrontation; he must see them as they depose against him so that he can observe their demeanour. And they for their part must give their evidence in the face of a present accused. The denial in the present case of that right was of so fundamental a nature that in my judgment it amounts per se to a failure of justice...*

However, the facts of this case were that an additional accused was joined in the middle of a criminal trial, without having been present – or even part of the case – during material portions of the trial. The recorded evidence of the complainants who had already testified was played back to the latecomer and then the trial proceeded. Thus, this situation affected the goal of "confrontation" in a manner very different from the use of screens or closed circuit television.

There are several different models for the use of intermediaries. One approach is a two-way use of the intermediary, such as in Western Australia. Western Australia refers to such persons as "communicators" and expresses their function as follows:

> *The function of a person appointed under this section is, if requested by the judge, to communicate and explain—*
>
> > *(a) to the child, questions put to the child; and*
> > *(b) to the court, the evidence put by the child.* [63]

A second model is to allow questions to be put to the witness through the intermediary, but not to allow the intermediary to convey responses. One example of such a model is Ireland. [64] Another is South Africa, which amended its Criminal Procedure Act in 1991 to allow witnesses under the age of 18 to give evidence in criminal proceedings through an intermediary, if it appears to the court that the child would be exposed to undue mental stress or suffering if he or she testifies directly. All examination, cross-examination and re-examination of the witness, except examination by the court, must take place through the intermediary. The intermediary may "convey the general purport of any question to the witness" unless the court directs that the question must be relayed verbatim. Where an intermediary has been appointed by the court, the witness may give evidence behind a screen or through electronic means. The Minister of Justice takes responsibility for determining what persons or classes of persons are competent to be appointed by the court as intermediaries. [65]

The following categories of persons have been identified as competent intermediaries:

- medical practitioners specialising in paediatrics or psychiatry;
- family counsellors who also have qualifications as teachers,
- social workers or psychologists;
- child care workers who have four years of experience and have completed a specified course;
- registered social workers with at least two years experience;
- teachers with at least four years experience; and
- clinical, educational or counselling psychologists. [66]

According to the South African Law Commission:

> *The success of the intermediary system in South Africa has not been evaluated*

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[63] Section 106F(20, Evidence Act 1906 (quoted in New Zealand Law Commission (n8) at 44.)

[64] New Zealand Law Commission (n8) at 44.

[65] Criminal Procedure Act 51 of 1977, section 170A, as amended by section 78, Criminal Procedure Amendment Act 135 of 1991. The provision is re-printed in full in Appendix 3.

Israel goes even further by allowing children who are victims of sexual offences to give evidence totally by means of a surrogate. The child is interviewed at an early stage by a "youth interrogator" who presents the evidence in court. The child does not have to appear at all, although an accused cannot be convicted on the evidence of an interrogator without corroborating evidence. South African Law Commission (n38) at 61-2.

[66] GN R1374 Gazette 15024 of 30 July 1993, as amended by R360 in Gazette 17882 of 28 February of 28 February 1997.

> *authoritatively. What appears necessary is that intermediaries should be experienced in interviewing children and specially trained in child language, psychology and the relevant law with particular emphasis on the law of evidence, which is not always the case. The supporting technological aids (video cameras, etc) are also not readily available at all times.* [67]

Zimbabwe has adopted a system which is similar to that of South Africa. The court may appoint n intermediary for any witness who is identified as a "vulnerable witness" in a criminal matter. The intermediary must be a court interpreter, or a person who has undergone approved training in the functions of an intermediary. Where the court has appointed an intermediary, no party to the criminal proceeding may put questions to the witness except through the intermediary, although the court may choose to address the witness either through the intermediary or directly. The intermediary must convey the "substance and effect" of any question put to the witness, and may relay the witness's answer to the court provided that the intermediary "shall, so far as possible, repeat to the court the witness's precise words". The court is entitled to give due regard to any effect that the appointment of the intermediary has had on the witness's evidence and on cross-examination of the witness. [68]

A third possible alternative is the approach taken in Canada, where an accused is forbidden to cross-examine a witness under the age of 18 personally in sexual offence or assault cases. Unless the presiding officer is of the opinion that the proper administration of justice requires that the accused cross-examine the witness personally, the presiding officer appoints counsel for the purpose of conducting the cross-examination. [69] This approach is available even in cases where testimony is not taking place behind a screen or via closed circuit television. However it is particularly important in those circumstances, to ensure that the objective of shielding the witness from the accused is not undermined.

A fourth possibility would be to require that all communications with the vulnerable witness be channeled through the presiding officer. None of the jurisdictions examined utilises such an approach, however – perhaps because the jurisdictions which have been examined, like Namibia, have legal systems predicated on an adversarial model rather than an inquisitorial approach. This approach could also prove practically difficult – if a witness is testifying behind a screen where he or she can see the presiding officer but not the accused, it may be difficult to maintain this layout while still allowing the accused to

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[67] South African Law Commission (n38) at 63. A South African NGO recently reported that "one court has been set aside at Wynberg in Cape Town as a Special Court for children to testify via a mediator. Unfortunately, this court buckles under the case loads, at times causing chaos." Anita Marshall and Vanessa Herman, *Child Sexual Abuse in South Africa,* RAPCAN (Resources Aimed at the Prevention of Child Abuse and Neglect), 1998 at 43.

South Africa was criticised for originally making the use of mechanisms such as screens and closed circuit television dependent on the appointment of an intermediary. The possibilities for using closed circuit television were broadened in 1996 by an amendment to section 158 of the Criminal Procedure Act, which is discussed above.

[68] Zimbabwe Criminal Procedure and Evidence Amendment Act 8 of 1997, Part XIVA, Protection of Vulnerable Witnesses, sections 319B, 319F-H.

[69] Section 486(2.3), Canadian Criminal Code. See also Nicholas Bala, *Criminal Code Amendments to Increase Protection to Children and Women: Bills C-126 & C-128*, 21 C. R. 4th 365.

communicate questions through the presiding officer.

An alternative to the use of an intermediary is to appoint an expert witness who can advise the court on the most appropriate phrasing of questions and shed light on the actual meaning of confusing or ambiguous statements made by a vulnerable witness. [70]

The New Zealand Law Commission makes a case for giving the courts a fairly broad discretion in respect of intermediaries:

> *The Commission believes that witness should be able to use intermediaries whenever their assistance is necessary to enable the witness to understand the questions put to them in court. We propose that in any case where the rational ascertainment of facts would be assisted by the use of an intermediary, the judge should have a discretion to direct that one be provided. The judge should also have a discretion as to who may act as intermediary. In many cases communication difficulties can be best addressed by lawyers and judges being sensitive to the characteristics of particular witnesses, but in some cases the assistance of a specialist intermediary may be more effective…*
>
> *... It would be part of the judge's role to give guidance to the intermediary on how they are to perform their functions in a particular case and to oversee the fairness and accuracy of rephrased questions.* [71]

The proposed provision would also give the court discretion to appoint intermediaries for vulnerable witnesses, and to guide their role in the case. Different degrees of intervention may be necessary in different cases. For example, a highly-trained intermediary might be necessary in a case involving a very young child or a person with mental disabilities which hamper his or her ability to communicate, while a lower level of mediation might suffice in a case involving an older child or an adult witness without disabilities.

***Intermediaries***

***(1) The court may—***

***(a) on its own initiative***
***(b) on the application of a party to the proceedings or***
***(c) on the application of the vulnerable witness***

***appoint an intermediary for the vulnerable witness from a list of persons approved for this purpose by the Minister in the* Gazette.**

***(2) The court may order that all questions directed to a vulnerable witness by any party to the case, or by the legal representative of any party, shall be communicated to the vulnerable witness through the intermediary appointed by the court.***

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[70] See New Zealand Law Commission (n8) at 446

[71] *Id*. at 45-6. The New Zealand Law Commission also suggests that the intermediary should take an oath and be subject to a criminal sanction if he or she makes a wilfully misleading or false statement. *Id.* at 46.

***(3) An intermediary shall convey the substance of the question to the vulnerable witness in a vocabulary and manner suited to the circumstances and understanding of the vulnerable witness: Provided that the court may address the vulnerable witness directly or through the intermediary.***

***(4) The court may ask the intermediary to give an opinion on the appropriate interpretation of the response of the vulnerable witness to any question.***

***(5) An intermediary who is not in the full-time employment of the state shall be eligible for the same remuneration and allowances as an expert witness.***

***(6) It shall be an offence punishable by a fine of up to N$XXX or a term of imprisonment not exceeding X years for an intermediary to wilfully make a false, inaccurate or misleading statement to the vulnerable witness, the court or any person involved in the proceedings.***

## Pre-recorded videotaped evidence

Some countries – including Canada, New Zealand, Sweden and some US states – allow pre-recorded videotaped interviews with child witness (or other vulnerable witnesses) to be introduced into a subsequent trial. The purpose of this technique is to record evidence while recollections are still fresh, and to allow traumatic events to be spoken about in a less forbidding setting, often with the assistance of persons with special training in how to deal with children.

The following reasons have been advanced in support of such videotaping:

> *First, videotaping may reduce the number of pretrial interviews required of the child, Second, videotaping the statements lessens the chance of inflicting further harm on the child by, at least, lessening the stress at trial. Third, videotaping may increase the accuracy of the testimony since the child may feel more comfortable and be more forthcoming in the atmosphere in which the video is recorded. Fourth, the admission of a videotape may prompt a guilty plea by the defendant and eliminate entirely the need for the child to appear as a witness in court. Finally, videotaping preserves an early account of the alleged events including the gestures and facial expressions accompanying the child's initial statement.* [72]

In some countries, such a videotape becomes evidence as if the statements were made in court, with an opportunity for cross-examination on the contents of the videotape and the circumstances in which it was made. For example, section 715.1 of the Canadian Criminal Code states:

> *In any proceedings relating to [a list of specified offences] in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is*

[72] Reasons cited in the Canadian case of *R v F (CC)* [1997] 3 SCR 1183 at paragraph 28.

*admissible in evidence if the complainant, while testifying, adopts the contents of the videotape.*

This technique was upheld against constitutional challenge by the Canadian Supreme Court in the 1993 case of *R v L (D.O.)* [73], which was elaborated upon in the 1997 case of *R v F (CC)* [74] The Court found that the technique did not infringe the accused's right to a fair trial because the child who was interviewed on videotape had to meet the usual competency requirements, adopt the videotape testimony on the witness stand and be subject to cross-examination.

Most US states which have adopted this approach also require that the witness be available for cross-examination on the evidence contained in the videotape. [75]

Other countries allow videotaped interviews with a child witness to substitute for the child's participation in the trial altogether. One suggested model along these lines proposes that the accused's legal representative be allowed to direct the examiner at the pre-recorded interview through an earphone to put certain questions to the child – which makes the pre-recorded interview not much different from giving evidence through an intermediary by means of closed circuit television at the trial itself. [76] Western Australia utilises a pre-trial hearing attended by the parties, lawyers, witness and support person which is videotaped for subsequent use at the trial, thus resembling the trial in every relevant aspect but timing. [77] This approach is sometimes referred to as "videotaped testimony" because of its incorporation of the usual courtroom requirements. [78]

The use of pre-recorded videotape interviews is not recommended for Namibia at present. It is probably not feasible to ensure that all child witnesses – or even all child sexual abuse victims – are immediately interviewed by a trained child psychologist or other expert personnel. It is also possible that a videotaped interview conducted by someone without a proper background in the rules of evidence and legal procedures could inadvertently reduce the likelihood of a conviction by included confusing or irrelevant information. On the other hand, if the pre-recorded interview were conducted by police, specialised training in interview skills relating to children would be required. Another consideration is the expense of providing appropriate video equipment in locations accessible throughout the country.

In addition, given the legal backgrounds and traditions in Namibia, it is likely that the vulnerable witness would have to appear in court to adopt the pre-recorded testimony and undergo cross-examination, meaning that some of the protections envisaged by such a technique would be undercut. This would also raise the possibility that the witness would

[73] [1993] 4 SCR 419.

[74] [1997] 3 SCR 1183.

[75] *Id*. at paragraph 25.

[76] South African Law Commission (n38) at 63; Zieff (n30) at 40-ff.

[77] New Zealand Law Commission (n8) at 38-39. The New Zealand Law Commission has suggested that this model should be adopted in New Zealand as well.

[78] See Ontario Law Reform Commission (n35) at 88.

contradict the evidence on the videotape during cross-examination, because of the lapse of time or perhaps because the videotape was taken at an early stage while the victim was still extremely upset. [79] Another drawback would be that the vulnerable witness might have to undergo even more cross-examination than under normal procedures, being questioned both on the events referred to in the videotape and on the circumstances of the videotaped interview.

Some of the other potentially problematic aspects of this approach are evident from the list of factors which the Canadian Supreme Court suggests for consideration before the pre-recorded videotape can be admitted into evidence:

> *(a) the form of questions used by any other person appearing in the videotaped statement;*
>
> *(b) any interest of anyone participating in the making of the statement;*
>
> *(c) the quality of the video and audio reproduction;*
>
> *(d) the presence or absence of inadmissible evidence in the statement;*
>
> *(e) the ability to eliminate inappropriate material by editing the tape;*
>
> *(f) whether other out-of-court statements by the complainant have been entered;*
>
> *(g) whether any visual information in the statement might tend to prejudice the accused (for example, unrelated injuries visible on the victim);*
>
> *(h) whether the prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant;*
>
> *(i) whether the trial is one by judge alone or by a jury [obviously not a relevant consideration in Namibia]; and*
>
> *(j) the amount of time which has passed since the making of the tape and the present ability of the witness to effectively relate to the events described.* [80]

For all these reasons, no provision on the use of videotaped evidence is recommended for Namibia at this time. It is submitted that many of the same objectives could be met by giving cases involving vulnerable witnesses priority so that evidence could be given while the events are still fresh in the witness's mind, and by the use of screens or closed circuit television and intermediaries. The use of pre-recorded videotape evidence could, however, be considered as a possibility for introduction at a later stage.

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[79] This problem arose in the Canadian case of *R v F (CC)* [1997] 3 SCR 1183.

[80] *Id* at paragraph 51.

## Support Persons

In Canada, Zimbabwe and several U.S. states and Australian provinces, statutes have been passed which permit a vulnerable witness to have a supportive person present during court proceedings. [81] In Zimbabwe, the court has discretion to appoint a support person for a vulnerable witness in any criminal case. The support person may sit or stand near the witness while the witness is testifying. [82] In Western Australia, a child witness under the age of 16 or a person who is declared to be a "special witness" is entitled to have a support person close by while he/she is testifying in any court proceedings. [83]

The function of the support person has been well-described by the Law Reform Commission of Western Australia:

> *"Support" can, of course, cover a wide range of activities. At its minimum it would usually involve accompanying a child to court and sitting near him or her either in court (or in a monitor room) when he or she is giving evidence. In the United States, where some very young children have given evidence, the support person has been the child's mother who has held the child on her lap while the child was questioned. The role of the support person is to give the child some emotional security in a strange situation, thereby enhancing the child's ability to withstand the ordeal of giving evidence. This is valuable for both child and prosecution. It is not the part of the support person to coach or prompt the child in what he or she has to say, but the role should not preclude a gentle encouragement to "tell the judge what happened' when a child seems to freeze, or giving a soothing pat to a distraught witness. Experience will obviously determine acceptable limits to such support and provide guidelines for support persons.* [84]

The presiding officer should decide what role the support person should take. While it is clear that the support person may not coach a witness at any time, the witness must be able to see the support person at all times. If it is a child, physical contact may be important. In some cases, the witness may sit on the support person's lap. That may not be appropriate in other cases.

The use of support persons should follow these guidelines:

- The identity of the support person for the vulnerable witness should be known to the parties and to the vulnerable witness before the trial if possible. This will provide an opportunity for parties to the case to raise any objections they might have to the intermediary in question, and it may

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[81] In Canada, the role of a support person is available only to child complainants in sexual offence and assault cases.

[82] Zimbabwe Criminal Procedure and Evidence Amendment Act 8 of 1997, Part XIVA, Protection of Vulnerable Witnesses, section 319G(3).

[83] See New Zealand Law Commission (n8) at 42.

[84] *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1990) at para. 4.83, quoted in New Zealand Law Commission (n8) at 41 (n166).

help to allay the fears of the vulnerable witness about the forthcoming court appearance.

- Support persons should receive written guidance on their role with particular reference to the extent of permitted communication with the vulnerable witness, whether or not any comfort can be provided, and whether they may interrupt the questioning in the event of an error by counsel.

- The person accompanying the witness should be permitted to alert the judge in the event of any problem arising for the vulnerable witness while giving evidence. [85]

The Scottish Law Commission has pointed to the advantages of using a support person, noting that "the presence, close at hand, of a parent or some other trusted adult can, in some cases, give a young child the reassurance that is required for evidence to be given clearly and confidently."[86]

The following provision on support persons is suggested for adoption in Namibia:

***Support persons***

***(1) A court shall appoint a support person in respect of any witness who is found to be a vulnerable witness in terms of section 1.***

***(2) Such a support person shall be a parent, guardian, or other relative of the witness, or any other person whom the court deems appropriate to provide the witness with support while the witness gives evidence: Provided that a person who is a party to the proceedings or a prospective witness may not be appointed as a support person.***

***(3) Where a support person has been appointed for a vulnerable witness, the support person shall be entitled***

***(a) to sit or stand near the witness while the witness is giving evidence in order to provide support for the witness;***

***(b) to interrupt the proceeding to alert the presiding officer to the fact that the vulnerable witness is experiencing undue distress, or to any other problem which may affect the testimony; and***

***(c) to perform any other supportive functions as directed by the presiding officer;***

***Provided that a support person shall not advise the vulnerable witness on how***

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[85] New Zealand Law Commission (n8) at 43.

[86] *Id*. at 92.

***to answer any question posed by the court, by any party to the proceeding, or by the legal representative of any party to the proceeding.***

## Facilities

The use of screens and closed circuit television is proposed so that vulnerable witnesses are separated from the accused while testifying. However, vulnerable witnesses should not only be separated from the accused while testifying but at any time when the witness is in the courthouse. If vulnerable witnesses are not separated from the accused while waiting to testify, the use of screens and closed circuit television will be meaningless.

The Working Party on Child Witnesses in New Zealand suggests that special arrangements should be made to protect the vulnerable witness from contact with the accused or his/her supporters in the following circumstances:

- entry to and exit from the court building;
- while waiting to testify, by provision of a private waiting area in a room of sufficient size to accommodate the vulnerable witness and the witness's supporters;
- entry to and exit from the courtroom;
- entry to and exit from the witness box or the closed circuit television room; and
- during access to toilets.[87]

The New Zealand Working Party states, "The need for improved facilities should not need to await major building projects in the courts. Short term arrangements to better provide for child witnesses (and therefore other witnesses who need some protection) must be arrived at." [88]

In Namibia, prosecutors, the police, and victim support groups should come together to propose and implement short term arrangements to protect vulnerable witnesses from disturbing contacts while they are at court. This can be accomplished by utilising simple, cost-free measures, such as

- allowing the vulnerable witness to use a separate entrance/exit and to wait in the prosecutor's office with the support person until it is time to testify
- providing for entry to and exit from the courtroom in such a way that the accused is hidden from view by the screen

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[87] *Id*. at 29.

[88] *Id*. at 30.

- providing for the vulnerable witness to be escorted to the toilet by a support person while a clerk or other employee waits by the entrance to ensure privacy.

The same groups should be consulted with respect to vulnerable witnesses whenever new court buildings or substantial renovations of existing court buildings are contemplated.

## Magistrates and judges

Presiding officers have the power to ensure that the court is not a hostile environment for a vulnerable witness. As the South African Law Commission notes:

> *Traditionally any courtroom has a spartan and severe appearance. The witness in particular experiences the witness box as forbidding, the more so because he or she gains the impression that the whole process is aimed at adversion, insinuation and contestation.* [89]

It is clear that presiding officers in Namibia must take steps to make vulnerable witnesses feel more comfortable while testifying. For example, in a recent case in the High Court, a five-year-old child sex abuse victim was required to stand on a chair while she testified because the judge could not see her. [90] This illustrates how current approaches expect children to conform to the court environment, rather than adapting the court environment for the comfort of the child (or other vulnerable witness).

Measures should be taken to ensure that the physical surroundings are more comfortable for the vulnerable witness. For example, a vulnerable witness might feel more comfortable testifying from a location other than the traditional witness box. [91] At the very least, furniture should be provided which fits a child witness. Presiding officers should also give the vulnerable witness breaks at appropriate intervals.

Magistrates and judges should prohibit lawyers from trying to intimidate vulnerable witnesses. They should also require that the language used in court can be easily understood by a witness who is a child (even if no intermediary is being used). [92]

Finally, magistrates and judges should receive specific training so that they may understand and effectively communicate with vulnerable witnesses. A. Yates comments that presiding officers must be educated in these respects "because through the use of their discretion they can influence the whole conduct of a trial and thereby control the treatment of children and other vulnerable witnesses."[93] The Ontario Law Commission

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[89] South Africa Law Commission (n38) at 13.

[90] "Alleged Rapist Bribed Small Victim With Meat", *The Namibian*, 29 July 1998.

[91] *Ibid.*

[92] New Zealand Law Commission (n8) at 91.

[93] New Zealand Law Commission (n8) at 92.

notes that presiding officers who understand the results of research into children's memory, suggestibility, and the ability to differentiate fact from fantasy may help to dispel myths surrounding children's evidence. Presiding officers with proper sensitization will also be able to better control the line of questioning adopted by some counsel. [94] Judges in the High Court as well as the presiding officers in Magistrates' Courts should receive regular in-service training to help them understand and support vulnerable witnesses.

# VII. CONCLUSION

Steps must be taken in Namibia to ensure that the testimony of vulnerable witnesses is not inhibited because they are afraid or anxious about court. Measures must be adopted to prevent the perceptions such as that of a nine-year-old who explained the meaning of victim in the study conducted by Karen Muller and Mark Tait: "If you have a robbery and you go to court and they ask you questions and you don't know, you are a victim." [95]

The suggestions for reform in this paper are low cost, effective measures recommended to make the experience of vulnerable witnesses in court as comfortable as possible. The idea is to enact a set of measures which can be easily implemented without delay and without creating requirements for extensive personnel or administration. While some law reform is necessary, other measures suggested here are simple matters of policy and procedure which could be implemented immediately.

Additional and somewhat more complex measures have been canvassed here, but not recommended for immediate adoption. These could be considered at a later stage as a "second wave" of reforms following an assessment of the effectiveness of the initial innovations.

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[94] *Ibid.*

[95] Muller & Tait (n21) at 456.

# APPENDIX 1 – CRITICISM OF EXISTING NAMIBIAN POSITION BY OFFICE OF THE PROSECUTOR GENERAL AND HIGH COURT JUDGE

## 'Change the system!'

WERNER MENGES

The ordeal forced on rape victims facing their alleged attackers when they testify against them in Court has come under stinging criticism from the Office of the Prosecutor-General and High Court Judge Nic Hannah.

Both Judge Hannah and Prosecutor-General Hans Heyman have called for a review in the procedure followed when rape victims have to testify - and when especially child rape victims seem to be so put off that when they come face to face with their attackers that they are unable to testify, causing the case against the alleged rapist to collapse.

They want a system which allows victims to testify on video or with a screen between them and their charged rapists. Even more importantly, Heyman told The Namibian on Friday, urgent attention had to be given to providing treatment for rape victims, who now received only cursory counselling for psychological scars destined to remain with them for the rest of their lives in the absence of proper treatment addressing the horrors of being raped.

An accused person "always gets everything from the State", with State-paid defence lawyers being provided for the accused, noted Heyman "but nothing is done for the victim".

"If the State can pay for the accused's defence, why can't it pay for treatment for the victim?," he asked.

Heyman and prosecutors working in his office on Friday spoke out for a change in the Court procedure which, according to them, would require minimal funding but which has so far not been provided for in the Ministry of Justice budget.

About half of the rape cases tried in the High Court, Heyman said, ended in the accused being acquitted. This was because the complainants, especially children, experienced difficulties when they had to testify in the direct presence of their alleged attacker.

In addition, they were subjected to what he felt was often too robust cross-examination by defence lawyers being given too much free rein by presiding Judges.

What particularly irked him and his staff, he indicated, was the acquittal on a rape charge two weeks ago of a Karasburg man who had been convicted on two counts of indecently assaulting and raping two 10-year-old children in 1989.

The man received an effective five-year prison term for those convictions, but was once again charged with rape, also involving a 10-year-old girl, in connection with an alleged incident on August 9 last year.

On May 12, the man was acquitted by Judge Hannah in the High Court in Windhoek after the young girl apparently became panic-stricken when she had to testify and was unable to answer customary introductory questions from Judge Hannah.

The questions were aimed at establishing whether the child knew the difference between telling the truth or lying and whether she was thus a competent witness.

According to Public Prosecutor Hilma Hitula, who conducted the prosecution, the child "froze" when she saw her accused rapist in court. Despite prodding from Judge Hannah and Hitula, the child either remained silent or gave contradictory answers to questions on whether she knew

what happened when a person told lies, leading to the Judge disqualifying her as a competent witness.

Said Judge Hannah when he concluded his judgement: "It's quite plain to me that without the evidence of the complainant in this case, there is no case for the accused to answer on this indictment. I think it's time that we should try and adopt the kind of system that's adopted elsewhere in the United States and the United Kingdom, where complainants, certainly young complainants, are not subjected to the rather terrifying ordeal of appearing in a witness box..

"Thought should be given to young complainants giving their evidence on video-tape, where they are questioned without being subjected to the ordeal of appearing in Court."

What was needed, explained Heyman, were simple facilities which would shield complainants from the alleged rapists. Even the conversion of only one court room at the High Court would help, he said.

If fitted with either a screen between the testifying complainant and the accused, or with a video system through which a complainant, sitting in another room, could give her evidence, rape trials could be shifted to such a court room, Heyman suggested.

The Ministry of Justice, which has allocated N$2,425 million [sic] to the Directorate of Legal Aid for the 1998-99 financial year, has however not earmarked any money for such a change.

In the meantime, the Office of the Prosecutor-General has directed a funding request for such a change to the United Nations Development Fund for Women (Unifem).

Drawn up by Public Prosecutor Suzette Schultz, the funding proposal for US$47 200 (N$243 080) aims to strengthen the prosecution of cases involving violence against women by providing training to prosecutors and members of the Namibian Police Women and Child Abuse Centre.

It also suggests that alternative procedures such as the use of screens or separate rooms or video equipment in courts be introduced, and that training be done to better provide support to rape complainants.

The proposal stresses that "it is of the utmost importance that a form of emotional and psychological support should be provided for the traumatised victim and that a victim friendly atmosphere be cultivated in the criminal courts of Namibia".

An answer to the request is still being awaited.

*The Namibian*, 1 June 1998

# APPENDIX 2 – PROPOSALS FROM UNIT FOR SEXUALLY ABUSED CHILDREN, SWAKOPMUND

**Excerpt from submissions of Unit for Sexually Abused Children to Law Reform and Development Commission, 1996**

4. POSSIBLE SOLUTIONS FOR THE IDENTIFIED PROBLEMS

It is generally perceived that it will not be easy to alter the course of the law. Wrong still has to be proven wrong beyond reasonable doubt. It could, however, not hamper and would rather facilitate the court proceedings if a form of emotional/psychological support could be given to a child in crisis. Furthermore, it is the feeling of the committee that a vulnerable child should be protected against further trauma.

The committee has considered the following possible solutions and recommendations:

4.1 The child should give his testimony to a team of experts consisting of a social worker psychologist and a police officer so that he/she need repeat his/her painful and traumatic experience only once, but that everybody involved in the eventual court case will have an opportunity to get all the evidence needed.

4.2 The team should consist of people specially trained to deal with the child witnesses.

4.3 This interview can be video taped for use in court. The video tape will serve to help the child to remember facts he/she might otherwise forget in the timespan between the reporting of the case and the actual court case.

4.4 The accused could be present behind a one-way mirror when the interview takes place to fulfill the requirement that an accused has the right to hear the evidence against him. It will take away the stress caused to the child by having to face his abuser in a courtroom.

4.5 To be cost efficient, cases of sexual abuse should be handled on a regional basis. In this way only one court in a region need be equipped with the necessary equipment, such as one-way mirrors, video cameras, etc.

4.6 Another alternative is that the child could be questioned in another room equipped with a camera, while the people in court see the interview on a screen in the court. The same motivation as in 4.4 applies.

4.7 Immediately after the court has received a complaint, action should be taken to protect the child from further abuse. The court could perhaps place the abuser under strict orders not to see or contact the child at all, or remove the child to a place of safety.

4.8 The sexually abused child stands alone in the witness stand, often not in a position to verbalize he/she knows to be the truth. On the other hand it is seen that a child is easily convinced that he is wrong.

5. There are no proper facilities for an abused child eg. a place of safety, proper counselling and support in order to deal with the situation after the case has been closed.

6. The long timespan between the report of the abuse and the actual court proceedings, which can be dragged out for up to two years causes trauma to the child:

6.1 who cannot put the abuse behind him and come to terms with it until such time as the court case has been dealt with:

6.2 who has to live in fear of the abuser and his threats since the abuser has not been found guilty or sentenced and is thus free to come into contact with the child at any time:

6.3 who forgets the details of the actual incidents and who is then easily intimidated under cross-examination.

7. In sexual abuse cases not enough corroborative evidence exists in order to support the children – often the child is the only witness due to the secretive nature of the abuse. Thus it is often the case that the court is not satisfied with the evidence of the child as an only witness and finds it difficult to prove beyond reasonable doubt that a crime has been committed.

8. Cases on sexual abuse of children are not always held in camera. The identities of the accused and the victim are not kept secret. The abused child has thus no protection against the widespread interest and sensationalism caused by media reports.

9. The age of the child could be a problem. Very young children find it difficult to verbalize due to their underdeveloped cognitive processes. Under cross examination the child is expected to repeat detail which often has little meaning to the child. Under pressure a child often retracts accusations or is inconsistent. Children have difficulties to think and perceive in terms of objectivity and realism.

10. Problems exist due to the fact that the child is not represented by an attorney as long as the case is in the hands of the state. The state attorney seldom has time to prepare the child as seen in contrast with the preparations the accused's attorney makes.

# APPENDIX 3 – ZIMBABWE

Excerpt from Zimbabwe Criminal Procedure and Evidence Amendment Act 8 of 1997

***PART XIVA***

***PROTECTION OF VULNERABLE WITNESSES***

*319A. In this Part-*

*"intermediary" means a person appointed as an intermediary in terms of paragraph (i) of section three hundred and nineteen B:*

*"support person" means a person appointed as a support person in terms of paragraph (ii) of section three hundred and nineteen B:*

*" vulnerable witness" means a person for whom any measure has been or is to be taken in terms of section three hundred and nineteen B:*

*319B. If it appears to a court in any criminal proceedings that a person who is giving or will give evidence in the proceedings is likely-*

*(a) to suffer substantial emotional stress for giving evidence; or*

*(b) to be intimidated, whether by the accused or any other person or by the nature of the proceedings or by the place where they are being conducted, so as not to be able to give evidence fully and truthfully;*

*the court may, subject to this Part, do any one or more of the following, either mero motu or on the application of a party to the proceedings-*

*(i) appoint an intermediary for the person;*

*(ii) appoint a support person for the person;*

*(iii) direct that the person shall give evidence in a position or place, whether in or out of the accused's presence, that the court considers will reduce the likelihood of the person suffering stress or being intimidated:*

*Provided that, where the person is to give evidence out of the accused's presence, the court shall ensure that the accused and his legal representative are able to see and hear the person giving evidence, whether through a screen or by means of closed-circuit television or by some other appropriate means;*

*(iv) adjourn the proceedings to some other place, where the court considers the person will be less likely to be subjected to stress or intimidation;*

*(v) subject to section 18 of the Constitution, make an order in terms of the Courts and Adjudicating Authorities (Publicity Restriction) Act [Chapter 7:04]*

*excluding all persons or any class of persons from the proceedings while the person is giving evidence.*

*319C. (1) When deciding whether or not to take any measure under section three hundred and nineteen B, the court shall pay due regard to the following considerations-*

*(a) the vulnerable witness's age, mental and physical condition and cultural background; and*

*(b) the relationship, if any, between the vulnerable witness and any other party to the proceedings; and*

*(c) the nature of the proceedings; and*

*(d) the feasibility of taking the measure concerned; and*

*(e) any views expressed by the parties to the proceedings; and*

*(f) the interests of justice.*

*(2) To assist the court in deciding whether or not to take any measures under section three hundred and nineteen B, the court may interview the vulnerable witness concerned out of the sight and hearing of the parties to the proceedings:*

*Provided that at such an interview the merits of the case shall not be canvassed or discussed.*

*319D. Before taking a measure under section three hundred and nineteen B, the court shall afford the parties to proceedings an opportunity to make representations in the matter.*

*319E. Without derogation from any other law, a court may at any time rescind a measure taken by it under section three hundred and nineteen B, and shall do so if the court is satisfied that it is in the interests of justice to do so.*

*319F. (1) Except in special circumstances, which the court shall record, a court shall not appoint a person as an intermediary unless that person-*

*(a) is or has been employed by the State as an interpreter in criminal cases; and*

*(b) has undergone such training in the functions of an intermediary as the Minister may approve.*

*(2) In appointing a support person for a vulnerable witness, the court shall select a parent, guardian or other relative of the witness, or any other person who the court considers may provide the witness with moral support whilst the witness gives evidence.*

*319G. (1) Where an intermediary has been appointed for a vulnerable witness, no party to the criminal proceedings concerned shall put any question to the vulnerable witness except through the intermediary:*

*Provided that the court may put any question to the witness directly or through the intermediary.*

*(2)Subject to any directions given by the court, an intermediary-*

*(a) shall be obliged to convey to the vulnerable witness concerned only the substance and effect of any question put to the witness;*

*(b) may relay to the court the vulnerable witness's answer to any question put to the witness:*

*Provided that when doing so the intermediary shall, so far as possible, repeat to the court the witness's precise words.*

*(3) Where a support person has been appointed for a vulnerable witness, the support person shall be entitled to sit or stand near the witness whilst the witness is giving evidence in order to provide moral support for the witness, and shall perform such other functions for that purpose as the court may direct.*

*319H. When determining what weight, if any, should be given to the evidence of a vulnerable witness for whom an intermediary or a support person has been appointed, the court shall pay due regard to the effect of the appointment on the witness's evidence and on any cross-examination of the witness.*

# APPENDIX 4 – SOUTH AFRICA

Relevant provisions from South African Criminal Procedure Act 51 of 1977, (along with commentary from Du Toit et al)

***158 Criminal proceedings to take place in presence of accused***

*(1) Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.*

*(2) (a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.*

*(b) A court may make a similar order on the application of an accused or a witness.*

*(3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would-*

*(a) prevent unreasonable delay;*

*(b) save costs;*

*(c) be convenient;*

*(d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or*

*(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.*

*(4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.*

[Substituted by s 7 of Act 86 of 1996.]
[Subsection (2) was introduced as a result of the recommendations of the South African Law Commission contained in the *Interim report on the Simplification of Criminal Procedure. Project 73 August 1995.]*

Section 159 deals with the circumstances in which criminal proceedings may take place in the absence of the accused.

The accused must generally be present at all stages of the proceedings, such as an inspection in loco (*R v Makiep* 1948 (1) SA 947 (A)).

The provision of the section are peremptory and cannot be waived (*R v Blackbeard* 1925 TPD 965). The judicial officer should not discuss the case out of court with litigants or their representatives (*S v Lewis* 1950 (1) SA 623 (E); *Pillay & others v Hyde* 1950 (2) SA 739 (N). It is irregular to change a sentence in the absence of the accused (*S v Radebe* 1973 (4) SA 244 (O)). This does not, however, apply to argument on review or appeal. In *S v Eyden* 1982 (4) SA 141 (T) when an accused appeared before a magistrate the prosecutor suspected the accused was mentally defective and led certain evidence. The accused was not asked to plead and the court acted in terms of s 78(2). The accused was meanwhile committed to a hospital for the mentally ill. In due course a medical report was furnished and in consequence the court found in terms of s 77(6) that the accused was incapable of standing trial and committed him to a hospital for mentally ill. The accused was not present at the time of the committal. The review court held that the committal formed part of the criminal proceedings and the proceedings had to take place in the presence of the accused. The order was set aside and the matter remitted to the magistrate. In *S v Sibande* 1984 (4) SA 708 (A) it was held that, in the absence of the accused who appealed on the ground that an order should have been made in terms of s 78 (6) that he was not guilty on the grounds of mental illness, the appeal could be dealt with in terms of s 322(1)(*c*).

In *S v Cotty* 1979 (1) SA 912 (NC) it was held that before a trial could take place for a prison offence in the absence of the accused it must be proved that the accused's absence was attributable to a failure on his part because the prison authorities can easily compel an accused who is in custody to appear before a court held at the prison.

In *S v Roman & others* 1994 (1) SACR 436 (A) one of four accused was giving evidence and he became ill at ease when the activities of prison gangs was raised. The judge purported to exercise a discretion and had the other three accused removed to the cells. The legal representative of the three accused did not object to this procedure although the state did object. The witness was at this stage giving evidence in mitigation of sentence. The Appellate Division held that the judge had no such discretion in terms of s 158 which is peremptory. Neither an accused or his legal representative can waive his fundamental right. Section 159 provides for circumstances in which a trial may proceed in the absence of the accused. Inhibition or fear of giving evidence in the hearing of other accused is not one of the circumstances.

***Other relevant provisions:*** s 159.

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## *170A Evidence through intermediaries*

*(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he 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 evidence through that intermediary.*

*(2)(a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.*

*(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.*

*(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his evidence at any place –*

*(a) which is informally arranged to set that witness at ease;*

*(b) which is so situated that any person whose presence amy upset the witness is outside the sight and hearing of that witness; and*

*(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his testimony.*

*(4)(a) The Minister may by notice in the Gazette determine the person or the category or class of persons who are competent to be appointed as intermediaries.*

*(b) An intermediary who is not in the full-time employment of the state shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him as the Minister, with the concurrence of the Minister of Finance, may determine.*

[S 170A inserted by s 3 of Act 135 of 1991.]

**General introduction**

This section is the result of research done and recommendations made by the SA Law Commission in its working paper 28 *The Protection of the Child Witness: Project 71* (April, 1989). Section 170A came into operation on 30 July 1993 (Proc R64 *Gazette* 15025 of 30 July 1993) and should be read with ss 161(2) and 165. Research has shown that ordinary adversarial trial procedure is at times insensitive to the needs of the child victim, especially in cases involving sexual abuse. At the same time it is equally true that an accused must have the fullest opportunity to present his case. And this includes the exercise of his fundamental right to confront his accusers and to do so through (vigorous) cross-examination. Section 170A is essentially aimed at striking a balance between the need to protect a child witness in the adversarial system and the need to ensure that an accused is given a fair trial. On the various issues and solutions in pursuit of this aim, see generally Levett 'Contradictions and Confusions in Child Sexual Abuse' 1993 *SACJ* 9; Zieff 'The Child Victim as Witness in Sexual Abuse Cases-A Comparative Analysis of the Law of Evidence and Procedure' 1993 *SACJ* 21 and Schwikkard 'The Child Witness: Assessment of a Practical Proposal' 1993 *SAJC* 44. The legislature has opted for a system of 'intermediaries' (s 170A(1)) as well as a system in terms of which the accused cannot insist that he (the accused) should be seen by the child witness in court (s 170A(3)). It should be noted, however, that s 170A(3) cannot be invoked unless an intermediary has been appointed in terms of s 170A(1). Once an intermediary has been appointed, the court has a discretion whether to invoke s 170A(3). The use of a screen placed between an accused and two child witnesses, was found unconstitutional in *Coy v Iowa* 487 US 1012 (1988). The children could not see the accused, and the accused could only dimly perceive the child witnesses; see Van der Merwe 1995 *obiter* 194; Schwikkard 1996 SACJ 215.

The youthfulness as a witness is only one factor to be considered in deciding whether to appoint an intermediary. It is also necessary to afford the parties an opportunity to address the court before a decision is made; *S v Mathebula* 1996 (2) SACR 231 (T).

**The intermediary**

An intermediary ('tussenganger' in Afrikaans) can be appointed only if it appears to the court that criminal proceedings would expose a witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings (s 170A(1)). This is obviously a question of fact and the prosecution as well as the defence should be given an opportunity to address the court on this issue and, where necessary, evidence might have to be led eg by calling the doctor who treated the victim. It is submitted that the court may mero motu raise the issue whether an intermediary should be appointed.

**Functions of an intermediary**

Once an intermediary has been appointed in respect of a specific witness, no examination, cross-examination or re-examination of that witness may take place in any other manner than through that intermediary (s 2 *(a)*). Examination by the court is an exception (s 2 *(a)*).

Unless the court directs otherwise, the intermediary may convey the general purport of any question to the witness concerned (s 2*(b)*). This provision makes a serious inroad upon ordinary trial procedure in terms of which parties can, subject to certain evidential rules and discretionary control by the court, largely formulate their own questions during examination-in-chief, cross-examination and re-examination.
The impact of s 170A(2)*(b)* will be at its greatest in respect of the cross-examiner. And it is submitted that a court should be very careful not to allow intermediary to frustrate the fundamental purposes of cross-examination, namely to give an accused an opportunity to present his defence and to do so through pertinent and probing questioning of those who testify against him. At the same time it is equally true that the legislature has sanctioned the use of intermediaries, and a certain latitude must be allowed in order to give effect to s 170A(2)*(b)*. In the final analysis, however, the right to a fair trial should be the controlling factor.

**The persons or the categories or classes of persons who are competent to be appointed as intermediaries**

In terms of s 170A*(a)* the Minister of Justice may by notice in the *Gazette* determine the persons or the category or class of persons who may be appointed as intermediaries. The first notice in this regard was GN R1374 *Gazette* 15024 of 30 July 1993 as amended by R360 in *GG* 17882 of 28 February 1997, which identified the following as competent to be appointed as intermediaries:

(a) Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974), and against whose names the speciality paediatrics is also registered.

*(b)* Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Service Professions Act, 1974, and against whose names the speciality psychiatry is also registered.

*(c)* Family counsellors who are appointed as such under section 3 of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), and who are or were registered as social workers under section 17 of the Social Work Act, 1978 (Act No. 110 of 1978), or who are or were classified as teachers in qualification category C to G, as determined

by the Department of National Education, or who are or were registered as clinical, educational or counselling psychologists under the Medical, Dental and Supplementary Health Service Professions Act, 1974.

(d) Child care workers who have successfully completed a two-year course in child and youth care approved by the National Association of Child Care Workers and who have four years' experience in child care.

(e) Social workers who are registered as such under section 17 of the Social Work Act, 1978 and who have two years' experience in social work.

(f) Educators in terms of the Educators' Employment Act, 1994 (Proclamation No. 138 of 1994), who have four years' experience in teaching and who have not at any stage, for whatever reason, been suspended or dismissed from service in teaching.

(g) Psychologists who are registered as clinical, educational or counselling psychologists under the Medical, Dental and Supplementary Health Service Professions Act, 1974.'

**Constitutionality**

The issue of the constitutionality of the section was considered in *K v The Regional Magistrate NO and others* 1996 1 SACR 434 (E); 1996 (3) BCLR 402 (E). Two grounds of challenge were forwarded namely *(a)* that as the intermediary was only required to convey the 'general purport' of a question put during cross-examination, proper cross-examination was impaired, limited or even excluded thus amounting to a violation of the accused's fundamental right to a fair trial; (*b)* the physical separation of the complainant from the courtroom resulted in a violation of the accused's right to a public trial.

The court considered the purposes of s 170A and found that the ordinary procedures of the criminal justice system were inadequate to meet the needs and requirements of child witnesses. The section is designed to address such imbalances and the question is whether, in so doing, it violates the right of an accused person to a fair trial: The intermediary acts, in a sense, as an interpreter and the accused or his representative is not prevented in asking questions in cross-examination. It was conceded that the effect of cross-examination may be blunted to some extent but this does not mean that the accused is denied the right to a fair trial as the intermediary may be required by the court to convey the actual question and not merely its general purport. The right to a fair trial must be the controlling factor.

The contention that the procedure violated the right to a public trial was not established. The mere fact that the complainant gives evidence in a separate room does not violate the right to a public trial. Melunsky J held that a proper balance between the protection of a child witness and the right of an accused to a fair trial could be achieved by permitting the witness to testify in congenial circumstances and out of sight of the accused.

# APPENDIX 5 – DRAFT BILL

The proposed law reforms could be formulated as a separate statute, or as amendments to the Criminal Procedure Act 51 of 1977. Under either approach, harmonising the proposals with the existing provisions of the Criminal Procedure Act is a simple technical matter which can be dealt with once the basic approach is finalised. The draft provisions are presented here without reference to the Criminal Procedure Act for the sake of simplicity.

***Definition of Vulnerable Witness***

*(1) A "vulnerable witness" means a person who is giving or will give evidence in a civil or criminal proceeding and is -*

> *(a) under the age of 18, or apparently under the age of 18;*
>
> *(b) likely to suffer substantial emotional stress from giving evidence;*
>
> *(c) likely to be intimidated, whether by the accused or a party to the proceeding or by any other person involved in the proceeding;*
>
> *(d) likely to be intimidated by the nature of the proceeding;*
>
> *(e) likely to be intimidated by the place where the proceeding is conducted.*

*(2) In determining whether a witness fits the definition of a vulnerable witness in terms of subsections (1)(b)-(e), the court shall give due regard to the following factors:*

> *(a) the age of the witness;*
>
> *(b) any physical, intellectual, or psychological disability of the witness;*
>
> *(c) the linguistic or cultural background of the witness;*
>
> *(d) the nature of the proceeding;*
>
> *(e) the subject matter of the expected evidence;*
>
> *(f) the relationship, if any, between the witness and any party to the proceeding;*
>
> *(g) any views expressed by the parties to the proceeding; and*
>
> *(h) the interests of justice.*

*(3) In determining whether a witness fits the definition of a vulnerable witness in terms of subsections (1)(b)-(e), the court may interview the witness concerned out of the sight and hearing of any party to the proceeding: Provided that the merits of the case shall not be canvassed or discussed at such an interview.*

*(4) Before making a determination that a witness fits the definition of a vulnerable witness in terms of subsections (1)(b)-(e), the court shall afford any party to the proceeding an opportunity to make representations in the matter.*

***Priority of cases involving vulnerable witnesses***

*(1) Cases involving vulnerable witnesses shall be given priority and be heard as quickly as possible.*

*(2) Cases involving vulnerable witnesses shall follow the prescribed time limits set forth in regulations promulgated in terms of this Act.*

*(3) Postponements in cases involving vulnerable witnesses shall not be allowed except on good cause shown.*

***Victim's Advocate Programme***

*A Victim's Advocate Programme shall be established in the Office of the Prosecutor General with the following aims and objectives in respect of criminal cases:*

*(a) to inform victims and witnesses of the progress of their cases;*

*(b) to communicate the needs and concerns of victims and vulnerable witnesses to appropriate persons in the criminal justice system;*

*(c) to assist victims in recovering property damaged or stolen and in obtaining restitution or compensation for medical and other expenses incurred as a result of the criminal act;*

*(d) to prepare victims and vulnerable witnesses for pending court proceedings by informing them of procedures involved;*

*(e) to accompany victims and vulnerable witnesses to court proceedings;*

*(f) to involve victims, when possible, in decision-making processes pertaining to the offence in question;*

*(g) to assist victims and vulnerable witnesses with personal logistical problems related to court appearances;*

*(h) to develop community resources to assist victims of crime;*

*(i) to generally encourage and facilitate testimony by victims of and witnesses to criminal conduct.*

***Treatment of evidence of children***

*The evidence of a child is not inherently unreliable and shall be evaluated in the same manner as any other evidence.*

***Alternative methods of giving evidence***

*The court may—*

*(a) on its own initiative*
*(b) on the application of a party to the proceedings or*
*(c) on the application of the vulnerable witness*

*direct that a vulnerable witness shall give evidence in any position or place, whether in or out of the presence of the accused or any party to the proceedings, that the court considers will reduce the likelihood of the vulnerable witness suffering stress or being intimidated: Provided that such accused or such party to the proceeding and his or her legal representative (if any) must be able to see and hear the witness giving evidence, whether directly or indirectly through electronic or other devices.*

***Intermediaries***

*(1) The court may—*

*(a) on its own initiative*
*(b) on the application of a party to the proceedings or*
*(c) on the application of the vulnerable witness*

*appoint an intermediary for the vulnerable witness from a list of persons approved for this purpose by the Minister in the* Gazette.

*(2) The court may order that all questions directed to a vulnerable witness by any party to the case, or by the legal representative of any party, shall be communicated to the vulnerable witness through the intermediary appointed by the court.*

*(3) An intermediary shall convey the substance of the question to the vulnerable witness in a vocabulary and manner suited to the circumstances and understanding of the vulnerable witness: Provided that the court may address the vulnerable witness directly or through the intermediary.*

*(4) The court may ask the intermediary to give an opinion on the appropriate interpretation of the response of the vulnerable witness to any question.*

*(5) An intermediary who is not in the full-time employment of the state shall be eligible for the same remuneration and allowances as an expert witness.*

*(6) It shall be an offence punishable by a fine of up to N$XXX or a term of imprisonment not exceeding X years for an intermediary to wilfully make a false, inaccurate or misleading statement to the vulnerable witness, the court or any person involved in the proceedings.*

***Support persons***

*(1) A court shall appoint a support person in respect of any witness who is found to be a vulnerable witness in terms of section 1.*

*(2) Such a support person shall be a parent, guardian, or other relative of the witness, or any other person whom the court deems appropriate to provide the witness with support while the witness gives evidence: Provided that a person who is a party to the proceedings or a prospective witness may not be appointed as a support person.*

*(3) Where a support person has been appointed for a vulnerable witness, the support person shall be entitled*

- *(a) to sit or stand near the witness while the witness is giving evidence in order to provide support for the witness;*
- *(b) to interrupt the proceeding to alert the presiding officer to the fact that the vulnerable witness is experiencing undue distress, or to any other problem which may affect the testimony; and*
- *(c) to perform any other supportive functions as directed by the presiding officer;*

*Provided that a support person shall not advise the vulnerable witness on how to answer any question posed by the court, by any party to the proceeding, or by the legal representative of any party to the proceeding.*