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PROJECT 71

PROTECTION OF THE CHILD WITNESS

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act 19 of 1973.

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Closing date for comments: 31 July 1989.

PREFACE

This working paper was prepared by Mr Justice P J J Olivier, project leader of the investigation, to serve a basis for the Commission's deliberations. The views, conclusions and recommendations contained in this paper should not at this stage be regarded as the Commission's final standpoints. The paper is published in its entirety to provide sufficient background information to afford those wishing to comment the opportunity of putting forward suggestions for the development, improvement, modernisation or reform of this aspect of the law in the form of substantiated submissions before the Commission.

Requests for comment or parts thereof to be treated as confidential wil be complied with. If no request for confidentiality or anonymity is made, the Commission will assume that the commentator assents to the Commission's citing or referring to and giving the source of the comment.

Any person or body wishing to make oral representations to the Commission is requested to furnish the Commission with a résumé of the intended representations, together with a written request to be heard by the Commission.

It would be appreciated if written comments, representations or requests could reach the Commission at the address given on the previous page not later than 31 August 1989. Anyone who is unable to submit comments in time is invited to contact the researcher.

The researcher responsible who may be contacted for further information, is Mr Gerhard van Zyl, Secretary of the Commission.

HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

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1. THE PRESENT POSITION REGARDING THE ABUSED CHILD AS A WITNESS IN COURT

When appearing in a court the abused child does so as a result of legal requirements developed over centuries, in circumstances evolved, refined and determined over many years, and in terms of rules and procedures developed over many generations. These legal requirements, circumstances, rules and procedures did not originate in an arbitrary manner, but are the product of experience gained over centuries from the uncompromising practice in our courts and the lessons of life learnt from that experience.

These principles can be summorised as follows:

1.1 The presumption of innocence and the burden of proof in a criminal case

In our law, just as in other Anglo American systems, the so-called presumption of inocence applies in a criminal case. This means that an accused is presumed to be not guilty of the alleged crime, until the state (the prosecutor) has succeeded in convincing the court beyond reasonable doubt of his guilt. This premise can best be described as a matter of policy regarding the burden of proof[1] and as a rule emanating from the desire to protect the accused against the infliction of punishment and the strong arm of the State.[2]

Regarding the standards of proof, the general rule is that the court must be convinced of the accused's guilt beyond reasonable doubt before convicting the accused. This notion has been described by Rumpff J A in S v Glegg 1973 1 SA 34(A) on 38-9 as follows:

> When the State has to prove its case in such a manner that the judex facti must be convinced that a crime has been committed, it is not

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1 Schmidt, Bewysreg, 2nd edition, Butterworth, 55.

2 Ibid.

> expected of the judex that his belief be based on a certainty consisting in an unlimited number of raised possibilities, hypothetical or speculative, which must be eliminated by the State. The notion 'reasonable doubt' cannot be precisely defined, but it can be said that it is a doubt which exists because of probabilities or possibilities which can be regarded as reasonable on the ground of generally accepted human knowledge and experience. Proof beyond reasonable doubt cannot be equated to proof beyond the slightest doubt, because the onus of adducing evidence as strong as that would in practice defeat the ends of criminal justice.

The result of the above-mentioned principle is that in practice an accused must be acquitted if at the end of the trial there is reasonable doubt about his guilt.

How is a reasonable doubt created? Reasonable doubt exists in practice if the evidence of the State is defective, or if the witnesses of the State contradict one another, or if a the version of a State witness is incomplete, illogical, contradictory or unconvincing, or if the State witness makes concessions pointing to the veracity of the accused's version, or if the cogency of the accused's version is such that it may be reasonably true.

A criminal proceeding is in effect aimed at comparing the two contradictory versions, that of the State and of that of the defence, against one another and to put both to the test of harsh cross-examination. According to well-known conceptions of justice, there is no better test for discovering the truth than cross-examination. The right to cross-examine a State witness in full is therefore regarded as a fundamental right of an accused. The reason for this is that experience has taught that the version of a State witness, although at first glance truthful and cogent, would quite often fall through under sharp and intelligent cross-examination and exposed to be a invention or to be unreliable. But for this rule, many an accused would daily be wrongfully convicted.

1.2 The adversary system

Our court procedure is cast in the same mould as the adversary system. This means that the presiding officer - judge or magistrate - plays a passive role, almost akin to that of an umpire in a cricket match. He hears both sides and sees to it that the rules of evidence and procedure are

adhered to. At the end of the trial he must make a finding as to the facts found proved and he must apply the law and give judgment. The presiding officer plays a neutral role.

The practical result of this principle in conjuction with the principle that cross-examination must be allowed, is that there is but little room for the presiding officer to interfere with cross-examination. The presiding officer cannot restrain cross-examination which is harsh and aggressive or which consists of leading questions or suggestions, or which is prolonged. If he does so the proceedings are irregular and the accused may thus receive the benefit and his conviction may be set aside.

The presiding officer may limit or prohibit offensive, humiliating, misleading or tormenting cross-examination. There is in practice the problem that there is sometimes a vague line between this sort of cross-examination and admissible sharp and aggressive cross-examination and that presiding officers are very cautious not to go beyond that limit. If the limit is indeed exceeded it may well lead to the setting aside of the whole case, which is extremely undesirable.

It would be better to caution the sharp cross-examiner, and questions are disallowed only if it is clear that the limit of propriety has been exceeded.

1.3 The court room

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

Though section 169 of the Criminal Procedure Act 51 of 1977 provides for the adjournment to any other place, if the court deems it necessary or expedient, it is however, a general rule that criminal proceedings shall take place in open court.

It is at present general practice in this country that cases concerning children be heard in the ordinary court room.

1.4 The presence of the accused

It is a basic principle of our criminal procedure that the accused is entitled to be present during his trial and therefore to hear all the evidence against him and consequently to demand that accusations against him be made face to face with him.

The accused will only in extreme cases be removed from the court room and kept elsewhere in the event of his disruptive conduct.[3]

In our current criminal procedure it is a standing rule that a child giving evidence must do so in the presence of the accused.

1.5 The role of the prosecutor: preparation of the child witness

The prosecutor leads the evidence for the State by tendering the evidence in chief of the witnesses for the State in order to place their evidence before the court. The accused, normally assisted by an attorney or advocate, then cross-examines the witness. The task of the defence is aimed at destroying incriminating propositions, and showing its falsehood, to elicit contradictions and deficiencies, and exposing improbabilities.

Before appearing in court the attorney or advocate for the accused prepares himself thoroughly. The accused and his witnesses are consulted and obscurities and contradictions are dealt with in detail and, if possible, cleared up. An inspection in loco is normally conducted in order that the accused and his witness may relive the occurrence and to refresh their memories. An attempt is made to anticipate the evidence to be led by the State and to obtain, if it is available, rebutting evidence. The facts and the law are gone into very thoroughly. The defence and the witnesses for the defence are in general well prepared for the trial. Everything is aimed at contradicting the State's case and procuring an acquittal.

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3 Sec 159 of the Criminal Procedure Act 51 of 1977.

Over against this approach by the defence, there is that of the State. Mr J C Ferreira, for years a prosecutor, magistrate and then Head of Justice Training, writes as follows in his textbook Strafproses in die Landdroshof, Juta 1967, 338:

> Daar is geen beswaar dat die aanklaer onderhoude voer met sy getuies voordat hulle geroep is nie en in baie gevalle sal dit selfs wenslik wees, maar sodra die getuie begin het om te getuig, sal dit onreëlmatig wees om verdere onderhoude met hom te voer, behalwe waar die getuienis ingewikkeld of lank is en dit nodig is om onderhoude te voer ten einde die getuienis verder te lei ...
>
> Die aanklaer behoort geen emosie te toon wanneer hy vervolg nie. Hy is nie die party wat verontreg is nie. Hy is die dienaar van die waarheid en die persoon wat die beskuldigde voor die regbank stel. Die aanklaer moet nie oordrewe begerig wees of 'n onverbiddelike stryd voer om 'n skuldigbevinding te verkry nie. Hy moet slegs met net één onwrikbare begeerte besiel wees, naamlik om die waarheid vas te stel en vir dié doel moet hy die feite van die saak voor die regbank, wat oordeel moet vel, lê. Van die aanklaer word onwrikbare regverdigheid vereis. Nòg die gruwelike aard van die misdaad nòg die verfoeilike gedrag of die hoë rang van die beskuldigde nòg enige ander omstandigheid moet die gelykmatigheid van die aanklaer versteur. Hy moet die vervolging met regterlike wysheid en 'n verantwoordelikheidsin voer.

There is in practice a vast difference between the preparation done by the prosecutor and that of the defence. As against the energetic action of the defence mentioned above, the normal practice is that the prosecutor does not consult with the complainant or state witnesses; that he does not in any way prepare them for the trial at all; that he does not go over their evidence and clear up obscurities and contradictions where possible; and that he does not conduct an inspection in loco with the witnesses. The general daily practice is that the prosecutor receives the docket from the investigating officer (the Police) containing the written statements obtained by the police officer from the state witnesses. The evidence of the witness is led from this statement, often without the witness having had the opportunity of reading, correcting or amplifying the statement, which was probably taken down months ago.

Compare the passive, unconcerned role put forward as the ideal for prosecutors, with the energetic, active role of the defence as described above.

1.6 Legal assistance for the child witness

As long as the prosecution remains in the hands of the State, a child witness will not be entitled to be assisted in court by his (or his parents' or guardians') private legal-representative concerning the presentation of his evidence, objections against aggressive cross-examination, the cross-examination of the accused and the other defence witnesses, or argument at the end of the case. The private legal representative of the child witness (or his parent or guardian) in a criminal case is in the same position as a spectator.

In R v De Kock 1914 EDL 348 the appointment of a private practitioner by the complainant to assist the prosecutor was strongly condemned by the court. In R v Adam Effendi 1917 EDL 267 the conviction was set aside because without the authority of the Attorney-General a private practitioner assisted the prosecutor by addressing the court. It was ruled that this was irregular and could have prejudiced the accused. On the undesirability of such a situation Graham J P made the following observations at 353-354:

> I have noticed for some time past that the practice of employing legal advisers to assit the prosecution in criminal cases ... is becoming quite common ... I am convinced that the practice is one which should not be tolerated in the interests of justice. A prosecutor appointed by the Crown approaches a case in a different frame of mind from that of an attorney or agent appointed by and remunerated by the complainant in the case. The Crown prosecutor should have no other interests in the case than to lay before the court such facts as may assist the court in arriving at the truth. This is his sole and only duty. If private practitioners are permitted at the instance of a complainant to take part in a prosecution, the whole object of the enquiry, which, I repeat again, is only to elicit the truth, may be lost sight of. And when, as in the present case, a private prosecutor is engaged by a person, who is admittedly at enmity with the accused, justice may easily be defeated, in spite of vigilant efforts of a conscientious magistrate. Moreover, if two prosecutors are engaged in a case, one rightly appearing to represent the Crown, the other irregularly appearing to represent the aggrieved individual, the issues may easily be obscured and the facts confused.

According to the decisions in Salusbury v R 1934 1 PH H83(T) informal assistance by a private practitioner appointed by an interested party is permissible. Such a practitioner would even be able to suggest questions

to the public prosecutor, but would not be allowed to address the court or participate in the cross-examination of the accused.

1.7 In camera trial

Under section 153(3A) and 153(5) of the Criminal Procedure Act 51 of 1977 a trial in camera takes place if the witness is under 18 years of age or where indecency is an element of the crime concerned.

What does trial in camera mean?

It simply means that no spectators are allowed. The accused and his legal representatives, the court staff and the child's parent or guardian or a person in loco parentis are not excluded.

1.8 The cautionary rules

Certain rules of practice have developed in our criminal practice in the course of decades. These rules have the effect that the court must, in certain cases where falsehood or untrustworthiness is according to general human experience extremely great, be careful in evaluating such evidence. These rules are applied to the evidence of prostitutes, participants, traps, private detectives, children, female complainants in sexual cases, and where there is only a single witness.

In the event of a child giving evidence in a sexual case, three of these cautionary rules are applicable and they are briefly discussed.

(a) The single witness

Although section 208 of the Criminal Procedure Act 51 of 1977 clearly provides for the conviction of an accused of any offence on the single evidence of a witness, the court still approaches the evidence of a single witness with circumspection.

A single witness does not mean that there is only one State witness. If there is only one witness on a single substantial matter in dispute, such a

witness is a single witness concerning that particular and sometimes decisive matter in dispute.

The broad premise of our courts is stated by Schmidt Bewysreg at 126:

> (S)odanige getuienis word altyd versigtig benader en in 'n strafsaak sal 'n skuldigbevinding normaalweg slegs volg indien die getuienis wesenlik bevredigend in elke materiële opsig of as daar stawing is. Die stawing hoef nie noodwendig die beskuldigde met die misdaad te verbind nie. Die versuim om die enkelgetuie se getuienis te probeer weerlê kan 'n ondersteunende faktor wees. Die getuienis kan bevredigend wees al is dit in 'n mate vir kritiek vatbaar. Die feit dat die enkelgetuie 'n amptelike posisie beklee, byvoorbeeld dat hy 'n polisieman ... is, versterk egter nie sy getuienis nie. Die noodsaaklikhied van 'n versigtige benadering word verhoog deur die faktore wat De Villiers RP in die eerste Mokoena-saak (R v Mokoena 1932 OPD 79 op 80: ... the section ought not to be invoked where ... the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation ...) gestipuleer het ... dit spreek vanself dat al die besondere feite van die saak in ag geneem word ten einde te bepaal of die enkelgetuie geloofwaardig is. Dit is belangrik om te besef dat die hof nie in formalisme verstrik moet raak nie ... Uiteindelik is dit die tradisionele bewysmaatstaf (bewys bo (alle redelike twyfel) wat deurslaggewend is.

(b) The child

The evidence of children is treated with circumspection. Sir Rupert Cross Evidence 5th ed Butterworths London 1979 refers at 193 merely to the unreliability of witnesses of tender years whereas Hoffmann & Zeffertt, 456 give more reasons by saying that the child's evidence "should be scrutinized with great care" because the danger is not only that children are highly imaginative but also that their story may be the product of suggestion by others. These writers go on to state at 456 that:

> In sexual cases, for example a child who is prompted by leading questions when he first makes a complaint is quite likely to believe that things which were suggested to him really happened.

Schmidt at 136 says that a young child's lack of experience, his imaginativeness and his susceptibility to influence cause the evidence to be

unreliable. Schreiner J A puts the matter even more strongly in R v Mlandla 1951 3 SA 158(A) at 163:

> The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinized with care, amounting, perhaps, to suspicion.

In his turn Schmidt at 138 says that the rule orginated in order that the trier of fact be made aware of the dangers concerning sexual misconduct and that there should be some or other safety factor reducing the risk of misconception. Schmidt gives the following reasons why this type of evidence should be treated with circumspection:

> Die ervaring het blykbaar geleer dat dit gevaarlik is om op die ongestaafde getuienis van die klaagster (of klaer) of eiseres staat te maak ... Juis omdat wangedrag van dié aard gewoonlik in die geheim plaasgevind het en omdat die klaagster 'n 'deelnemer' was, is dit maklik om die getuienis te vervals en moeilik om te weerlê. Daarbenewens bestaan die gevaar dat emosionele reaksie of wraaksug 'n faktor kan wees; of dat vrywillige geslagsverkeer as verkragting voorgestel word wanneer die klaagster deur omstandighede gedwing word om te erken dat sy omgang gehad het.

2. CRYSTALLISING OF PROBLEMS

In this section the consequences of the present legal position pertaining to the child witness, his parent or guardian, the State and society will be examined, together with criticism levelled against the present system.

2.1 The presumption of innocence and the fact that the onus is on the State to prove the accused's guilt beyond reasonable doubt

As long ago as 1925 a British departmental committee reached the conclusion that the existing criminal procedure and rules of evidence made it exceedingly difficult to obtain a conviction against child abusers.[4] In 1962

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4 Report of the Departmental Committee on Sexual Offences against Young Persons (1928) Cmnd 2562, par 36 et seq.

this was again emphasised in England in a memorandum by the Board of the British Magistrates' Association.[5]

Experience has been the same in this country.

In a submission to the Commission Mr W G M van Zyl, Regional Court President of Natal stresses that, as a result of problems regarding the rules of evidence, guilty child abusers go scot free, possibly to commit a second more serious aberration with other children.

In an article, The child witness and the battle for justice (January 1988 De Rebus 54 et seq) Dr J J A Key of the Addington Hospital published the results of a survey on the incidence of convictions in cases of child abuse following on cases investigated by the Addington Hospital during 1985 and 1986.

The figures are as follows -

(a) Child witness under six years

There were only three convictions out of 42 cases. Dr Key states: "My experience leads me to believe that except in the unlikely event of an adult witness being able to testify to having seen a child being abused, it is almost impossible to secure a conviction in cases of abuse involving a child who is younger than six years."

(b) Child witness between six and 12 years

There were only 11 convictions out of 49 cases. The reason for the low conviction rate was for want of corroboration. Dr Key concludes that "it would seem that the child's evidence alone is insufficient."

(c) Child witness between 12 and 16 years

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5 Memorandum on Criminal Procedure and Child Victims of Sexual Offences, 17 May 1962.

There were 14 convictions out of 19 cases, a conviction rate of 73%.

From this analysis it is clear that where a conviction depends on the evidence of a child, the conviction rate is particularly low and that it drops in accordance with the lower age of the child.

The question can justly be posed whether the State's burden of proof is not too high, considering all the problems pertaining to a conviction on the evidence of a child. Does this high burden of proof still serve the interests of society in the case of child abuse?

2.2 The adversary system

One of the great and repeated complaints against the present system is directed against the adversary system and everything it implies: aggressive cross-examination of the child witness and the neutral role of the presiding officer.

The complaint is so often repeated that it is necessary to cite only a few witnesses:

(a) Just about all the researchers refer to the brutal cross-examination meted out to child witnesses by attorneys and advocates appearing for the accused.

Dr Key[6] mentions the case of protracted sodomy by the father on his own son. The son was at the time of the trial $12^{1}/_{2}$ years of age. The trial took place eight months after the charge was laid. Dr Key has the following to say regarding the trial and the cross-examination:

> Had I known then what I know now I would have doubted the wisdom of laying charges which would result in this young boy being subjected to the horrendous secondary abuse he received in court ... He was subjected to one and a half days of persistent and detailed cross-examination about the appalling sexual abuse to which he had been subjected by his father for as far back as he

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6 Ibid.

could remember. Throughout the hearing the boy demonstrated signs of severe anxiety. He held his hand against his face to blinker out the sight of his father. When asked why he was so upset he said that his father had, on numerous occasions, produced a knife and threatened to kill him if he ever told anyone about what his father had done to him. The case was remanded for two months and then remanded again because of a change in defence counsel. Finally in October 1986, fourteen months after the original charge was laid, this unfortunate child once again was required to stand in the witness box for hour upon hour of gruelling cross-examination. Within ten minutes on the first day he was in tears. As before he held his hand against his face to avoid seeing his father. He was bullied about details he could not remember. He was accused of being a liar and making up the whole story. At this stage he broke down completely and pleaded to know why the defence did not believe him.

Dr Jean Hammond of the department of psychology at the University of Natal who was in court with him during his evidence wrote in her report 'The child witness' dated April 1987:

> This boy's life has already been shattered by years of unthinkable abuse. The threats on him were so great that he would never have been able to disclose the matter himself. Discovery was accidental and since then he has been gradually building himself up again with the aid of intensive therapy. And yet, here in the 'cause of justice' he is being completely broken down again by the court procedure which is not only permitted but apparently demanded by our judicial system.

The object of the cross-examination is to establish that the child is lying. If the accused himself conducts the cross-examination the effect on the child can be terrifying. The cross-examiner is not limited by the rule against asking leading questions. The child may agree with questions put to her by the accused for fear of punishment if she disagrees.

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

(b) Mr W G M van Zyl, Regional Court President of Natal, says:

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

(c) Nancy Seijas The child witness in the adversarial justice system - a proposal for reform July 1988, says:

. ... children who have suffered some of the most horrific sexual abuse and indecent assault often take a witness stand, only to find themselves under attack again. The defence counsel may probe and cross-examine them ruthlessly in an attempt to acquit the accused, who is sitting right behind, watching the child's every move. Many people are opting not to prosecute at all ... just to keep their children out of the courtroom ... The evidence that children are severely traumatized by the criminal proceedings of child abuse cases is abundant, and so is the evidence that the trauma, or the anticipation of it, is frightening people away from the court system.

(d) The Child Witness Project Group of the University of Natal, Pietermaritzburg, calls for a more rigorous approach by Magistrates and Judges in order to limit the potential harm caused by the cross-examination of the child witness.

2.3 The court room

There is abundant evidence that the traditional court room and the juxtaposition of the presiding officer, the accused, the legal representatives of the accused and the prosecutor (some of whom are attired in black robes) result in the child witness being afraid, uncertain and confused. In S v Basil Simons Durban & Coast Local Division 1988-06-13 CC 84/88 Wilson J remarks as follows:

> I propose for a moment to digress and to state that it appears to me that it is time that urgent consideration is given to a change in the manner of conducting criminal trials arising out of the sexual abuse of young children. I do not suggest that there should be any substantial changes made to our criminal procedure as such, but it appears to me that it would be eminently desirable to evolve a system that when a child is called upon to give evidence that child is not required to do so in a large austere looking court room before judicial officers sitting on a bench above them. In other words in circumstances that are completely strange to the child, and must cause a great deal of stress and tension. It would in my view be far fairer, both to the State and the defence, if arrangements could be made in cases of this nature for the child to give evidence in circumstances which are not strange to her, so that he or she, depending on the sex of the child, is not subjected to more traumatic experiences than are absolutely necessary.

The full effect of the court room is also raised by the Child Witness Project Group of the University of Natal, Pietermaritzburg, Dr J J A Key, and J C & E J Hammond, Justice and the child witness in SASK (11) 1987, 3 at 8 et seq.

2.4 The presence of the accused

Quite a number of researchers, in this country and overseas, point to the effect which the presence of the accused has on the child witness and the resultant possibility that the child may water down his evidence against the

accused or change it completely merely to escape from the unpleasant experience.[7]

2.5 The role of the prosecutor: preparation of the child witness

It must be accepted as fact that public prosecutors do not prepare the child witness for trial to the same extent as in the case of defence witnesses. The reasons for this are probably the accumulation of the prosecutor's work, an exceedingly heavy court programme which leaves no time for consultations and inspections, insufficient co-operation with the investigating officer, and existing practice.

Whatever the reasons, the almost inevitable result is that the child witness is totally unprepared for what is expected of him or her and what he or she may expect. The witness appears to be uncertain and thus untrustworthy. He or she cannot remember all the details of the experience about which evidence must be given and he or she has not had the benefit of a consultation to refresh his or her memory. There are therefore contradictions, lacunae and uncertainties which create the impression of untrustworthiness. As a result of his own neglect to consult beforehand, the prosecutor struggles from the outset to place the witnesses version cogently before the court. The court immediately calls the value of the evidence into question. In practice it is not too difficult for the cross-examiner to "break" the witness - and yet another guilty abuser goes scot free.

2.6 Legal assistance for the child witness

Various researchers show that if legal assistance is provided for child witnesses they would at least be better prepared on the facts, that they would have a better grasp of what is expected of them, and that they would be better protected against aggressive cross-examination and repeated remands as are at present the case.

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7 Cf Hammond & Hammond op cit 8 et seq; Nancy Seijas op cit 4 et seq.

The appointment of a legal representative for the abused child is therefore called for.

Hammond & Hammond[8] state:

> A plea for a child's advocate was made at the first National Child Abuse Conference in Southern Africa (Allwood, 1984):
>
> > Recent legislation makes provision for the 'friend of the child' in legal proceedings. The time is ripe for the urgent introduction of the 'child's advocate' into the management of child abuse. Such a person will have knowledge of both legal and psychosocial concepts in order to bridge the gap and facilitate meaningful communication in the interests of the child. The interests of parents and child are not always synonymous, and these should be defended separately. Someone must speak to the interests of the child in a language intelligible and in concepts meaningful to those who have the power to dictate the future of that child (117).
>
> In a recent letter to De Rebus (June 1986) a social worker, Van der Byl, recommends that a legal adviser with special knowledge about child abuse should be appointed in child abuse cases when the parents have obtained a defence counsel. Alternatively, legal counsel should be part of a multi-disciplinary case conference in order to become fully cognizant of the details of the case. In her experience as a social worker there are grave disadvantages 'when counsel, who has done no personal investigations of the abuse decides in time honoured adversarial fashion to try to bully them into returning a child prematurely to the 'loving' parent who was responsible for the abuse in the first place (250).
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> In its enquiry into family courts, the Hoexter Commission (1985) proposes an office of children's friends for the Republic who have the power to arrange legal representation for the child at public expense. Under the new Child Care Act of 1984 it would seem expedient for this office to be introduced in advance of the establishment of the family courts to ensure the protection of abused children.

2.7 Trial in camera

It is clear that the present rules regarding trials in camera do not sufficienly protect the child witness because the accused and his legal

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8 Ibid 7.

representative are still present and it is indeed their presence and conduct which, as far as the child witness is concerned, lie at the root of the evil.

2.8 The cautionary rules, particularly the misgivings about the value of the child witness

More and more doubt exists regarding the basic premises on which the cautionary rules concerning children are based:

Hammond & Hammond states:[9]

> There is a growing body of empirical evidence which demonstrates that children are no less credible than adults in areas relevant for witness assessment, such as suggestibility, memory and distinguishing between reality and fantasy (Cohen & Harnich, 1980; Johnson & Foley, 1984; Loftus & Davies, 1984; Martin, et al, 1979; Goodman, 1984; Melton, 1981).
>
> This calls into question the whole rationale behind the demand for corroborative evidence to back up a child's testimony, which although not statutory in this country is nearly always demanded in practice (Peiris, 1981; Hoffmann & Zeffertt, 1981). It also demands a re-evaluation of the cautionary rule which the court is required to apply in assessing a child's testimony.

As result of empirical research done, Hammond & Hammond came to the following conclusion:

> Our results show clearly that while young children do not perform as well as older children or adults, they are far from incompetent. Indeed, in the immediate spatial memory task, they performed better than adults did. Furthermore, their performance showed no tendency to decline with the passage of time.
>
> One time-dependent outcome was the tendency to get more 'reckless' in target identification over time. Since other measures show that the accuracy of their memories does not decline over time, the lesson to learn from this is that interrogation procedures should preferably be of the 'either or' type and not too open ended.
>
> Some of the ethnic results are interesting, if not too surprising. White children are more accurate than black children when assessing

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9 Ibid 3.

photographs, as one would expect given the difference in their circumstances. Children perform better when recognizing faces of their own ethnic group. Girls (of both groups) appear to be less affected by ethnicity than boys (of both groups). There is a hint in these results that one should be cautious about over-compliance when the questioning of very young black children is done by a white experimenter.

Much potentially useful research remains to be done. Of great pertinence is the distinction drawn between episodic and semantic memory (Tulving, 1972). The former is our memory of events, while the latter corresponds to our general knowledge. Children probably have better episodic memories than semantic memories, since the latter are the distillation of the former. This means that they should make good witnesses, since one will get a recitation of the facts 'uncontaminated' by common sense. Contrast this with what we adults experience. Our memories become logically organized, even when this is at the cost of veracity.

3. THE CONCERN OF THE GOVERNMENT REGARDING THE MATTER

The Government has, in the light of the above, voiced its concern regarding the matter. On 8 November 1988 the following press statement was released by the Minister of Justice, Mr H J Coetsee, MP:

> The South African Law Commission, as well as parliamentary committees, the President's Council and other departments have recently undertaken numerous investigations which have a bearing on the law of persons, family law and related legal aspects. In particular attention was given to the protection of the child. Several investigations have been completed and have either been implemented or are in the process of implementation. Other investigations are still under way.
>
> Investigations already completed and in respect of which certain proposals have been implemented are, for example, the following:
>
> 1. As a result of the South African Law Commission's investigation into women and sexual offences in South Africa, the Law of Evidence and the Criminal Procedure Act Amendment Act, 1987 (Act 103 of 1987), was placed on the Statute Book. Amongst others, provision was made therein for the amendment of section 153 of the Criminal Procedure Act, 1977 (Act 51 of 1977), so as to provide for the automatic hearing of male and female complainants' evidence in camera in respect of offences of an indecent nature. In order to protect the identity of such a male or female complainant at all times, section 154 of the Criminal Procedure Act, 1977, was amended likewise.
>
> 2. Arising from the recommendations of the President's Council in its report on its investigation into the Immorality Act, 1957, (Act 23

of 1957), this Act was amended in 1987 in many respects so as to protect the child's interests. Section 9 of the said Act provides that a parent or guardian of any female who procures such female to have unlawful carnal intercourse, or orders, permits or assists to bring about, or receives consideration for, the defilement, seduction or prostitution of such female, shall be guilty of an offence. This section has now been extended to give protection to children of both sexes under the age of 18 years. It has also been made an offence for a parent or guardian of such a child to permit the child to commit any immoral or indecent act. Where section 14 of the said Act only made provision for the commission of an immoral act with a girl under 16 years, provision is now made that a female can also commit an indecent act with such a boy. In order to facilitate the State's burden of proof in cases of this nature, a presumption was built into the Act.

3. The Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987), envisages, amongst others, that the protection of the interests of minor or dependent children at divorce be improved. The family advocate, an office envisaged in the Act, must, amongst others, investigate and make recommendations regarding the welfare of such children, if requested thereto by the court or any party to the proceedings comtemplated in section 4(1). The family advocate may also, on his own initiative, become involved in the proceedings if he deems it necessary in the interests of the children. The Act has not yet been put into operation. Such a step requires a broad infrastructure. An implementation committee will advise me on the establishment of a proper infrastructure. As in the case of the small claims courts it is envisaged that initially pilot projects will be launched in determined areas. The target date for the implementation of the first pilot project is 1 April 1989.

4. In 1987 I decided that offenders serving sentences of imprisonment for violence against children, will not automatically be entitled to parole. I consider each such case personally.

5. An Interdepartmental committee attending to the needs of victims of sexual offences has been appointed. This committee is investigating the establishment of a model which will ensure comprehensive multi-professional support for the victim. The H S R C is involved in the research for the development of such a model.

As a result of representations to me relating to the further protection of children in connection with court cases, I have decided to sumbit the following project to the South African Law Commission:

That an investigation be instituted into the giving of evidence by children in litigation involving allegations of indecent acts and that in particular consideration be given to the following possible protective measures and procedures:

1. That a child giving evidence in a trial be assisted by a representative.

2. That the identification of a suspect by a child ought not to take place in open court, but from behind a one-way mirror.

3. That the evidence of a child be heard in an informal atmosphere, which includes the hearing of such evidence in a room other than a court of law, and which also includes the possibility of hearing the child's evidence whilst the child is screened off by a one-way mirror or in the absence of the accused.

4. That a pre-trial questioning of the child be carried out by a psychologist appointed by the court, who must be entitled to express his opinion in court regarding the child's credibility; such questioning to take place in consultation with the accused, the prosecution and the presiding officer.

5. That video tapes relating to interviews between the child and a social worker during the investigation stages of the case ought to be admissible in court and ought to be made available to the accused before the trial.

4. SOLUTIONS SUGGESTED IN THIS COUNTRY AND ELSEWHERE FOR THE SAID PROBLEMS

In this section the solutions suggested in this country and elsewhere in order to solve the problems identified are briefly discussed.

4.1 Evidence by a child investigator

This system was introduced in Israel in 1955. Where an abused child is under the age of 14 years he or she is questioned by a trained child investigator or youth interrogator. The majority of investigators are females and they are psychiatrists, welfare officers, or clinical or educational psychologists. This official protects the child against interference and intimidation, evaluates the trustworthines of the child and testifies and is cross-examined on behalf of the child if the official decides that it is not in the interest of the child to testify in person. Only a small percentage of such children, between 2% to 10%, do in fact testify in person.[10]

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10 See Hammond & Hammond, Ibid, 5.

On this procedure Hammond & Hammond[11] report:

> Since the law has been introduced in Israel there has been an increase in the number of reports of these cases because people are aware that the child will be protected (Reifen, 1973) and there is no indication that the chances of a conviction decrease under this system. In contrast, in South Africa and other countries with similar procedures, there are frequent reports about the unpredictable effect a court appearance will have on a young child, so that she might have been quite coherent about what happened to her when interviewed by police or social workers out of court, but in the court setting found she could say nothing (eg Goodman & Michelli, 1981; Spencer, 1986; Robertson 1986b, personal communication). Obviously the lack of key evidence in such circumstances will drastically decrease the chances of a conviction.

In summary, the advantages of the Israeli system are:

(a) A single investigator deals with the case throughout, avoiding the numerous interviews demanded of a child victim from a variety of investigators.

(b) The child is very seldom required to give evidence in court, but is represented in a manner laid down in the law by a well-trained professional.

The disadvantages are:

(a) In the majority of cases when the child investigator represents the child in court, the accused is deprived of his right to contest directly the evidence of the witness.

(b) Corroboration of children's evidence is still required.

4.2 Special court rooms and "translated" cross-examination

There is a strong general opinion that the child witness should testify in a special court room (eg a play room) assisted by a trained official (psychiatrist or psychologist) from behind a one-way mirror. The court and defence are able to see the child but the child is not aware of their presence. Cross-examination is put to the official who listens to it by means of earphones and who will then relay it to the child in an objective and non-aggresive manner. The court and the defence are able to listen to

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11 Ibid 6.

the interpreted question and answer. Alternatively all questions are put to the presiding officer who would then put them as he deems fit to the official who conveys them to the child.

Hammond & Hammond explain as follows:[12]

> Libai (1969) and Parker (1982) are among those who suggest a children's courtroom with special features to protect the child from contact with the offender while at the same time allowing the offender his legal right to cross-examine the witnesses. The proposal is for a one-way mirror in these courtrooms. Behind this the defendant and his counsel could view the child and hear his or her evidence, but could not themselves be seen by the child. A specially trained attorney known as a Child Hearing Officer would hear the child's evidence and act as interpreter for questions from the prosecution and the defence relayed to him by way of an earphone. The whole procedure should be videotaped and this tape used as deposition evidence at the court trial proper, removing the need for the child to repeat her story many times. The Child Hearing Officer should then be allowed to represent the child if further evidence is required.
>
> In 1986 a parliamentary recommendation, clause 21 of the latest Criminal Justice Bill allows the use of live video links in English courts when a child victim of physical or sexual abuse is called to give evidence. This procedure is already in practice in California and in some 19 other American states. In effect this means that the child does not have to appear in the formal court room. It therefore has the advantage of keeping the child out of the formal atmosphere of the courtroom which many child witnesses find extremely daunting. It also avoids the major problem of the child having to face the accused in court, and having to give evidence in his presence. In many cases the child has been threatened with death or other punishment if he or she should ever tell what happened, and although a number of commentators have said that the live video link is only a small step, (eg Spencer, 1986; Davies and Flin, 1986) there would seem to be a substantial advantage to the child to give evidence and answer cross-examination out of the presence of the accused. The advantages for the law are that the child is effectively present for the purposes of giving evidence-in-chief and cross-examined by the defence.
>
> Myers (1986) speaks strongly in favour of the use of video links with child witnesses:
>
> > ... video testimony can be structured to satisfy both cross-examination and confrontation. Nothing inherent in the technique is inconsistent with full and effective cross-examination. In fact, reducing the stress of testifying may make it possible to elicit more and better information from child witnesses ... the

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12 Ibid 8.

> state's parens patriae interest in protecting children from trauma, the 'strong interest in effective law enforcement', the tremendous difficulty of proving abuse, and the urgent need to deal with the problem. When these factors combine, the argument favoring video testimony outside the presence of the accused becomes convincing (239-40).

With effect from 1 January 1989 a system was introduced in Britain allowing a child to testify from some other room by way of live television links. The child does not see the court or the accused. Questions in cross-examination are not "translated".[13]

4.3 Legal assistance for the child witness

The advantages and implications were discussed above.

4.4 Sympathetic and careful taking of the initial statement

Various researchers call attention to the advantages of taking the initial statement of the child witness with care and sympathy.

Hammond & Hammond describe the procedure in Britain as follows:[14]

> Gwynn (1986) described an innovative method of training personnel to deal specifically with child sexual abuse cases. It involves the collaboration of the Department of Social Services and the Metropolitan Police in London Borough of Bexley in the United Kingdom.
>
> They reviewed interviewing methods used with child sexual abuse victims and improved on these with the use of anatomically correct dolls and line drawings as an integral part of taking statements from children suspected of being victims. They have also introduced the routine video recording of these interviews. Other agencies involved in the welfare of these children are given access to the video tapes in an endeavour to reduce the number of times the child has to repeat the story and to improve co-ordination between agencies in dealing with the case.

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13 Daily Telegraph 31-12-88, 13.

14 Ibid 17.

Training of the special investigators includes self-awareness training and the establishment of trust and interdependence between members of the team.

On referral one social worker and one policeman are allocated as joint investigators; any other agencies or records which might have relevant information are consulted; the person who made the referral is interviewed; the family is visited and all members interviewed; consent is obtained on a written form to interview the child, have a medical examination done, and use any video recordings taken within the network. If consent is not given and the investigators suspect that one of the parents is the abuser, the child is taken to a place of safety.

The child is interviewed in a specially equipped recording room, in the paediatric unit of the local hospital, where the atmosphere is informal and relaxed.

The current legal position is that this video recording cannot be used to replace the child giving evidende in person in court unless the defence agrees to its use. One exception to this is if the suspect accepts the truth of what he sees when shown the video (Gwynn, 1986).

Gwynn further recommends that the tape should always be presented as an exibit to the court and will in many cases help to substantiate and demonstrate consistency of the child's testimony.

4.5 Video recording and the initial statement as admissible evidence

There are proposals that the initial statement of the child be recorded on video and adduced as evidence at the trial.

Hammond & Hammond have the following to say:[15]

> There is increasing international pressure to make exceptions to the rule in cases where a child is the victim and only first-hand witness of abuse (Spencer, 1986; Myers, 1986). The acceptance of video-recordings made under standardized procedures as alternatives to the presence of a child witness would go a long way in solving the moral dilemma with us now.

4.6 Expert evidence on trustworthiness of the child witness

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15 Ibid 10.

There are learned persons who suggest that experts - for example child psychologists - be present in court during the testimony of a child and then give evidence on their opinion of the child's credibility. This opinion would then be based on the expert's observation and his explanation, from a psychologial point of view, regarding some aspects of the child's evidence, which could possibly be wrongly interpreted by the court. It is sometimes even suggested that such an expert be appointed as an assessor to sit with the presiding officer.

Hammond & Hammond[16] explain this suggestion as follows:

> Spencer (1986) argues for the introduction of child psychologists as expert witnesses to give their opinion as to whether a child has been abused, based on their observation of the classical symptoms. To avoid a battle between the experts who could then be called by the prosecution and the defence, he suggest that ideally the psychologist should be called by the court to sit with the judicial officer as an assessor.
>
> A common theme used to discredit a child who has been the victim of sexual abuse is to ask why the child did not report the matter sooner, since it is often claimed that the abuse has been going on for months and even years. The child may answer that she was afraid to tell anyone because of threats by the perpetrator. This may or may not convince the judicial officer. This is where an expert witness/assessor such as a psychiatrist or psychologist could help. Such a person is likely to know of Summit's (1983) identification of the 'Child Sexual Abuse Accommocation Syndrome'. Secrecy forms part of this syndrome. Summit feels that the credibility of the child's case is increased, not decreased, if the significance of apparently negative features of the case, such as secrecy and delayed disclosure, are made known to the court. He reported (1986) that using this format, evidence presented in court has always been accepted.
>
> A further symptom of the Child Sexual Abuse Accommodation Syndrome is retraction of a statement by the victim. In 1983 an important case, State v Middleton, was heard in the Oregon Supreme Court. The court approved the use of expert testimony and said:
>
> > ... in this instance we are concerned with a child who states she has been a victim of sexual abuse by a member of her family. The experts testify that in this situation the young victim often feels guilty about testifying against someone she loves and wonders if she is doing the right thing in so testifying. It would be useful for the jury to know that not just this victim but many

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16 Ibid 11.

child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behaviour by identifying its emotional antecedents could help the jury better assess the witness's credibility (from Myers, 1986 201).

4.7 The cautionary rules and the requirement for corroboration

With reference to their empirical research regarding the trustworthiness of the child's evidence Hammond & Hammond[17] are of the opinion that:

> Corroboration should not be required routinely since children are no less credible than adults and indeed are very unconvincing liars. More research is needed, but from what we already know it seems that no gulf separates children and adult witnesses as far as their cognitive capabilities are concerned. However, children do have to be treated in an age-appropriate fashion.

4.8 Avoid trial delays and remands

Hammond & Hammond state as follows:[18]

> The Ciba Foundation (1984) suggests that one important change in the judicial system should be to set a short maximum time limit for the trial of child sexual abuse cases. They would like to see no more than a three-month delay after the charge is made. Among the advantages of such a rule would be less disruption to the child and other family members and memories of the events would still be relatively fresh in the child's mind for the purposes of giving evidence. The writers of the Ciba Foundation report predict that such expedited hearing procedures should not require special legislation, but that a directive from the Lord Chancellor to the court's administrators could achieve this end.
>
> Parker (1982) also pleads for expedition in cases where a child witness is involved, recommending that these cases should be given priority in the interest of speed with a maximum delay of six months before the case is brought to trial.

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17 Ibid 18.

18 Ibid 8.

4.9 Identification and pointing out

Various researchers point to the desirability of a procedure by way of which the child witness would not be expected to confront the accused face to face during the police investigation and to touch the accused in order to bring about a lawful identification.

Nancy Seijas declares:[19]

> South Africa should also adopt one other aspect of the American system to better protect the child witness. In the US, all victims identifying suspects may do so without having to actually face and touch the individual they identify. They may view the line-up of suspects from behind a one-way mirror and pick out the suspect they wish to identify. This way, child victims would be much less likely to be too frightened to identify their abuser.
>
> South African child victims should have the option of standing behind a one-way mirror to identify suspects, or identifying them from television images, either live or pre-recorded. Neither method would in any way compromise the rights of the accused. The child's environment could be controlled easily, so as to prevent any outside influence on the child's act of identification. The current method of forcing a child witness to touch the alleged abuser is intended to protect suspects from being falsely or haphazardly accused. If we had a more reliable court system for proving child abuse, we would see that the current identification process itself is highly unreliable ...

4.10 Preparation by the prosecutor

The general practical problem in this connection has already been referred to.

5. EVALUATION OF THE DIFFERENT SOLUTIONS SUGGESTED

In this section the different solutions suggested and discussed in section 4 are dealt with according to existing principles, the practical effectiveness of the proposal, and the feasibility of the proposal.

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19 Ibid 10.

5.1 Evidence by child investigator

From a psychological point of view it is obviously desirable that the child witness should, as soon as possible after the event and up to the finalisation of the trial, be supported by a qualified child psychologist in order to assist the witness in dealing with the trauma caused by the assault and the court procedure.

Obtaining support for the abused child or the child witness falls within the sphere of activities of the South African Police. The S A Police, who do very valuable work in connection with child abuse and the protection of children, are therefore requested by the Commission to submit proposals on the desirability of making such arrangements a statutory requirement, or to propose alternative measures to ensure that such arrangements are made.

The crux of the said solution is, however, that the child investigator will testify and face cross-examination on behalf of the child.

This solution is in conflict with quite a number of the fundamental premises of our criminal law and law of evidence, for example that a witness must testify in person; that hearsay evidence is inadmissible; that a witness must face cross-examination in person; etc. The great danger regarding this procedure is of course that the child investigator would, in good faith and instinctively, and in particular during cross-examination, colour the child's story and give it a rational image, something which the child would not be able to do himself. The trustworthiness and reliability of the child's evidence can hardly be tested in this way. Either the prosecution or the defence could therefore be seriously prejudiced.

If the interests of the entire community - including those of the accused and the child - were to demand such a solution, then the mere fact that the said the solution is of a drastic nature would not stand in the way of law reform. However, the Commission is of the opinion (a) that the solution runs counter to many time-honoured principles, (b) that the practical dangers connected with it would be extremely great for the prosecution and the defence, and (c) that there are, as will be indicated, other and better solutions to the problem.

For the said reasons these solutions cannot be supported save to the extent already indicated, namely that psychological support be given throughout to the abused child and the child witness. The proposals of the S A Police in this connection are awaited.

5.2 Special court room and "translated" cross-examination

It must immediately be placed on record that the Commission's present provisional impression is that this proposal has merit. It allays the problems concerning the child's fear of the court and the accused as well as the problems concerning aggressive and intimidating cross-examination. It is also the Commission's impression that both elements - a separate court room behind a one-way mirror and translated cross-examination - are essential components regarding these problems. The one without the other is not of much value.

The basic question of law is whether "translated" cross-examination can be justified in the circumstances. Here again the interests of the entire community, including those of the child and accused, are at issue. It need hardly be said that it is in the interest of society that the guilty be convicted and the innocent acquitted. The witness must also be fairly treated, so that he may testify to the best of his ability. Aggression towards the witness, intimidation, eliciting contradictions, shrewd word-play and setting traps have in our practice got out of control, particularly as far as children are concerned. The Commission is of the opinion that the normal protection, namely objections by the presiding officer, are of little use. The mere presence of the accused and his legal representative(s) and the manner in which the attack is conducted already intimidate the child.

The purpose of the "translated" cross-examination procedure - i e questions in cross-examination are put by the defence by way of earphones to the child investigator who then tactfully put them to the child - is not to take the sting out of intelligent and even sharp cross-examination. Its purpose is to limit aggressiveness and intimidation to a minimum. There cannot be any objection against this objective. It is also suggested that the presiding officer determine from case to case, after having seen the child in chambers

and hearing the prosecutor's and defence's arguments, whether such a procedure should be followed.

The only question is whether such a system could be put into practice by the Department of Justice. -This means that in practice a room with an informal appearance (play room or sitting room) be made available to the child investigator and the child witness at the seat of the court. A one-way mirror should be fitted through which the court, the prosecutor and the defence may view the child but not vice versa. There must also be earphones by way of which questions can be put to the child investigator and his or her answers can be relaid. Anatomical figures must be available as aids to the child.

The Commission is, as has already been said, of the opinion that the interests of society demand such a solution. Financial sacrifices will have to be made. The Commission does not, however, foresee that it would be unpractical to make the said facilities available at each district court in view of the fact that in many district courts no or very few cases of this type are heard during the course of the year.

Since the implementation of this proposal would have practical and financial implications for the Department of Justice, the proposal is referred to the said Department with the request that that Department make proposals concerning the practical implementation of the system in order that a full proposal be included in the Commission's final report to Parliament.

A further practical problem is the availability of child investigators. Ideally such persons should be educational prsychologists, since they are au fait with the techniques of interviewing children and extracting information from them. Are enough such child investigators available?

The answer would appear to be in the affirmative. In April 1985 the Commission decided against the procedure in Israel, inter alia on grounds of the manpower problem with regard to the child investigators required by this solution.

Hammond & Hammond do not consider this to be a valid objection:[20]

> The manpower argument demands a serious reassessment of our priorities. The Department of Health and Welfare, in its representation to the Law Commission, offered manpower from its own officers for this purpose. There is a plentiful supply of trained clinical psychologists since the professionalization of psychology in 1974. Judging from interest demonstrated in our research by a whole range of professionals there is not doubt that trained members of other appropriate professions would welcome the opportunity to specialize in this field.

It must be granted that the child investigator need not necessarily be an educational psychologist. If educational psychologists are not available, the services of a psychologist, a clinical psychologist or a welfare officer may be employed. The manpower problem does not, therefore, appear to be a valid objection.

Therefore, the result is that this solution is strongly recommended and that legislative provision for this be formulated upon receipt of the proposals of the Department of Justice regarding the practical implementation of the facilities.

5.3 Legal assistance for the child witness

In view of the recommendation that the solution that has just been discussed above be accepted, the need for a legal representative for the child witness falls away.

It must also be stated clearly that the idea of appointing a legal representative to assist the child witness cannot take the place of the solution put forward above. The real practical advantage, as regards the present applicable system as it applies at present, of such a legal representative is that he would be able to object against aggressive and unfair cross-examination by the accused or his legal representative. The

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20 Ibid 6.

appointment of a legal representative for the child witness does not, therefore, introduce new or better protection.

5.4 Sympathetic and careful taking of the initial statement

Naturally, the sympathetic and careful taking of the child's initial statement is of great importance. From a psychological point of view it is important that the child should not be frightened away and lose faith in the system. From a legal point of view it is important that full and correct statements be taken, since these must be used during preparation for the trial and in conducting the child's evidence. If the initial statement has been taken down badly and incompletely, it may gravely prejudice the prosecution and expose the child to psychologial harm.

The Commission is of the opinion that the S A Police, in whose sphere the taking of the said statements falls, do in fact produce work of high quality, particularly in the case of their Child Protection Units. The comments of the S A Police are, however, required on the question whether it is desirable to make statutory provision for the taking of the statement of the child witness and, if not, what assurances can be given that the matter is being dealt with properly.

The question of the video recording of the statement is dealt with below.

5.5 Video recording of the initial statement of the child as admissible evidence

The recording of the child's initial statement on video may be of much informal and practical use to the Police and the prosecutor, but according to our current rules of law such a recording does not carry any weight. The video recording of such a statement would, in the hands of the prosecutor, be inadmissible because (a) it would just be self-corroboration, (b) a previous consistent statement and (c) irrelevant in view of the legal principle that a witness must testify viva voce in person in court.

The taking of such a statement on video puts the child at risk because it becomes, in the hands of the defence, material to be used in cross-examination.

There is no justification for making such a video recording admissible in the hands of the defence if the child gives evidence in person. If the child does not give evidence in person, such a statement is in any case not admissible since the accused is not given the opportunity to cross-examine the maker of the statement.

This proposal can therefore not be supported.

5.6 Expert evidence concerning the trustworthiness of the child witness

The calling of compurgators to give evidence about the trustworthiness of other witnesses has long since become extinct in our law. The court decides at the conclusion of the trial on the trustworthiness of the evidence, the cross-examination and the general probabilities and the demeanour of the witness.

Expert evidence is of course admissible to clarify certain aspects concerning the witness's evidence and it may deal with the reasons why a witness acted in a certain way or even why he testifeid in a certain way.

There is no justification, particularly in the light of the acceptance of the proposal discussed above, for changing the current legal postition regarding the admissibility of expert evidence. For these reasons the proposal that persons such as psychologists be employed as assessors, is unacceptable. The assessor may in any case not rely on undisclosed knowledge or deductions and he must, like the presiding officer, try the case on the proffered evidence. His presence on the bench therefore makes no contribution to the trial.

5.7 The cautionary rules and requirement regarding corroboration

In our law the cautionary rules and the requirement regarding corroboration have been developed over many decades and they are founded on practical experience of generations of attorneys, advocates, magistrates and judges. The cautionary rules regarding children do not rest on the conception that children are per se untrustworthy, but on the experience that children are often unreliable witnesses. Although children are good observers, they cannot always interpret events and they may give a wrong connotation to events which they have observed. Furthermore, children can easily be manipulated and intimidated. Especially during cross-examination, they make concessions or change their testimony merely because they think it is expected of them or to satisfy someone (for example, the cross-examiner) or because they want to put an end to the unpleasant experience of cross-examination.

There is no justification for changing the existing legal position pertaining to the cautionary rules and corroboration, especially in view of the fact that the above-mentioned solution would alleviate the problems regarding the child witness.

5.8 The avoidance of delays during trial and remands

It is clear that delays and remands during the trial must indeed be avoided. This is, however, a warning that applies to all criminal cases, but which needs be stressed where a child witness is concerned.

Legislation cannot regulate the delays and remands because this is a practical matter which falls within the discretionary power of the court. Nevertheless, this matter is referred to the Department of Justice for their proposals regarding the solution of the problem. These proposals will then be included in the Commission's final report for consideration by Parliament.

5.9 Identification and pointing out

There is really no cogent reason why a child witness should confront the suspected criminal for purposes of identification and then to touch his person. The crux of the matter is that this sort of positive confrontational

identification is based on primitive notions. This system discourages and frightens the child witness without serving any useful purpose.

The procedure must therefore be changed so as to make it possible for the child, where identification is called for, not to confront the accused. The use of a one-way mirror is but one possibility.

Since this is a practical matter the S A Police are requested to make proposals regarding the implementation of this suggestion, so that these proposals can be included in the Commission's final report to Parliament.

5.10 Preparation by the prosecutor

It is obvious that the present situation is unsatisfactory. The contest between the prosecutor and defence ought not, for lack of preparation, to be an unequal one. This Commission is also of the opinion that, as far as possible, the Department of Justice should supply prosecutors who have been specially trained for cases in which children have to testify on sexual acts.

The solution to this problem does not lie in legislation since it concerns practical matters such as instructions to prosecutors and the availability of adequate time for preparation. The matter is therefore referred to the Department of Justice for submission of proposals regarding the solution of this problem, such solutions to be included in the Commission's final report to Parliament.

6. SUMMARY OF RECOMMENDATIONS

6.1 The S A Police are requested to furnish the Commission with proposals regarding the making available of psychological assistance to the abused child and the child witness and in this connection also the desirability of making legislative provision for this or to propose alternative measures so as to see to it that such assistance be made available.

6.2 It is recommended that the evidence of a child witness be heard in a special room in the presence only of the witness and a qualified assistant (an educational psychologist, a psychologist, a clinical psychologist or a welfare officer). The court, prosecutor and the defence would be able to see the child through an one-way mirror, but the child would not be able te see the said persons. The prosecutor, defence and the court would put questions to the child investigator who would then relay the questions tactfully to the child and the said person would then relay the child's answers to the persons on the other side of the mirror. In the alternative all questions of the prosecutor and the defence are put to the court and the presiding officer would then, as he deems fit, relay the questions to the child investigator.

6.3 The proposals of the Department of Justice regarding the practical implementation of this system are requested.

6.4 The S A Police are requested to comment on the question whether it is desirable to make statutory provision for the taking of the child's evidence, and, in the alternative, the measures they propose for the proper regulation the matter.

6.5 The Department of Justice is requested to make proposals regarding the problems of delays at the start of the trial in which a child witness testifies, the remands during such a trial, and how these problems can be solved.

6.6 It is suggested that the identification and pointing out by the child of the suspected criminal not be conducted face to face but that the child should not have to confront the suspect and touch his person. Identification from behind a one-way mirror is recommended. The S A Police are requested to make proposals regarding the practical implementation of this proposal.

6.7 It is suggested that prosecutors who are to lead the evidence of child witnesses give particular and full attention to the preparation of the case, the preparation of the child for trial inter alia by way of

consultations, and inspections in loco. The Department of Justice is requested to make proposals on the practical implementation of this proposal.

GJVZ12/ao