



**CHALLENGES FACING CHILD VICTIMS IN SOUTH AFRICAN COURTS: AN
OVERVIEW OF THE SOUTH AFRICAN LEGAL FRAMEWORK AND THE
PROTECTION OF SUCH CHILDREN, WITH A SPECIFIC FOCUS ON COURTS IN
DURBAN, KWAZULU NATAL.**

BY

BATHABILE MANDISI MAUREEN NGUBANE

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NAME OF SUPERVISOR: MR ADRIAN BELLENGÈRE

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DECLARATION

I, Miss Bathabile Mandisi Maureen Ngubane, declare that:

- The work described in this dissertation is my original work,
- This dissertation has not been submitted to the University of KwaZulu-Natal or any other tertiary institution for purposes of attaining an academic qualification,
- All the work contained in this dissertation titled “Challenges facing child victims in South African courts: an overview of the South African legal framework and protection of such children, with a specific focus on Durban Court, KwaZulu Natal.” is my original work. All sources used or quoted in the study have been indicated and acknowledged by way of complete references.

Signed at Durban on this 3rd April 2022

SIGNED

MR ADRIAN BELLENGÈRE

SIGNED

BATHABILE MM NGUBANE

ABSTRACT

South African children are most vulnerable to sexual offences and the high level of sexual violence against children in South Africa is of great concern. Currently, South Africa is facing the challenge of rising crime levels across most sectors of crime, but sexual offences affecting children are amongst the most predominant of the crimes facing the country. Delays in the criminal justice processes, as well as the re-victimisation of child victims, result in many sexual offences going unreported to the police. Therefore, many victims remain without justice. Some research indicates that child victims of sexual offences experience secondary victimisation when seeking assistance from the police, officials, criminal justice officials in courts and correctional services. This research study sought to investigate how (or whether) South African law protects child victims during the criminal justice process and to ascertain how it could be improved. The study discovered that the sexual offence of a child victim of a sexual offence is mostly perpetrated by people that children trust and are familiar with. Secondary victimisation is perpetrated by police officials when victims report the crime, health workers during medical examination, court officials during court proceedings and correctional officials when granting parole without liaising with all parties involved.

Keywords

Child victims, sexual offences, perpetrator, secondary victimisation, South African legal framework, the Constitution of South Africa, and multidisciplinary approaches.

ABBREVIATIONS

Children’s Act, 38 of 2005 (**ACT**)

Closed-circuit television (**CCTV**)

Community Service Centre (**CSC**)

Constitutional Court (**CC**)

Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32, 2007 (**SORMA**)

Criminal Procedure Act (**CPA**)

Deoxyribonucleic acid (**DNA**)

Department of Correctional Services (**DCS**)

Department of Education (**DoE**)

Department of Health (**DoH**)

Department of Justice (**DoJ**)

Department of Justice and Constitutional Development (**DOJ & CD**)

Department of Social Development (**DSD**)

Doctor (**Dr.**)

Employment of Educators Act (**EEA**)

Family Violence, Child Protection and Sexual Offences (**FCS**)

Forensic social workers (**FSW**)

Gender-based violence (**GBV**)

Head of Department: Education (**HOD**)

HIV Testing Services (**HTS**)

Human immunodeficiency virus (**HIV**)

Justice Crime Prevention Strategy (**JCPS**)

KwaZulu-Natal (**KZN**)

Ministerial Advisory Task Team appointed on the Adjudication of Sexual Offences Matters (**MATTSO**)

National Crime Prevention Strategy (**NCPS**)

National Prosecuting Authority (**NPA**)

National Register for Sex Offenders (**NRSO**)

National Victim Empowerment Programme (**VEP**)

Networking HIV & AIDS Community of Southern Africa (**NACOSA**)

Non-governmental organisations (**NGOs**)

Organization of African nations (**OAU**)

Post Exposure Prophylaxis (**PEP**)

Restorative Justice (**RJ**)

Sexual Offences Act 23 of 1957 (**SOA**)

Sexual Offences and Community Affairs Unit (**SOCA**)

Sexual Offences Courts (**SOCs**)

South African Police Services (**SAPS**)

State of the Nation Address (**SONA**)

Thuthuzela Care Centres (**TCCs**)

United Nations Convention on the Rights of the Child 1989 (**UNCRC**)

University of Kwa-Zulu Natal (**UKZN**)

Western Cape (**WC**)

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CHAPTER 1: INTRODUCTION

1.1 Introduction

High levels of sexual violence against children in South Africa are of great concern. This research study seeks to investigate how South African law protects child victims during the criminal justice process to ascertain how it could be improved.

The research found that in South Africa Dedicated Sexual Offence Courts are insufficient to deal with all cases involving child victims. For example, in Durban, “two Dedicated Sexual Offences Courts hear cases involving children, while the remaining 14 regional courts operate with mixed rolls that include sexual offences cases involving adult victims.”¹ Not all child victims receive an opportunity to access the dedicated sexual offences courts where their cases will be treated with priority, as a result, these child victims are mixed with older, or adult, victims. This is one of the factors furthering secondary victimisation and could also lead to a delay in the hearing of child victim matters. The research study’s focus is regional courts as there is a need for regional courts to be upgraded to sexual offences courts. A sexual offences court is a specialised court that mainly focuses only on cases of sexual offence, where child victims are supposed to get more support as it is sexual assaulted victims centred.

A sexual offences court is a special courtroom that deals with sexual offences such as rape.²

“In June 2012, a Ministerial Advisory Task Team was appointed on the Adjudication of Sexual Offences Matters (MATTSO) to investigate the possibility of re-introducing sexual offences courts in the country. In August 2013, MATTSO submitted a recommendation to upgrade 57 regional courts into sexual offences courts over a period of three years.”³

¹ Report on the re-establishment of sexual offences courts: ministerial advisory team on the adjudication of sexual offence matters (2013) 28.

² Why South Africa needs specialised sexual offences courts available at <https://www.bona.co.za/special-sexual-offences-courts-important/>, accessed on 13 September 2019.

³ Ibid.

“Since August 2013, MATTSO the department has established 43 sexual offences courts, which function to the model recommended by MATTSO. We strive to deliver victim-centred services,” said Minister Masutha.⁴ The progressive upgrading of regional courts to Sexual Offences Courts (SOCs) was completed in 2018. Some of Regional Courts in South Africa upgraded into SOCs during the period 1 Apr 2007 to 31 Mar 2018 are at Madadeni, Scottburgh and Umbumbulu.⁵ Sexual Offences Courts established from August 2013 to 2018 in KwaZulu Natal are located at Ntuzuma, Emlazi, Durban, Madadeni, Pietermaritzburg, Scottburgh and Umbumbulu.⁶

“Rape Crisis’s Advocacy Coordinator, Jeanne Bodenstein, says: ‘we have worked with the Department of Justice and civil society to draft regulations’⁷ for the courts that will serve as minimum standards while still fulfilling the role of sexual offence courts- minimising secondary trauma and supporting survivors. We want a funded and realistic model that would be rolled out across the country so that all survivors have access to these courts.’”⁸

The reason that this research study is more focused on South African regional courts is because sexual assault cases are not only being dealt with in sexual offence courts, but also in the nearest regional court from the station where the case was registered. The designated sexual offence courts seem as if they are not even fully equipped in some cases. Hence the study is going to focus mainly on regional courts and all stakeholders involved in cases involving children.

⁴ Ibid.

⁵ Ibid.

⁶ Department of Justice and Constitutional Development (DoJ&CD). Annual Report Implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) 1 April 2017 - 31 March 2018 available at https://www.gov.za/sites/default/files/gcis_document/201409/sexualoffencereport02aug2013.pdf, accessed on 19 April 2020.

⁷ These regulations have since been finalised and published. See: Regulations relating to Sexual Offences Courts: Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in GN 108 of 2020 in Government Gazette 43000 of 7 February 2020.

⁸ Why South Africa needs specialised sexual offences courts: An important tool in dealing with the serious issue of sexual violence in SA available at <https://www.bona.co.za/special-sexual-offences-courts-important/>, accessed on 13 September 2019.

1.2 Background

“The Department of Justice reported in parliament that there were 75 sexual offences courts in May 2018, but Rape Crisis and Shukumisa think that not all of them are fully equipped or functioning properly.”⁹ Police stations are crucial as this is the place where the whole process begins. For the case to go to court, it must first be registered at the police station. The research study wants to reveal the multidisciplinary role of all stakeholders involved in cases involving children.

There must be a victim-friendly facility in all police stations, which it has transpired is still a work in progress. There is still a great need for assistance to the South African Police Service (SAPS) to deliver a service that is victim centred. All police stations need a victim-friendly room where the child victims would be able to express themselves freely and at ease. The SAPS Pinetown is the first police that have the completed victim-friendly facility. This shows how much work still needs to be done for all Durban police stations to obtain victim-friendly facilities.

“A number of SAPS stations have been identified for victim-friendly facilities, with Pinetown SAPS being the first to be completed. Further states that the purpose of the facility is to provide victims of a sexual assault or gender-based violence a place of calm, where they can sit and talk to a helpful police officer about the incident they have experienced.”¹⁰

“The current President of South Africa (SA) Mr Cyril Ramaphosa has reiterated the importance of ending gender-based violence and violence towards women and children. A crucial step is assisting the SAPS with their efforts in this mission. A well-equipped, safe, and comfortable place for victims to speak to our police officers goes a long way towards that” said Mills at the official opening on Thursday, 14 November.¹¹

How child victims are treated when reporting the case to the police (where it all begins) all the way through to the point where the perpetrator is sent to correctional services is very important.

⁹ Ibid.

¹⁰ ‘Pinetown SAPS trauma rooms gets new look’ Highway Mail 22 November 2019 at 7.

¹¹ Ibid.

Children, especially child victims, must be treated with dignity and their best interests must be provided for.

Basically, in all matters concerning the care, protection and well-being of a child, the child's best interest is of the utmost importance. In other words, the child's best interest is the most important factor that judicial officials and all criminal justice officials/stakeholders must take into consideration when making decisions regarding any matter involving children. This includes the provision of protection and the prevention of future offences taking place against child victims. It is a fundamental principle in South African law is that courts seek to act in the best interests of children in matters concerning their welfare. This principle thus implies that the courts have a role to play in protecting children. The Constitution of the Republic of South Africa has made special provision for the children of this country. Section 28(2) maintains that 'a child's best interests are of paramount importance in every matter concerning the child.'¹²

Children's Act 2 (6) (3) if it is the best interest of the child, the child's family must be given the opportunity to explain their views in any matter concerning the child.¹³

Secondary victimisation is the result of 'unsympathetic, disbelieving and inappropriate responses that victims experience at the hands of society in general and at each stage of the criminal justice process.'¹⁴

Sexually assaulted children are subject to high emotions and need to be treated well by all stakeholders dealing with them. This research study aims to discover how these victims are protected from being re-victimized by criminal justice officials, the multidisciplinary team involved in the matter and volunteers. Child victims would need to obtain all the victim support available to assist them to cope with an ordeal of sexual offence. Therefore, it would be crucial to discover if they are the professionals dealing with sexual assault child victims properly trained? If not, what is the action plan to rectify this? Most importantly, is there a way in which the child victims can report if they are being ill-treated by criminal justice officials, other professionals, and volunteers?

¹² Constitution of the Republic of South Africa Act, 108 of 1996.

¹³ Children's Act, 38 of 2005.

¹⁴ Artz, & Smythe, D 'Should We Consent?' 2008 *Rape Law Reform in South Africa* ' 268.

How to prevent secondary victimisation and how to make victims and communities aware of their responsibilities to report any form of secondary victimisation that they are suffering, or that they have witnessed?

1.3 Statement of the problem

“Children in South Africa experience very high levels of sexual violence, especially by adults responsible for their care and protection in the home and in schools.”¹⁵ Yet section 12(1) (c) of the Constitution¹⁶ states that every person has the right to be free from all forms of violence from either public or private sources.¹⁷ It provides child victims with the assurance that no one is allowed to hurt or assault them. If anyone assault them is violating their rights and must be reported to the Police and face the mighty hand of law. Read with section 28(2) of the Constitution this highlights the tragedy of violence against children and the inadequate response thereto which results in secondary victimisation.

As Townsend *et al* note,

“Most often, the nature of child sexual abuse means that there is little supporting evidence, and the court proceedings are based on the word of the child against that of the (usually) adult perpetrator.”¹⁸

Sexually assaulted child victims are considered as vulnerable children and in need of care and protection. Unfortunately, adults who are supposed to be protecting children seem to be the ones who are violating them. If an instance of child sexual abuse or assault does eventually get prosecuted in court, the child victim is almost always required to testify.

Testifying, or giving evidence, can be especially traumatic for victims of sexual assault and even more so for children who are often completely unprepared for the harshness of a court environment. This trauma is called secondary victimisation, as the nature of testifying often requires the victim to relive, in great and explicit detail, the horrors and trauma of the initial assault.

¹⁵ Martin, P *Analysis of the Children's Sector in South Africa* (2015).

¹⁶ Constitution of the Republic of South Africa Act, 108 of 1996.

¹⁷ Ibid.

¹⁸ Townsend, L Waterhouse S & Nomdo, C ‘Court support workers speak out: Upholding children’s rights in the criminal justice system’ *SA Crime Quarterly* 2014 (48).

Therefore, the purpose of this research is to critically investigate the applicable legal frameworks regarding the secondary victimisation that is being experienced by child victims in South African courts. According to section 150 of the Children's Act 38 of 2005¹⁹ (Act), a child needs care and protection if the child has been orphaned, abandoned, exploited, and abused or neglected. Furthermore, if the child lives in or is exposed to circumstances that may harm their physical, mental, or social well-being, he or she is also considered to need care and protection.²⁰ Section 150 of the Act serves as an important provision for criminal justice officials in terms of understanding children who need care and protection.

“The Act recognises that the protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children in isolation from their families and communities.”²¹

Government, social welfare organisations, families, caregivers, and the communities at large must work hand in hand to ensure the protection, care, and safety of all children. As a result of a crime that has occurred to a child victim, that child will have to undergo court proceedings. Child victims are thus exposed to the court environment and that is when their journey with the criminal justice officials takes off. This is especially important as the court environment can be intimidating or even threatening to child victims. Children have had to ‘suffer the additional ordeal of having to present their evidence in the presence of the accused. The adversarial nature of the South African court procedure, with its confrontation and cross-examination of witnesses did little to improve the plight of these children.’²²

Police Minister, Mr. Bheki Cele, during the release of the crime statistics in 2018 (which saw a decrease in sexual offences), stated that sexual offences committed against children showed a slightly bigger decrease of 4.8% from 24 677 cases for the 2016/2017 reporting period compared to 23 488 cases for the 2017/2018 reporting period.²³

¹⁹ Children's Act, 38 of 2005.

²⁰ Ibid.

²¹ Donnelly, J *Universal Human Rights in Theory and Practise* 2ed (2003).

²² Müller, K & Tait, M *Little witnesses: a suggestion for improving the lot of children in court* (1999) 242.

²³ Kempen, A Crime Statistics 2017/2018 finding the truth in the complicated business of crime stats and the public's perceptions about crime (2018).

However, South Africa still has one of the highest incidences of rape in the world²⁴ and while there may have been a decrease in reported cases, the number is unacceptably high and does not consider the number of unreported cases. A staggering 50 108 sexual offences were recorded for the 2017/2018 reporting period. Although most offences (10 116 cases) were committed in Gauteng, The Inanda Police Station in KZN recorded the highest number of cases, namely 330, followed by Nyanga Western Cape (WC) with 308 cases and Umlazi (KZN) with 290 cases.²⁵

One sexual offence against a child victim is one too many and since Inanda and Umlazi are both in Durban, it reveals that sexual offences are an extremely prevalent problem in South Africa and are a continually increasing statistic.

This research study will investigate how child victims are treated when reporting sexual offence cases. It will identify circumstances that could lead to the under-reporting of sexual offences against child victims. It will also identify the South African framework that should provide adequate protection to such children, and it will identify the role of the multidisciplinary team in the criminal justice system.

The reality that cannot be denied is that children in unacceptable numbers are the victims of sexual assault offences and it appears that if this problem is to be solved, it needs a multidisciplinary team comprised of all professionals and non-governmental organisations (NGOs) involved in cases involving children in the criminal justice system. There is a multidisciplinary approach that is being performed by various stakeholders. As this research focuses on South African courts particularly in Durban, it will commence with the genesis process of reporting the sexual offence. A case must be opened and be assigned a case number from the police station where it was reported for it to reach the court.

Children's Act 38 of 2005 (9) states that in all matters concerning the care, protection, and wellbeing of a child the standard that the child's best interest is of paramount importance, must be applied.²⁶ It is of the utmost importance to take the best interests of child victims into serious consideration in all cases involving children. Child victims must be treated with

²⁴ Naidoo, K 'Rape in South Africa – a call to action' (2013) 103 (4) *South African Medical Journal* 210.

²⁵ Kempen, A Crime Statistics 2017/2018 finding the truth in the complicated business of crime stats and the public's perceptions about crime (2018) available at <https://journals.co.za/doi/abs/10.10520/EJC-11c5e871f9>, accessed on 10 November 2021.

²⁶ *Iqabane South African Police Service*, (2015) 44.

respect and in a manner that does not degrade them.

Court proceedings need to take place in a conducive environment. The child victims must be protected from having contact with the accused. Victims are to be respected as unique human beings, afforded privacy, and have their decisions respected without judgement.²⁷

1.4 Rationale

Research is the principal method of acquiring knowledge and uncovering the causes of human behavior.²⁸ This research study is based on a desktop review as the source of data is mainly textbooks, journal articles, newspapers, internet sources, the Constitution of South Africa, other legislation, and law reports.

The rationale for this research study is that South Africa is faced with high levels of crime and amongst the leading crime statistics in Durban are sexual offences. For example, Inanda and Umlazi Police stations were the top two leading stations on the top 30 sexual offence stations in consecutive years. These are stations where the sexual offence crime rate is increasing annually, according to these comparison statistics presented.

Sexual offences: top 30 stations 2018/2019 1. Inanda KwaZulu-Natal 2018 =330 and 2019 =385 and 2. Umlazi KZN 2018 = 290 and 2019 = 301.²⁹

Sexual offences: top 30 stations 2019/2020 1. Inanda KwaZulu-Natal 2019= 385, 2020=351 2. Umlazi KwaZulu-Natal 2019=301, 2020 = 335³⁰

Sexual offence statistics reveal that sexual offences are increasing yearly. For example, in 2018/2019 sexual offence statistics show that at Umlazi in 2018 it was 290 and in 2019 it was 301. Moving forward looking at 2019/2020 statistics focusing at Umlazi, in 2019 sexual offences were 301 and in 2020 it was 335. It reveals that indeed sexual offence cases are increasing annually, and it is a pressing issue in South Africa that requires all interventions possible to deal with it. This research study focuses more on when cases of sexual offences against children have been reported and when child victims are being maltreated during criminal justice proceedings.

²⁷ *National Policy guidelines for victim empowerment.*

²⁸ Neuman, W L *Social research methods: Qualitative and quantitative approaches* 7 ed (2011) 273-285.

²⁹ Crime statistics crime situation in Republic of South Africa twelve (12) months (April to March 2018_19) 97.

³⁰ Crime statistics crime situation in Republic of South Africa twelve (12) months (April to March 2019_20) 74.

This research study aims to investigate the challenges facing child victims; identify the legal framework protecting child victims during court proceedings; and identify the role of the multidisciplinary team regarding cases involving children in South African courts.

Chapter one presents the background to this research study, the statement of the problem regarding sexual abuse experienced by children when accessing legal platforms and their subsequent testifying in court proceedings. It will then go further to provide a rationale for the study, proceeding to outline the research questions and then provide a brief overview of the research methodology and a literature review.

The researcher currently works for the South African Police Service as a Police official holding a Sergeant rank. She has discovered that child victims of sexual offences are not always taken to specialised courts such as the sexual offences courts, but that often their matters are dealt with in the ordinary Magistrates' Courts. Therefore, the study is not going to focus on South African sexual offences courts but instead on the non-specialised South African courts. The motivation for this research study is to encourage putting the best interests of children first whenever dealing with matters involving them in South African courts.

The research attempts to ascertain ways of protecting and providing conducive police stations and court environment to child victims. Child victims must be treated with a child-centred approach. The secondary victimisation that is experienced by the victims and the fact that the prevalence of sexual offences is a concern in South Africa have influenced the researcher to take a closer look at the multidisciplinary team involved in criminal justice system service delivery to child victims.

1.5 Research aims and objectives

Although South African statistics suggest a slight decrease in sexual offences, this is not necessarily as it might seem as there could be many reasons behind the decrease. Reyneke and Kruger remarked that SOCA has realized that there are an alarming number of silent victims who do not even enter the criminal justice system because of the fear of secondary victimisation.³¹

³¹ Reyneke, J M & Kruger, H B 'Sexual Offences Courts: Better justice for children?' (2006) 31 (2) Journal for Juridical Science 107.

One of the reasons could be that the sexual offences are being increasingly under-reported, which could be caused by secondary victimisation and the delays in court proceedings that are being experienced by child victims of sexual offences. 'Many victims in the study to explore how law enforcement treats victims in United States noted that they would not have reported if they had known what the experience would be like.'³² Therefore a subsidiary objective of this study will be to attain a more comprehensive understanding of the phenomenon of secondary victimisation that is taking place in South African courts and to come up with some solutions which are in line with the Constitution, especially, as it has been suggested that presiding officers sometimes shy away from exercising their discretion owing to a lack of knowledge of the possible methods of reducing trauma for children.³³

The current South African Police Minister Mr. Bheki Cele, said during the release of the crime statistics that he could not guarantee that the decrease in sexual offences was due to a real decrease since under-reporting could also have impacted the recording of these crimes.³⁴ The existence of the link between the under-reporting of sexual offences by victims of sexual offences and experiences of secondary victimisation in the criminal justice system, as evidenced in academic research will therefore be taken into account.³⁵

The connection between under-reporting of sexual offences and maltreatment by criminal justice officials could be obtained by relying on several studies that have found that the prospect of secondary victimisation deters reporting of rape cases.

This research study utilising desktop method of collecting information has the following objectives: The primary objective is to determine whether there is a link between the treatment of victims by criminal justice officials, starting from the reporting of the sexual offence case, running through court proceedings, up to correctional services involvement and the under-reporting of child sexual offences.

³² Patterson, D 'The Linkage between Secondary Victimisation by Law Enforcement and Rape Cases' (2011) 26 (2) *Outcomes Journal of Interpersonal Violence* 328–347.

³³ Fintel, M V & Zoch, A 'The dynamics of child poverty in South Africa between 2008 and 2012: An analysis using the National Income Dynamics Study' Stellenbosch economic working paper (2015) at 5.

³⁴ Kempen, A 'Crime Statistics 2017/2018: finding the truth in the complicated business of crime stats and the public's perceptions about crime' (2018).

³⁵ See for example, Patterson, D 'The Linkage between Secondary Victimisation by Law Enforcement and Rape Case' (2011) 26 (2) *Outcomes Journal of Interpersonal Violence* 328–347.

Another objective is to determine the role of the South African legal framework in providing protection to child victims in South African courts, as well as to determine the role of a multidisciplinary approach in effectively intervening to improve the situation of child victims.

It is important to understand all the phases of the child victim's protection and identify any areas where it is going wrong or right and how they can be improved. All stages must be considered, from the moment that the offence is reported. Sexual offenses against children could be reported by any person, even if he or she was not present when the incident took place.

When sexual assault against a child is committed, it is usually reported at the nearest Police station in the charge office known as CSC (Community Service Centre) by a witness or the elderly person or friends who were told by the child victim of what happened to her or him. A police official would attend the complaint or crime scene and when standing off would secure the crime scene, observe, and acquire the services of additional emergency workers also present at the crime scene and collect all evidence. The sexual assault case would then be registered, the investigation would begin. The evidence collected such as Deoxyribonucleic acid (DNA) would be taken to the forensic laboratory for testing and analysis. "An examination of the crime scene is vital for an investigator, to gather clues and collect evidence before the crime scene is contaminated, and valuable evidence is lost."³⁶ If a perpetrator is arrested and charged the matter will go to the court. If the perpetrator is found guilty, he or she will be sentenced, and the sentence often involves incarceration. In such cases the perpetrator is handed over to the Department of Correctional Services (DCS). He or she will then be incarcerated in a correctional service centre.

The entire process involves several different departments and role players and so a coordinated, holistic, and multi-disciplinary approach appears to be particularly important at the reporting, investigation, and prosecution stages of the criminal justice process.³⁷

³⁶ Saferstein, R *Criminalistics: An Introduction to Forensic Science* 11th Ed Pearson (2015).

³⁷ Healy, D 'Exploring Victims' Interactions with the Criminal Justice System: A Literature Review' University College Dublin (2019).

This research study will also include how a multidisciplinary approach can effectively intervene to provide psychological assistance to child victims, their families and community and regarding the rehabilitation of the offender.

It is to Correctional Services that a perpetrator is handed over once convicted for incarceration and rehabilitation. The Correctional Services are thus involved at the end of the integrated process if recidivism³⁸ in sexual offence cases is to be avoided. The rehabilitation of offenders and their successful social reintegration into society should therefore be among the basic objectives of criminal justice systems. Reduced criminal recidivism remains the ultimate indicator of successful social reintegration programmes.³⁹ Rehabilitation corrects the offenders' behaviour and prepares him or her to correct the offending behaviour. The chaplains, psychologists and social workers work hand in hand to assist the offender not to reoffend.

The obligation of the DCS is primarily to rectify offending conduct with a specific end goal to reduce reoffending. Rehabilitation is the only approach that reduces criminal behaviour, prompting a decrease of criminality.⁴⁰

1.6 Research Questions

The aim of this research study is to discuss the following questions:

- 1 What is the link between the treatment by criminal justice officials from the reporting of the sexual offence case to court proceedings, correctional involvement, and the under-reporting of child sexual offences?
- 2 How does the South African legal framework protect child victims from the secondary victimisation inherent in the South African criminal justice system, specifically regarding sexual assault cases?

³⁸ "Recidivism" ('reoffending') refers to whether a person who is the object of a criminal justice intervention reoffends later on." *Introductory Handbook on The Prevention of Recidivism and the Social Reintegration of Offenders* (2018) 3.

³⁹ *Introductory Handbook on The Prevention of Recidivism and the Social Reintegration of Offenders* (2018) 3.

⁴⁰ Murhula, P B B 'A Critical Analysis on Offenders Rehabilitation Approach in South Africa: A Review of the Literature' (2019) 12 (1) *African Journal of Criminology and Justice Studies* 34.

- 3 How can a multidisciplinary approach effectively intervene to improve service delivery provided by criminal justice officials to vulnerable children and mitigate against secondary victimisation against child victims in criminal justice system holistically?

1.7 Research Methodology

This research study is based on desktop research about secondary victimisation aspects that are taking place in South African courts in matters affecting child victims and witnesses.

The nature of the research is to investigate the service provided by criminal justice officials to child victims. Therefore, desktop literature will provide all the data required.

A thorough legal framework in terms of the protection of children in South African courts will be looked at. Therefore, legislation, legal journals, judicial decisions, and textbooks will be consulted. This research will also look at progressive legislation such as the Children's Act 38 of 2005, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and so on.

“Desktop research refers to secondary data or that which can be collected without fieldwork.”⁴¹ This includes important sources like published reports and statistics. In this dissertation it also includes all sources which did not involve any fieldwork.

This research study will primarily utilize the books and journal articles available in the Law Library. Reference will be made to Bellengere *et al*: *The Law of Evidence in South Africa*, Oxford (2019). Other important texts on the Law of Evidence, such as Schwikkard & Van Der Merwe and Zeffertt, Paizes & St Skeen will also be used, as will journals, newspapers, internet sources, the Constitution of South Africa, legislation, and law reports. The purpose of the literature review is to gain a broad understanding and provide an overview of existing academic scholarship in the area under scrutiny.⁴² “Prior to the constitutional dispensation, sexual offences were partly catered for statutorily in terms of the previous Sexual Offences Act (Sexual Offences Act 23 of 1957) (SOA)”.⁴³

⁴¹ ‘Chapter 4 An introduction to research methodologies’ available at <https://www.b2binternational.com>, accessed on 21 June 2020.

⁴² Hofstee, E *Constructing a good dissertation*. Exactica 121 (2006).

⁴³ Steven, P ‘Recent Developments in Sexual Offences against Children: A Constitutional Perspective’ (2016) available at <https://mail.google.com/mail/u/0/?tab=rm&ogbl#sent/QgrcJHsbgZfTgJNSchDqzvBDSTgwnvHFdLG?projector>

“The advent of the Constitution undoubtedly played a pivotal role in the far-reaching transformation of the criminal law pertaining to sexual offences, eventually giving rise to the enactment and commencement the Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA).”⁴⁴

This research study will focus more on national legislation such as the Constitution, Children’s Act (No. 38 of 2005) (Act), Criminal Procedure Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32, 2007 (SORMA).

“The Justice Department has enacted various measures to deal with all forms of gender-based violence, including sexual offences. ‘Some of the progressive legislation includes the Domestic Violence Act 116 of 1998; Older Persons Act 13 of 2006; Children’s Act 38 of 2005; Criminal Law (Sexual Offences and Related Matters) Amendment Act No.32, 2007 (SORMA); and the Prevention and Combating of Trafficking in Persons Act 7 of 2013.’”⁴⁵

1.8 Preliminary literature review

Sexual offences are very concerning, and disturbing criminal offences committed against child victims. Moreover, it helps to locate the study into the broader debate, as well as to illustrate the gap that the research is covering and bolster value within the broader research enterprise.⁴⁶

Maltreatment of children is unacceptable and when it has occurred and is reported to the police the criminal justice system comes into operation. Sexual offences and secondary victimisation are the main phenomena that are going to be the focus of this study, which will describe what a sexual offence is, and what constitutes secondary victimisation. It will also look at other important definitions such as victim, perpetrator, child, child with disability and multidisciplinary team.

[=1&messagePartId=0.1](#), accessed on 09 July 2020 quoting Sexual Offences Act 23 of 1957 (SOA). Also see in general Snyman Criminal Law (2002) 362-365; Burchell Principles of Criminal Law (2005) 699 pertaining to the position in terms of the SOA.

⁴⁴ Stevens, P ‘Recent Developments in Sexual Offences against Children: A Constitutional Perspective’ (2016) available at <https://mail.google.com/mail/u/0/?tab=rm&ogbl#sent/QgrcJHsbGZfTgJNSchDqzvBDSTgwnvHFdLG?projector=1&messagePartId=0.1>, accessed on 09 July 2020. quoting Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the "Act") The Act effectively commenced on 16 December 2007.

⁴⁵ Manyathi-Jele, N ‘Justice Department on target with establishment of sexual offences courts’ (2015) 14.

⁴⁶ De Vos, A S et al *Research at grassroots: For the Social Sciences and human services professions* 4ed (2011).

The legislation that provides protection to child victims domestic and internationally will also be examined.

The South African legal framework in terms of the protection of children in South African courts will be identified and legislation, legal journals, judicial decisions, and textbooks will be consulted.

The Optimus Study SA shows that sexual abuse of children and adolescents is widespread: 36.8% of boys and 33.9% of girls reported some form of sexual abuse.⁴⁷

Literature review for this research study was obtained from the Articles in academic journals, books, newspapers, dissertations and internet sources, the constitution of South Africa, legislation law and research reports. The review of literature focus on three phenomenon namely as secondary victimisation, overview of legal frameworks and multidisciplinary approach in all matters affecting child victims of sexual assault. Causes of secondary victimisation would be identified, domestic and international law in the protection of children and the role of each stakeholder in providing the best interest of the child.

“A 53-year-old man was out on bail for the alleged sexual assault of an 11-year-old boy when he allegedly committed a myriad sexual offence against other minors with his co-accused, a well-known advocate who has acted as a high court judge.”⁴⁸

Sexual assault of children remains a pressing challenge and it does not affect girls only, but the boys are the victims as well. Evidence that the child maltreatment and intimate partner violence co-occur and produce intergenerational effects. These suggest that there is a need for more integrated early intervention.⁴⁹

1.9 Chapter Breakdown

Chapter 1: This chapter is the preview of the research study and consists of a Statement of the problem, Rationale, Research objectives, Research Questions, Research Methodology, Preliminary Literature Review, Chapter Breakdown and Chapter Timelines.

⁴⁷ ‘The prevalence of child sexual abuse in South Africa’ (2018) (108) (10) *The Optimus Study South Africa* 791.

⁴⁸ Top advocate's co-accused in child sex ring case previously charged with sexually assaulting boy, 11. Available at <https://www.news24.com/news24/southafrica/news/top-advocates-co-accused-in-child-sex-ring-case-previously-charged-with-sexually-assaulting-boy->, accessed on 2021-11-18.

⁴⁹ Guedes, et al, ‘Bridging the Gaps’ 2016 a global review intersection of violence against women and violence against children.

Chapter 2: The second chapter includes an overview of the phenomenon of secondary victimisation of child victims when accessing legal platforms, child victims reporting sexual offences cases to the South African Police Service (SAPS), South African courts during court proceedings and circumstances that cause the under-reporting of sexual offences. This chapter's focus will be on relevant literature regarding the challenges faced by child sexual offence victims in accessing the South African criminal justice system.

Chapter 3: This chapter encapsulates the overview of the legal framework that is in place to protect child victims, from the reporting of the case and during court proceedings in the South African criminal justice system.

The focus is on relevant constitutional provisions such as Section 28(2) maintains that 'a child's best interests are of paramount importance in every matter concerning the child and legislation such as the Children's Act (Children's Act 38 of 2005) (Act) and Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32, 2007 (SORMA).

Chapter 4: Chapter Four focuses on the concept of a multidisciplinary approach from the genesis of the sexual offence reporting regarding child victims, all the way to the court processes in the South African courts and sentencing of perpetrators in the department of correctional service centre.

Chapter 5: This chapter seeks to provide a summary of the research study by revealing the most important findings, recommendations, and conclusions. The Bibliography will then follow, along with the annexure.

1.10 Chapter timelines

This chapter timeline is the strategic plan to finalise this dissertation. The life has been very challenging since covid 19 pandemic begun in 2019. We are now in 2021 but corona virus still exists. It has not been easy to access libraries, LAN and lectures as we used to. However, life still goes on with technology and the provision we obtained from the University of KwaZulu-Natal as they supplied sufficient data monthly, to be able to proceed with our studies without impediment.

First Semester: January to March it was for registration, study fees payment and wait to be financially cleared and then do the administration duties like reinstate student card and library access. I then met my supervisor and planned together the way forward. We applied for the ethical clearance and the approval of the title of the dissertation.

Second semester: April to June started with literature review after the title of the dissertation was approved. Literature review was done and submitted to supervisor for corrections. After it came back, I was able to do the corrections and proceed to chapter 1. I would submit and obtain feedback do corrections and resubmit.

I also managed to partial begin chapter 2 just the introduction and main headings. It was submitted to supervisor and the go ahead was granted.

Third semester: July to September I went into depth of chapter 2 submitted, did corrections, and proceeded to chapter 3 I did it and submitted, it came back with corrections did those and started chapter 4, it was also done and sent to supervisor, and it came back with corrections. When it came back, I rectified all errors and begun the final chapter 5. I submitted back for corrections and with the introduction and findings on chapter 5. It came back with corrections even on my findings and that made life easier for me to rectify those.

Fourth semester: October to December I was already in the middle of chapter 5. I finalised it and sent to supervisor to correct it, it came back with corrections, and I rectified it and sent it. It came back and I did the final touches, and it was ready to be sent to the examiners.

This research study as it is desktop research about secondary victimisation aspects that are taking place in South African courts in matters affecting child victims and witnesses. The focus on legal frameworks that provide protection of children in South African courts. It transpires that the legal framework in South Africa states clearly that it is mandatory to report a case of sexual abuse or any kind of abuse against children that people are aware of. The legal framework is available, but it appears that the reporting of child abuse cases is not escalating.

‘South Africa has a statutory framework for the mandatory reporting of abuse against children. The statutory duty to report incidents of abuse against children is set out in section 4 of the Prevention of Family Violence Act 39 and section 42 of the Child Care Act⁴⁰, as amended.

Section 4 of the Prevention of Family Violence Act provides for mandatory reporting to a police official, Commissioner of Child Welfare or to a social worker by any person who examines, attends to, advises, or cares for any child in circumstances which ought to give rise to a reasonable suspicion that such child has been ill-treated, or suffers from any injury, the probable cause of which was deliberate.⁵⁰

The Optimus Study mentioned in this research study as footnote 47 reveals that in South Africa we are experiencing sexual abuse problem against children which affects both males and females.

Despite the existence of a statutory framework for reporting of child abuse in South Africa, reporting of child abuse cases remains low.⁵¹

CHAPTER 2: CHALLENGES FACED BY CHILD VICTIMS IN SOUTH AFRICAN COURTS

2.1 Introduction

This chapter will therefore address, the concept of secondary victimisation and the consequences that it may give rise to, will then go on to examine the various stages in the process of dealing with an alleged sexual offence including the reporting of sexual offences, police responsibilities towards child victims, the duty to report knowledge of a sexual offence that has been committed, the withdrawal of sexual offence matters and the under-reporting of sexual offences by child victims. It will look at the untrained criminal justice official dealing with children matters and examine the protection of child victims, within court and outside the court environment, as well as the future protection of victims and potential victims.

It is crucial to look at South African courts to examine how they intervene after an offence has occurred. This chapter focuses on exploring secondary victimisation in South African courts that influence the protection of children from sexual abuse.

“Child sexual abuse is a social problem that requires attention in South Africa.”⁵²

⁵⁰ Report on sexual offences against children does the criminal justice protect children available at https://www.gov.za/sites/default/files/gcis_document/201409/childsexoff0.pdf, accessed on 10 December 2021

⁵¹ Ibid.

⁵² Keeton, C ‘Sexual abuse on the rise in Africa: Governments must act’ (2004) 82 (4) *Bulletin of the World Health Organization*, 313.

Yet, in the greater eThekweni area (Durban), the research found that in 2013 there were only two dedicated Sexual Offences Courts which heard cases involving children. The other 14 regional courts operated with mixed roles which included sexual offences cases involving adult victims.⁵³

It has transpired that very few child cases are being attended to by a dedicated sexual offences court and most of them were being addressed in regional courts alongside all the other cases that do not involve children.

Not all child victims get the opportunity to access dedicated sexual offences courts. As a result, children are mixed with victims of other crimes in the Magistrates' Courts. This can lead to delays because the courts are not only attending to child victims but to the adults as well, and their matters could not be treated as priority.

Children continue to be more vulnerable as they are not safe in their homes and communities. 'Population-based prevalence studies show that the most common forms of violence against children reported in South Africa are physical and sexual violence in the home and community.'⁵⁴

Children are experiencing child abuse in their homes and communities where they are supposed to be protected. It has become a common form of violence that is occurring against children in South Africa. The spirit of ubuntu is fading away in homes and communities which is very disappointing. The spirit of ubuntu that say a person as person through other people. It does not work like that now; it is hard to trust family members and it is worse to trust our communities. It is crucial that when such cases of child abuse are being reported in criminal justice system that it received special attention from competent criminal justice system officials to prevent all maltreatment of child victims that could possibly take place. Hence, the need to address the challenges they face during court proceedings is very important.

⁵³ Report on the re-establishment of sexual offences courts: ministerial advisory team on the adjudication of sexual offence matters (2013) 28.

⁵⁴ Bekink, M The Protection of Child Victims and Witnesses in a Post-Constitutional Criminal Justice System with Specific Reference to the Role of an Intermediary: A Comparative Study, PhD Thesis, UNISA 2016 available at http://uir.unisa.ac.za/bitstream/handle/10500/22774/thesis_bekink_m.pdf?sequence=1&isAllowed=y, accessed on 07 July 2020.

Untrained court officials to deal with cases involving child victims could be a contributing factor into challenges faced by child victims in South African courts. For example, dealing with a child victim requires a special training to be able to provide service delivery that is to their best interest. It is important to empathise with child victims and be non-judgemental. If an official is not trained would not know how to deal with such child victims and that could lead to many problems such as being unable to obtain all testimony from children, delayed convictions, and secondary victimisation.

2.2 Definitions

2.2.1 Sexual offence against children

The most relevant piece of legislation is the Criminal Law SORMA. In terms of this Act, Acts of consensual sexual penetration with certain children constitute statutory rape.

15. (1) A person (“A”) who commits an act of sexual penetration with a child (“B”) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child. (2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the National Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the National Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1). (b) The National Director of Public Prosecutions may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not. Acts of consensual sexual violation with certain children (statutory sexual assault)

16. (1) A person (“A”) who commits an act of sexual violation with a child (“B”) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child.

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the relevant Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the Director of Public Prosecutions concerned authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1). (b)

The Director of Public Prosecutions concerned may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.”⁵⁵

The Act repeals the common law offence of rape and replaces it with a newly expanded definition and ensures that the Act applies irrespective of the gender of the victim. Whether you are a female or a male you are vulnerable to sexual assault and are protected by legal framework.

2.2.2 Child

There are several variations in the many definitions of what constitutes a child but, as can be seen from the definitions that follow, the general principles are common to all of them. “A child is primarily defined by age, with the most common agreement being 18 years.”⁵⁶ “The importance of defining the concept of a child speaks for itself since it determines to which specific rights a person up to 18 years is entitled.”⁵⁷

Convention on the Rights of the Child (CRC) states that the term “children” refers to all persons under the age of 18 within the jurisdiction of a State party, without discrimination of any kind, in line with articles 1 and 2 of the Convention.⁵⁸ In terms of Article 1, for the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

CRC, constitution and UNRC states that a child are all people under the age of 18. it is constitutional that if any person is below age 18 is treated as a child. The Constitution defines a child as any person under the age of 18 years old. This is in line with the United Nations Convention on the Rights of the Child 1989 (UNCRC) defines a child as anyone under the age of 18 unless a different age has been set by law in any specific country.⁵⁹

⁵⁵ Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

⁵⁶ Fintel, M V & Zoch, A ‘The dynamics of child poverty in South Africa between 2008 and 2012: An analysis using the National Income Dynamics Study’ Stellenbosch economic working paper (2015) 05/15.

⁵⁷ Spijker, G H A ‘The placement of children in need of care and protection: A comparative study between South African Law and Dutch Law in the light of international standards’ LLD Thesis University of Pretoria (2013).

⁵⁸ General comment No. 14 (2013)3(1) on the right of the child to have his or her best interests taken as a primary consideration⁷.

⁵⁹ Article 1 of the Convention on the Rights of the Child: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” Available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, accessed 20 October 2021.

2.2.3 Child victim

“The term ‘child victim’ is used to refer to a child against whom a sexual offence has been committed. The term ‘victim’ has generated much debate in the context of sexual exploitation and violence against children. Many argue that this term implies powerlessness, rather than the resilience of the victim.

Those who support this argument prefer to use the term ‘survivor’, since it is more positive and draws attention to resistance, coping and survival.”⁶⁰

A child becomes a child victim when he or she has been sexually abused or abused in any manner. Those who report their cases and be able to obtain counselling sessions, when they have completed their counselling sessions, sometimes they can feel like survivors of the scourge of sexual abuse.

“Victim is used to refer to someone experiencing injustice for which the perpetrator is responsible. It indicates that the persons experiencing human rights violations have the right to protection, assistance, and reparation.”⁶¹

Child victims are being overpowered by the perpetrator as they are being violated their rights of being protected in the country of South Africa. This violation infringes the rights of victims of being free from any harm.

“A victim is any person who has suffered harm, including physical or mental injury; emotional suffering; economic loss or substantial impairment of his or her fundamental rights through acts or omissions that are in violation of the criminal law. ‘Victim’ includes, where appropriate, indirect victims such as the immediate family or dependents, or even neighbours or colleagues of a direct victim. A person may be considered a victim regardless of whether the perpetrator is: identified, apprehended, prosecuted, or convicted; and regardless of the familial relationship between the perpetrator and the victim.”⁶²

⁶⁰ United Nations Office on Drugs and Crime, Regional Office for Southeast Asia and the Pacific, Training Programme on Prosecuting and Adjudicating Cases of Sexual Exploitation of Children for Prosecutors and Judges. 2016, UNODC, Bangkok, Thailand iii.

⁶¹ United Nations Office on Drugs and Crime, Regional Office for Southeast Asia and the Pacific, Training Programme on Prosecuting and Adjudicating Cases of Sexual Exploitation of Children for Prosecutors and Judges. 2016, UNODC, Bangkok, Thailand iii.

⁶² National policy guidelines victim empowerment at <https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/National%20policy%20guidelines%20for%20victim%20empowerment.pdf>, accessed on 11 April 2020.

A child victim refers to the child or a person who has been violated by the perpetrator whether physically, mentally, economically, or emotionally.

The focus of this research study though is physically abuse sexual abuse and even if the perpetrator has been apprehended or not the child victim remains.

2.2.4 Children with disabilities

Children with disabilities: Children who have an impairment, i.e., physical e.g. loss of a limb; sensory e.g. loss of hearing and sight; intellectual e.g. learning difficulty.⁶³

2.2.5 Perpetrators

Perpetrator “Refers to an individual responsible for committing a criminal or violent act. It is usually used in relation to the effects of the act on another person, the victim. In the case of violence in a domestic context, the term ‘abuser’ may also be used.”⁶⁴

Perpetrator is any person who has done a criminal act against a person in the case of physical abuse. If the violated person decides to open a case against that person, he or she can be arrested and the consequences of their criminal act.

Perpetrator is the suspect, a person who allegedly committed a criminal offence and was arrested by police officials. The perpetrator should be “identified, apprehended, prosecuted or convicted; and regardless of the familial relationship between the perpetrator and the victim.”⁶⁵

2.2.6 Multi-disciplinary Team

A multidisciplinary team involves a range of health professionals, from one or more organisations, working together to deliver comprehensive patient care.⁶⁶

⁶³ Guidelines for early childhood development services: Department of Social Development in South Africa (2006)7.

⁶⁴ Ibid.

⁶⁵ National policy guidelines victim empowerment available at <https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/National%20policy%20guidelines%20for%20victim%20empowerment.pdf>, accessed on 11 April 2020.

⁶⁶ ‘A Health One NSW multidisciplinary team’ available at <https://www.health.nsw.gov.au/healthone/Pages/multidisciplinary-team-care.aspx>, accessed on 17 November 2021.

Various professionals and volunteers from different departments and NGO's join in providing service delivery to vulnerable victims. Their service is based on joint strategic planning, and they update one another to produce a quality product.

A multi-disciplinary approach “to address the diverse needs of victims, services must be rendered on a multi-disciplinary basis by relevant role players from the various sectors in a coordinated and integrated manner”.⁶⁷

Multi-disciplinary team includes all department stakeholders such as the department of health, department of safety and security, criminal justice system, correctional service centre and NGO'S. It is to ensure that an effective service delivery is provided to all child victims.

2.3 Secondary victimisation

2.3.1 Introduction

The Sexual Offences Courts are mainly intended to “address the victim’s special needs; reduce and eliminate secondary traumatisation of the victims and their families as they engage with the court system; as well as improve the case cycle times and the outcomes of cases.”⁶⁸ A report by a ministerial advisory team on the adjudication of sexual offence matters further states that a Sexual Offences Court is defined as a regional court that deals exclusively with cases of sexual offences.⁶⁹

“A further objective was to train justice personnel and other stakeholders to handle sexual offence matters. The task team was subsequently dissolved and overtaken by the establishment of the Sexual Offences and Community Affairs Unit (SOCA) within the National Directorate of Public Prosecutions in September 1999. The SOCA Unit was given the responsibility of establishing specialised sexual offences courts and introducing specialist sexual offences prosecutors.”⁷⁰

⁶⁷ Supra note 26.

⁶⁸ Commission for Gender Equality, *struggling to meet the Ends of Justice: Assessing departmental responses to CGE findings on the Victims Charter* Department of Justice (2016).

⁶⁹ Report on the re-establishment of sexual offences courts: ministerial advisory team on the adjudication of sexual offence matters (2013) 10.

⁷⁰ Müller, K D & van der Merwe, I A ‘The sexual offences prosecutor: a new specialisation?’ (2004) 29 (1) *Journal for Juridical Science* 136.

Secondary victimisation is the result of “unsympathetic, disbelieving and inappropriate responses that victims experience at the hands of society in general and at each stage of the criminal justice process”.⁷¹

This research study will focus on how a multidisciplinary approach will implement interventions that would assist child victims and their families.

The focus is on coping with their current situation of sexual abuse against child in South Africa. Provide counselling, social support and be available when they need guidance. Working with a family in child protection is difficult because of the family’s aggression and lack of insight, and the subsequent need for colleagues and the police to become involved.⁷²

Multi-disciplinary intervention focuses on providing wellbeing of child victims. They provide counselling to assist the child victim cope with their ordeal. They provide social support such as focus group where all victims who has suffered the same ordeal such as sexual abuse could be part of a healing process, just to hear how other victims are coping with such offence. They are also providing guidance as to how child victims can carry on living their lives after sexual offence has occurred against them.

2.3.2 Potential faults within the criminal process

The child victim’s experience with the criminal justice system commences with an incidence of child sexual abuse. Sexual abuse is defined as ‘the involvement of a child in sexual activity that he or she does not fully comprehend is unable to give informed consent to, or for which the child is not developmentally prepared, or else that violates the laws or social taboos of society’.⁷³

A sexual offence is traumatic to the child victim and requires trained criminal justice officials or volunteers to deal with them. The fact is that the child did not consent to the act and that the child is often not yet mature enough to comprehend all the consequences of being sexually assaulted. It is crucial, therefore, that these children are aware that they are being treated with the respect they deserve.

⁷¹ Artz, L & Smythe, D (Eds) ‘*Should We Consent?*’ 2008 *Rape Law Reform in South Africa* 268.

⁷² J Hope & C van Wyk ‘Intervention strategies used by social workers in emergency child protection’ (2018) 54 (3) *Social Work/Maatskaplike Werk* 427.

⁷³ World Health Organization *Violence & health in the WHO African region* (2010).

Children are more likely to witness violence and experience maltreatment (including sexual abuse by people they know) in their homes than anywhere else.⁷⁴ Sexual assault is a serious offence and perpetrators are known in most cases and happen to be family members. As a result, the court experience will be even more traumatic. “The experience of sexual abuse impacts negatively on the child’s development, behaviour and perception of his/her environment, which is referred to as trauma.”⁷⁵

Firstly, an incident is committed by the perpetrator which results in a crime and a crime scene. Immediately once the crime is reported to the police, the complainant officially becomes the victim of that crime. A sexual offence crime can be reported at any time as there is no specific time limit. However, it is advisable to report it as early as possible. Once the crime has been reported, a case will be opened, and the docket will be allocated to a specialised detective who will then conduct all the necessary investigations. In the case of sexual assault where the victim is a child, the case will be given to the detective in this specialised field, as the SAPS established the Family Violence, Child Protection and Sexual Offences (FCS) unit in 1995. It will then proceed to a medical practitioner to attain the required physical evidence and thereafter (though often after some delay), it will proceed to court.

“Victims of crime and violence experience not only the direct negative impact of the incident (primary victimisation), but also frequently other negative impacts that are secondary to the incident and that occur during contact with the criminal justice and associated systems (secondary victimisation).”⁷⁶ For example, a child who has been sexually assaulted may experience a “second rape” when asked to disclose the incident in an open area at a charge office, as it is still a challenge that many police stations do not have fully equipped victim-friendly rooms and this has been my personal observation as I was previously detached at the KZN Provincial task team. We would be deployed in different areas during our shifts and perform our duties in all KZN police stations and I discovered that some of the police stations had no victim friendly room at all.

⁷⁴ Dawes, A et al *Towards more comprehensive and indirect determinants of understanding of the direct determinants of violence against with a view to enhancing women and children in South Africa violence prevention* (2016) 96.

⁷⁵ Jonker, G & Swanzen, R ‘Intermediary services for child witnesses testifying in South African criminal courts’ (2007) 6 (4) *International Journal on Human Rights* 99.

⁷⁶ National policy guidelines victim empowerment available at <https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/National%20policy%20guidelines%20for%20victim%20empowerment.pdf>, accessed on 11 April 2020.

The victim friendly room in Pinetown SAPS where I am currently based was completed in 2019, which was very exciting as a step forward to reduce secondary trauma on child victims of sexual offence.

This research study focuses on a multidisciplinary team that is involved in supporting and providing relevant assistance to the child victim in South African Courts.

For example, it may also happen that the child victim is being examined by a doctor who lacks empathy and then again in court where maybe when giving evidence at her trial, the questions would be humiliating, such as: *were you wearing the same short skirt that you are wearing today when the incident occurred?* This type of questioning makes the victim believe it was their fault that the perpetrator sexually assaulted them. The following comments made in respect of the cross examination of a child victim in the Omotoso trial illustrate this point:

“During her rape trial – Zondi alleged that from the tender age of 14, Nigerian Pastor Timothy Omotoso raped and sexually abused her multiple times during her visits to the Pastor’s mission house in Durban. Representing his client, Daubermann posed the question “Why didn’t you scream?” to Zondi. But the invasion did not stop there - Daubermann went further to ask Zondi details about her alleged rapist’s penis and how deep he had penetrated her. Daubermann’s cross-examination of Zondi left South Africans shell-shocked and outraged.”⁷⁷

“Gender activists and civil society decried the cross-examination as secondary victimisation, which forces victims to relive their trauma and places the blame at the victim’s doorstep. This, however, is commonplace in an adversarial law system such as the one found in South Africa, according to Justice and Constitutional Development Deputy Minister John Jeffrey in an interview with *SA News*.”⁷⁸

Secondary victimisation is experienced by a child victim when, for example, after being sexually assaulted and reporting the case to the police station he or she is judged or ill-treated by the police or is questioned in an unfriendly environment.⁷⁹ This could continue at the

⁷⁷ Sensitising the legal arm to address sexual offences available at <https://www.sanews.gov.za/features/sensitising-legal-arm-address-sexual-offences>, accessed on 10 April 2020.

⁷⁸ Ibid.

⁷⁹ This could be in the public open space of the Client Service Centre (CSC), normally referred to as the charge office where a lot of people can hear the conversation and might judge the victim as a result of the offence that had occurred.

Department of Health (DoH), as the child victim would require a doctor's examination. The child victim might be examined by a doctor who lacks empathy. This could continue at the courts the child victim case might be given to criminal justice officials lack the skills. it could happen that they lack professionalism necessary to deal with cases where a child is the victim or a witness, or both. Child victims of crime and violence therefore experience negative impacts that are secondary to the incident.

It could occur during contact with law enforcement upon reporting the sexual offence, as well as and the with criminal justice system during court proceedings. Sexual assault is a painful and traumatic experience; hence the various role players must perform all their duties in the best interest of the child victim. The use of intermediaries by the court when dealing with child witnesses is an example of how the system has been developed to consider the needs of children and intermediaries (when used) now play a major role in terms of familiarising a child victim with the court proceedings.

The child victim, if testifying as a witness, requires court preparation before delivering his or her testimony in the trial and they should be assisted by intermediaries. Section 170A of the Criminal Procedure Act enables a child to give evidence via an intermediary in situations where the child would experience undue mental stress or suffering if they were to testify in the conventional manner.⁸⁰

2.3.3 Consequences of secondary victimisation

“In addition to exacerbating the negative effects of the sexual abuse, secondary victimisation results in the victim not trusting professionals; intensifying their anger; and questioning or denying whether the sexual abuse had occurred.”⁸¹ ‘Secondary victimisation may be reflected in a wide range of symptoms ranging from relatively minor discomfort to severe physical, psychological and emotional trauma, which may result in social difficulties.’⁸² This discomfort may be emotional, physical and/or mental, all of which require social services involvement. The impact of victimisation felt by child victims of sexual offences will vary from one child to another.

⁸⁰ The Criminal Procedure Act, 51 of 1977.

⁸¹ Denov, M S ‘To a safer place? Victims of sexual abuse by females and their disclosure to professionals’ (2003) (27) *Child Abuse and Neglect* (2003) (27) 47-61.

⁸² Ibid.

For example, one victim may experience anger toward him or herself as self-blame, whereas another one would be angry at all people and may even deny the occurrence of the crime. Secondary victimisation affects all victims but is particularly traumatic to children. Not only are children more vulnerable, but often because family might be the perpetrators, they are left unsupported and unprotected during the court hearing.

Thus, deplorably, it often occurs that the people who are supposed to protect children are the ones victimising them. The court is the only entity with the authority and power to identify and evaluate the evidence, especially the real evidence that could lead to the conviction of the accused. Upon proper identification, real evidence need only be relevant for it to be admitted.⁸³

Courts are required to ensure that the child victim or witness understands what is meant by real evidence and the admissibility of evidence. Judicial officials must therefore be able to identify real evidence and use it in a reasonable manner. Evidence is not limited to real evidence, however and thus, regarding oral evidence child victims must be taught the difference between telling the truth and a lie when testifying, as it could happen that due to their developmental stage, they still cannot identify the difference. This is also the duty of criminal justice officials. The defence is obliged to attack the child's credibility to highlight inconsistencies and discredit the child's evidence.⁸⁴

Müller says that "...in evaluating the competency of the child to act as a witness, there are two components to consider. The first requirement is eyewitness ability, i.e., the ability to report the details of an observed event accurately and completely. This relates to the child's cognitive development with consideration of factors that influence the acquisition, retention, retrieval, and verbal communication of information. The second requirement is the witness's willingness to tell the truth, i.e., the motivational aspect."⁸⁵

⁸³ P J Schwikkard & S E van der Merwe *Principles of Evidence* 3ed (2009) 395. Because real evidence is admissible if relevant, no child needs necessarily be exposed to the risk of secondary victimisation when the court is dealing with real evidence. For example, the admissibility of DNA evidence does not require the testimony of the child victim. Of course, the child may still be needed to supply a context for the DNA evidence, but this, if skilfully handled, can still reduce their exposure to the potential secondary trauma.

⁸⁴ G Jonker & R Swanzen 'Intermediary services for child witnesses testifying in South African criminal courts' (2006) (6) (4) *International Journal on Human Rights* 92.

⁸⁵ As cited in Jonker, G & Swanzen, R 'Intermediary services for child witnesses testifying in South African criminal courts' (2006) (6)(4) *international journal on human rights* 92.

All these moments of interfacing with child victims present the officials concerned with an opportunity to be kind to the child victims or to cause them to suffer secondary victimisation.

2.3.4 Causes of secondary victimisation

Thus, from the discussion above it is possible to glean an understanding of the possible causes of secondary victimisation.

Once these are identified the way a multi-disciplinary approach can address these can then be examined. Orth and Maecker identify possible causes of secondary victimisation to include.

- i. “The long wait in between the report of a crime and the day of the trial, which might be remanded a number of times.
- ii. Victim’s experience of being blamed for the crime.
- iii. The court decision being perceived as outrageous, and
- iv. Negative assessments of procedural justice.”⁸⁶

“It is important that multi-disciplinary teams work together with all stakeholders to curb secondary victimisation against child victims. All departments must work with a victim centred approach to put the victims first and provide their best interest.

To prevent secondary victimisation of people providing protection, response, care, and support and re-integration programmes, to provide a framework for integrated and multi-disciplinary coordination of victim and multi-disciplinary coordination of victim empowerment and support, and to provide for the specific roles and responsibilities of relevant department and other stakeholders.⁸⁷

Prevention and solution approach to secondary victimisation it must involve multiple stakeholders to work together in providing service delivery to child victims. Offering support programmes to empower all child victims accessing their service. Child victims need must be prioritised to provide what is their best interest.

⁸⁶ Orth, U & Maecker, A ‘Do trials of perpetrators retraumatize crime victims?’ (2004) 19 (2) *Journal of Interpersonal Violence* 212-227.

⁸⁷ Victim support Bill, 2019 as cited in Roberts, M Policy Brief Victim-centred prosecutions Lessons for South Africa available at <https://www.africaportal.org/documents/21006/pb-153.pdf>, accessed on 21 December 2021.

The departments need to work together and compile one document to consolidate effectively all the differences as well as the problems that the departments are facing in implementation. This is very important as the policy makers are not directly working with victims.⁸⁸

Multi-disciplinary team must implement programmes to assist child victims cope with their situation programme such as counselling sessions the implementation of such programmes could be a problem. The ideas could be right and very helpful theoretical but comes the implementation and no one is taking an initiative to begin.

It is the duty of the court official to prepare the child before appearing to testify in court. If not, a child victim can experience fear. Court is a foreign land to a child, so the court official or intermediary must even prepare the child, tell him or her the roles that will be present in court. When they arrive, they will recall what they have been told and be calm and present themselves well.

Secondary victimisation occurs in courts when the child victim was not prepared for court proceedings, by the insensitive treatment by criminal justice officials. The Constitutional Court has recognised that a victim of sexual assault having to testify about intimate details in front of the perpetrator and being exposed to hostile cross-examination can cause secondary trauma.⁸⁹

It has transpired that child victims experience secondary victimisation when testifying in the presence of the perpetrator. For the perpetrator to encounter child victim during court proceedings, it requires a trained criminal justice stakeholder. The trained multi-disciplinary officials would know that the child victims and perpetrator can testify in different rooms. The child could utilise CCTV to testify against the perpetrator.

2.4 Reporting sexual offences

Sexual offences must be reported to police stations, which is the first step in enabling a functioning criminal justice system to follow up on and send a clear message to all perpetrators. Therefore, reporting sexual offence cases is an important initial phase in addressing the challenge facing child victims of sexual offences in South African courts.

⁸⁸ Jonkers, G 'Roles and responsibilities of forensic social workers in the family violence sexual offences unit' (2012)67.

⁸⁹ Bellengère, A et al, *The Law of Evidence in South Africa* 2ed (2019) 508.

The service must be provided professionally by a skilled police official in a victim-friendly facility. The environment must be conducive enough for the child victim to feel at ease and to be able to disclose all the information that could lead to the arrest of the perpetrator.

‘Since disclosure is the initial step in the child’s healing process and often precipitates intervention, the circumstances and way disclosure occur and is handled is critical.

The nature and manner of disclosure and the response to it has a bearing on the trauma to the child, the child’s response to counselling and the conduct of subsequent legal proceedings.’⁹⁰

The case of sexual offence against a child or a child with disability must be reported by the other person such as a professional who has been told by the child or has observed that the child has changed in a manner that requires some interventions, such as medical and criminal justice system. It can also be reported by the child victim him or herself or any other person who is aware of the offence is obliged to report it.

‘Universally there are two approaches to reporting child abuse which includes sexual abuse, namely, mandatory, and voluntary reporting. Mandatory reporting occurs where a designated person is under an obligation to report a case of child abuse that comes to his/her attention under certain specified circumstances. Voluntary reporting is where there is no obligation on a person to report abuse, even where he/she acquires knowledge of abuse in the context of his/her profession.’⁹¹

The police official or investigating officer must have a two-way communication with the court and be able to provide accurate information to the child victim. The South African Police Services is “the initial point of entry to the criminal justice system in the majority of cases and is therefore responsible for ensuring that the victims of crime, especially sexual offences, and other serious and violent crimes, are provided with a victim-friendly service.”⁹²

⁹⁰ Report on sexual offences against children: does the criminal justice protect children available at https://www.gov.za/sites/default/files/gcis_document/201409/childsexoff0.pdf, accessed on 10 December 2021.

⁹¹ Ibid.

⁹² Victim Empowerment Service in the South African Police Service available at https://www.saps.gov.za/resource_centre/women_children/amended_victim_empowerment_service.pdf, accessed on 11 April 2020.

Victim Empowerment Service in the South African Police Service further states the role of the investigating officer as keeping the victim informed of the progress made with the investigation (medical examinations, identification parades, identification and arrest of the alleged suspect); court procedures (decision of the prosecutor to prosecute/not prosecute, first appearance of the accused, bail hearing, bail conditions, trial dates, postponements, date required to testify, pre-trial meeting with the prosecutor, outcome of the trial); the date and place when seized property may be collected; prepare the victim for the court process; and inform the victim that the accused will have access to the docket.⁹³

The reporting of a sexual offence must be done ‘immediately’, according to section 54(1)(a) of the SORMA. All people are required or expected to report a sexual offence against children and children with disabilities as soon as they discover it. Should they fail to do so, they could be liable for breaching section 54(1)(a) of the SORMA.

If police officials from the word go do not treat the child victims with respect, it is more likely that they will not report cases of sexual offence because they are concerned that police officials will victimise them further. Support is therefore essential to child victims.

2.4.1 Police responsibilities toward child victims

The Victim Empowerment Service document perfectly sums up the police’s responsibilities to wards child victims: “Police officials are required to treat child victims with sensitivity. They must provide information to child victims, complainants, and witnesses. If the police discover that the child victim’s life is in danger if she or he is sent back home, it is their responsibility to provide whatever assistance the circumstances require: for example, referral according to the needs of the child victim, which may involve assisting the child victim to obtain suitable shelter and attain medical treatment. The child victim must be informed that the perpetrator can access the information regarding the case against him or her and they must be informed that they also have a right if they do not want the perpetrator to have access to any information regarding the victim and the case, to send a request to the prosecutor and block the perpetrator from accessing that information.”⁹⁴

“If the victim has any specific reason for not wanting the accused to have this

⁹³ Victim Empowerment Service in the South African Police Service available at https://www.saps.gov.za/resource_centre/women_children/amended_victim_empowerment_service.pdf, accessed on 11 April 2020.

⁹⁴ Victim Empowerment Service in the South African Police Service available at https://www.saps.gov.za/resource_centre/women_children/amended_victim_empowerment_service.pdf, accessed on 11 April 2020.

information, the police must submit the request to the prosecutor to withhold the name and address of the victim and also inform the victim of available support/counselling services.”⁹⁵ For this to be effective, police officials must be able to assist child victims in the language of their choice. As the Victim Empowerment Service in the South African Police Service document suggests,⁹⁶ the police must explain to the person that “being a victim of crime can be a traumatic experience and that people often need counselling and other support services to cope with the impact of this experience, or to participate effectively in the criminal justice process.”⁹⁷ This includes the following:

- i. “Ask the person whether he/she wants to be referred to these services for assistance.
- ii. Consult the support services referral list and select appropriate service providers. (If possible, provide the victim with the names and contact numbers of at least two service providers so that the victim can make the final choice).
- iii. Notify the appropriate service provider if the victim so wishes.
- iv. Provide the following information to the service provider when referring someone:
 - a. The name, address, contact number and age of the victim.
 - b. A very brief description of the victim’s problem(s).
 - c. All other necessary information, depending on the type of service provider the victim is referred to: e.g., a lawyer, social worker, medical doctor.
- v. Never give more information than is strictly necessary, as this will violate the confidentiality and trust the victim has put in him/her; and
- vi. Never provide a victim with any victim support services, like counselling. All traumatised victims must be referred to professional service providers.”⁹⁸

⁹⁵ Victim Empowerment Service in the South African Police Service available at https://www.saps.gov.za/resource_centre/women_children/amended_victim_empo_service.pdf, accessed on 11 April 2020.

⁹⁶ Victim Empowerment Service in the South African Police Service available at https://www.saps.gov.za/resource_centre/women_children/amended_victim_empo_service.pdf, accessed on 11 April 2020.

⁹⁷ Victim Empowerment Service in the South African Police Service available at https://www.saps.gov.za/resource_centre/women_children/amended_victim_empo_service.pdf, accessed on 11 April 2020.

⁹⁸ Victim Empowerment Service in the South African Police Service at https://www.saps.gov.za/resource_centre/women_children/amended_victim_empo_service.pdf, accessed on 11 April 2020.

Police officials play a pivotal role in this context, and it is therefore important that they are appropriately skilled in order to provide relevant assistance. Victims need to be given information and to be treated with respect. If police officials are not skilled, they would not be able to refer the child victims to relevant stakeholders as they themselves would be ignorant.

For example, if the first-stop officials, who are the police officials, do not know how to perform their duties, they would not be in a good position to provide relevant information and referring a child victim to the relevant professional will probably not happen. He or she might end up providing counselling instead of referring the child victim. The confidentiality of the matter might be compromised, leaving the child victim in a position where they do not receive the support they require.

2.4.2 Duty to report knowledge of a sexual offence committed

In terms of section 54(2)(a) of the SORMA, “every person has a duty to report knowledge of a sexual offence committed against a child and knowledge, reasonable belief or suspicion of a sexual offence committed against a mentally disabled person.”⁹⁹

The report must be immediate and must be made to a SAPS official. “Failure to report under this section is considered a criminal offence and punishable with a fine or imprisonment of 5 years, or both.”¹⁰⁰

The community at large must be educated not to keep quiet when they see sexual offences being committed. Most community members are aware that they must report cases, but they need to be reminded by crime awareness campaigns and educational programmes. The vulnerable child victims might be powerless to rescue themselves and thus require someone to come to their rescue. There is therefore a need to “upgrade our culture of reporting crime when [one] sees it being committed.”¹⁰¹

The duty to report is not limited to the police or to communities. It is also applying to professionals. While most professionals are competent in performing their duties some are incompetent and require skills development in this regard.

⁹⁹ Section 54(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

¹⁰⁰ Section 54(1)(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

¹⁰¹ Ramaphosa, C State of the Nation Address: South African Government 13 February 2020 available at <https://www.gov.za/speeches/state-nation-address-numbers>, accessed on 11 April 2020.

All departments and all stakeholders, including professionals, dealing with cases involving children must be trained and must be assessed for competence prior to being involved in assisting child victims. It is therefore important to provide information to the families, communities, professionals, and child victims about the importance of reporting cases against children. They must be taught about section 54 of SORMA, which provides that:

“any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial-care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected must report such conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.”¹⁰²

Reporting child abuse is mandatory. All people are compelled not to remain silent when a criminal offence has occurred against a child, and one is aware of it. The Sexual Offences Act, however, compels all citizens (i.e., all persons living in SA who are entitled to the rights promised by the Constitution in terms of section 3) who are aware of the sexual exploitation of children to report the offence to the police.¹⁰³

2.5 Withdrawal of cases regarding sexual offences

“Experts estimate that only 10-30% of perpetrators are strangers — the rest are family members or acquaintances.”¹⁰⁴

¹⁰² Ibid. For more information on mandatory reporting see, inter alia, Hendricks, M L ‘Mandatory reporting of child abuse in South Africa: Legislation explored’ (2014)104(8) *South African Medical Journal* 550-552 available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95742014000800018&lng=en&tlng=en; Meinck, F et al, (2017) Disclosure of physical, emotional and sexual child abuse, help-seeking and access to abuse response services in two South African Provinces, *Psychology, Health & Medicine*, 22:sup1, 94-106, DOI: 10.1080/13548506.2016.1271950; M Bekink Reversing the ‘syndrome of secrecy’: Peremptory reporting obligations in cases of child abuse and neglect (2021) *South African Crime Quarterly*, accessed on 20 August 2021.

¹⁰³ Hendricks, M L ‘Mandatory reporting of child abuse in South Africa: Legislation explored’ available at <https://www.semanticscholar.org/paper/Mandatory-reporting-of-child-abuse-in-South-Africa%3A-Hendricks/14ba54a9fd0891ad09dc411d70690a18d676c5d6>, accessed on 18 November 2021.

¹⁰⁴ Lisae, C Jordan, E S Q & McDermott, M L ‘Sexual assault legal institute: Understanding the Legal System When Your Child Has Been Sexually Abused’ (2018).

Children are vulnerable at their residence and the perpetrators happen mostly to be the people they trust. If the case involves a family member, families often attempt to resolve the matter on their own. If the case has been reported family members sometimes agree to withdraw the case to protect the image of their family. The disclosure of sexual offence can also be stressful to all family members, and this too could negatively affect the reporting of the case.¹⁰⁵ This could negatively impact upon the progress of the case and wellbeing of the child victim. The child victim would remain vulnerable and might be denied obtaining any assistance.

2.6 The failure to report and underreporting

When presenting the South African crime statistics for 2017/2018, Minister Bheki Cele highlighted the problem of the under-reporting of sexual offences. This is very worrying indeed as in 2001 Finkelhor *et al* highlighted this problem in an international context.¹⁰⁶ Therefore, it should have come as no surprise to the Minister almost two decades later that this is an issue needing to be addressed. This reveals that the problem has a deep root that need to be uprooted for the sake of protecting child victims.

There are a number of hindrances to disclosure, which could include difficulties in accessing legal services; the possibility of retaliation by the perpetrator; fears of not being believed; self-blame; and fear of the medical examination and of the legal proceedings. In cases where a child is involved, it means that an additional appropriate person is going to be involved such as parents, professionals, and guardians. There is a legal expectation from professionals to aid according to a victim's needs, which seems to not always be the case.

There have also been reports from mothers of sexually abused children concerning the lack of support from professionals.¹⁰⁷ Some of the reasons why cases are not reported, besides the prospect of secondary victimisation, are briefly outlined below.

Firstly, the victims of sexual offences often feel as if there was something that they did to push the perpetrator to victimise them.

¹⁰⁵ Ibid.

¹⁰⁶ Finkelhor, D Wolak, J & Berliner, L 'Police reporting and professional help-seeking for child crime victims: A Review' (2001) 6(1) *Child Maltreatment* 17-30.

¹⁰⁷ Plummer, C A & Eastin, J A 'System intervention problems in child sexual abuse investigations: The mothers' perspectives' (2007a) 22 (6) *Journal of Interpersonal Violence* 775.

Thus, when victims feel sad, embarrassed or blame themselves, the likelihood that they will obtain the strength to face police officials to report the case is greatly diminished. The thought that if they report the matter, they are going to receive a less than welcoming and supportive reception from the police may well deter them further. If it happens that they find the courage to report the matter, insensitive treatment by police officials will make it even worse for victims. If this continues to court and they do not receive professional assistance by skilled officials, it could lead to the victims losing hope in the criminal justice system, thereby preventing them from reporting in future.

“Feelings of self-blame and helplessness are two common emotional consequences of sexual abuse.”¹⁰⁸ Such feelings are not uncommon with child victims who are likely to experience mixed emotions. Their experience of being sexually assaulted could leave them feeling helplessness and blaming themselves.

“A child faces many social and emotional difficulties at the time of appearance in court, as well as during the interrogation by the defendants’ lawyers in an open forum that is highly stressful and demanding to the child; professionals have also described this as “revictimisation” or “the second rape”.”¹⁰⁹

Victims of sexual offences mostly feel as if the incident would not have occurred if, for example, they had not dressed the way they did or if they had not been present at that crime scene at the particular time. They tend to suffer more self-blame which is exacerbated when they are also judged while bringing the matter to the attention of the law enforcement agencies.

Secondly, children are vulnerable, even in places or homes where they are supposed to be safe.

Sometimes, the victim’s family intervenes and compels the child victim not to disclose such an ordeal. As a result, even if the case is reported, it may be delayed as the family members would not want to resolve the matter and so the child remains vulnerable to circumstances.

¹⁰⁸ Jeremy, P S ‘Self-blame versus helplessness in sexually abused children: an attributional analysis with treatment recommendations’ (1989) 8 (4) *Journal of Social and Clinical Psychology* 442-455 available at <https://guilfordjournals.com/doi/pdf/10.1521/jscp.1989.8.4.442>, accessed on 08 July 2020.

¹⁰⁹ Richter, L Dawes, A & Smith, C H *Sexual abuse of young children in South Africa* South Africa: HSRC press (2004) available at <http://hdl.handle.net/20.500.11910/7963>, accessed on 20 November 2021.

Sometimes a child victim will miss the court date and no one in the family or very few will encourage him or her to continue with the case or remind her or him of all the important dates regarding court proceedings.

Thirdly, children are often threatened by the perpetrators that they will kill them if they disclose the assault or abuse, whilst others are being brainwashed into believing that it is their secret game and it must stay between them (the child victim and the perpetrator). A sexual offence, when committed on a child, can be truly confusing because the child often does not even know what is happening to him or herself. The perpetrator could bluff him or her and tell them that it is their ‘little secret’ and that it must remain between them. This sexual offence can be prolonged and often goes unreported. “Abuse is less likely to be disclosed in cases where it is more severe, of longer duration and where the perpetrator is known to the child.”¹¹⁰

Fourthly, the situation is exacerbated when the perpetrator is a family member as the family is faced with a situation where it will face further disgrace if the perpetrator is publicly accused. Unfortunately, it is not uncommon that the perpetrator is within the family.

“Durban: 16 January 2020– It is usually people you trust the most in life that turn out to be the ones to hurt and betray you the most. This is what happened to a 15-year-old girl and her 41-year-old mother when they were sexually violated by their trusted relative in September 2015 at Esigodini in Mondlo.”¹¹¹ In African family’s disclosure of sexual offences often evokes a negative reaction from the family at large. It is like a disgrace to the family that must never be known to the public.

The elders may be certain that the child victim is disclosing the truth, but they will act as if it is normal and not take any action as they would want to keep the sexual assault as a family secret. This is evident from the following quote: “The girl, speaking exclusively with the Sowetan, the publication that broke the story, revealed that she was also repeatedly raped by her aunt’s boyfriend. After the other children in the home had informed her grandmother about the ordeal she had faced, the girl claims that this was ignored by the grandmother.”¹¹²

¹¹⁰ Ullman, S E ‘Social reactions to child sexual abuse disclosures: A critical review’ (2003)12(1) *Journal of Child Sexual Abuse* 89- 121.

¹¹¹ Mother and daughter raped, relative sentenced. KZN Prov. Corporate Communication & Liaison, email: Secretary MjanaN@saps.gov.za. 2020/01/17 08:40 AM.

¹¹² 13-year-old girl’s grandmother, aunt and uncle implicated in repeated rape and forced abortion. Available at

“One day, the younger kids were telling my grandmother what they saw happening to me on the couch and she told them to shut up and never to talk about it again. The girl’s father, who had entrusted his mother, brother, and sister to take care of his 13-year-old daughter at their home, was devastated by the revelations.”¹¹³

This leaves the child victim unprotected and often in close proximity to the perpetrator and the child victim is also denied the opportunity of receiving counselling from professionals. The alleged perpetrator, if he or she is a family member, seems to attain more support than the child victim.

As a result, there are many cases of a child who was sexually assaulted by her father, the man who is meant to be the protector of his home, where the family have intervened and caused the matter to remain unreported.

However, there is hope as this is not always the case, as the following quote illustrates.

“In December 2017, the victim who lived with her father and a stepmother was at her home in Amaoti when her father came home in the absence of the stepmother. He forcefully raped his child, blamed her mother for leaving him and threatened to kill the child if she reported the incident. A case of rape was opened at Inanda police station and transferred to the Inanda Family Violence, Child Protection and Sexual Offences Unit for investigation. The accused was immediately arrested and taken to court where he was kept in custody throughout the trial. The accused was sentenced to 20 years imprisonment for rape.

He was declared unfit to possess a firearm and his name will be included in the National Register for Sexual Offenders.”¹¹⁴

The reasons for not reporting a sexual offence can thus be summarised and listed as follows:

“

- i. Fear of not being believed or being accused of lying
- ii. Feelings of shame, guilt, humiliation, and embarrassment
- iii. Feelings of pity and love towards the offender

<https://www.thesouthafrican.com/news/13-year-old-girls-repeated-rape-forced-abortion/>, accessed on 11 April 2020.

¹¹³ Ibid.

¹¹⁴ Biological father sentenced for rape. KZN Prov. Corporate Communication & Liaison, email: Secretary MjanaN@saps.gov.za. Thu 2019/12/05 09:06 AM.

- iv. Problems of physical access to police or social workers
- v. Fear of retaliation or intimidation by the offender, especially when combined with a lack of confidence that the legal process will result in a conviction
- vi. Fear of legal processes, including experiencing rudeness and poor treatment by the police
- vii. Fear of having to relive the trauma in court and during the investigation
- viii. Fear of upsetting the stability of the family
- ix. Fear of the power and authority of the abuser
- x. Fear of loss of economic support by the abuser
- xi. Preference for cultural means of resolving disputes (such as the payment of damages by the offender)
- xii. Fear of ostracism or ridicule by peers
- xiii. Wanting to avoid the stigma attached to being raped (being labelled as 'damaged')."¹¹⁵

2.7 Consequences of reporting

It is encouraging when sexual offence perpetrators are punished for committing sexual offences against children. It can be viewed as a job well done by all the stakeholders and it must be commended. When a child who was violated by the person they know and who was also threatened not to report the incident, manages to get it reported, he or she also deserves to be applauded as this could have remained undercover.

There are, apart from the obvious ones, several positive benefits to be gained from reporting. The disclosure of child sexual abuse can affect the entire family system.¹¹⁶

According to Staller and Nelson-Gardell, disclosure brought relief to the child victims. "A great sense of relief was experienced after disclosure by many of the girls in their study sample."¹¹⁷

¹¹⁵ Rape and other forms of sexual violence in South Africa, available at <https://www.saferspaces.org.za/uploads/files/PolBrief72V2.pdf>, accessed on 06 July 2020.

¹¹⁶ A guide for Friends and Family of Sexual Violence Survivors: Pennsylvania Coalition against Rape' (2013) available at https://www.pcar.org/sites/default/files/resource-pdfs/friends_and_family_guide_final.pdf, accessed on 08 July 2020.

¹¹⁷ Staller, K M & Nelson-Gardell, D 'A burden in your heart: Lessons of disclosure from female preadolescent and adolescent survivors of sexual abuse' (2005) 29(12) *Child Abuse & Neglect* 1415-1432.

However, it was discovered that “while some children had positive experiences of various interventions, some experienced professionals as unhelpful and prone to siding with adults, rather than listening to the child’s side of the story.”¹¹⁸ Thus victims must be made aware of their rights, for example, if their case is handled by an official of a different gender to the victim, they must be informed that it is their right to request to be assisted by an official of the same gender, or the gender of the victim’s preference.

Child victims have been shown to have “varying degrees of both helpful and harmful experiences in the aftermath of the disclosure. [Varying experiences were also discovered in the legal system] where some victims felt that the police were supportive and sympathetic, whilst others found the thought of testifying in court scary as they felt they had less power over the whole situation.”¹¹⁹ Other children felt that “the police were incompetent and they found talking to them frightening and uncomfortable, or that they were pushed into giving details they were not ready to give.”¹²⁰ Therefore it is of the utmost importance that the criminal justice system officials use a child-centred approach when dealing with cases involving children. This means that whatever they perform, it must be in the best interest of the child. All professionals dealing with cases involving children must be skilled and competent in this field. They must be aware of childhood developmental stages and must treat victims according to their different levels.

2.8 Impact of a failure to report

The impact of not reporting a case goes beyond the immediate consequences for the victim alone. When a sexual offence occurs, it does not involve only reporting the matter. There is much more to it. It must be reported to police officials; the necessary referrals have to be obtained; the victim often has to subject him/herself to a medical examination; and also has to go to court. Thereafter, it is also important that if the perpetrator is found guilty, they receive rehabilitation through a rehabilitation programme.

¹¹⁸ Mudaly, N & Goddard, C *The truth is longer than a lie: Children’s experiences of abuse and professional interventions* (2006).

¹¹⁹ Staller, K M & Nelson-Gardell, D ‘A burden in your heart: Lessons of disclosure from female preadolescent and adolescent survivors of sexual abuse’ (2005) 29(12) *Child Abuse & Neglect* 1415-1432.

¹²⁰ Mudaly, N & Goddard, C *The truth is longer than a lie: Children’s experiences of abuse and professional interventions* London: Jessica Kingsley Publishers (2006).

“The implications of a lack of justice may include the following:

- (i) The victim is not vindicated.
- (ii) The perpetrator does not receive legal or therapeutic intervention; and
- (iii) The victim and community continue to be at risk of violation from the un-corrected/ un-rehabilitated offender.”¹²¹

Victims remain at risk of further violation and the community is also at risk, which gives the perpetrator more power to continue with their despicable actions. This imposes a great responsibility on the criminal justice system, which needs to improve its record in terms of protecting victims and in making sure that guilty perpetrators do not go unpunished. This place a responsibility on all stakeholders to ensure the process is initiated and followed through. For example, police officials must make sure that they perform a thorough investigation and are careful not to make any errors which might result in the accused being acquitted.

2.9 Protection of child victims from experiencing secondary victimisation when reporting sexual offence cases

The protection of child victims of sexual offences from experiencing secondary victimisation is a crucial aspect and requires a strategic approach to fruitfully provide what is in the best interest of the child. Child victims of sexual offence are diverse, and all their needs must be provided for to the best of the provider’s ability and in the best interest of the child victim. This means that there must be enough resources to keep the services rendered to all child victims in need.

Various government departments and civil society must work in collaboration in service delivery to child victims of sexual offences as that is the key to the success of the integrated Victim Empowerment Programme. The National Victim Empowerment Programme (VEP) is the initiative of the South African Government (announced in 1996 and implemented in 1999), committed to the victim-centred criminal justice system and delivery of support services to victims to victims.¹²²

¹²¹ Mistry, D ‘Victims and the Criminal Justice System in South Africa.’ Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 11, 29 October (1997); I L Moyer, *Criminological theories: traditional and non-traditional voices and themes* Thousand Oaks: Sage (2001).

¹²² Pretorius, Z & Louw, B ‘Victim empowerment support in South Africa’ in *Victimology in South Africa* (2005).

Because of the very high levels of crime and violence in the country ('Interpol data and crime statistics indicate that South Africa has unacceptably high levels of crime and violence.'¹²³) and the fear it causes lots of South Africans see the Bill of Rights providing more protection to criminals than it does to ordinary citizens.¹²⁴

Crime is high in South Africa, and it could happen that because the constitution of South Africa provides the protection of perpetrators. The arrested perpetrators have right from being apprehended, during court proceedings. Perpetrators that have committed sexual offence against children they are allowed to apply for a bail in court. One would wish that they are infringed their rights to apply for a bail. From the beginning of their arrest, they have the rights of appointing their legal representative and in courts they are present to negotiate what is in their favour and which would be against the child victim's will. The court decision to grant the perpetrator a bail could exacerbate secondary victimisation against the child victim.

"In response, government adopted a crime prevention approach that places the rights and needs of the victims at the centre of the crime prevention strategy. This was the National Crime Prevention Strategy (NCPS), which was developed in 1996."¹²⁵ This has been said that the Victim Empowerment Programme is "one of the key outputs of the National Crime Prevention Strategy (NCPS). It is one of the key programmes of Pillar One of the NCPS."¹²⁶

However, the NCPS has been superseded, "Nonetheless, at the beginning of the second term of the democratic government in South Africa in 1999, the NCPS was replaced by the Justice Crime Prevention Strategy (JCPS).

The intention of the JCPS is to improve upon and broaden the scope of the NCPS to cover issues beyond the Criminal Justice System."¹²⁷

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ 'Victim empowerment is an approach to facilitating access to a range of services for all people who have individually or collectively suffered harm, trauma and/or material loss through violence, crime, natural disaster, human accident and/or through socio-economic conditions.' National policy guidelines victim empowerment available at <https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/National%20policy%20guidelines%20for%20victim%20empowerment.pdf>, accessed on 11 April 2020.

¹²⁷ 'Victim empowerment is an approach to facilitating access to a range of services for all people who have individually or collectively suffered harm, trauma and/or material loss through violence, crime, natural disaster, human accident and/or through socio-economic conditions.' National policy guidelines victim empowerment available at

Nevertheless, the VEP has not been discarded. ‘Despite this change, Victim Empowerment and Support continues to be a priority of the South African Government.’¹²⁸

2.9.1 Victim Empowerment

‘Victim empowerment (VEP) is an approach to facilitating access to a range of services for all people who have individually or collectively suffered harm, trauma and/or material loss through violence, crime, natural disaster, human accident and/or through socio-economic conditions.’¹²⁹

Victim empowerment aims to restore the loss or damage caused by criminal acts and their consequences through a variety of actions intended to empower the victim to deal with the consequences of the event, to leave it behind and suffer no further loss or damage.¹³⁰ The Victim empowerment programme is the process of helping victims of crime to access all services available for them and to support them. Furthermore, it empowers the victims of crime by providing a service that they require in a respect full manner. The aim is to help the victims of crime not to view themselves as victims but as victors (survivors) after all.

2.9.2 Protecting the child within the court environment

‘The South African Police Service is the initial point of entry to the criminal justice system in most cases and is therefore responsible for ensuring that the victims of crime, especially sexual offences, and other serious and violent crimes, are provided with a victim-friendly service. Further, the role of the investigating officer is to keep the victim informed of progress made with the investigation (medical examinations, identification parades, identification and arrest of the alleged suspect), court procedures (decision of the prosecutor to prosecute/not prosecute, first appearance of the accused, bail hearing, bail conditions, trial dates, postponements, date required to testify, pre-trial meeting with the prosecutor, outcome of the trial) and the date and place when seized property may be collected. They must also prepare the victim for the court process and inform the victim that the accused will have access to the docket.’¹³¹

<https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/National%20policy%20guidelines%20for%20victim%20empowerment.pdf>, accessed on 11 April 2020.

¹²⁸ National policy guidelines victim empowerment available at <https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/National%20policy%20guidelines%20for%20victim%20empowerment.pdf>, accessed on 11 April 2020.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Victim Empowerment Service in the South African Police Service available at https://www.saps.gov.za/resource_centre/women_children/amended_victim_empo_service.pdf, accessed on 11 April 2020.

The child victim's beginning phase is with the South African Police service, which is where the protection must begin. After the case has been registered at the police station, the investigators need to perform their role. Thereafter the case docket must go to court where the court proceedings begin. This is a crucial stage in proceedings and is one where children are particularly vulnerable. The child victim must be therefore prepared to undergo the court proceedings. The investigator must familiarise the child victim with court personnel, including the intermediary that will have a close contact with the child. 'The role of the child victim as a witness is also explained by emphasising that the child must listen carefully to questions, answer as clearly as possible and always tell the truth.'¹³² Court officials must work together to address the needs of child victims in South African courts. One of the most important of these needs is the need to protect the child from further trauma.

(i) Intermediaries

The Constitution provides in section 28(1)(d) that a child has a right to be protected from maltreatment, neglect, abuse, or degradation. This includes when a victim is testifying in court. The Criminal Procedure Act, (CPA) contains section 170A (1) which introduces the concept of an intermediary and contemplates that a child witness

"Should be assessed prior to testifying in court in order to determine whether the services of an intermediary are required. If such an assessment reveals that the services of an intermediary are needed, then the State must see to it that an application for the appointment of an intermediary in terms of section 170A (1) is made before the child testifies."¹³³

Intermediaries are needed to aid child victims feel at ease during in South African courts. They are expected to create a conducive and safe environment for the child victim. 'The provision of an intermediary is intended to create this atmosphere for the child.'¹³⁴ Child victims are supposed to be treated with respect and dignity when reporting the sexual offence, as well as during court proceedings. 'Child victims should be exposed to as little stress and

¹³² Müller, K & Hollely, K *Introducing the child witness* (2000) 302.

¹³³ *DPP v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC) paras 110-112118.

¹³⁴ *DPP v Minister of Justice and Constitutional Development* para 96.

mental anguish as possible, particularly in the case of a child witness who has been the victim of a sexual attack,¹³⁵ which is in line with the Constitution.

The appointment of intermediaries depends on certain criteria set out in section 170A(1) of the CPA, which provides that whenever criminal proceedings are pending before any court and it appears to the court that a witness under the biological or mental age of eighteen years would be exposed to undue mental stress or suffering by testifying at such proceedings, the court may appoint a competent person as an intermediary in order to enable such witness to give testimony through that intermediary.¹³⁶

However, the application of section 170A has been erratic with some courts regarding the requirement of undue mental stress or suffering to mean something more than the ordinary stress of testifying.¹³⁷ Others regard this as unnecessarily obstructive. This viewpoint was endorsed by the High Court in *S v Mokoena*¹³⁸ where the court, with reference to the grounds of “undue mental stress and suffering” held as follows:

“In *S v Stefaans*¹³⁹, the court held that “undue” is “something in excess of ordinary stresses”. According to the court, section 170(1) can therefore only be implemented if the witness would suffer more stress than is ordinarily experienced. However, research has indicated that even ordinary stress suffered by children when testifying in an adversarial court can be regarded as undue stress.”¹⁴⁰

Clearly, therefore, the use of an intermediary is not compulsory and depends on whether the court is of the opinion that one is necessary. This has led to some uncertainty in the application of section 170A. For example,

“In *S v Mokoena*, Bertelsmann J declared section 170A (1) of the Criminal Procedure Act to be unconstitutional in that the subsection grants discretion to a court to appoint or not to appoint an intermediary when a child witness has to present testimony in a

¹³⁵ Bekink, M ‘The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa’ available at <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5774>, accessed on 18 September 2019.

¹³⁶ Paraphrased from Section 170A of the Criminal Procedure Act.

¹³⁷ *S v Stefaans* 1999 (1) SACR 182 (C) at 188.

¹³⁸ 2008 (2) SACR 216 (T) at paras 79-80.

¹³⁹ *S v Stefaans* 1999 (1) SACR 182 (C) at 188.

¹⁴⁰ Schwikkard, PJ *Evidence SACJ* (1999) (259)262.

criminal trial.”¹⁴¹

The matter was raised in the case *DPP v Minister of Justice and Constitutional Development*. Unfortunately, the court did not take the opportunity presented to it to maximise the protection of child witnesses and victims even though,

‘The Constitutional Court acknowledged that a child witness testifying about the details of abusive acts may cause severe harm to the child's psychological and emotional wellbeing and may lead to secondary traumatisation.’¹⁴²

The Constitutional Court went on to conclude that when considering section 170(A) of the CPA, if section 170A(1) fails to meet the objective of section 28(2) of the Constitution which provides that “A child’s best interests are of paramount importance in every matter concerning the child”, namely the protection of the interests of the child, “the fault lies not in the provision itself but in the manner in which it is interpreted and implemented.”¹⁴³

As Bekink notes ‘It is regrettable that the court, despite highlighting the fact that intermediaries are key to the questioning of children in the determination of competency, did not provide any guidelines in *DPP v Minister of Justice and Constitutional Development* as to the circumstances in which an intermediary should assist in this process.’¹⁴⁴

There has been widespread criticism of the decision. Schwikkard argues that

‘The flawed approach adopted by the High Court towards section 170A (1) appears to have arisen out of a bias in favour of the accuser’s right to confront and to cross-examine the child witness, and it is not entirely clear whether this bias can be overcome through a process of judicial education, as the Constitutional Court suggested.’¹⁴⁵

¹⁴¹ Bekink, M ‘The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa’ at <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5774> accessed on 18 September 2019. *S v Mokoena* 2008 2 SACR 216 (T) para 101.

¹⁴² *DPP v Minister of Justice and Constitutional Development* para 108.

¹⁴³ Bekink, M ‘The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa’ available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812019000100025, accessed on 10 December 2021.

¹⁴⁴ Bekink, M ‘The Protection of Child Victims and Witnesses in a Post-Constitutional Criminal Justice System with Specific Reference to the Role of an Intermediary: A Comparative Study’ PhD Thesis UNISA (2016).

¹⁴⁵ Bekink, M ‘The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa’ available at <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5774>, accessed on 18 September 2019 quoting P J Schwikkard *Kerkhoff v Minister of Justice and Constitutional Development* (2011) 2 SACR 109 (GNP): Intermediary Appointment Reports and a Child's Right to Privacy versus the Right of an Accused to Access to Information *Acta Juridica* (1996) 162.

Freedman points out that ‘while it is true that some child complainants may want to confront their abusers, it is very unlikely that the majority of child complainants will want to’.¹⁴⁶ He further emphasises that in this respect, it is important to bear in mind that it was the High Court that misinterpreted section 170A(1) and diluted the protection it confers on child complainants.¹⁴⁷ He goes on to note that “the Constitutional Court’s reasons for rejecting the High Court’s view that section 170A(1) is unconstitutional is that its provision to confer discretion to appoint an intermediary are not entirely convincing, at least in so far as sexual abuse cases are concerned.”¹⁴⁸ Others agree and Bekink notes that “Similarly, Matthias and Zaal are of the opinion that the High Court’s approach is preferred for a society in which (as was generally agreed in both cases of *Kerkhoff v Minister of Justice and Constitutional Development*)¹⁴⁹ the problems of insufficiently motivated and sensitised prosecutors and magistrates are extensive.”¹⁵⁰

The CPA therefore seems to disregard the rights of child victims to be protected from maltreatment that could occur during court proceedings if it grants the court leeway to use its discretion regarding the appointment of intermediaries.¹⁵¹

The reality is that testifying in court is not easy and as a child victim, there is a great need for court preparation before the child victim goes to court to testify. This court preparation is provided by intermediaries and if, as in some cases, there is no intermediary appointed, this means the child victim will be exposed to stressful criminal proceedings without being familiarised with it through proper preparation. After all, ‘Both the High Court and the Constitutional Court clearly accept as a point of departure the fact that testifying as a complainant in a criminal trial is stressful.’¹⁵² The situation thus remains that it is ‘required of the judicial officer to therefore consider whether, on the evidence presented to him or her,

¹⁴⁶ Bekink, M ‘The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa’ available at <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5774>, accessed on 18 September 2019.

¹⁴⁷ Freedman, W ‘The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa’ 2010 *SACJ* 305.

¹⁴⁸ Bekink, M ‘The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa’ available at <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5774>, accessed on 18 September 2019 quoting W Freedman ‘Constitutional Law: Recent Cases’ (2010) *SACJ* 299-317.

¹⁴⁹ *Kerkhoff v Minister of Justice and Constitutional Development* 2011 2 *SACR* 109 (GP) para 7.

¹⁵⁰ Bekink, M ‘The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa’ available at <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5774>, accessed on 18 September 2019 quoting Matthias, CR & Zaal, FN ‘Intermediaries for Child Witnesses: Old Problems’ 2011 *New Solutions and Judicial Differences in South Africa Intl J Child Right* 251-269.

¹⁵¹ “Further concerns were raised when proposals to extend the use of Closed-circuit television (CCTV) and intermediary facilities in court were not fully incorporated in the Sexual Offences Bill” J M Reyneke & H B Kruger ‘Sexual Offences Courts: Better justice for children?’ (2006) 31(2) *Journal for Juridical Science* 73-107.

¹⁵² *DPP v Minister of Justice and Constitutional Development* para 108.

and viewed in the light of the objectives of the Constitution and section 170A(1), it is in the best interests of the child that an intermediary be appointed.’¹⁵³

Intermediaries are intertwined with CCTV as they prepare the child victim for court proceedings, they familiarise them with CCTV. Their service must be provided in a friendly manner and the child victim must feel free and be able to trust them. CCTV assists child victims and child witness to be able to attend full court proceedings via CCTV not in the presence of perpetrator. They are protected from a direct contact with the perpetrator and that eliminate chance of secondary victimisation from occurring.

The role of the court preparation officer, according to section 170A of the CPA, is to facilitate the admission of evidence through an intermediary.¹⁵⁴ An intermediary’s services are linked with CCTV and provide for evidence to be placed before the court (and therefore the accused) in this manner because, according to section 158 of the CPA, all proceedings are to take place in front of the accused.

The court may, subject to an application by the public prosecutor, order that the vulnerable witness give evidence by means of closed-circuit television or similar electronic media.¹⁵⁵

(ii) Protection of identity

The use of an intermediary is intended to protect child witnesses and victims from undue stress and suffering, but the law also provides for the identities of child victims to be withheld. In *S v Mokoena* Bertelsmann J commented on this and “describes the rationale for the protection of the privacy of the child victim and witnesses while testifying in criminal proceedings as follows: Vulnerable witnesses must be protected from public exposure, either because disclosure of their identity may endanger their life or limb, or because the sense of embarrassment and discomfort at having to testify before an audience, particularly concerning traumatic and sexually sensitive

¹⁵³ Bekink, M ‘The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa’ available at <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5774>, accessed on 18 September 2019 quoting *DPP v Minister of Justice and Constitutional Development* para 115.

¹⁵⁴ Whenever criminal proceedings are pending before any court, and it appears to such court that it would expose any witness under the biological age of 18 to undue mental stress or suffering if he or she testifies to give evidence through intermediary. T Msibi ‘Court proceedings and use of intermediary services in court’ 5.

¹⁵⁵ Ibid.

events, may expose the witness to emotional and psychological harm.”¹⁵⁶

(iii) Undue exercise of authority

In *Minister of Welfare and Population Development v Fitzpatrick*¹⁵⁷ the Constitutional Court held that section 28 also protects children against the undue exercise of authority.

‘The children's involvement in the criminal trial would be traumatic without their having to face the additional prospect of an attack of this nature’s being launched upon their credibility, morals and probity.’¹⁵⁸

2.9.3 Protecting the child victim outside the court environment

The protection, wellbeing and the safety of the child are important. Sexual offences occur on child victims mostly because of their vulnerability. They can be perpetrated by a person who resides with the child. Once the case has been reported, it is also the responsibility of criminal justice officials to make sure that the child victim is prevented from being further victimised. If the accused is out on bail, the home environment becomes untenable for the child. This may be the case even if the accused is in jail awaiting trial. “It is the obligation of the state, but also other duty-bearers, to ensure that a child's survival and development is guaranteed.”¹⁵⁹

The rights of the accused are evident and clear¹⁶⁰ but the protection of the child victim is crucial, whether he or she is in the court or not. Sometimes it seems as though child victims are more protected during court proceedings but that their safety is not adequately considered thereafter. Often, therefore, the child will need to be removed from the home environment. However, “child protection or child welfare services may unintentionally disrupt the abused child’s living circumstances and alter arrangements involved with the child’s schooling in

¹⁵⁶ Bekink, M ‘The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa’ available at <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5774>, accessed on 18 September 2019. *S v Mokoena* 2008 2 SACR 216 (T) para 101.

¹⁵⁷ *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) at para. 17.

¹⁵⁸ Bekink, M ‘The Constitutional Protection Afforded to Child Victims and Child Witnesses while Testifying in Criminal Proceedings in South Africa’ at <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5774> accessed on 18 September 2019 quoting *Prinsloo v Bramley Children's Home* 2005 5 SA 119 (T) 123E-H.

¹⁵⁹ Blokland, F M L ‘Legislation: A road to the protection of children in residential care institutions in Suriname? Mini dissertation for Master of Public Administration in Governance, F.H.R. Lim A Po Institute for Social Studies’ (2011).

¹⁶⁰ “Everyone who is arrested and allegedly to have committed an offence has a constitutional right to apply for bail. This right is contained through numerous sections amongst others: section 35(1)f; section 35(3)h; and section 12(1)(a).” Lamprecht, A M ‘The close circuit television in South African criminal courts (2019) 24.

cases where the child is removed and placed in foster care.”¹⁶¹ In general, the criminal justice system is expected to take responsibility for protecting child victims in South African courts and this must be backed up by action.

“South African common law and statutory law do not deal adequately, effectively and in a non-discriminatory manner with many aspects relating to or associated with the commission of sexual offences, and a uniform and coordinated approach to the implementation of and service delivery in terms of the laws relating to sexual offences is not consistently evident in Government; and which thereby, in too many instances, fails to provide adequate and effective protection to the victims of sexual offences, thus exacerbating their plight through secondary victimisation and traumatisation.”¹⁶²

The following quote illustrates the very real dangers that child victims face:

‘A 16-year-old girl is fighting for her life in hospital after she was attacked and shot nine times in Imbali last month (August 2021). It is alleged that she was shot by a man who had also allegedly raped her in 2019. The man was arrested for the rape, denied bail by the magistrate’s court, but later granted bail when he appealed the decision to the Pietermaritzburg High Court. He has not yet been arrested in connection with the shooting.

The girl was shot in front of her three younger siblings aged 12, six and four. Her mother was not at home on the day of the incident. She was shot four times in the stomach, twice in her breast and three times on her left hand.’¹⁶³

Child victims of sexual offences seems to be forever vulnerable, both before the sexual offence occurred and thereafter, even when they did all that they were required to do after the sexual assault offence occurrence. They report the case to the police station and the perpetrator is apprehended and detained. Just when the child victim thinks that they are safe, because the abuser is behind bars, he is granted bail and they see him coming to visit them to show them that he can still abuse them. This is the moment where citizens feel as if the criminal justice

¹⁶¹ Staller, K M & Nelson-Gardell, D ‘A burden in your heart: Lessons of disclosure from female preadolescent and adolescent survivors of sexual abuse’ (2005) 29(12) *Child Abuse & Neglect*, 1415-1432.

¹⁶² See the preamble of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

¹⁶³ Call for justice after bailed rapist shoots teenage girl in Pietermaritzburg available at <https://www.news24.com/witness/news/pietermaritzburg/call-for-justice-after-bailed-rapist-shoots-teenage-girl-in-pietermaritzburg>, accessed in 2021-11-18.

system is letting them down and they should be encouraged to take action to rectify the situation. For example, Lifeline notes that,

“The way Pietermaritzburg officers deal with gender-based violence (GBV) cases have improved. In November last year victims complained about the treatment they received from police. Lifeline Pietermaritzburg Director Sinikiwe Biyela says the Plessislaer Police Station’s management listened to the criticism from victims of abuse and improved their service. She says they also have a better working relationship with the police”.¹⁶⁴

2.10 Conclusion

There are good criminal justice officials, but there are also those who are not performing their duties. These individuals must be named and shamed. Seemingly, there is need for collaboration between government training and NGOs monitoring teams monitoring whether child victims receive the assistance they require. While court proceedings are not inevitable for child victims once a case has been registered, the court should nevertheless be a safe and supportive environment for child victims. Children in courts must be treated in a friendly manner and be alerted to all the things they will encounter during court proceedings.

Therefore, child witnesses must be provided with court preparation as it is an environment that they are not familiar with. If the children are at ease during court proceedings, they will be able to provide accurate evidence which will assist in improving the conviction rate of perpetrators and will assist in reducing the secondary victimisation of child victims.

The SORMA “empowers courts to provide specialised victim-support services in order to militate against secondary victimisation or traumatisation reduce case handling time and improve conviction rates.”¹⁶⁵

The responsibility to protect child victims even after the conclusion of the criminal trial also

¹⁶⁴ Anti-GBV protesters demand life sentence for assault victim’s former lover available at <https://www.news24.com/witness/news/pietermaritzburg/anti-gbv-protesters-demand-life-sentence-for-assault-victims-former-lover->, accessed on 2021-11-18.

¹⁶⁵ N Sibanda-Moyo, K Eleanor & Maame Kyerewaa Brobbey ‘*Violence against women in South Africa: a country in crisis*’ (2017) 21.

extends to the protection of the child's identity. The child victim needs a holistic assistance. It must not begin at the police station and end in court or by the Department of Correctional Service Centre but go even beyond. It is important to know that the crime affects the child victim even emotionally. It is also important that their emotional needs are being taken care of before and after court proceedings.

'The regulations in the catalogue of service provide 12 key support services. These are information service for victims to navigate the system, court support services, private consultation with the NPA, private testifying services by the DOJ & CD, intermediary services, anatomical dolls used for children testifying to demonstrate abuse, disability centric services, and a restitution/impact statement service.¹⁶⁶

The appointment of intermediaries in courts is to give child victims and child witness support. They provide their support to child victims just to assist them feel at ease and understand court proceedings. There is a need of Forensic social workers in FCS unit. Forensic social workers are operating in the areas where there TCCs. Due to the pandemic, looting of some laboratory and loadshedding is causing delay in providing forensic results. Forensic social workers are essential to provide effective support to child victim. It is also crucial that they understand perfectly the language spoken by child victims to avoid all kinds of communication breakdown.

Each family and child support (FCS) cluster should be staffed with a forensic social worker for effective service delivery. Further states that assignment of forensic nurses should take place in all areas where there were no TCCs.¹⁶⁷

There was a need of Afrikaans speaking forensic social workers in Gauteng, Limpopo, the Eastern Cape and KwaZulu Natal further states that loadshedding, the Covid 19 pandemic and a lack of internal skilled laboratory technicians to render services and the calibration of instrument also presented challenges in eliminating backlogs.¹⁶⁸

¹⁶⁶ Integration of criminal justice information systems; functioning of sexual offences courts and TCCs; investigation and prosecution of GBV cases; status of DNA case backlogs; with Deputy Minister available at <https://pmg.org.za/committe-meeting/31622/>, accessed on 21 December 2021.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

CHAPTER 3: OVERVIEW OF THE LEGAL FRAMEWORK

3.1 Introduction

This chapter will focus on the Constitution (specifically the bill of rights), the Criminal Law (Sexual offences and Related Matters) Amendment Act,¹⁶⁹ (SORMA) (in terms of victims' rights and how it provides protection to child victims), the Children's Act¹⁷⁰, the Criminal Procedures Act, (CPA) and Witness protection Act 112 of 1998. Proceed to look at international instruments, specifically the United Nations Convention on the Rights of the Child 1989 and finally the Declaration of basic principles of justice for victim of crime and abuse of power (1985).

This chapter focuses on the legal framework in South Africa. The focus is mainly on the Constitution as the supreme law of the country; the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (which was amended to address pressing issues regarding sexual offences); proceeding to the Children's Act No 38 of 2005; and the Criminal Procedure Act. This chapter will focus on the most relevant international law which is the United Nations Convention on the Rights of the Child 1989 and the African Charter on the Rights and Welfare of the Child.

3.2 The Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of South Africa is the supreme law of the country; therefore, it must be used as a guiding principle when dealing with children's matters. The constitutional imperative to protect children is extremely relevant as it recognises that all child victims have rights.

In all child-related matters, it is of paramount importance to attend to them in a manner that provides for what is in the best interests of the child. The starting point is to define the terminology 'child' and identify the common law principle of 'the best interest of the child' by identifying the rights of victims and mentioning the difference between the truth and lies for child victims. 'At all times, the "Child's best interest" must remain the guiding principle to be applied in all situations in which children are involved'.¹⁷¹

¹⁶⁹ Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

¹⁷⁰ Children's Act, 38 of 2005.

¹⁷¹ G A Ogunbanjo & D K Van Bogaert 'Ethics CPD' (2010) 52 (6) *The Rights and Wrongs of the Children Rights* 13 Section 28 of the Constitution has been discussed earlier in the dissertation.

3.2.1 The rights of victims

“When a crime is committed, the basic human rights of the victim as set out in the South African Constitution are violated. In the context of crime and violence, the Victims’ Charter affirms seven specific rights for all victims.”¹⁷²

The Department of Justice and Constitutional Development’s (2004) *Service Charter for Victims of Crime in South Africa*¹⁷³ (The Victims’ Charter) summarises these seven rights as follows:

- i. *“The Right to be treated with fairness and with respect for dignity and privacy.* It is where all Multidisciplinary role-players are expected to treat the victim with respect and in a non-judgemental manner; ensure that they minimise any inconvenience to the victim and use the language that is understandable to the victim.
- ii. Multidisciplinary role-players refer to police officials during investigations, the prosecutors and court officials such as intermediaries during preparation for court proceedings and medical practitioners and other professionals or volunteers that could be involved.
- iii. *The Right to information.* Victim must be informed that they can give further statements to the police if he or she wants to, and they can attain assistance. For example, if they require wellness or legal support, they must receive it.
- iv. *The Right to receive information.* The victim has a right to be informed of the status of the case. In attending the case, they must know the court dates, receive information on witness fees and be informed of the bail conditions.
- v. *The Right to protection.* Victims have a right to be free from intimidation, harassment, fear, tampering, bribery, corruption, and abuse.
- vi. *The Right to assistance.* Victims must be fully informed that they have the right to request assistance and, where relevant, have access to available social, health and counselling services as well.

¹⁷² “1. The right to be treated with fairness and with respect for one’s dignity and privacy; 2.The right to be offered information; 3.The right to receive information; 4.The right to protection; 5.The right to assistance; 6.The right to compensation; and 7.The right to restitution. Victims are to be respected as unique human beings, afforded privacy and have their decisions respected without judgement.” National policy guidelines victim empowerment available at <https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/National%20policy%20guidelines%20for%20victim%20empowerment.pdf>, accessed on 11 April 2020.

¹⁷³ Department of Justice & Constitutional Development (2004) *Service Charter for Victims of Crime in South Africa*.

- vii. *The Right to compensation.* If the victim during the occurrence of a crime lost any valuable items, they can be provided with the information that they could be compensated if they follow the right procedures according to the guidance of criminal justice employees or volunteers. However, it does not really apply in sexual offence cases because a convicted accused is usually jailed which makes it impossible to obtain compensation for the victim's pain and suffering."

However, one does not hear very much about platforms to report victimisation by criminal justice officials, which makes it very difficult for child victims to cope. Spohn and Tellis mentioned in their report the incidences of victimisation at police stations by police officials.¹⁷⁴ They say that the reporting of officials who have further victimised complainants or child victims is crucial information that is not always available to all who might need it, which makes it harder to address.

Victims' rights are to be recognised and supported by all stakeholders providing support to child victims. For victims' rights to be recognised by all departments, it is necessary that they work together to prioritise the needs of child victims by providing for what is of the child's best interest. Shilumani recommends that collaboration between the police, medical service providers, social workers and NGOs is essential for dealing with the trauma and effects of rape.

3.3 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA)

"Sexual offences" in terms of chapters 2, 3 and 4 and sections 55 and 71 (1) & (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 include:

"Rape, compelled rape, sexual assault, compelled sexual assault, and self-sexual assault, compelling or causing persons to witness a sexual offence, sexual acts or self-masturbation, Exposure or display of or causing exposure or display of genital organs, anus or female breasts ('flashing'), engaging in sexual services, as well as incest, bestiality and sexual acts with a corpse.

¹⁷⁴ Spohn, C & Tellis, K 'The Criminal Justice System's Response to Sexual Violence' (2012)18(2) *Violence Against Women*, 169- 192.

Abuse shall also be inclusive of attempting, conspiring and the incitement or inducing of another person to commit sexual offence and trafficking in persons for sexual purposes”.¹⁷⁵

The South African legislation on sexual offences brought about several changes, including providing a new definition of sexual offences to protect all child victims of crime. “Every state defines crimes like ‘rape,’ ‘sexual assault,’ and ‘sexual abuse’ differently. Rape usually means forced vaginal, anal, or oral penetration by a body part or object.”¹⁷⁶

“Sexual assault or abuse means any unwanted sexual contact. It is when someone uses force or pressure (either physical or emotional) to get one to do something sexual. Rape is when someone forces or pressures one into having sex.”¹⁷⁷

The Victims’ Charter provides important information with regard to complaints by victims about: a) the way they have been treated, b) the information they have received and c) decisions that have been made.¹⁷⁸

If a victim has a complaint about the police, the victim can submit it by writing to the commanding officer of the police station concerned. Such a complaint can be about a police officer, a police service policy or a practice or procedure.¹⁷⁹ South African Police Service Victims’ *Charter of Rights* further states that “should a victim feel dissatisfied with the way in which his or her complaint has been attended to by the role-players or service providers in the criminal justice process, the victim may seek recourse for the service provided through organisations such as: a) the Public Protector or b) the South African Human Rights Commission or Lawyers for Human Rights or c) a lawyer of their choice and at their own cost.”¹⁸⁰

The SORMA has intervened in the South Africa criminal justice system in dealing with cases related to sexual offences.

¹⁷⁵ Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

¹⁷⁶ Sexual assault, abuse, and rape available at <https://www.plannedparenthood.org/learn/teens/bullying-safety-privacy/sexual-assault-abuse-rape>, accessed on 21 April 2020. See also https://www.msmonline.co.za/wp-content/uploads/2019/07/Protocol_Sexual_Abuse_Harassment.pdf. 21 April 2020.

¹⁷⁷ Ibid.

¹⁷⁸ South African Police Service *Victims’ Charter of Rights* (2009) (1).

¹⁷⁹ South African Police Service *Victims’ Charter of Rights* (2009) (1).

¹⁸⁰ South African Police Service *Victims’ Charter of Rights* (2009) (1).

The Act was formulated to provide all victims with the maximum legal protection against sexual offences. It acknowledges that child victims of sexual offence are amongst the groups of vulnerable people in society.

“The SAPS response to sexual offences remains fragmented, with members of the uniform division based in the Community Service Centre (CSC) still being responsible for initial reporting processes.”¹⁸¹

“While the establishment of separate police stations dedicated solely to crimes against women and children may be impractical in the South African context, this does not prevent the SAPS from thinking about how to create women and child-friendly spaces within police stations.”¹⁸²

There is still a room for improvement in terms of cooperation and coordination between the SAPS and DSD, to provide an efficient service delivery to all child victims of sexual offences. For example, CSC is operating 24 hours a day and DSD is operating weekday (Monday to Friday) office hours excluding weekend and public holidays. This insufficient professional service delivery also causes a delay in providing immediate assistance to child victims. The SAPS operates on a 24-hour basis and can receive complaints and crime reports at any time of the day and night. Further states that very often, officials find it difficult to help victims to access the other services they may require because other departments do not operate during those hours.¹⁸³ Access to the DSD is essential to providing counselling to child victims. When a sexual offense case against a child or children has been registered, it is for the best interest of child victims that they obtain emergency medical assistance and counselling. The DSD, which is the primary government department in helping victims to access counselling services and shelters, does not render a 24-hour service.¹⁸⁴

There is still a room for improvement at SAPS in the manner that they deal with child victims of sexual offences. For example, detectives skilled in handling matters that deal with children are not available 24 hours at the CSC. As a result, child victims’ matters are started with whatever police official is available at the CSC and are then handed over to the skilled

¹⁸¹ The organisation of the South African Police Service’s (SAPS) response to sexual offences available at <https://mail.google.com/mail/u/0/?tab=rm&ogbl#sent/QgrcJHsbgZfTgJNSchDqzvBDSTgwnvHFdLG?projector=1&messagePartId=0.3>, accessed on 09 July 2020.

¹⁸² Ibid.

¹⁸³ Mmamabolo, T ‘Rendering victim-friendly services for women and children in South Africa: why is the SAPS’s response to victims still unsatisfactory?’ (2020) 18.

¹⁸⁴ Ibid.

detectives who usually only work straight shifts, i.e., Mondays to Fridays, excluding weekends and holidays. One or two skilled members are on standby during weekends and on public holidays, however this is insufficient both in terms of the number of cases that occur on weekends and in terms of their immediate availability, in the sense that the victims have to wait for the standby to be contacted and then make their way to the station.

In Durban, there are only two Dedicated Sexual Offences Courts hearing cases involving children, while the remaining 14 Regional Courts operate with mixed rolls that include sexual offences cases involving adult victims.¹⁸⁵ Not all child victims receive an opportunity to access the dedicated sexual offences courts where their cases will be treated with priority.

3.4 Children's Act, 38 of 2005

The Children's Act (Act) prioritises the protection of vulnerable children. For example, once the child victim's incident has been brought to the attention of law enforcement agencies, it is crucial to identify if the child needs to be removed from the residing place where she or he is exposed to further victimisation.¹⁸⁶ Hence, if the child is not safe, he or she has a right to be removed to a suitable alternative residence. Basically, arrangements for child victims must be made to find a suitable shelter and to obtain medical treatment. According to section 150 of the Act¹⁸⁷, a child needs care and protection if the child has been orphaned, abandoned, exploited, and abused or neglected. Furthermore, if the child lives in or is exposed to circumstances that may harm their physical, mental, or social well-being, he or she is also considered to need care and protection.¹⁸⁸

3.5 Criminal Procedure Act

There are several sections in the CPA that address several important aspects relating to the protection of child victims. These include section 170A¹⁸⁹, which provides for children younger than 18 years to "testify in a separate room linked to the court via closed-circuit

¹⁸⁵ Report on the re-establishment of sexual offences courts: ministerial advisory team on the adjudication of sexual offence matters (2013) 28.

¹⁸⁶ Section 151 of the Children's Act makes specific provision for the removal to a place of safety of a child defined in section 150 as being "in need of care and protection" which included being "exposed to circumstances which may seriously damage that child's physical mental or social well-being." (Section 150(1)(f)). Section 152 makes provision for the emergency removal of a child without a court order. It is also possible, as per section 153, to have the alleged perpetrator removed if necessary.

¹⁸⁷ Children's Act, 38 of 2005.

¹⁸⁸ Ibid.

¹⁸⁹ The Criminal Procedure Act, 51 of 1977.

television and/or with the assistance of an intermediary.”¹⁹⁰ Child victims are thus protected from being in close contact with the accused while testifying in court as they are able to testify in a room where closed-circuit television (CCTV) is used to present their evidence before the court. Not being forced to testify in the same room and be in contact with the perpetrator protects the child victim. The child victim thus does not have to testify in the presence of the accused. Intermediaries in courts are there to facilitate the child’s testimony during court proceedings. They must support the child all the way through the court proceedings. They are also expected to help provide a conducive environment for the child. The provision of a child friendly environment in which victims and a multi-agency team can work together and establish systems in which secondary victimisation is minimised and child protection is maximised is imperative and it should strive to put children’s voices and wellbeing at the heart of the system.¹⁹¹

However, the exposure of a child victim to risk is not limited to the period during which they are testifying. The child victim needs to be protected from the perpetrator at all stages. For example, the perpetrator and the child must never be transported in one vehicle.

‘The SAPS National Instruction on Victim Empowerment recommends that where there is a need to transport a victim, this must be done using an unmarked police vehicle. If a marked vehicle must be used it should be a sedan. Should the station lack access to the described vehicle and the police van is the only vehicle available, victims must be transported in the cabin of the van and not in the back. Police officials must ensure that victims are, by all means, separated from suspects.’¹⁹²

The testifying room must be a conducive environment to help the child victim and witnesses to be calm and ready to testify freely. The waiting rooms must also be separated from the waiting rooms to which the perpetrator has access. It involves all multi-disciplinary team to work together to produce and maintain a friendly environment. The most important matter is to have trained personnel to deal with child victim matters.

¹⁹⁰ Ibid.

¹⁹¹ This is an earlier version of the paper published in the journal of criminological research: Policy Practice (2016) (2) 22.

¹⁹² Mmamabolo, T ‘Rendering victim-friendly services for women and children in South Africa: why is the SAPS’s response to victims still unsatisfactory?’ (2020) 17.

It requires forensic social workers, intermediaries, investigators, prosecutors, nurses, Doctors, and NGOs.

If all these multidisciplinary team can work together with one goal to provide a conducive environment to all child victims. More of friendly environment could be experienced by child victims when accessing, during and after criminal justice system proceedings.

The interview room is a room with friendly settings for interviewing a child about a crime and should not be the common places used for interviewing adults and “...waiting areas shall be invisible or inaccessible to the accused and shall be separated from the adults’ waiting room.”¹⁹³

3.6 Witness Protection Act 112 of 1998.

The Witness Protection Act 112 of 1998 protects both the victim and the witness in the criminal justice system. Child victims are those that has been abused or victims of sexual offence and the witness is the one who testifies in court about the crime. The child victim and the witness would be protected in court, and they must not wait in the same room with perpetrator.

3.7 International law

3.7.1 United Nations Convention on the Rights of the Child (1989) (UNCRC)

The United Nations Convention on the Rights of the Child 1989 (UNCRC) is an international instrument that “has provided guidance to South Africa in developing a legislative framework that is compliant with the global trends in the intervention process against gender-based and sexual violence. Article 3(1) of the UNCRC lays down the general standard that courts should follow when dealing with cases involving child victims.”¹⁹⁴ It provides that “in all official actions concerning children, whether undertaken by public or private social welfare institutions, courts of law or administrative authorities, the best interests of the child shall be a primary consideration”.¹⁹⁵

¹⁹³ Group 2 ‘Ideal measures in investigation and trial phases (84).

¹⁹⁴ Article 3(1) of the UNCRC available at <http://www.justice.gov.za/>, accessed on the 20 October 2021.

¹⁹⁵ Report on the re-establishment of sexual offences courts: ministerial advisory team on the adjudication of sexual offence matters (2013) 38.

The United Nations Committee has commented on the rights of the children. Its General Comment No.13 (2011) – the right of the child to freedom from all forms of violence,

“Referred to institutional and system violations of child rights and explained that all levels of the state are responsible for the rights and explained that authorities at all levels of the state are responsible to the protection of children from all forms of violence and may directly or indirectly cause harm by lacking effective means of implementation of the obligation under the convention.”¹⁹⁶ General comment 13 is just general as it does not provide sufficient material or resources to take action and provide protection to children from all forms of violence. Article 19 of the CRC is also relevant to the General comment 13 because it does not have sufficient authority to provide adequate protection of children from all forms of violence out of the care of their parents. It gives authority to the state to take necessary measures to protect the child from violence.

Article 19 of the CRC states parties must take appropriate legislative, administrative social and education measures to protect the child from all forms of physical or mental violence, injury, or abuse, negligent or negligent treatment, maltreatment or exploitation or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.¹⁹⁷

3.7.2 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (“the African Children’s Charter” or ACC) was adopted by the Assembly of the Heads of State and the Organization of African nations (OAU) in July 1990 and came into force in November 1999.¹⁹⁸

3.7.2.1 Protection of the rights and welfare of the African children

“The African Children’s Charter represents the ‘African’ concepts of children’s rights and strives to promote and protect the rights and welfare of the African child. It should be noted, however, that the African Children’s Charter is not opposed to the United Nations Convention on the Rights of the Child.

¹⁹⁶ Dandurand, Y ‘Article 19 of CRC and the criminal justice system’s duty to protect children against violence’ *School of criminology and criminal justice: Canadian Justice Journal of Children’s Rights* (2014) 45.

¹⁹⁷ Ibid.

¹⁹⁸ Van Bueren, G *International Documents on Children* 33: South Africa ratified the African Children’s Charter on 7 January (2000).

Rather, the two documents are complementary, and both provide a framework for the enhanced protection of African children.”¹⁹⁹

3.7.2.2 Best interest of children according to the African children’s charter

The African children’s charter promotes the best interest of children in all matters affecting children and in the traditional cultural values, where it focuses on the wellbeing and safety of children in terms of primacy of the Charter over harmful customs and cultural practices.

According to Viljoen, “the African Children’s Charter is best understood with reference to three principles, namely the child’s best interests, the principle of non-discrimination and the primacy of the Charter over harmful customs and cultural practices.”²⁰⁰

Article 4.1 reads: “In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”²⁰¹

“One of the most important features of the African Children’s Charter is that the child’s best interests are made the paramount consideration. While the CRC states that a child’s best interests shall be “a” primary consideration, the African Children’s Charter goes a step further by declaring these interests “the” primary consideration in all actions concerning the child. Although the use of the definite instead of the indefinite article may seem pedantic, it nonetheless has significant practical implications. Through this wording, the Charter elevates the best interest principle to an overriding consideration and thereby offers better protection to children.”²⁰²

The ACRWC also makes provision in Article 16 for the further protection of children. Although entitled “Protection against Child Abuse and Torture” the article actually goes further requiring states to,

¹⁹⁹ Kaime, T *The Convention on the Rights of the Child* 25 (2011).

²⁰⁰ Viljoen, F ‘African Charter on the Rights and Welfare of the Child’ in Boezaart, T (Ed) *Child Law in South Africa* Juta: Claremont (2009).

²⁰¹ Sillah, R M & Chibanda, T W ‘Assessing the African Charter on the Rights and Welfare of The Child (ACRWC) As a Blueprint Towards the Attainment of children’s rights in Africa’ *Journal of Humanities and Social Science* (11)(2)52.

²⁰² Lloyd, ‘Evaluation of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet’ 2002 *International Journal of Children’s Rights* 183.

“...take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.”²⁰³

3.7.3 Declaration of basic principles of justice for victims of crime and abuse 1985.

The Declaration of basic principles of justice for victims of crime and abuse 1985²⁰⁴ deals with the victims of crime. All people who have been abused or maltreated are permitted to report the case at the police station. This declaration is to protect victims from abuse during criminal proceedings. It provides information that the victim is updated with, regarding all the things that they are required to perform. In addition, child victim's treatment must be free and fair.

3.8 Conclusion

The purpose of this chapter was to outline the South African legislative framework pertaining to sexual offences affecting children. While comprehensive and in many respects adequate, nonetheless there are logistical deficiencies, such as not enough skilled police officials, intermediaries being not compulsory for child victims in courts, the unavailability of DSD personnel 24 hours a day every day of the week and no easy way to report victimisation by the police, and some minor deficiencies, primarily in the implementation of the legislation, are apparent. Thus, the legal framework still needs to be amended in order to fully protect the child victims of crime.

All governmental departments must make sure that they screen all the applicants who are applying to work with children. This information on a platform to screen employees or applicants must be made available to the public or community at large.

The reality is that it adds more pain to victims if the law service providers ill-treat them. All processes involved after the ordeal of a sexual offence has occurred - reporting to police officials, obtaining a medical examination, attending court proceedings, and coping with the

²⁰³ Article 16.1 of the African Charter on the Rights and Welfare of the Child. Article 16.2 even specifies some of the interventions that should be undertaken: “Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

²⁰⁴ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985.
<https://www.ohchr.org/en/professionalinterest/pages/victimsofcrimeandabuseofpower.aspx>. Accessed 10 December 2021.

outcome- are very important to the child victims, their families and the community at large.

CHAPTER 4: A MULTI-DISCIPLINARY APPROACH

4.1 Introduction

The sexual offence scourge requires not only the criminal justice system alone to act to protect children but demonstrates a need for a multi-disciplinary approach involving various stakeholders that have an interest in attending to the needs of child victims of sexual offences, to eliminate and prevent secondary victimisation. This chapter focuses on the concept of a multi-disciplinary approach to dealing with child victims of sexual offences, beginning from the genesis of the occurrence of the sexual offence to the reporting phase, all the way through the court proceedings to correctional services.

“To address the diverse needs of victims, services must be rendered on a multi-disciplinary basis by relevant role-players from the various sectors in a coordinated and integrated manner.”²⁰⁵ This chapter therefore aims to provide more insight into the multi-disciplinary team that is in operation in South Africa’s criminal justice system, which aims to facilitate the process of sexual offences matters involving children in South African courts. It is about the services provided by these stakeholders to child victims, child witnesses and complainants. A complainant could be the victim or could be a third party that is intervening, seeking justice for a vulnerable child victim.

4.2 Victim support

Victim support refers to the assistance provided to victims of crime and violence in terms of practical and emotional support, information, and advocacy.²⁰⁶ Victim support is crucial after a sexual offence has occurred against a child. The child becomes the victim where his or her rights have been violated, namely the right to be protected and the right of dignity and privacy. As a result, they need support in reporting and going through all the criminal justice proceedings. Therefore, victim support becomes essential as it is victim-centred, putting the needs of the child victim first. This approach should be used by government and non-governmental organizations.

²⁰⁵ National policy guidelines victim empowerment available at <https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/National%20policy%20guidelines%20for%20victim%20empowerment.pdf>, accessed on 11 April 2020.

²⁰⁶ Pretorius, Z & Louw, B *Victim empowerment support in South Africa*: in *Victimology in South Africa* (2005).

Victim support seeks to assist sexual assault child victims and all other victims of crime and violence. Victim support is the “empathic, person-centred assistance rendered by an organisation or individual following an incident of victimisation.”²⁰⁷ Victim support is in line with the Batho Pele²⁰⁸ principles, which is putting the victims first and providing the service according to their needs.

There are several reasons for children failing to disclose being sexually abused. These were fully discussed earlier in this dissertation, but briefly summarised they include:

- “(i) Threats of bodily harm (to the child and/or the child’s family)
- (ii) Fear of being removed from the home
- (iii) Fear of not being believed
- (iv) Shame or guilt.”²⁰⁹

Mixed sentiments could engulf child victims as they may experience fear and self-blame. All forms of support to aid them overcome their situation and be able to carry on with their lives are of uttermost importance. Child victims of sexual offences thus require a great deal of support from all stakeholders right from reporting the case, attending to court processes through to the court’s final decision.

Government and non-governmental organizations must work together because, in South Africa, victim support services to child victims are primarily rendered by non-governmental organizations. Therefore, a multidisciplinary team must have a strategy to meet the needs of all child victims.

²⁰⁷ National policy guidelines victim empowerment available at <https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/National%20policy%20guidelines%20for%20victim%20empowerment.pdf>, accessed on 11 April 2020.

²⁰⁸ “Batho Pele refers to the culture of putting people first, with clients being a priority in service delivery.” National policy guidelines victim empowerment at <https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/National%20policy%20guidelines%20for%20victim%20empowerment.pdf>, accessed on 11 April 2020.

²⁰⁹ Caring for kids: What Parents Need to Know about Sexual Abuse. The national child traumatic stress network (2009) available at https://www.nctsn.org/sites/default/files/resources/fact-sheet/caring_for_kids_what_parents_need_to_know_about_sexual_abuse.pdf, accessed on 08 July 2020.

4.3 Victim empowerment

Victim empowerment focuses mainly on empowering victims of crime and preventing them from being victims of crime in future. This service empowers victims as individuals and spreads to families and to the community at large. “Victim empowerment implies a greater role for victims in the criminal justice process and increasing resistance to repeat victimisation.”²¹⁰

Victim empowerment is an approach focusing on providing or delivering a service to all victims of crime, which involves sexual offence child victims. This service could be provided to one victim or many victims that have suffered harm, trauma or abuse due to crime. It is a powerful, essential empowerment service to all victims of crime. Therefore, it is important that child victims are being empowered by having their needs that emanated from the incident of victimisation satisfactorily met.

Victim empowerment would assist child victims who approach SAPS to report their cases of sexual assault, take them through all processes that they need to take in order to obtain assistance and cope with their current circumstances. The child victims must obtain emotional support to cope, be given all information and be treated with respect. The child victims must be kept abreast of the progress of the case.

It is important to understand the group of people you are dealing with when providing victim empowerment because, in this instance the victims are not only children, but are also victims of gender-based violence (GBV). Gender based violence (GBV) can be described as harmful acts of violence committed against women, men and children based on their gender, or what roles and behaviour are socially accepted of each gender. Further groups that are particularly vulnerable include:

- “Women and girls
- children
- older people
- people with disabilities
- LGBTQIA + Group”²¹¹

²¹⁰ Steenkamp, F W Nortje, C & Gouws, A ‘The prevalence of sexual harassment within a student sample of Stellenbosch University’ Cape Town: University of Stellenbosch (2010).

²¹¹ EHW Message: 16 Days of Activism Campaign. Internal Liaison, email interna.liaison@saps.gov.za. Thursday 2021/12/02 10:24AM.

Thus, child victims of sexual assault cases are particularly vulnerable victims requiring special care and empowerment both because of their age and because of the nature of the crimes that they have been subjected to. The ongoing campaigns addressing gender-based violence²¹² and the support they receive indicates the prevalence of the problem. As of 2009 more than 2,000 organizations in over 156 countries had participated in the 16 Days Campaign since 1991, mobilizing support for practical measures to end violence against women and girls (VAW) around the whole world.²¹³

4.4 multi-disciplinary role-players

A multidisciplinary team is crucial to deliver services according to the needs of sexual offence child victims. There are several multidisciplinary role-players already present in South African courts. The question is, are they providing what is required by child victims or are they also contributing to their further victimisation?

The professionals and volunteers working with sexual offence child victims need to understand the needs of the victims. This means that they must have undergone some training to be effective in delivering the service they seek to deliver.

The service provided must be victim centred and Batho Pele principles put people first. Child victims need to be put first by the multi-disciplinary team whenever they are dealing with matters involving these child victims. The service must be provided with integrity where confidentiality must be kept, and child victims would be encouraged to trust the service provided to them.

“The concept of ‘putting people first’ was first introduced through Government’s Batho Pele initiative in 1997. Batho Pele has as its core precepts the drive to have public servants adopt a service-orientated approach to their customers, which is characterized by a commitment to excellence and continuous improvement. Integrity management is a mechanism by means of which the spirit and principles of Batho Pele are established and managed within the South African Police Services.”²¹⁴

²¹² Educational interventions such as 16 Days of Activism campaign are a good example.

²¹³ Campaigns to End Violence against Women and Girls available at <https://www.endvawnow.org/uploads/modules/pdf/1342724232.pdf>, accessed on 10 December 2021.

²¹⁴ National Instruction 18 of 2019 Integrity Management Integrity Management Service V01.00 (1) 59 Issued by Consolidation Notice26 of 2019 Effective: 2019-07-23.

Services by these service providers are rendered in different settings and at different levels of service delivery, depending on the needs of the various prioritised categories of victims or target groups.²¹⁵ A case involving a child victim of a sexual offence affects various government departments and non-governmental role-payers, such as:

The South African Police Services.

The Department of Social Development (DSD).

The Department of Health.

Relevant non-government organisations, e.g., Thuthuzela Care Centres (TCCs);

The Department of Education.

The Department of Justice (DoJ); and

The Department of Correctional Services (DCS).

4.4.1 South African Police Services (SAPS)

It is the responsibility of stakeholders in SAPS to open all cases including sexual offences, to investigate, to prevent sexual offences where possible, to provide special services according to victims' requirements, to refer child victims to Family Violence, Child Protection and Sexual Offences (FCS) must maintain relationships with NGOs and other service providers, to provide services for human immunodeficiency virus (HIV) testing, to provide Post-Exposure Prophylaxis (PEP) to victims of sexual offences and to make sure that the child victim receives victim-friendly services.

4.4.1.1 SAPS Investigation role

FCS is a Unit dedicated to investigating Family Violence, Child Protection and Sexual Offences and other related crimes. It consists of trained investigating officers who are responsible for investigating reported cases. They provide transport to victims for medical examinations; they refer child victims to relevant professionals such as for counselling sessions; they familiarise child victims with the court environment; they provide child victims with relevant information; they collect and transport evidence such as Deoxyribonucleic acid

²¹⁵ National policy guidelines victim empowerment available at <https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/National%20policy%20guidelines%20for%20victim%20empowerment.pdf>, accessed on 11 April 2020.

(DNA) samples to forensic science laboratories; and remove children in need of care and protection.

This unit is situated in the South African Police Services and there must be Forensic social workers (FSW) working together with the investigating officers. Forensic Social Workers are a specialised field within the Police Social Work Services, focusing on taking statements from child victims, interviewing them, assessing child victims, preparing them for court proceedings, making court reports and providing expert testimony when necessary, in courts.

“The role of the FCS (Family Violence, Child Protection and Sexual Offences) Detectives is to ensure the effective prevention, investigation of FCS-related crimes; and to ensure excellence in service delivery to victims of family violence, crimes against children and sexual offences.”²¹⁶ Various government departments and stakeholders must work together as the need arises, as they will be responsible for providing inter-departmental service delivery, ensuring effective child victim protection, providing information to victims, and monitoring if everything is done accordingly. Referral of sexual offence child victims to government services must also be done as needed.

4.4.1.2 Referral service in the SAPS

Providing integrated and multi-disciplinary services which successfully address the diverse needs of child victims of sexual offences must be done effectively and efficiently. “Effective implementation requires that all role-players provide services in a sensitive and efficient manner, all the way from the complaint being received by the police to the final adjudication of the matter.”²¹⁷

A prime example of the need for a multi-disciplinary approach is demonstrated by the need to provide counselling. The SAPS do not do the counselling but refer child victims to social workers or psychologists. Child victims must receive trained professional social service assistance to protect them and help them come to terms with the trauma of having been sexually assaulted. It is sad that child victims of sexual assault sometimes do not obtain this counselling, or psychological and social work services.

²¹⁶ Western Cape Family Violence and Child Protection Unit (FCS) available at <https://mail.google.com/mail/u/0/?tab=rm&ogbl#sent/QgrcJHsbGZfTgJNSchDqzvBDSTgwnvHFdLG?projector=1&messagePartId=0.4>, accessed on 09 July 2020.

²¹⁷ USAID ‘Final Report on the Compliance Assessment of the Thuthuzela Care Centres with National Department of Health Guidelines for Managing HIV in the Context of Sexual Assault 13’ (2007) 13.

As a result, child victims are often clouded with uncertainty and develop a distrust of the criminal justice system. The training programme that was conducted in New York discovered that the gender of the professional is an important aspect to take into consideration further states that it is important to give the child the choice whether he or she wants to be interviewed by a woman or a man.²¹⁸

Child victims must be offered counselling and it could happen that the child was sexually abused by a male or a female and therefore still finds it difficult to be attentive to a certain gender.

However, the study conducted in Chicago, according to Ullman, children are often in such need of counselling and support that they are appreciative of having a professional to offer them counselling regardless of the gender of the professional. Children did not have any problem with the gender of the social worker and appreciated social workers who were caring, who listened to them, and who had a sense of humour.²¹⁹

In South Africa the gender of the professional offering counselling or services to the child victims is not specified but professionals must offer their service in a manner that does not re-victimise the child victim. It could be crucial that if the professional dealing with the child victim did not give the child victim an opportunity to choose the gender of the choice, whether they would like to be assisted by a male or a female, that they observe the child's participation and use their discretion. The truth of the matter is that counselling is better than none especially if none takes place because a counsellor of the appropriate gender cannot be located. The Victim's Charter goes on to address expressly and explicitly the way the police are expected to address victims.

‘The police (during the investigations), the prosecutors and court officials (during preparation for and during the trial proceedings), and all other service providers will take measures to minimise any inconvenience to you by, among others, conducting interviews with you in your language of choice and in private, if necessary. These measures will prevent that you are being subjected to secondary victimisation.’²²⁰

²¹⁸ ‘Training Programme on the Treatment of Child Victims and Child Witnesses of Crime for Law Enforcement Officials: United Nation Office on Drugs and Crime’ (2015) (54).

²¹⁹ Ullman, S E *Social reactions to child sexual abuse disclosures: a critical review* Chicago: Haworth Press (2003).

²²⁰ ‘Service charter for victims of crime in South Africa: the consolidation of the present legal framework relating to the rights of, and services provided to victims of crime’ (2004) (6).

Investigation role in sexual offence cases against children. Investigators collect evidence that reveals that the perpetrator indeed committed an offence. They work hand in hand with the child victim and witnesses. They follow leads and compile comprehensive statements. When all evidence is collected and every procedure is followed correctly the perpetrator is arrested and the court proceedings start. The court relies on the evidence and statements provided by the investigator which contributes to the sentencing of the perpetrator.

4.4.2 Department of Social Development (DSD)

The Department of Social Development (DSD) is responsible for coordinating and implementing victim empowerment programmes for sexual offence child victims.

This must begin with the opening of a case at a police station or Thuthuzela Care Centre. Police officials must perform referrals for such victims. Child victims must be able to access appropriate psycho-social services, which could be clinical psychologists, social workers, and clinical social workers. The DSD must also provide information to child victims, or those caring for them, about the many NGOs contracted to provide services to victims of all offences, as well as help them make use of it.

4.4.2.1 Restorative Justice

Restorative approaches to corrections must be seen as part of a wider approach in corrections, where it eventually becomes part of the ethos of the correctional centre; mainstreamed within the content of orientation programmes upon entry; and incorporated into all programmatic interventions during the rehabilitation pathway and at the rerelease and release phase.²²¹

Restorative justice is the process that involves child victims, offender, and the community. The correctional officers and all stakeholders contribute into making offenders' reintegration back into their communities successful. Psychologist, Chaplains, and social workers are needed to play a crucial role in aiding the child victims heal spiritually and emotionally.

The well-being of the child victim is the most important aspect that must be taken care of, but the support system behind him or her must not be forgotten. Therefore, counselling should be offered to all affected individuals, starting from the child victim, and moving to parents, guardians or any appropriate adult responsible. Child victims sometimes they disclose that

²²¹ Hargovan, H 'Violence, victimisation and parole: Reconciling restorative justice and victim participation' (61).

they have been sexually abused to a family member and this is not only traumatic to the child victim but also to that family member. As soon as it has been brought to their attention, they are legally obliged to report it to law enforcement. It could happen that the perpetrator is a family member and the whole family could compel them not to report the matter to the law enforcement with the promises that they are going to resolve it as a family. Therefore, the counselling would be essential for all affected individuals.²²²

The child victim, family members and community must be informed about the possibilities of offenders to be provided with parole. They must get the understanding of what parole is and must be informed of the rehabilitation programmes that were provided during his or her incarceration to give them assurance that the offender has developed some good behavioural changes. Parole is an internationally accepted mechanism that provides for the conditional release of offenders from correctional centres into society before they have served their entire sentence of imprisonment.²²³

It is also important that any mediation between the victim and perpetrator be facilitated professionally. Changwa and Pather note that these psychological services needed by a rape victim are often neglected.²²⁴

4.4.3 Department of Health

A multidisciplinary team is expected to provide child victims with information and protection. Professionalism, proficiency, and respect for the child victims are of the utmost concern in such service delivery. The medical examinations performed by district surgeons and nurses are very important in providing evidence for courts. This is a huge contributing factor towards the outcome of the trial as the court relies on the information provided in the reports from various departments.

“All role-players must ensure that patients do not experience secondary traumatising through the process of seeking justice and/or medical treatment.”²²⁵

²²² It should be noted that while they are not the subject of this dissertation, mention is made of these important aspects because they illustrate the complexity of the problems surrounding child victims. It is precisely because of this complexity that a multi-disciplinary approach is needed.

²²³ Ibid.

²²⁴ Changwa, M & Pather, M ‘The management of sexual assault victims at Odi District Hospital in the North-West Province: How can the quality of hospital care be improved?’ (2008) 50 (6) *SA Fam Pract* 45.

²²⁵ USAID ‘Final Report on the Compliance Assessment of the Thuthuzela Care Centres with National Department of Health Guidelines for Managing HIV in the Context of Sexual Assault’ (2007) 5.

If a case of sexual assault is reported late (which is not uncommon, especially in the case of child victims), this will affect the provision of forensic evidence. The delayed reporting and examination could affect the provision of medical care including post-exposure prophylaxis for HIV, and to negatively impact upon the possibility of obtaining forensic evidence.²²⁶

It is essential that the forensic evidence is collected by a skilled professional who must also know, once they have collected forensic evidence, how to store it to avoid contamination.

Machisa et al note that J88 forms appear to be more poorly completed for male survivors and that “the examination of male or child victims require specific skills, knowledge and approach, yet no evidence was found that they were consulted by more experienced health care providers or specifically within specialised centres.”²²⁷

However, as vital as medical professionals are to the process, here too certain problems arise. Machisa et al²²⁸ note the importance of medico-legal evidence “Medico-legal evidence is very important in progress of cases in the criminal justice system”²²⁹ but go on to lament that “it is vital that staff are properly trained to carry out this work.”²³⁰ They point out that “there has not been a great deal of training recently. It is essential that this is continued.”²³¹ It is evident therefore that health professionals play a vital role in the process.

4.4.3.1 Thuthuzela Care Centres

“Thuthuzela Care Centres are basically one-stop crisis centres that are Multidisciplinary, and which are usually located at hospitals, clinics or in a house in the community.

²²⁶ Machisa, Met al ‘Medico-legal findings from examination of rape victims in South Africa evidence and recommendation from a study of the investigation, prosecution, and adjudication of reported rape cases in South Africa (2012) 2.

²²⁷ Ibid. See also Holtmann, B ‘Gender Bias in Service Delivery to Victims of Crime: Masters Dissertation’ University of the Witwatersrand (Faculty of Management) (2001).

²²⁸ Machisa, M et al, “Medico-legal Findings from Examination of Rape Victims in South Africa: evidence and recommendation from a study of the investigation, prosecution and adjudication of reported rape cases in South Africa, 2012.” Medical Research Council available at <https://www.samrc.ac.za/sites/default/files/attachments/2021-05-25/Prosecution.pdf>, Accessed 21 October 2021.

²²⁹ Machisa, M et al, “Medico-legal Findings from Examination of Rape Victims in South Africa: evidence and recommendation from a study of the investigation, prosecution and adjudication of reported rape cases in South Africa, 2012.” Medical Research Council available at <https://www.samrc.ac.za/sites/default/files/attachments/2021-05-25/Prosecution.pdf>, accessed 21 October 2021. The authors set out several of the problems encountered during the criminal justice process if the evidence is not correctly obtained.

²³⁰ Ibid, page 4.

²³¹ Ibid.

Child victims of sexual offences can receive medico-legal assistance, emotional support, and trauma counselling, as well as legal and police investigative services. These centres are also known as one-stop trauma centres, sexual offence crisis centres, violence referral centres or Thuthuzela rape care centres.”²³²

A child victim can just go straight to one of these centres instead of going to a police station. Sexual offence cases are reported to the police official who would be available to the centre.

“Thuthuzela Care Centres are one-stop facilities that have been introduced as a critical part of South Africa’s anti-rape strategy, aiming to reduce secondary victimisation, improve conviction rates and reduce the cycle time for finalisation of cases.”²³³

4.4.4 Department of Education

Educators are obliged to report cases of sexual offences suspected to have occurred to pupils in school. When an educator discovers such an offence, they bring it to the attention of the law enforcement agencies. This has been addressed by the development of the Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools (the Protocol).²³⁴

Be it that the offence occurred outside of the school premises or inside, the bottom line must be about the protection of pupils.

“In terms of section 17(1) of the Employment of Educators Act (EEA), if an educator is alleged to have behaved in a disgraceful, improper, or unbecoming manner, commits sexual or any other form of harassment, he or she must be charged by their employer with misconduct. The EEA states that if the misconduct is also a criminal offence, separate, additional proceedings will occur.

²³² Nqopiso, N ‘The Prevalence and Impact of Secondary Victimisation on the Victims of Domestic Violence perpetrated by SAPS in Durban.’ Master of Social Science (Criminology) dissertation UKZN, 2017.

²³³ ‘Thuthuzela Turning Victims into Survivors’ 2. <https://www.edge.co.za/turning-victims-into-survivors/> Accessed December 2021.

²³⁴ Department of Basic Education, Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools available at <https://www.education.gov.za/Portals/0/DoE%20Showcase/Launch%20of%20protocol/Sexual%20Abuse%20and%20Harassment%20in%20Schools%20march%202019%20.pdf?ver=2019-03-13-093825-600>, accessed 20th October 2021.

Having a sexual relationship with a learner of the school where an educator is employed is considered a serious offence in terms of the Act and warrants dismissal.”²³⁵

“In terms of section 110(1) of the Children’s Act, there is a duty (on educators) to report if there are reasonable grounds to believe that a child has been abused in a manner causing physical injury, sexual abuse or deliberate neglect. The report may be made to either a provincial department of social development (DSD), to a child protection organisation or to the SAPS. Failure to report under this section is considered a criminal offence. Section 305(1) (c) of the Act states that a person is guilty of an offence if that person fails to comply with section 110 (1).”²³⁶

Educators are part and parcel, amongst many other professionals, who bear the duty to report sexual assault.²³⁷ Educators are close to students, it may be easy for them to notice a change in a child and the child could open and tell the educator if he or she has been sexually abused. The educator will then be obliged to report the case to the SAPS or inform a social worker to further deal with the matter.

Educators are engaging with pupils daily while in school, and this gives them time to observe and identify if there are any changes in the pupils’ behaviour. They can easily notice these behavioural changes which can be addressed swiftly. There are protocols in place in schools which can be enforced, and educators should abide by the legal frameworks that protect children against any form of abuse or maltreatment.

‘Educators are in a position to observe children and will be able to detect if there is a change in behaviour. A policy includes plans on what actions should be taken in cases where a child discloses sexual abuse to an educator and mention the Policy on Screening, Identification, Assessment and Support (SIAS policy) makes provision for School Based Support Teams (SBST) that have to be established in each school.’²³⁸

²³⁵ The Employment of Educators Act 76 of 1998. available at https://www.msmonline.co.za/wp-content/uploads/2019/07/Protocol_Sexual_Abuse_Harassment.pdf, accessed on November 2020.

²³⁶ Children’s Act, 38 of 2005 available at https://www.msmonline.co.za/wp-content/uploads/2019/07/Protocol_Sexual_Abuse_Harassment.pdf, accessed on 20 November 2020.

²³⁷ For example, the Protocol provides that “If a victim is under 18, the Principal or member of the SMT must report the matter to the SAPS on his/her behalf.” Department of Basic Education, Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools available at <https://www.education.gov.za/Portals/0/DoE%20Showcase/Launch%20of%20protocol/Sexual%20Abuse%20and%20Harassment%20in%20Schools%20march%202019%20.pdf?ver=2019-03-13-093825-600>, page 17, accessed on 20 October 2021.

²³⁸ ‘Guidelines and procedures in the reporting of child sexual abuse in the public schools of Ladybrand’ (2018).

4.4.5 Department of Justice (DoJ)

The DoJ's role is mainly to focus on the process once the offence has been reported, all the way through to the end of the trial. This means that it is concerned with the court system and the evidence that is needed, especially that provided by child victim and child witness, if any. This is where a child victim's experiences with the criminal justice system in courts begin.

The courts will look at the admissibility of the evidence and then, once admitted the credibility of the witnesses and the weight of the evidence. They will evaluate the evidence and decide based on this evaluation.

It is also crucial to establish if the child witness is sufficiently competent to testify in a court of law. If the evidence is found to be unreliable, the court may reject such evidence²³⁹ or accord it less weight. This has a lot to do with the child witness's ability to recall the occurrence of the criminal act clearly. The courts' presiding officers must evaluate the evidence given by a child victim in the court of law, as well as establish whether it was obtained and given in a manner that was in line with the Constitution²⁴⁰ and according to section 165 of the Criminal Procedures Act (CPA). This process of testifying "may" or "shall" be administered by the presiding officer through an intermediary if one is appointed for the child witness concerned. Intermediaries are present in courts to make the life or experience of child victims in courts less intimidating. They are also there to provide training to children about the court environment. The questioning of a young witness during cross-examination through an intermediary may be useful and effective.

In most sexual offence cases involving child victims, the accused are older than the victims. Therefore, it is paramount that child victims are protected from such accused. Consequently, child victims need to be properly prepared for court proceedings and must be protected from direct contact with the accused.

²³⁹ Erasmus, D 'The Truth, the Whole Truth or Nothing' Is the Competency Inquiry Applicable to Child Witnesses an Evidentiary Barrier to Truth Finding? 2010 *Speculum Juris* 103-114.

²⁴⁰ Section 35(5) of the Constitution states that "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice." P J Schwikkard & S E van der Merwe *Principles of Evidence* 3rd Ed Juta (2009) 214.

All avenues to improve the confidence and ability of the child to testify must be utilised.

“The nature of child sexual abuse means that, [most often] there is little supporting evidence, and the court proceedings are based on the word of the child against that of the (usually) adult perpetrator.”²⁴¹ Thus it is important to get the best possible evidence from the child witness.

Section 5 of the Act, which has amended section 158 of the CPA, provides that “a court must provide reasons for any refusal of an application to allow a child complainant below the age of 14 years to testify by means of electronic media or closed-circuit television.

From this section, it appears that the legislature has decided to discriminate between a child complainant below the age of 14 years and those above that age”.²⁴²

4.4.5.1 Admissibility of evidence in sexual offence cases

Evidence is “anything or statement that might prove the truth of the fact in issue. Evidence is that which demonstrates, makes clear or proves the truth of the fact in issue.”²⁴³ Evidence can be divided into several categories including oral real and documentary evidence. “Real evidence consists of things which are examined by the court as means of proof upon proper identification, and it becomes itself evidence,”²⁴⁴ while documentary evidence consists of anything written and oral evidence is testimony given under oath in court.

South Africa adopts a strict system of evidence, which means that evidence needs to be admissible before it can be presented in court. If it is not admissible for any one of many reasons (for example, if it is irrelevant or if it was unconstitutionally obtained or if another law prohibits its use), then it cannot be admitted, and a court cannot rely on it when making a finding. To determine whether evidence is admissible is a matter of law for the presiding judge or magistrate to decide.²⁴⁵

4.4.5.2 Evaluation of Evidence

Court officials therefore need to be lenient with children and understand that they may not fully understand the whole concept of giving evidence in court.

²⁴¹ Townsend, L Waterhouse, L & Nomdo, C ‘Court support workers speak out: Upholding children’s rights in the criminal justice system’ *SA Crime Quarterly* 2014 (48).

²⁴² Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007.

²⁴³ Sheppard, M S *The Wolters Kluwer Bouvier Law Dictionary* Compact Edition (2011) 396

²⁴⁴ Schwikkard, P J & van der Merwe, S E *Principles of Evidence* 3rd Ed Juta (2009) 395.

²⁴⁵ Mason, S *Electronic Evidence* 2ed (2010) 319.

Children should be allowed to testify but presiding officers should also try come down to their level to understand their stories correctly. It must be taken into consideration whether the child was properly prepared for the court proceedings, the court proceedings themselves, and even what might occur after the court proceedings: has the child been informed of what is still going to happen?

The court must question the child in a friendly manner where it requires clarity. Five techniques are available to aid the child, and all should be exhausted. However, only trained officials should utilise the alternative techniques.²⁴⁶

Whether a person witnessed the crime occur or was informed by the child victim or noticed something wrong with the child who was subsequently taken for a medical examination (where it was discovered that she or he was sexually assaulted), he or she will be required to testify as a witness. However, the victim themselves is usually the complainant and as such the primary witness for the state. Often then, the state's main witness is a child.²⁴⁷

The evidence must be presented in the court of law to prove beyond a reasonable doubt that the perpetrator is guilty of the offence with which he or she is charged. It must be constitutional and be fair. The evidence is evaluated after oral testimony have been challenged during a process of cross-examination. "The object of cross-examination is thus two-fold: to elicit information that is favourable to the party on whose behalf the cross-examination is conducted and to cast doubt upon the accuracy of the evidence-in-chief given against such party."²⁴⁸ A child victim who testifies is supposed to recall everything that happened during the occurrence of the crime, when testifying and again under cross-examination, which can be extremely be traumatic.²⁴⁹

²⁴⁶ See '5 essential questioning techniques for legal professionals' available at <https://www.onelegal.com/blog/5-essential-questioning-techniques-for-legal-professionals/>, accessed on 19 November 2021.

²⁴⁷ 'Sexual violence in South Africa is high with the number of reported rapes increasing to 41,583 cases per year compared to 40,035 in 2017/2018 (3.9% increase). Children accounted for 18,586 of the rape victims' Sexual exploitation of children briefing paper 2019 <https://www.ecpat.org/wp-content/uploads/2019/10/South-Africa-Briefing-Paper-Sexual-Exploitation-of-Children-October-2019.pdf>, accessed on 7 July 2020 quoting South African Police Service. (2019). Crime situation in Republic of South Africa twelve months April to March 2018_19. 5.

²⁴⁸ *K v Regional Court Magistrate* 1996 (1) SACR 434 (E) at 442.

²⁴⁹ See earlier discussion on secondary victimization.

“Children are thus required to relive the horror of the crime in open court, where they may be subjected to brutal and humiliating treatment when asked to relate the (often embarrassing and intimate) details of the traumatic experience, as a result of which they suffer severe mental stress.”²⁵⁰

Testifying about the traumatic experience is sad and traumatising, but the presence of the child victim in court is paramount and the court relies on their testimony.

According to Bellengère *et al* it is the court’s duty to evaluate evidence to assess its weight. He goes on to state that

“The evaluation of evidence refers to the process of examining and assessing the evidence presented to determine:

- i. Exactly what facts have been proved by the evidence.
- ii. Alleged facts that are not supported by the evidence; and
- iii. How the facts fit together to form a complete picture from which the court can draw conclusions.”²⁵¹

Therefore, the child victim’s role in proceedings is of critical importance to the judicial process. Alternative questioning techniques emphasise the importance of trained officials working with child victims. Not trained official cannot be able to use AQT. If this technique is used it assist to discover evidence that is crucial to link the perpetrator with the crime committed against the victim. All the facts collected are used in the court to finalise the case and convict the perpetrator.

4.4.5.3 Competent witnesses

“Children are regarded as competent witnesses if in the opinion of the court they are able to understand the difference between the truth and a lie and have an appreciation of the seriousness of the occasion and the consequences of lying.”²⁵² Child witnesses must be competent for their evidence to be permissible in court. All witnesses are presumed to be competent, but it is possible that due to age (or disability) a child witness may not be competent.

²⁵⁰ *DPP v Minster of Justice and Constitutional Development* 2009 (2) SACR 130 (CC) at para 1.

²⁵¹ Bellengère, A et al, *The Law of Evidence in South Africa* 2nd ed (2016) 28.

²⁵² Bekink, M ‘The Testimonial Competence of Children: A Need for Law Reform in South Africa’ PER / PELJ 2018(21) available at <http://www.scielo.org.za/pdf/pelj/v21n1/21.pdf>, accessed on 13 July 2020.

The court will decide on a case-by-case, witness-by witness basis on the competence of any child witnesses before it. If they are found to be competent, their evidence will be admissible in the court of law.²⁵³

Victim impact statements in pre-prosecution social work forensic reports are especially needed if the victim of the crime is a child. These cover, inter alia "...whether the child will be able to testify and can the child differentiate between lies and telling the truth."²⁵⁴

Joubert and van Wyk also note that "If child is a victim of sexual offence, report needs to have collateral information – parents, school, etc. Reports can be in English or Afrikaans – according to the child's language."²⁵⁵

According to Muller, cited in Bekink,

"Competency involves four fundamental issues which should all be taken into account by the presiding officer in his or her determination of a child's competency, namely:

- ❖ the child's mental capacity to observe an event.
- ❖ the child's capacity to remember the event about which he or she has to testify.
- ❖ the child's capacity to communicate about the event.
- ❖ the child's possession of sufficient intelligence to appreciate the obligation to speak the truth.²⁵⁶

Child victims must be able to differentiate between what is the truth and a lie and must be able to testify and they must be protected from experiencing secondary victimisation when testifying in court. Children must be able to identify what is the truth and what is not to be found to be competent.

All child victims (and those with disability), must have a trained court official to work with them, utilising their skills to discover whether the child is competent.

²⁵³ A critical analysis of the rules relating to competency of child witnesses is not the topic of this dissertation. For this see, for example, Bekink, M 'The Testimonial Competence of Children: A Need for Law Reform in South Africa' PER / PELJ 2018(21) - DOI <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3407>. What is relevant to this dissertation, however, is the establishment of the fact that the competency of child witnesses is a complex and sensitive issue which lends weight to the central hypothesis of this dissertation that a multi-disciplinary approach is needed if the rights, interests, and protection of child victims is to be meaningfully achieved.

²⁵⁴ Joubert, M van Wyk, M 'Social work forensic reports in South African criminal courts' (2014) (50)(4)(3) *Inevitability in the quest for justice* 495.

²⁵⁵ Joubert, M van Wyk, M 'Social work forensic reports in South African criminal courts' (2014) (50)(4)(3) *Inevitability in the quest for justice* 495.

²⁵⁶ Bekink, M 'The Testimonial Competence of Children: A Need for Law Reform in South Africa' (2018).

The investigators must test them if they know the difference between a lie and the truth. The forensic social worker can compile a report identifying that the child is competent or not.

“The truth-lie competency test sets out to determine a child’s understanding of truth and lies, and the importance of telling the truth in court.”²⁵⁷

The person also interviewing the child victim would also have tasks to accomplish in order provide the court with the reliable evidence that it requires.

The person interviewing a child witness therefore faces two major tasks:

1. To elicit a complete, credible account of the offence.
2. To protect the child’s psychological well-being, which has been seriously harmed by the abuse experience.²⁵⁸

As criminal proceedings in court are generally not disability friendly, intermediaries are used to assist both witnesses and perpetrators with communication disabilities during the court process and ultimately to support the witness or perpetrator to participate equally in the court process.²⁵⁹ Child victims with disability must be taken care of even with regard to physically accessing the courts. The intermediaries must ensure that they will be able to easily access the court room, or the separate room in which they will testify.

4.4.6 Department of Correctional Services (DCS)

Rehabilitation of the offender’s behaviour is important to prevent the offender from repeating an offence as this is obviously in the best interests of potential further child victims. The DCS is responsible for developing and implementing certain strategies to manage sexual offences, such as rehabilitation and restorative justice programmes. Parole Boards must do all that is in the best interest of the child victim when considering granting parole to a convicted accused.

Community awareness and public education must be done to provide relevant information regarding the decisions that are taken regarding the offenders.

²⁵⁷ Bekink, M ‘The Testimonial Competence of Children: A Need for Law Reform in South Africa’ (2018).

²⁵⁸ Group 2 ‘Ideal measures to protect children as witnesses in investigation and trial phases’

²⁵⁹ White, R M at al, ‘Transformative equality: Court accommodations for South African citizens with severe communication disabilities’ (2020) (9) (0) *African Journal of Disability* 8.

“Restorative Justice (RJ) aims to give victims the opportunity to explain the impact of crime upon them, to seek an explanation and apology from the offender, or to play a part in agreeing restorative or reparative activity for the offender to undertake. RJ seeks to hold offenders to account and enable them to face the consequences of their actions and the impact it has had on others.”²⁶⁰ It is necessary to get both sides how the crime impacted them. The child victim must get an opportunity to open up about the impact of crime. Therefore, after the court proceedings have been completed the department of Correctional Services must also play its role.

4.5 Conclusion

This chapter highlighted the provision of victim support and victim empowerment as being crucial to protecting child victims through the criminal justice process. It focused on providing a holistic understanding of the justice system in response to sexual offences. It is the responsibility of criminal justice officials and non-governmental organizations to ensure those child victims of sexual offences are provided with victim-friendly service.

“A victim-friendly service means a service where the dignity and rights of victims are protected, and the victim is empowered and not subjected to secondary victimisation by insensitive officials of the criminal justice system.”²⁶¹

It went on to set out the various role players that have an impact on child victims during the criminal justice process, arguing that none of these role players can operate optimally in total isolation and that an integrated system which draws all the role players in together would serve the interests of child victims best. This multi-disciplinary approach, it is argued, is necessary to ensure proper protection of child victims.

‘The process evaluation of psychological support services provided by Global Fund funded NGOs at TCCs had two primary purposes. The first of these was to assess the progress and quality implementation of service provided by Global Fund-funded NGOs at TCCs with a focus ascertaining how follow-up, HTS and adherence of PEP treatment services was functioning.

²⁶⁰ Transforming Rehabilitation: a summary of evidence on reducing reoffending available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243718/evidence-reduce-reoffending.pdf, accessed on 13 July 2020.

²⁶¹ Nqopiso, N ‘The Prevalence and Impact of Secondary Victimisation on the Victims of Domestic Violence perpetrated by SAPS in Durban.’ Master of Social Science (Criminology) dissertation UKZN, 2017.

The evaluation's second purpose was to identify factors that were affecting implementation, quality of psychological services for the remainder of the grant period.²⁶²

The evaluation process focuses on the most crucial point regarding the implementation of services which is always the difficult part. There can be exciting plans, but implementation is always the biggest issue as sometimes it does not begin at the time it was supposed to. It is also focusing on performing follow up which is also very important to be done, because this is when you discover what was done was sufficient or there is more still to be done.

Evaluation plays an important role in programme implementation by firstly ascertaining the progress and equality of implementation of services provided and how these are functioning within the context in which they are implemented.²⁶³

The Thuthuzela Care Centres approximate a multi-disciplinary approach, "Thuthuzela Care Centres are one-stop facilities mainly based within health facilities,"²⁶⁴ but the question that arises is whether they are sufficient and efficient? However, this is misleading.²⁶⁵ The real issue is whether the Thuthuzela Care Centres support the argument that a multi-disciplinary approach improves the service offered to child victims. Research has indicated that, while far from perfect,²⁶⁶ there are positive aspects to these centres and certain advantages to be gained by their existence that far surpass the alternative of not having them in place.²⁶⁷

²⁶² Process Evaluation of NGO Services at Thuthuzela Care Centres available at <https://www.nacosa.org.za/wp-content/uploads/2018/09/GBV-Evaluation-Report-Web.pdf>, accessed on 21 December 2021.

²⁶³ Ibid.

²⁶⁴ Support services for victims of sexual offences/ Vuk'uzenzele available at <https://www.vukuzenzele.gov.za/support-services-victims-sexual-offences>, accessed on 18 September 2019

²⁶⁵ The scope of this dissertation does not include an analysis of the Thuthuzela Care Centres.

²⁶⁶ "Challenges with Long-term Psychosocial Support Evaluation participants noted that several challenges have been faced in the process of conducting long-term follow-ups with survivors. Whilst these challenges are outside of the control or influence of the SR, key challenges mentioned by NGO staff were:

1. Survivors being unable to return to the TCC due to transport limitations, particularly an inability to afford transport costs. However, as stated above, the findings revealed that some AFSA-funded SRs mitigated this challenge by either providing survivors with transport or providing them with the finances to attain transport to and from the TCC for their follow-up appointments.

2. As reported by NACOSA (Networking HIV & AIDS Community of Southern Africa) evaluation participants, survivors providing incorrect contact details on their intake forms, and as such preventing NGO staff from contacting survivors telephonically or for home visits." 'Process Evaluation of NGO Services' at Thuthuzela Care Centres (2018).

²⁶⁷ For a critical analysis of the effectiveness of the TCCs (which is not within the scope of mandate of this dissertation) see Process Evaluation of Global Fund-Funded NGO Services at Thuthuzela Care Centres – Final Evaluation Report available at <https://www.nacosa.org.za/wp-content/uploads/2018/09/GBV-Evaluation-Report-Web.pdf>; accessed on 08 July 2021, L Vetten, 'Listening, care, support and respect: a field guide to the making of inequality in South Africa's Thuthuzela Care Centres.' Transformation: Critical Perspectives on Southern Africa, vol. 101, 2019, p.61-83. Project MUSE, doi:10.1353/trn.2019.0037 and Machisa et al <https://www.samrc.ac.za/sites/default/files/attachments/2021-05-25/Medicolegal.pdf>, accessed on 08 July 2021.

Thus, it is clear that TCCs provide evidence of the fact that a multi-disciplinary approach, even a limited one, is a positive improvement on a situation where victims of sexual offences are dealt with in standard charge office conditions.²⁶⁸

The criminal justice system is expected to provide excellent service to all victims and not to focus only on sexual offence child victims. However, if facilities are insufficient, broadly speaking, there is no way that the service can be delivered in a proper way to child victims. There is a need for improvement to provide quality service to child victims.²⁶⁹ This will be discussed in the next chapter.

See also Maschia *et al* 'The War at Home Gender Based Violence Indicators Project', Gauteng Research Report, https://www.saferspaces.org.za/uploads/files/GenderLinks-13452_begin_war_at_home.pdf, accessed on 08 July 2021.

²⁶⁸ Machisa, M et al, 'Medico-legal findings from examination of rape victims in South Africa evidence and recommendation from a study of the investigation, prosecution, and adjudication of reported rape cases in South Africa (2012) (2): Medical Research Council. The authors acknowledge the value that TCCs provide: "Whilst there has been concerted efforts to increase coverage of the specialised and one-stop TCCs nationally, the majority of rape victims still utilize services at general public facilities (56.8%). Only 30% of victims were examined in Thuthuzela Care Centres (TCC) and another crisis centres." Available at <https://www.samrc.ac.za/sites/default/files/attachments/2021-05-25/Medicolegal.pdf>, accessed 21 October 2021.

²⁶⁹ "Victim unfriendliness remains a problem at Thuthuzela Care Centres (TCC's) and contributes to secondary victimisation. This largely continued insensitivity of emergency medical services (EMS) and Police (SAPS) staff, inadequate counselling rooms to ensure privacy and only half 52% having a separate entrance for perpetrators." The 2018 victim of crime survey reports revealed an increase in crime levels for 2017/2018, as compared to 2016/2017, coupled with a decline feeling of safety and trust in the criminal Justice System (CJS).

CHAPTER 5: CONCLUSION

5.1 Introduction

This chapter summarises the main themes, describes the findings of the research and recommendations flows from findings. The aim is to have a brighter future treatment of victims of sexual offences by criminal justice officials and non-government officials to prevent secondary victimisation.

The research objectives were first, to determine the link between the treatment by criminal justice officials, commencing with the reporting of the criminal case, through to evidence collation (medical examinations), court proceedings up to and including correctional services involvement, and the impact of secondary victimisation; secondly, to describe the role of the various South African legal frameworks in protecting child victims in South African courts; and thirdly, to argue for the necessity of a multi-disciplinary approach to intervening to improve the quality of the child victim's experience and to ultimately better the situation of child victims.

The research investigated the impact of secondary victimisation on child victims, caused by the criminal justice system, starting with SAPS officials through to criminal justice officials, as well as non-governmental stakeholders in South Africa, KwaZulu-Natal: Durban.

5.2 Summary

This chapter provides a summary of the study from Chapters 2 to 4 and draws appropriate findings and recommendations.

The main theme of this study was discussed in Chapter 2: the need to avoid secondary victimisation. The following themes were identified: secondary victimisation, reporting of sexual offences, the withdrawal of sexual offences charges, under-reporting of sexual offences and the protection of child victims of sexual offences.

Chapter 3 provided an overview of the legal frameworks focusing on the Constitution of the Republic of South Africa, which basically states that the best interest of the child victims in dealing with sexual offence cases where they are involved, and victims' rights are recognised.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

(SORMA) provided a new definition of sexual offences to provide clarity to charge perpetrators with relevant criminal offences. The Children's Act 38 of 2005 placed its priority on the protection of vulnerable child victims. It focused on the protection of the child victim from the alleged perpetrator. The child victim must be prevented from being exposed to an environment that could cause him or her harm holistically, whether it is physical, emotional, economical, mental or spiritual. It also focused on the Criminal Procedure Act where it also addressed the protection of child victims when testifying in court.

Chapter 4 dealt with international law: The United Nations Convention on the Rights of the Child (1989) and The African Charter on the Rights and Welfare of the Child. The United Nations Convention on the Rights of the Child (1989) focused on the best interests of the child victim when involved in gender-based violence and The African Charter on the Rights and Welfare of the Child maintained that the child victims' wellbeing be protected.

5.3 Findings

This research study has revealed that a victim's feelings are seldom considered when dealing with matters involving children during court proceedings. Postponement upon postponement of trials is not the concern of the court. The fact that the child victim is continuously exposed to a stressful environment in courts is not taken into consideration, so it is clear that no significant attempt is being made to provide what is in the best interests of the child victim. Child victims are also not evidently protected outside court.

This research study also discovered that child victims of sexual offences have lost faith and trust in the criminal justice system. They are not protected in courts, and they often find themselves testifying in the presence of the perpetrator, which makes it very hard for them to cope. Victims often feel embarrassed and blame themselves for victimisation and this, in many circumstances, results in the withdrawal of charges or even not reporting the sexual assault at all. It also transpires that perpetrator is often granted bail, further placing the safety of the child victim in jeopardy as perpetrators often return to child victims and abuse them further. In South Africa children still fear reporting cases of sexual abuse and on some occasions, children are suppressed by their family members and relatives not to report sexual offences cases. Indeed, many child victims are sexually abused by perpetrators known to them, some of whom are the child's relatives, breadwinners, and caregivers.

Not only circumstances compel the child to suffer in silence also the people who supposed to be supporting the child sometimes exacerbate the abuse.

“Reasons advanced for failure to report cases to the police hinge on fear of secondary victimisation at the hands of the legal system. Other reasons include: the child’s feelings of shame, guilt, humiliation and embarrassment towards him/herself, the child’s feelings of shame and pity towards the perpetrator (this often happens where the perpetrator is known to the victim); the child’s need to protect others e.g., parents/caregivers, peers, boyfriend or teacher; fear of not being believed especially where he/she displays no physical signs of violence; the child’s fear of reliving the experience and anxiety to move on with his/her life; and the child’s fear of upsetting the stability of his/her family especially where the offender is the breadwinner.”²⁷⁰

Section 170A (1) of the CPA could be “unconstitutional in that it grants a discretion to the trial court to appoint or not to appoint an intermediary when a child witness is to be called in a criminal trial.”²⁷¹ Section 170A (1) therefore does not provide the required protection to all child victims of sexual offences in courts. Because section 170A grants the court discretion when dealing with child witnesses many are not afforded the protection it is meant to provide, which is truly unfair to child victims generally. There are no guidelines on how to exercise this discretion, presiding officers are not educated psychologists with an understanding of the intricacies of secondary victimisation and the test to be applied is too vague to be of any significant use.

As has been established elsewhere and in the academic literature referred to throughout this study, there is a clear link between the treatment by criminal justice officials from the reporting of the sexual offence, through to the court proceedings and culminating in the involvement of correctional services and the under-reporting of child sexual offences. It involves multidisciplinary team which also needs to evolve in their operating hours, for the satisfaction of child victims and effective service delivery.

It seems as if the victims’ needs are not taken into consideration at all at certain times, which makes it even more difficult to ensure that the victims attain the justice they deserve.

²⁷⁰ Report on sexual offences against children does the criminal justice protect children available at https://www.gov.za/sites/default/files/gcis_document/201409/childsexoff0.pdf, accessed on 10 December 2021.

²⁷¹ The Legal Resources Centre, *Protecting Children who testify in Court*, 2008.

The South African legal framework which is supposed to be protecting child victims in courts is deficient. Delays in court proceedings are frustrating to the victims and do not appear to be taken as an important issue.

Courts are not using a child or victim-centred approach and this need to be re-visited and amended. The child victim must be considered as an important part of all court processes and delays must be avoided as much as possible.

5.4 Recommendations

Recommendations based on the findings are as follows:

1. Enhanced protection of the child victim in and out of court should be of paramount importance. Child victims are being sexually abused repeatedly by people who, once apprehended, are released on bail. Child victims are thus vulnerable even once the assault has been reported.

The role impact of the multi-disciplinary approach to effectively intervene to improve and ultimately better the situation of child victims needs to be further reviewed and the challenges identified (including those already identified elsewhere) need to be addressed.²⁷²

2. An educational desk needs to be created in all police stations that is easily accessible to all community members who should be able to come and obtain all the kinds of advice that they could require such a social work service that is available if they need counselling, encouraging them not to tolerate sexual offences, their right to report sexual abuse (and all kinds of crime).

²⁷² See for example Bougard, N B and Booyens, K 'Adult female rape victims' views about the Thuthuzela Care Centres: a South African multi-disciplinary service delivery model' *Acta Criminologica: Southern African Journal of Criminology* Special Edition No 5/2015. Available from: https://www.researchgate.net/publication/344872037_Adult_female_rape_victims'_views_about_the_Thuthuzela_Care_Centres_a_South_African_multi-disciplinary_service_delivery_model, accessed on 20 October 2021. See also Herbert, J L & Bromfield, L 'Better Together? A Review of Evidence for Multi-Disciplinary Teams Responding to Physical and Sexual Child Abuse.' *Trauma, Violence, & Abuse*. 2019; 20 (2):214-228. doi:10.1177 /1524838017697268, accessed on 21 October 2021.

A specific focus would include the provision of information in an accessible format about access to the justice system, the steps that can be taken to protect children, as well as information that will facilitate access to other aspect and entities with the multi-disciplinary co-operative.²⁷³

3. More awareness campaigns that educate the community about sexual offences and which empower them with information about how and where child victims can receive assistance need to be conducted. 16 Days of Activism campaigns could be changed to 365 days awareness campaign, because children are exposed and vulnerable daily, weekly, monthly and yearly. Frequent campaigns must be implemented as a constant reminder to teach all people who are in contact with children.
4. Section 170A (1) of the CPA regarding the protection of child victims in courts should be amended, making the appointment of intermediaries' compulsory when dealing with cases involving child victims of criminal offences. This is becoming increasingly important as the need to protect children in court from undue mental stress and suffering is already a legislated imperative and the importance thereof has been recognised by the highest court. Leaving courts with an unguided discretion whether to apply section 170A or not results in the capricious and uneven application of the section – an infringement of the principle of legal certainty. If the use of intermediaries is not unconstitutional²⁷⁴ in one case, there is no rational argument to make out that it would be in another case. In any event, the view that it should not apply in all cases can easily be accommodated by simply shifting the onus onto the party seeking it not to be used to persuade the court why the rule should be relaxed in a particular circumstance as opposed to the present situation where the onus rests on the party seeking to have the rule applied. In addition, if a victim wishes to confront their attacker in court (an argument erroneously raised to justify not making the rule compulsory) they can simply waive the application thereof.

²⁷³ The precise content and focus need not be specified at this stage as it may vary from area to area depending on the needs of the community. For example, drug related crime – which has a serious negative impact on children, may be more prevalent in some areas than others and may necessitate a different focus.

²⁷⁴ See *K v Regional Court Magistrate* 1996 (1) SACR 434 (E).

5. The South African Police Service, the Department of Social Development and the Department of health must implement a 24-hour service where skilled detectives would be available to attend child victim cases. Social workers dealing with the placement of victims in suitable places and Doctors performing forensic investigations should be available to attend to essential service delivery.

All the various departments must implement or improve the proper monitoring of the South African Victim Empowerment Service and manage the development, monitoring, and evaluation of the implementation of a sustainable best practice in service delivery.

6. Training support must be provided to officials dealing with child victims of sexual violence. All multi-disciplinary stakeholders must be integrated to keep themselves informed and updated of new Acts and regulations. For example, SAPS police officials that are investigating sexual offence cases must be trained how to deal with sexually assaulted child victims. There must also be a way to provide essential service in the areas close to child victims' residence. Child victims could be video recorded and make the video made available to relevant stakeholders to prevent the child victim from having to repeat the same incident several times.
7. Compulsory programmes supporting and empowering the child survivors of sexual offences should be researched and the possibility of introducing such programmes, if the benefits thereof warrant it, should be considered.
8. If a long-term societal view is taken of the need to protect child victims, then the rehabilitation of offenders against child victims needs to be mandatory for all offenders in South Africa. All such offenders must be obliged to participate in rehabilitation programmes to reduce the risk of reoffending. If there was a shortage of officials to provide such service, they must work with NGOs to intervene.
9. The criminal justice system should reconsider the rules relating to the granting of bail to alleged sexual assault perpetrators, especially when there is a risk that the perpetrator may encounter the child victim. While making it mandatory that in cases involving the sexual assault of children bail should not be granted may be subject to a Constitutional challenge, certainly shifting the onus, in cases involving child victims, onto the alleged perpetrator should be considered.

Certainly though, it is arguable that perpetrators of sexual violence against children should not be entitled to be granted bail.

5.5 Conclusion

This research study intended to contribute to the knowledge on the prevalence of secondary victimisation and to provide recommendations for the protection of child victims from such secondary victimisation experienced by them when interacting with criminal justice officials.

Sexual offences in South Africa have not received as much attention as they should have. There might be many contributing factors to this, some of which could be because it is not easily talked about by child victims due to ignorance, self-blame, confusion and hurt felt by the children affected and their significant others. Furthermore, in South Africa, many child victims are being sexually abused by the people they know and trust. This provides an additional barrier to the reporting of the offence as the person best placed to facilitate the victim's access to the police has a vested interest in ensuring that such access does not occur. It is even worse when child victims do come forward seeking assistance and the criminal justice system lets them down. It has emerged from this research study that sexual offences are under-reported and that one of the reasons for this is a fear of secondary victimisation when seeking help from criminal justice officials. 'When victims have positive experiences with the police and the entire justice system, it increases the likelihood of seeking help from the system the next time they need it.'²⁷⁵ A multi-disciplinary approach where the responsibilities for the welfare of child victims is shared among various stakeholders with responsibilities and expertise can function to reduce the risk of secondary victimisation. Even if the levels of co-operation between stakeholders is not optimal, this does not preclude each entity from improving their performance with a view to improving the experience of child victims at every stage of the criminal justice process.

²⁷⁵ J Calton & LB Cattaneo 'The effect of procedural and distributive justice on intimate partner violence victims' mental health and likelihood of future help-seeking' (2014) 84 (4) *American Journal of Orthopsychiatry* 329- 340.

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