PROSECUTING SEXUAL ABUSE OF CHILDREN: ENHANCEMENT OF VICTIMS' RIGHTS VS PROTECTION OF CONSTITUTIONAL FAIR TRIAL RIGHTS

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By

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DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and I have not previously in its entirety or in part submitted it at any university for a degree.

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ABSTRACT

In 2002 the South African Law Commission published a report in which amendments to the existing rules of criminal procedure and evidence were proposed. A number of these recommendations have since been included in a Bill that was tabled before Parliament in 2003. The proposed amendments largely reflect values which underlie the "Victims' Rights" movement. The aim of this thesis is to consider the possible influence of these amendments on the constitutionally guaranteed fair trial rights of the accused. The study focuses on those amendments that play a role in the prosecution of alleged sexual offences against children, and shows that although the recognition of victims' rights is important, it should not be done at the expense of a fair trial. Dangers inherent to the proposed amendments are therefore highlighted. The rights of the accused are used to test the desirability or not of the proposed amendments. Foreign authority is used to support the argument made in the thesis.

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OPSOMMING

In 2002 het die Suid-Afrikaanse Regskommissie 'n verslag gepubliseer waarin veranderings aan die huidige strafprosesreg- en bewysregreëls voorgestel word. 'n Aantal van hierdie voorgestelde wysigings is intussen opgeneem in 'n Wetsontwerp wat in Augustus 2003 voor die Parlement gedien het. Die voorgestelde wysigings reflekteer tot 'n groot mate waardes wat die "Victims' rights" beweging onderlê. Die doel van hierdie tesis is om die moontlike invloed van hierdie wysigings op die grondwetlik verskanste billike verhoor regte van die beskuldigde te ondersoek. Die ondersoek fokus op daardie veranderinge wat 'n rol speel in die vervolging van beweerde geslagsmisdade teen kinders. Daar word aangetoon dat alhoewel die erkenning van regte vir slagoffers belangrik is, dit nie ten koste van 'n regverdige verhoor gedoen kan word nie. Gevare verbonde aan die voorgestelde wysigings word dus uitgewys. Die regte van die beskuldigde word deurgaans gebruik om die wenslikheid al dan nie van die voorgestelde wysigings aan te toon. Buitelandse gesag word aangewend om die betoog te ondersteun.

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Between the idea
And the reality
Between the motion
And the act
Falls the Shadow

For Thine is the Kingdom

Between the conception
And the creation
Between the emotion
And the response
Falls the Shadow

Life is very long

Between the desire
And the spasm
Between the potency
And the existence
Between the essence
And the descent
Falls the Shadow

For Thine is the Kingdom

T.S. Eliot
The Hollow Men, 1925

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This thesis is dedicated to my parents.

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1.

CHAPTER 1: INTRODUCTION

1 1 Introduction

Although much has been written about sexual abuse of children and child-witnesses, studies in this field tend to focus on the position of the child while largely disregarding the position of the accused. However, the fair trial rights of the accused are equally worthy of protection. This study seeks to use the interests of society as a mechanism through which a balance between the rights and interests of the child victim and the rights of the accused can be found.

It is debatable whether the instances of sexual abuse of children, and particularly those of young children, are on the increase or whether the public has merely become more aware of these cases.[1] Be that as it may, the statistics are shocking.

[1] Lyon & De Cruz *Child Abuse* (1990) 1.

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During the period between January 1996 and December of the same year, for example, 20,099 cases of rape or attempted rape of children under the age of 18 years were reported to the South African Police Service (SAPS). In addition, 2,511 cases of indecent assault of a girl under the age of 18 and 702 involving a boy were reported. A further 215 cases of incest involving a child under the age of 18 years were documented. Added to this were 581 cases of sexual intercourse with a female under the prescribed age[2] and 169 cases of indecent acts with a male under the prescribed age[3] and 2,022 instances of abduction.

While 1997 showed an increase in cases reported, 1998 showed a slight decrease in these figures. However, 1999 showed a marked increase again and, despite the already high number of cases reported in this year, the figures for the following year showed yet another increase with 21,438 reported cases of rape or attempted rape, 2,400 cases of indecent assault of a girl, 1,672 cases of indecent assault of a boy, 113 cases of incest, 531 cases of intercourse with a girl under the prescribed age, and 79 cases of indecent acts with boys under the prescribed age and 2,219 cases of abduction.

Unfortunately statistics of specific types of sexual offences against children since 1999 are not available. However, reported cases of rape and indecent assault in general have increased markedly, as have reported cases of "child abuse". For example, in the period April 1999 – March 2000 49,679 cases of rape, 4,968 cases of sexual assault and 2,497 cases of child abuse were reported, while statistics for April 2003 – March 2004 indicate that 52,425 cases of rape, 9,302 cases of indecent assault and 6,504 cases of child abuse were reported. SAPS statistics indicate an increase of 111.9% in reported cases of child abuse between April 1994 and March 2004. In light of this, it can be argued that the incidence of sexual abuse of children would have increased accordingly.

As societies and laws differ in this regard, it is difficult to compare these figures with those of other countries, particularly developing countries. In societies that place a taboo on the mention of sexual matters, for example, very little is known

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[2] As set out in s 14 (1) Sexual Offences Act 23 of 1957.
[3] As set out in s 14(3) Sexual Offences Act 23 of 1957.

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about whether and how sexual abuse occurs. In addition, not all countries have a culture of reporting such abuse. However, figures such as those provided above, cannot be ignored. Children must be protected by the law.

Relevant here is that section 28 of the Constitution guarantees the rights of children and provides *inter alia* that every child has the right to be protected from maltreatment, neglect, abuse or degradation.[4] This right is a municipal reinforcement of art 19(1) of the United Nations Convention on the Rights of the Child,[5] which requires states parties to

> "take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. . ."

These measures are not limited to legislative measures. Art 19(2) of the Convention makes it clear that they should include effective procedures for the establishment of social programmes to provide the necessary support for the child and for judicial involvement, while section 28(2) of the Constitution provides that "a child's best interests are of paramount importance in every matter concerning the child."

Since the operation of section 28(2) is not limited by its wording, it is inevitable that situations will arise where the child's right to be protected from abuse and maltreatment will conflict with the rights of other individuals. For example, section 35(3) of the Constitution provides that the accused has the right to a fair trial. This right includes the right to a public trial before an ordinary court,[6] the right to be present when being tried,[7] the right to be presumed innocent, to remain silent, and not to testify at proceedings,[8] the right to challenge and adduce evidence,[9] and the right not to be compelled to give self-incriminating evidence.[10] It is a residual right, which includes, but is not limited to, the rights listed in sections 35(3)(a)-

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[4] S 28(1)(d).
[5] De Waal, Currie & Erasmus *Bill of Rights Handbook* 4th ed (2001) 464. The Convention was ratified by South Africa on 16 July 1995.
[6] S 35(3)(c).
[7] S 35(3)(e).
[8] S 35(3)(h).
[9] S 35(3)(i).
[10] S 35(3)(j).

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(o).[11] In referring to this right as set out in section 25(3) of the Interim Constitution,[12] the court in *S v Zuma,*[13] per Kentridge AJ, found that the provision was broader than the rights enumerated in the subsections of the right to a fair trial. This approach was confirmed in *S v Dzukuda*[14] where the Constitutional Court considered the right to a fair trial and found that it is a comprehensive and integrated right[15] that embraces the concept of substantive fairness.[16] The rights listed in subsections (a)-(o) of section 35(3) should therefore, according to the court, be seen as mere elements of the right and not as an exhaustive specification of what the right entails.[17]

While both children and accused persons have rights that are constitutionally enshrined, the question is whether section 28(2) should have absolute application. In other words, should the rights of the accused be limited on the basis of section 28(2)? While the courts have not explicitly discussed this tension, Pantazis and Mosikatsana[18] are of the opinion that some limit must be placed on the applicability of the "best interests" provision, even if the limitation pertains only to its applicability in a particular case.

The reasons for the abuse of children are multi-fold and complex.[19] Kalisch[20] divides the main causes of child abuse into four categories, namely (1) cultural factors, (2) psychological factors, (3) pregnancy and the period after birth and (4) dysfunctional families. Pretorius,[21] on the other hand, suggests five groups: (1) factors relating to the (social) environment, (2) factors relating to the parents of the child, (3) factors relating to the child, (4) crisis factors and (5) cultural factors.

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[11] Snyckers "Criminal Procedure" in Chaskalson, Kentridge, Klaaren, Marcus, Spitz, Woolman *Constitutional Law of South Africa* 2nd ed (2003) 27-60B.
[12] 200 of 1993.
[13] 1995 2 SA 642 (CC).
[14] *S v Dzukuda; S v Tshilo* 2000 4 SA 1078 (CC).
[15] § [9] 1091C. See also *S v Zuma* 1995 2 SA 642 (CC).
[16] § [9] 1091C.
[17] § [9] 1091C.
[18] Pantazis & Mosikatsana "Children's Rights" in Chaskalson, Kentridge, Klaaren, Marcus, Spitz, Woolman *Constitutional Law of South Africa* 2nd ed (2003) 33-20.
[19] Le Roux & Engelbrecht "The Sexually Abused Child as Witness" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 343.
[20] Kalisch *Child Abuse and Neglect – An Annotated Bibliography* (1978) 111.
[21] Pretorius *Opvoeding, Samelewing, Jeug: 'n Sosiopedagogiekkleerboek* (1988) 235.

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Whatever the reasons underlying the high incidence of child abuse in South Africa, abusers of children must be prosecuted.[22]

In light of estimates[23] that the success rate in the prosecution of all reported cases of child abuse in South Africa stands at a mere 5%[24] and that only 30% of all child abuse cases are reported to professional welfare organizations,[25] the natural reaction of South African society has been to disregard the rights of an accused person and even, as has been reported, to kill the alleged offender.[26] It is not in the long-term best interest of a society to allow such action. Since the South African legal system is based on the supremacy of the Constitution[27] and the rule of law,[28] all legislative or common law provisions have to comply with it. This includes measures designed to protect children who have been victimised. As Meintjies-van der Walt aptly states:

> "The failure of the criminal justice system to provide effective answers to crime and to respect of victims' rights should be rectified by addressing the social and economic conditions conducive to crime and by establishing a legislative and institutional infrastructure that meets the requirements of a constitutional state, and not through the abandonment of principles of procedural fairness".[29]

While the enhancement of Victims' Rights will promote the establishment an infrastructure that meets the requirements of a constitutional state, procedural fairness and the constitutionally guaranteed fair trial rights of the accused cannot be sacrificed to achieve this goal. Therefore, it is necessary to consider the possible

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[22] This thesis does not purport to offer a solution to the problem of child abuse, but merely seeks to investigate and evaluate the legal system within which prosecutions take place.

[23] Van Niekerk "Behavioural Patterns and Risk Assessment" in Van Niekerk, Skelton, Muntingh, Katz-Levin, Le Roux, Els, Saayman, Du Plessis, Scholtz, Potgieter, Van Niekerk, Mellis, Schutte, Meintjies, King & Govender *Child Law Manual for Prosecutors* C2-2.

[24] SAPS statistics for the period January 1996 to December 2000 indicates that of the 124,414 reported sexual offences against children (rape, attempted rape, indecent assault, incest and statutory crimes) a conviction was secured in 12,866 cases. On average 10.341% of cases resulted in a conviction. Of the 62,736 cases which were referred to court by the investigating authority 12,866 resulted in convictions, putting the average success rate at 20.508%.

[25] Zellman "Child abuse reporting and failure to report among mandated reporters" 1990 *Journal of Interpersonal Violence* 5.

[26] Ngobeni, Mabe & Maphumulo "Law breaks down in Mamelodi" *Mail and Guardian* 11 August 2000; Ngobeni "Vigilante group sweeps the suburbs" *Mail and Guardian* 21 January 2000.

[27] 108 of 1996.

[28] S 1(c).

[29] Meintjies-van der Walt "Towards victims' empowerment strategies in the criminal justice process" 1998 *SACJ* 157 159.

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impact of measures aimed at enhancing Victims' Rights on the fair trial rights of the accused.

1 2 Internal tensions in the criminal justice system and the need to balance values

Society has an interest in, on the one hand, in the effective enforcement of the criminal law and the protection of victims and potential victims of crime and, on the other, the protection and preservation of the common law, and statutory and constitutional rights and freedoms of individuals.[30] These two interests compete, cause tension and call for reconciliation.

In any criminal justice system competing interests result in internal tensions. Many examples of such tensions can be found in the South African criminal justice system.[31] Most of these tensions affect the system in general, but some are unique to the prosecution of sexual offenders and more particularly, those who offend against children. The latter being the topic of this study. The balancing of these internal tensions and the values that underlie the criminal justice system is a difficult but necessary task. Should they not be balanced, a failure of justice will necessarily follow. The following tensions in the South African criminal justice system serve as a background to the problem that gave rise to this study:

1 2 1 Securing a conviction vs protecting the innocent

The first tension exists as a result of the fact that procedural rules apply to all persons accused of committing a crime. However, the reality is that innocent people also get drawn into the criminal justice system. Therefore, it can be said that the rules of criminal procedure apply to both guilty and innocent people, especially during the pre-trial investigation phase. As a result, strict rules of procedure aimed at securing a conviction could create the risk of convicting innocent people. Here there is a tension between the need to secure as many convictions as possible and the need to protect innocent people from wrong convictions.

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[30] Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche & Van der Merwe *Criminal Procedure Handbook* 6th ed (2003) 4.
[31] Bekkker *et al Criminal Procedure 5ff.*

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1 2 2 Protecting the innocent vs acquittal of the guilty

The balancing process with regard to the tension between the need to secure convictions and the need to protect innocent people from wrong convictions necessarily leads to the existence of a second tension. This tension exists between the need to protect the innocent individual against conviction[32] and the reality that measures that prevent the conviction of innocent people create the risk of acquittal of guilty persons.[33]

There are many examples of rules of evidence that seek to protect the innocent individual against conviction, even at the expense of securing a conviction of the factually guilty. One such example is the presumption of innocence, which requires that the state prove the guilt of the accused beyond reasonable doubt by proving the elements of the crime.[34] If the state fails to prove each and every element of the crime beyond reasonable doubt, the accused is entitled to an acquittal, despite the fact that he may be factually guilty. In *Nortje v Attorney-General Cape*,[35] the court, per Marais J, discussed this tension. It found that the presumption of innocence does not mean that the court cannot "entertain the *possibility* that persons charged with crime *may* indeed be guilty,"[36] nor does it mean that care should not be taken to avoid laying down principles of criminal procedure that are open to manipulation and abuse.[37] The court found, instead, that principles of criminal procedure should be seen as a "carefully constructed compromise" designed to accommodate two objectives between which tension exists. The aims referred to by the court are, firstly, the need to eliminate the risk of an innocent person being wrongly convicted and, secondly, the need to avoid making successful prosecution of the guilty so difficult to achieve that it leads to apathy or cynicism in society.

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[32] Ashworth "Concepts of Criminal Justice" 1979 *Crim LR* 412 416.
[33] Damaska "Evidentiary Barriers to Conviction and the Two Models of Criminal Procedure: A Comparative Study" 1973 *U Pa L Rev* 506 576.
[34] The presumption of innocence is discussed below. For a general discussion see Schwikkard *Presumption of Innocence* (1999) and Dlamini "The Duty to Prove Each and Every Element of the Offence" 2001 *SACJ* 20.
[35] *Nortje v Attorney-General, Cape* 1995 2 SA 460 (C).
[36] 469F. Emphasis in original.
[37] 469F.

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The court adid, however, acknowledge that it was impossible to achieve a perfect reconciliation between these conflicting aims.[38]

1 2 3 State powers vs individual rights

A third tension exists between absolute powers of the state and absolute rights of individuals. If the state were to have absolute powers, it is obvious that the state would be able to curb criminality. However, this would result in society living under tyranny of the state. If the rights of the individual were absolute, the state would be powerless to curb criminality and society would suffer harm. It is obvious that although the limitation of state power is essential, it is equally essential to limit the rights of individuals in certain circumstances.[39]

1 2 4 Negative regulation of state powers vs positive regulation of state powers

The fourth tension relates to the need to regulate state power. In the previous paragraph it was shown that limitation of state power is necessary. This limitation can be described as negative regulation. However, if state power were to be regulated in the negative sense only, the state would become powerless to curb criminality. Therefore, positive regulation of state power is equally necessary. Naturally, this gives rise to a tension between the positive regulation and negative regulation of state power. On the one hand, the state must be empowered to perform certain acts, while, on the other, the power of the state to perform those acts must be limited. For example, it is important from the perspective of society

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[38] 469I.

[39] Fundamental rights and freedoms are not absolute and it is generally recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Erasmus "Limitation and Suspension" in Van Wyk *Rights and Constitutionalism* (1994) 629. S 36 of the Constitution allows for constitutionally permissible limitation of fundamental rights, provided that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. See for example, *S v Mbatha; S v Prinsloo* 1996 2 SA 464 (CC); *S v Manamela* 2000 3 SA 1 (CC); *Investigations Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 1 SA 545 (CC); *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC).

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that the Constitution expressly sanctions deprivation of freedom by way of arrest, but it is equally important that people are not deprived of freedom arbitrarily.[40]

1 2 5 Admission of evidence vs fundamental rights

The fifth tension can be found between the need to admit all relevant evidence during the prosecution of alleged criminals and the need to protect the fundamental rights of individuals. This tension becomes clear when there is a question about the admission of evidence obtained in a manner inconsistent with the fundamental rights of the accused.[41] As Zeffertt puts it:

> "[T]he fundamental reason for excluding improperly obtained statements is that they are unreliable. Another approach is to look at the matter from what is good or bad for society. It is not in the interest of society to try a man on such evidence, because it would be unfair to do so – it is socially malignant to get a conviction by recklessly disregarding whether the accused is truly guilty. But there is another reason for getting rid of the tainted results of violence and deceit. A just society cannot exist if its policemen are violent, sadistic and corrupt. If courts were to receive improperly obtained statements, they would encourage policemen to resort to vicious and evil practices"[42]

The Constitutional Assembly recognised the tension between the need to protect the fundamental rights of the accused and the need to admit all relevant evidence. For this reason, a qualified exclusionary rule was incorporated in section 35. In terms of section 35(5), evidence obtained in a manner that violates a right in the Bill of Rights, must be excluded if admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. In these circumstances, the court has a duty to exclude the evidence.[43] However, the court is vested with the discretion to decide whether the admission of the evidence would result in one of these two consequences.[44]

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[40] Kriegler & Kruger *Hiemstra: Suid-Afrikaanse Strafproses* 6th ed (2002) 89.
[41] Zeffertt "Pointing Out" in Kahn (ed) *Fiat Justitia: Essays in Memory of Oliver Deneys Schreiner* (1983) 395
[42] Zeffertt in Kahn (ed) *Fiat Justitia* 395
[43] See in general *S v Soci* 1998 2 SACR 275 (E) 394*f*; *S v Mphala* 1998 1 SACR 645 (W); *S v Naidoo* 1998 1 SACR 479 (N); *S v Cloete* 1999 2 SACR 137 (C); *S v Nombewu* 1996 2 SACR 396 (E).
[44] *S v Lottering* 1999 12 BCLR 1478 (N) 1483B; *S v Ngcobo* 1998 10 BCLR 1248 (N); *S v Seseane* 2000 2 SACR 225 (O); *S v Cloete* 1999 2 SACR 137 (C); *S v M* 2002 2 SACR 411 (A).

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Kriegler J, in *Key v Attorney-General, Cape Provincial Division*,[45] expressed the following view with regard to the exclusion of unconstitutionally obtained evidence:

> "In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by state agencies in the prevention, investigation or prosecution of crime. But none of this means sympathy for the crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial... At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted."

It is clear that the tension between the admission of all relevant evidence and the protection of fundamental rights continues to exist, despite the inclusion of the qualified exclusionary rule in the Constitution.

1 2 6 Rights of the accused vs rights of the child

The sixth tension that is identifiable is particularly relevant in the prosecution of people accused of having committed sexual offences against children. The Due Process presumption of innocence entitles the accused to be granted bail pending trial. However, section 28(1)(b) of the Constitution provides that every child has the right to parental or family care. Where the accused is a family member of the victim, the granting of bail would often result in the accused returning to the family home and having contact with the victim. Should the victim's right to parental or family care be enforced, bail would be denied, or the accused would be prohibited from returning to the family home.[46] This is so, despite the fact that at this stage the accused is still presumed innocent. The tension here therefore exists between the Due Process rights of the accused and Victims' Rights values.[47]

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[45] *Key v Attorney-General, Cape Provincial Division* 1996 4 SA 187 (CC) § [13] 195G-196B.
[46] See, for example, *S v H* 1999 1 SACR 72 (W).
[47] As explained in Chapter 2 below.

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1 2 7 Rights of the accused vs victims' rights

The tension that gave rise to the research question in this study exists between protection of the fair trial rights of accused persons and protection of the victims of crime from further harm that may potentially be caused by their participation in the prosecution of the alleged offender. This tension often occurs in the prosecution of sexual offenders. The accused has the right to challenge and adduce evidence, which includes the right to challenge the credibility of the witness. However, the victim-witness has the right to dignity, which is also worthy of protection.[48] Attempts to protect the victim's right to dignity could, however, negatively impact on the right of the accused to challenge and adduce evidence. This tension relates particularly to the tension between the accused's Due Process right to challenge and adduce evidence and Victims' Rights values, which demand that the victim be protected from secondary victimisation during participation in the prosecution of the accused.

With regard to procedural matters Snyckers[49] remarks that

> "[a]ctivity in court which is premised on the guilt of the accused threatens the presumption of innocence. Procedures which are designed to protect victims of crime from further victimization place considerable strain upon the presumption of innocence, since the difficult suspension of disbelief entailed by respect for the presumption becomes almost impossible where the procedures adopted assume the accused is guilty as charged."[50]

In essence, this remark by Snyckers defines the research question of this study. Firstly, do the procedures designed for the protection of victims indeed threaten the fair trial rights of the accused (including the presumption of innocence) and, if so, how can this infringement on the rights of the accused be justified?

1 3 Balancing tensions

The values that underlie the South African criminal justice system include, but are not limited to, Due Process, Crime Control and Victims' Rights. The outcome of

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[48] *S v M* 1999 1 SACR 664 (C) 673*g-j*.
[49] Snyckers in Chaskalson *et. al.* (eds) *Constitutional Law* 27-86.
[50] For a discussion on the procedural aspects with regard to the prosecution of sexual offences against children and the possible implications for the right to be presumed innocent, see Chapter 4 below.

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the balancing of tensions in the criminal justice process discussed above depends largely on which of these underlying values dominate in a particular system. For example, where Due Process is the dominant value in a system, the outcome of the balancing process tends to favour the rights of the accused. On the other hand, if Victims' Rights is the dominant value in a particular system, infringement of the rights of the accused is more readily accepted, provided that the infringement serves a Victims' Rights purpose. The values that dominate in South Africa are examined in Chapter Two.

1 4 Rationale

The internal tensions and the values that compete in the criminal justice process become particularly important when the desirability and acceptability of legislative changes to the criminal justice process are evaluated. Recently the South African Law Commission published a report on Sexual Offences.[51] The report contains a draft Bill,[52] which, if passed by Parliament, could have a drastic impact on the criminal justice process in so far as the prosecution of sexual offenders is concerned. In an attempt to curb the incidents of sexual offences and to protect the interests of the victims of sexual offences, the Law Commission recommended that certain rules of evidence and procedure be amended. Some examples of these proposed legislative amendments include the abolition of cautionary rules that apply to the evidence of children; the amendment of the requirements for the admissibility of previous consistent statements made by victims of sexual offences; the adjustment of the requirements for the appointment of intermediaries in terms of section 170A of the Criminal Procedure Act and amendment of the requirements set for leave, in terms of section 158 of the Criminal Procedure Act, to testify *via* closed circuit television. Some of these amendments proposed by the South African Law Commission have the potential to infringe the rights of the accused in one way or another.

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[51] SA Law Commission *Sexual Offences* Project 107 Report (2002).

[52] The draft Bill proposed by the Law Commission has since been tabled before Parliament as the Criminal Law (Sexual Offences) Amendment Bill B50-2003. Further reference to the Bill will be reference to the latter.

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The aim of this study is to highlight the possible impact of measures aimed at the enhancement of Victims' Rights on the fair trial rights of the accused. It will be shown that, while the enhancement of Victims' Rights is an important consideration, the fair trial rights of the accused should be protected. Therefore, the study aims to identify ways in which Victims' Rights and the fair trial rights of the accused can be balanced. While the current position is influenced very strongly by the accused's right to a fair trial, the proposed amendments contained in the Criminal Law (Sexual Offences) Amendment Bill[53] indicate that Victims' Rights could in future outweigh the rights of the accused. The question is whether this about face is in the interest of society. Does the interest of society dictate that the rights of the accused outweigh the rights of the complainant and child victim, as is the case at present? Or does the interest of society require an infringement of the rights of the accused in favour of the rights of the child-complainant?

This study is based on the premise that neither of these extremes poses a solution. It has been argued that entrenchment of constitutional fair trial rights in the Bill of Rights[54] has led to a belief that entrenchment of fundamental rights and freedoms facilitates criminal conduct because accused persons have successfully challenged statutory provisions and procedures on the basis of an infringement of these rights.[55] Followers of this viewpoint propose the curtailment or abrogation of fair trial rights in the interests of public safety and victims of crime.[56] However, fair procedures are for the benefit of both parties and for this reason victims' rights cannot be promoted at the cost of the curtailment of fair trial rights.[57] What is needed is a balance between the rights of the accused person and those of the victims of crime.[58] The legitimacy of the criminal justice system lies in its ability to protect the fundamental rights of all citizens.[59] A fair criminal procedure takes

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[53] B50-2003.
[54] S 35 Constitution.
[55] Meintjies-van der Walt 1998 *SACJ* 157 158-159. See for example, *S v Zuma* 1995 2 SA 642 (CC); *S v Bhulwana; S v Gwadiso* 1996 1 SA 388 (CC); *S v Mbatha; S v Prinsloo* 1996 2 SA 464 (CC); *S v Julies* 1996 2 SACR 108 (CC); *Scagell v Attorney-General, Western Cape*; *S v Coetzee* 1997 2 SA 368 (CC).
[56] Meintjies-van der Walt 1998 *SACJ* 157 159.
[57] Meintjies-van der Walt 1998 *SACJ* 157 159. See also Snyman "The victim impact statement as a means of addressing the victim's needs for rights" 1995 *Acta Criminologica* 30.
[58] Meintjies-van der Walt 1998 *SACJ* 157 159.
[59] Meintjies-van der Walt 1998 *SACJ* 157 159. See § 4 3 1 below.

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due account of the competing rights and interests, and requires that such rights and interests be balanced. Against the backdrop of the internal tensions and underlying values found in the criminal justice process, the study therefore evaluates procedures that are of particular importance during the prosecution of people accused of having committed sexual offences against children.

It is accepted that the existing framework within which alleged child abuse offenders are prosecuted does not sufficiently take cognisance of Victims' Rights. However, underlying the research question of this study is the concern that the amendments proposed in the Criminal Law (Sexual Offences) Amendment Bill[60] will not have the desired effect, namely the effective prosecution of alleged child abuse offenders. It may, quite possibly, rather have the effect of infringing on the rights of the accused to a fair trial and consequently be contrary to the interests of society.

While society has a very real interest in the protection of the rights of the child, it should also have an interest in the protection of all fundamental rights, one of which is the constitutional right of the accused to a fair trial. Equilibrium between these two interests must be achieved. If the rights or the interests of one or more parties outweigh the rights and/or interests of another, this equilibrium is disturbed with the result that the principles of justice are infringed, or worse, broken down completely. Justice is, to a large extent, found in procedural fairness, which in turn is found in the effective balancing of the internal tensions in the criminal justice system.[61]

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[60] B50-2003.

[61] The principle of justice is to be found in the various checks and balances that are present at the different levels of the entire process, which will ultimately lead to either conviction or acquittal of the accused. On one level substantive criminal law requires that the various elements of an offence be proven beyond reasonable doubt as having been factually and as a matter of law committed by the accused. On a second level the rules of procedure determine how the elements prescribed by substantive law are to be proven (or not, as the case may be) to the satisfaction of the court. On a third level, the law of evidence determines how what has to be proven may be brought to the attention of the court, and in this regard, exclusionary and cautionary rules are of paramount importance in establishing the factual and legal guilt or innocence of the accused. As is evident, justice as a concept is capable of definition only with reference to these various aspects that are multi-dimensional and interrelated. For purposes of this study, the issue of procedural fairness, however, as it interrelates with the rules of evidence, are of primary interest. See § 2 4 below.

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1 5 Methodology, limitations and sequence of argument

In this study the existing legal framework and the framework proposed by the Sexual Offences Bill are evaluated critically against the background of the hypothesis from which it proceeds and the underlying values of the criminal justice process. The study is limited to investigating the position regarding the sexually abused child. While mention is made of the abuse of children in general, the procedures and mechanisms considered here are mainly those that have an impact on the child as the complainant in offences of a sexual nature. Although it is true that children are often sexual offenders themselves,[62] the balancing of interests in such cases are more complex and cannot be investigated fully within the scope of this study. Since the thesis is therefore limited to the identification of legal problems that arise in the course of prosecution of people accused of having committed sexual offences against children, any social and psychological problems that are addressed are limited to those that influence the prosecutorial framework.

Chapter Two is devoted to a discussion of the values that underlie the South African Criminal Justice Process. Some models that represent these underlying values are analysed as they exist in the South African legal system. Specific attention is given to the Due Process Model and the Punitive Victims' Rights Model. It is indicated that, although the South African criminal justice process is to a large extent based on the Due Process Model, certain existing and proposed procedures and rules are based on values that underlie the other models. It is therefore necessary to pay special attention to constitutional provisions that guarantee the Due Process rights of the accused as well as proposed legislative provisions aimed at providing protection for Victims' Rights.

Chapter Three focuses on the constitutionally guaranteed fair trial rights of the accused. The discussion is limited to those rights which are important in the

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[62] Redpath "South Africa's Heart of Darkness: Sex Crimes and Child Offenders: Some Remarks" 2003 *SA Crime Quarterly*.

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prosecution of alleged sexual offenders and which may be infringed by provisions of the Criminal Law (Sexual Offences) Amendment Bill.[63]

Chapter Four is dedicated to a discussion of Victims' Rights. In this chapter the need to recognise Victims' Rights is considered along with arguments in favour of such recognition. Attention is then drawn to existing provisions aimed at enhancing Victims' Rights. In this chapter it is indicated that Victims' Rights can function on different levels, namely Extra-trial Level and Trial Level, and that the rights serve various different purposes. At trial level Victims' Rights serve two purposes, namely the enhancement of victim participation in the criminal justice process and the protection of victims of secondary victimisation caused by their involvement in the criminal justice process. The latter two functions form the basis for the division of Chapters Five and Six.

Chapters Five and Six entail an investigation of specific procedures and rules of evidence that are important in the prosecution of people accused of having committed sexual offences against children. While Chapter Five focuses on measures aimed at enhancing victim participation at trial level, Chapter Six examines measures aimed at protecting victims from secondary victimisation by the criminal justice system. The basis for each of these measures is evaluated in terms of the values that underlie the different models of the criminal justice process and the constitutionally guaranteed fair trial rights of the accused.

In the concluding chapter arguments made in the course of Chapters Five and Six are discussed and the dangers of enhancement of Victims' Rights highlighted.

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[63] B50-2003.

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CHAPTER 2: COMPETING RIGHTS AND INTERESTS

2 1 Introduction

In the introductory chapter, attention was drawn to the possible competing rights of sexual offenders and child victims. A number of internal tensions that exist in any criminal justice process were identified and it was argued that the outcome of the balancing process of these tensions depends on the values that underlie the particular criminal justice system.

In this chapter, attention is given to two different models of criminal procedure that represent different value systems. These models are the Due Process Model and the Punitive Victims' rights Model. Various other models of the criminal justice process have been identified, for example, the Crime Control and the Non-Punitive Victims' Rights Model. However, due to the limited scope of this study the discussion will be limited to the Due Process and Punitive Victims' Rights Models.

2 2 Models of the criminal justice process

Packer[64] identified two normative models that represent an attempt to abstract separate value systems that compete for priority in the operation of the criminal process. He called these models the Crime Control Model and the Due Process

[64] Packer *The Limits of the Criminal Sanction* (1968) 153.

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Model. Pointing out that these two models are a "distortion of reality",[65] he also argued that no criminal justice system completely subscribes to all the characteristics of one model to the exclusion of the other.[66] Although the two models represent the two ends of a spectrum, they are not necessarily rival models, since both seek to vindicate the goals of the substantive criminal law, although they do so along different routes.[67] The polarity of the models is therefore not absolute.[68]

Since Herbert Packer published his seminal discussion about the models underlying the criminal justice process in 1968, he has attracted not only support and following[69] but also dissent and criticism.[70] There have been writers who have tried to either add to or replace the two models of Packer[71], but as Roach so succinctly puts it: "None have enjoyed his success and durability".[72]

Based on the criticism of other authors and the emerging trend towards the consideration of victims' rights in the criminal justice process, Roach[73] developed two alternative models of criminal justice. Roach calls these two models the Non-Punitive Model of Victims' Rights and the Punitive Victims' Rights Model.

For the purpose of this study only one of his models of the criminal justice process is discussed, namely the Punitive Victims' rights Model. This model has been selected because the values that underlie it are evident in the amendments to the

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[65] Packer *Criminal Sanction* 153.
[66] Roach "Four Models of the Criminal Process" 1999 *J. Crim. L & Criminology* 671 672; Sanders "From Suspect to Trial" in Maguire, Morgan & Reiner (eds) *The Oxford Handbook of Criminology* 2nd ed (1997) 1051-1052. See also Packer *Criminal Sanction* 154.
[67] Bekkker *et al Criminal Procedure* 5.
[68] Sanders in Maguire *et. al.* (eds) *Handbook of Criminology* 1052.
[69] Smith "Case Construction and the Goals of Criminal Process" 1997 *B.J. Crim.* 319; Duff "Crime Control, Due Process and 'The Case for the Prosecution'" 1998 *B.J. Crim.* 611; Goldstein "Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure" 1974 *Stan. L. Rev* 1009.
[70] Ericson & Baranek *The Ordering of Justice: A Study of the Accused Persons as Dependants in the Criminal Process* (1982)
[71] See for example Arnella "Re-thinking the functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies" 1983 *Geo. L.J.* 185; Damaska "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" 1973 *U. PA. L. Rev* 506; Feeley "Two Models of Criminal Process: An Organizational Perspective" 1973 *L.& Soc'y Rev.* 407; Ericson & Baranek *Ordering of Justice*; Smith 1997 *B.J. Crim.* 319; Duff 1998 *B.J. Crim.* 611; Goldstein 1974 *Stan. L. Rev* 1009.
[72] Roach 1999 *J. Crim. L & Criminology* 676.
[73] Roach 1999 *J. Crim. L & Criminology* 699*ff.*

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law of evidence and criminal procedure proposed by the South African Law Commission in its report on Sexual Offences.[74]

2 3 Common ground between different models

Since it is unwise to attempt to construct models that exist in an institutional vacuum, it is important to keep in mind that the criminal justice system must adhere to minimum limits. These limits are underpinned by a number of assumptions which form the common ground between the different models of the criminal justice process. The difference between the models with regard to these assumptions is merely a matter of emphasis.[75]

Packer points out that the first two assumptions are inter-related and are merely two sides of the same coin.[76] The first assumption is that the function of defining conduct that may be treated as criminal is separate from the process of identifying an individual as a criminal and dealing with him or her accordingly. Furthermore, the former function must precede the latter process.[77] In South African law this assumption is embodied in the principle of legality.[78] This principle is, in turn, embodied in two maxims: *nullum crimen sine lege*[79] and *nulla poena sine lege.*[80] Section 35(3)(l) of the Constitution expressly lists this principle in the right to a fair trial.

The second assumption is that the criminal process should ordinarily be invoked by the organs responsible for the administration of criminal justice when it appears

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[74] SA Law Commission *Sexual Offences* Project 107 Report (2002)
[75] Bekkker *et al Criminal Procedure* 5.
[76] Packer *Criminal Sanction* 156.
[77] Packer *Criminal Sanction* 155.
[78] *S v Dodo* 2001 3 SA 382 (CC) § [13] 393H; *S v Malgas* 2001 2 SA 1222 (A). For a discussion on the principle of legality, see Snyman *Criminal Law* 4th ed (2002) 39*ff*; Burchell & Milton *Principles of Criminal Law* 2nd ed (1997) 57*ff*; *Dig* 50.16.131; De Wet & Swanepoel *Die Suid-Afrikaanse Strafreg* 2nd ed (1960) 43 - 45; Du Toit *Straf in Suid-Afrika* (1981) xxiv; Van Zyl-Smit "Sentencing and Punishment" in Chaskalson, Kentridge, Klaaren, Marcus, Spitz, Woolman (eds) *Constitutional Law of South Africa* 2nd ed (2003) 28-2.
[79] Freely translated: There is no crime unless there is a law that has been contravened.
[80] Freely translated: Where no law exists which affixes punishment to a certain act, there is no crime in law. See *Dig.* 50.16.131; De Wet & Swanepoel *Strafreg* 43-45; Du Toit *Straf* xxiv; Van Zyl-Smit in Chaskalson *et al* (eds) *Constitutional Law* 28-2.

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that a crime has been committed and that there is a reasonable prospect of apprehending and convicting the perpetrator.[81]

Thirdly, it is assumed that the powers of government to investigate and apprehend suspected criminals must be limited.[82] This assumption concerns the principle that the security and privacy of individuals may not be invaded at will. It is clear from its wording that section 35(5) of the Constitution, which creates a qualified exclusionary rule in respect of unconstitutionally obtained evidence, read with section 14, which guarantees the right to privacy, and section 12, which enshrines the right to freedom and security of the person, is in line with the assumption that the powers of government to investigate and apprehend suspected criminals must be limited.[83]

The last assumption is that the alleged criminal forms an independent entity in the criminal process who, if he so chooses, may actively participate in the process.[84] This means that the criminal justice process has the potential to become an adversarial struggle between the authorities and everyone who is subjected to it.[85] In the South African law, this choice is embodied in section 35(3)(i), which guarantees the right to challenge and adduce evidence and section 35(3)(h), which guarantees the right to remain silent and not to testify during the proceedings. The former rights can be referred to as "active defence rights", while the latter rights can be referred to as "passive defence rights".[86] Other "passive defence rights" include the right to remain silent upon arrest,[87] the right to be presumed innocent,[88] and the right not to incriminate oneself.[89]

Despite the fact that any criminal justice system must adhere to minimum limits, the extent to which effect is given to these minimum limits depends on the values that underlie the particular criminal justice system.

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[81] Packer *Criminal Sanction* 155.
[82] Packer *Criminal Sanction* 156.
[83] *S v Mayekiso* 1996 2 SACR 298 (C).
[84] Packer *Criminal Sanction* 157.
[85] Packer *Criminal Sanction* 157.
[86] Schwikkard & Van der Merwe *Principles of Evidence* 2nd ed (2002) 30.
[87] S 35(1)(a) Constitution.
[88] S 35(3)(h) Constitution.
[89] S 35(3)(j) Constitution.

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2 4 Values underlying the Due Process model

Although the Due Process Model acknowledges the importance of effective criminal law enforcement, it is based on the principle that the primary function of the criminal justice is not only to secure a conviction, but rather to ensure that the outcome of the case is achieved in terms of rules that are designed to properly acknowledge the rights of the individual at every critical stage from pre-arrest investigation to post-trial proceedings.[90] This principle was echoed by the court in *S v Nkabinde,*[91] where the court emphasised that the fairness of a trial is not determined only by what takes place at the trial itself, but that fairness and a lack of bias must also be reflected in pre-trial investigations.[92] De Waal *et al* express the opinion that "[w]hile only 'accused' persons have the right to a fair trial, violations of the rights of arrested and detained persons ... may make the trial of the accused person unfair".[93]

The Due Process Model is characterised by an insistence on formal[94], adjudicative, adversary[95] fact-finding processes in which the factual case against the accused is publicly[96] heard by an impartial tribunal[97] and is evaluated only after the accused has had full opportunity to discredit the case against him.[98] The demand for finality is relatively low in the Due Process Model, since it is recognised that human error is a possibility.[99] The Model therefore rejects the idea of efficiency in circumstances where efficiency might result in a lack of reliability.[100]

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[90] Packer *Criminal Sanction* 163*ff*.
[91] 1998 8 BCLR 996 (N).
[92] 1001E.
[93] De Waal, Currie & Erasmus *Bill of Rights Handbook* 4th ed (2001) 597.
[94] See for example ss 144 – 149 Criminal Procedure Act 51 of 1977.
[95] SA Law Commission *Protection of the Child Witness* Project 71 Working Paper 28 (1985) 2 described the South African criminal justice process as follows:

> "A criminal proceeding is in effect aimed at comparing two contradictory versions, that of the State and that of the defence, against one another and to put both to the test of harsh cross-examination"

[96] S 35(3)(c).
[97] S 165(2) Constitution.
[98] S 151 Criminal Procedure Act 51 of 1977. S 51 provides for the leading of evidence by or on behalf of the accused. Packer *Criminal Sanction* 163-164. See s 35(3)(i) Constitution.
[99] Packer *Criminal Sanction* 164. S 35(3)(o) of the Constitution guarantees that as part of the fair trial right, the accused has a right to appeal to, or review by, a higher court. Langa J, writing for a unanimous court in *S v Mbatha; S v Prinsloo* 1996 2 SA 464 (CC), expressed the opinion that "[n]o legal system can guarantee that no innocent person can ever be convicted. Indeed the provision of

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The Due Process Model places the emphasis on the primacy of the individual and the complementary concept of limitation of official power.[101] It is accepted that power is always subject to abuse, and because the individual is subject to the coercive power of the state, the Due Process Model is prepared to accept a substantial reduction in efficiency in the interest of preventing official oppression of the individual.[102]

The emphasis of the Due Process Model is on the doctrine of legal guilt, rather than a determination of factual guilt only.[103] Packer[104] explains:

> "[A] person is not to be held guilty of a crime merely on a showing that in all probability, based on reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these formal determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if various rules designed to protect him and safeguard the integrity of the process are not given effect..."

The principle of legal guilt can be found in South African law. For example, in *S v Lwane*[105] Holmes JA held that

> "[t]he pragmatists may say that the guilty should be punished and that if the accused has previously confessed ... it is in the interests of society that he be convicted. The answer is that between the individual and the day of judicial reckoning there are interposed certain checks and balances in the interests of a fair trial and the due administration of justice... According to the high judicial tradition of this country it is not in the interests of society that an accused should be convicted unless he has had a fair trial in accordance with accepted tenets of adjudication".[106]

The Due Process Model also includes deterrent rules that are designed to prevent an abuse of power or abuse of the system by police and prosecutors.[107] The

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corrective action by way of appeal or review procedures is an acknowledgement of the ever-present possibility of judicial fallibility" § [10] 472F.

[100] Packer *Criminal Sanction* 165.

[101] Packer *Criminal Sanction* 165.

[102] Packer *Criminal Sanction* 166. The court in *S v Mayekiso* 1996 2 SACR 298 (C) 307Cexpressed the view that the Bill of Rights is aimed, *inter alia*, at protecting the individual against an abuse of state power and an eroding thereof can only be tolerated where the importance of the other interest which is promoted by the limitation, requires such a limitation for compelling reasons.

[103] Packer *Criminal Sanction* 166. See *S v Mbatha; S v Prinsloo* 1996 2 SA 464 (CC) § [20] 475F*ff.*; Schwikkard & Van der Merwe *Principles* 177.

[104] Packer *Criminal Sanction* 166.

[105] 1966 2 SA 433 (A).

[106] 444C-D.

[107] See for example, s 35(5) of the Constitution which provides for the exclusion of evidence which was obtained in a manner that violates any right in the Bill of Rights in cases where the admission

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remedies could include the release of a factually guilty person in cases of illegalities, even if, despite ignoring the irregularity, the fact finder would be convinced of the person's guilt.[108]

In *S v Moodie*[109] the court considered whether an irregularity would result in the setting aside of a conviction and came to the following conclusion:

> "1. The general rule in regard to irregularities is that the court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial Court would inevitably have convicted if there had been no irregularity.
>
> 2. In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is *per se* a failure of justice, and it is unnecessary to apply the test of inquiring whether a reasonable trial court would inevitably have convicted if there had been no irregularity.
>
> 3. Whether a case falls within (1) or (2) depends upon the nature and degree of the irregularity."

In *Klein v Attorney-General, Witwatersrand Local Division*,[110] for example, Van Schalkwyk J found:

> "An investigation into the nature and degree of the irregularity would, in my view, comprehend an investigation of the extent of the violation as well as the circumstances under which it took place. A very serious violation of an accused's legal professional privilege, for instance, might give rise to the conclusion that the accused was per se thereby deprived of the right to fair trial, and the circumstances under which the violation took place might then be of little or no consequence. Conversely, a relatively trivial violation might have taken place under circumstances so fundamentally inimical to the accused's constitutionally guaranteed rights that the court will, as a matter of principle, refuse to uphold a conviction where the proceedings were so tainted."[111]

In *S v Mushimba*[112] the secretary of the accused's attorney made certain evidence available to the police. This evidence was later used to convict the accused. On appeal it was found that the legal professional privilege of the accused was

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of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

[108] Packer *Criminal Sanction* 168.

[109] 1961 4 SA 752 (A) 758E-G.

[110] 1995 2 SACR 210 (W).

[111] 224*c-d*.

[112] 1977 2 SA 829 (A).

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infringed. This was found to have resulted in a failure of justice[113] and therefore the conviction was set aside.

In the South African system, prior to the coming into effect of the [interim] Constitution[114] and in terms of the Criminal Procedure Act,[115] a conviction could only be set aside on appeal or review if an irregularity resulted in a "failure of justice".[116] A distinction was drawn between common irregularities, which would not necessarily be fatal provided that there remained sufficient untainted evidence to prove guilt beyond reasonable doubt, and exceptional irregularities, which would as a result of the nature and degree of the irregularity necessarily be fatal.[117] The post-constitutional position can be summarised as follows: The Supreme Court of Appeal in *S v Smile*[118] found that not every constitutional irregularity committed by a trial court would justify setting aside a conviction. Also, whether there has been a fair trial must ultimately be decided with regard to the particular circumstances of each case.[119] The court in *Smile*[120] adopted the approach of Namibian Chief Justice Mohamed[121] in *S v Shikunga*[122] where he found that

> "[e]ssentially the question one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by the irregularity. Where the question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally compelling claims – the claim that society has that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irregularity, though less fundamental, taints the conviction the latter interest prevails. Where the irregularity is such that it is not of a fundamental nature and it does not taint the conviction the former interest prevails".[123]

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[113] 845E-F.
[114] 200 of 1993.
[115] 51 of 1977.
[116] S 332(1) Criminal Procedure Act 51 of 1977.
[117] De Waal *et al Bill of Rights Handbook* 661.
[118] 1998 1 SACR 688 (A).
[119] De Waal *et al Bill of Rights Handbook* 662.
[120] 1998 1 SACR 688 (A).
[121] Acting in his capacity as Chief Justice of Namibia.
[122] 2000 1 SA 616 (NmS).
[123] 629G-I.

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Equality is another value that underlies the Due Process Model. In terms of this value, there is a public obligation to ensure that financial inability does not prohibit the accused from asserting challenges to the process being invoked against him.[124]

From this it appears that the nature of ordinary proceedings in the South African criminal procedure reflects a Due Process character. This character is especially evident in the following provisions: the right to legal representation,[125] the right to be given adequate time and facilities to prepare a defence,[126] the passive defence right entailing the right to remain silent during the investigation phase[127] as well as during the trial phase.[128] The accused also has the right to apply for bail[129] and to be released from detention if the interests of justice allow.[130] Further, the accused has the right to access to an independent and impartial court,[131] the right to a public trial,[132] and the right to be informed of the reason for his arrest,[133] while a detained person has the right to invoke and rely on the *interdictum de libero homine exhibendo* (writ *habeas corpus*).[134] The right to be brought before a court as soon as reasonably possible[135] is also based on Due Process values. The accused also has the right to be informed of the charge with sufficient certainty to answer it,[136] the

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[124] Packer *Criminal Sanction* 168-169. See s 35(3)(g) which provides for the right of the accused to have a legal practitioner assigned to him or her at state expense of substantial injustice would otherwise result. In *S v Huma* (1) 1995 2 SACR 407 (W) 409F the court appointed an expert witness on behalf of the indigent accused finding that the appointment of a ballistics expert is analogous to the appointment of a medical expert to assist *pro deo* counsel. See also *R v Linda* 1959 1 SA 103 (N) and *R v Mfuduka* 1960 4 SA 770 (C).

[125] Ss 35(2)(a), 35(2)(c) and 35(3)(f) Constitution.

[126] S 35(3)(b) Constitution.

[127] S 35(1)(a)-(c) Constitution.

[128] S 35(3)(h) Constitution.

[129] Ss 59 and 60 Criminal Procedure Act 51 of 1977.

[130] S 35(1)(f) Constitution. *Cf* S 60(11) Criminal Procedure Act 51 of 1977 which places a reverse onus on the accused to prove that, in the case of a schedule 5 offence, the interests of justice permit his release or, in the case of a schedule 6 offence, that there are exceptional circumstances which justify his release in the interests of justice.

[131] S 165(2) of the Constitution requires the courts to be independent and to apply the law impartially and without fear, favour or prejudice. See also s 35(3)(c) where independence of the court is assumed as part of the "normal" court requirement. For a discussion see Snyckers *Criminal Procedure* in Chaskalson, Kentridge, Klaaren, Marcus, Spitz, Woolman (eds) *Constitutional Law of South Africa* 2nd ed (2003) 27-68 – 27-69.

[132] S 35(3)(c) Constitution.

[133] S 39(2) Criminal Procedure Act 51 of 1977.

[134] S 35(2)(d). See *Schermbrucker v Klindt NO* 1965 (4) SA 606 (A)

[135] S 35(1)(d) Constitution.

[136] S 35(3)(a) Constitution. This right may include the right to access to the police docket (*Shabalala v Attorney-General, Transvaal* 1996 1 SA 725 (CC); *S v Fani* 1994 3 SA 619 (E); *Qozeleni v Minister of Law and Order* 1994 3 SA 625 (SE); *S v James* 1994 3 SA 881 (E); *S v*

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right to be present when tried,[137] the right to be informed of procedural rights by the court,[138] and the right to challenge and adduce evidence,[139] the right to a speedy trial,[140] the right to testify at trial[141] and the right not to testify at trial.[142] The right not to be tried for a crime of which the accused has previously been either convicted or acquitted[143] and the right not to be convicted of a crime in respect of any act or omission which at the time of such act or omission was not a crime,[144] further reflect the Due Process nature of the South African criminal procedure. In addition to the above-mentioned rights, the accused has the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;[145] the right to receive only such a sentence as is permitted by law,[146] the right to finality, in other words, the right to demand a verdict,[147] and the right to address the court on the merits of the case[148] as well as on sentencing.[149] The accused also has the right not to be convicted unless guilt has been proved by the prosecution beyond reasonable doubt[150] on the basis of admissible evidence[151] and in terms of a regular procedure.[152] There is also the right to appeal to a higher court or to apply for review to a higher court.[153]

Smith 1994 3 SA 887 (SE); *Khala v Minister of Safety and Security* 1994 4 SA 218 (W); *S v Majavu* 1994 4 SA 268 (Ck); *S v Botha* 1994 4 SA 799 (W); *S v Khoza* 1994 2 SACR 611 (W); *S v Sefadi* 1995 1 SA 433 (D)); the right to consult with state witnesses (*S v Xaba* 1997 1 SACR 194 (W); *S v Makiti* 1997 1 All SA 291 (B); *S v Smile* 1998 1 SACR 688 (A)) and the right to information about the charge (*S v Manamela* 1999 9 BCLR 994 (W); *S v Chauke* 1998 1 SACR 354 (V); *S v Kester* 1996 1 SACR 461 (B); *S v Simxadi* 1997 1 SACR 169 (C); *S v Maseko* 1996 9 BCLR 1137 (W)).

[137] S 35(3)(e) Constitution.

[138] De Waal *et al Bill of Rights Handbook* 622.

[139] S 35(3)(i) Constitution.

[140] S 35(3)(d) Constitution.

[141] S 166(1) Criminal Procedure Act 51 of 1977.

[142] S 35(3)(h) Constitution.

[143] S 35(3)(m).

[144] S 35(3(l).

[145] S 35(3)(n).

[146] Burchell & Milton *Criminal Law* 61.

[147] S 108 Criminal Procedure Act 51 of 1977 as read with s 106(4) of the same Act.

[148] S 175(1) Criminal Procedure Act 51 of 1977.

[149] S 274(2) Criminal Procedure Act 51 of 1977.

[150] S 35(3)(h) Constitution. See the discussion below § 3 2 1.

[151] *R v Kirsten* 1950 3 SA 659 (C).

[152] *S v Coetzee* 1997 3 SA 527 (CC).

[153] S 35(3)(o).

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2 5 Values underlying the Punitive Victims' rights Model

The Punitive Victims' Rights Model normatively stresses that the rights of crime victims or even potential victims of crime are worthy of protection. The rights of the crime victim therefore compete with the Due Process rights of the accused.[154] The Punitive Victims' rights Model recognises high levels of unreported crime which confirms the failure of the criminal justice system. Along with reports of victims being maltreated in the criminal justice process, this leads to demands for reform of the criminal justice process.[155] Therefore, the Punitive Victims' rights Model seeks to ensure reform by placing the criminal justice system under pressure to improve itself by encouraging reporting of crime and preventing re-victimisation within the criminal process.[156]

Victims' rights advocacy groups often demand that the rights of victims be given the same constitutional status as those of the accused. Bills of rights have been proposed in which victims' rights are recognised in an attempt to match the rights given to the accused, thereby creating a perceived equality between the victim and the accused.[157] The Punitive Victims' Rights Model views plea bargaining with suspicion because it does not generally include victims. The model measures its success in terms of the satisfaction of victims.

The Punitive Victims' rights Model focuses on factual rather than legal guilt.[158] It is therefore opposed to the Due Process claims of the accused because these claims divert the attention away from factual guilt and often allow the criminal to go free. The model bases its objection to the Due Process claims of the accused on the need to protect the rights of victims or potential victims of crime.

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[154] Fletcher *With Justice for Some: Victims' rights in Criminal Trials* (1995) 152.
[155] Roach 1999 *J. Crim. L & Criminology* 700.
[156] Roach 1999 *J. Crim. L & Criminology* 701.
[157] See generally Kgosimore "The Bill of Rights in the Constitution of the Republic of South Africa and its application in the criminal justice system" 2000 *Crime Research in South Africa*, Moolman "Victims' rights in Anglo-American and continental European countries: What can South Africa learn?" 1997 *SACJ* 273; Visser & Potgieter "Some critical comments on South Africa's Bill of Fundamental Human Rights" 1994 *THRHR* 493; Moolman "Rights of crime victims in South Africa: An evaluation and future prospects" 1997 *Acta Criminologica* 67; Snyman "The victim impact statement as a means of addressing the victim's needs for rights" 1995 *Acta Criminologica* 30.
[158] Roach 1999 *J. Crim. L & Criminology* 702.

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The model assumes that the enactment of criminal law, prosecution of offenders and punishment of the guilty control crime. Victim advocacy groups often focus on creating new criminal laws and developing existing criminal laws in an attempt to prevent future victimisation.[159] This is evident from the drastic changes in rape laws proposed in the Criminal Law (Sexual Offences) Amendment Bill.[160] For example, according to the common law, rape is the unlawful and intentional intercourse by a man with a woman without her consent.[161] The definition of the crime is gender specific: only a man can be the perpetrator[162] in rape and only a woman can be raped. It is also necessary to consider that an act will only amount to rape if there is penetration of the vagina by the penis. Anal penetration does not classify as rape according to the common law, nor does vaginal penetration with an object other than the genital organs of the rapist. In terms of section 3(7) of the Criminal Law (Sexual Offences) Amendment Bill[163] the common law crime of rape will be repealed.[164] Rape will be defined as follows:

> "[any unlawful and intentional] act which causes penetration to any extent whatsoever by the genital organs of that person [committing the crime of rape] into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act..."[165]

This provision makes the crime of rape gender-neutral in an attempt to protect potential victims from victimisation. These changes are indicative of the perception that changes in the law will protect possible victims of crime. However, this perception is not necessarily correct, as will be indicated in subsequent chapters.

Elements of the Punitive Victims' rights Model can be found in the Criminal Law (Sexual Offences) Amendment Bill.[166] For example, schedule 1 of the Bill, that contains certain objectives that must be considered in the application of the provisions, provides for the protection of the victims by, *inter alia*, prohibiting

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[159] Roach 1999 *J. Crim. L & Criminology* 702-703.
[160] B50-2003.
[161] Snyman *Criminal Law* 445.
[162] A woman may be found guilty of being an accessory to rape.
[163] B50-2003.
[164] Save where an accused has, at the time of commencement of the act, already been charged, but not yet convicted of rape in terms of the common law.
[165] S 3(1) Criminal Law (Sexual Offences) Amendment Bill B50-2003.
[166] B50-2003.

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discrimination against complainants.[167] Victim participation in the process is also included as an objective of the Bill.[168]

The Bill attempts to match the Due Process rights of the accused by conferring certain "rights" on the complainant. Schedule 1 refers specifically to the "rights" of victims and complainants thereby creating the impression that these "rights" should have the same status as the constitutionally guaranteed Due Process rights of the accused.[169] Schedule 1(f) of the Bill states that "in addition to all due process and constitutional rights, victims should have the following rights..." This indicates that the drafters of the Bill had the rights of the accused in mind when this section was drafted, but that the drafters of the Bill found it necessary to pit the rights of the accused against the rights of the victims of sexual offences, thereby creating the need for a more intricate balancing process.

Some provisions of the Bill are aimed at the prevention of re-victimisation of complainants in the criminal justice system. For example, in terms of section 15 of the Bill, certain victims must be declared vulnerable witnesses and the court is required to direct that such a witness be protected by one or more measures listed in section 14(4).[170]

2 6 Concluding remarks

It has been shown that although the South African criminal justice system is largely based on Due Process values, values that underlie the Punitive Victims'

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[167] Schedule 1(a).
[168] See, for example, schedule 1(d), (e), (f) and (j).
[169] For example, schedule 1(d) states that the complainants must be informed of their rights and the procedures within the criminal justice system which affect them. Schedule 1(e) gives complainants the right to express an opinion, to be informed of all decisions, and to have their opinion taken seriously in any matter affecting them. Schedule 1(f) confers the following rights on complainants: to have present at all decisions affecting them a person or persons important to their lives; (ii) to have matters explained to them in a clear, understandable manner appropriate to their age and in a language and manner which they understand; (iii) to remain in the family, where appropriate, during the investigation and whilst awaiting a final resolution of the matter and, if a child is removed from the family, to have the placement periodically reviewed; (iv) to have procedures dealt with expeditiously in time frames appropriate to the complainant and the offence. Schedule 1(g) gives the complainant in a sexual offence case the right to confidentiality and privacy.
[170] The specific measures will be discussed in Chapters 5 and 6.

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rights Model can be identified in the Criminal Law (Sexual Offences) Amendment Bill.[171]

In terms of section 36(1) of the Constitution[172] the rights in the Bill of Rights may be limited only by a law of general application and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In deciding whether the limitation is justifiable, the court must take certain factors into account, including the nature of the right, the importance and purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether less restrictive means by which the same purpose can be achieved exist. In terms of section 36(2) no law may limit any right entrenched in the Bill of Rights, except as provided in section 36(1).

The question is whether a limitation of the constitutionally guaranteed fair trial rights of the accused by legislative provisions based on Victims' rights values can be justified in terms of section 36 of the Constitution. In other words, should these values, in the balancing process, be allowed to supersede the Due Process values which underlie the constitutionally guaranteed fair trial rights? The extent to which this can be allowed will be shown in the evaluation of the rules of evidence and procedure which will be discussed in the following chapters.

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[171] B50-2003.
[172] 108 of 1996.

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CHAPTER 3: FAIR TRIAL RIGHTS

3 1 Introduction

This chapter deals with constitutionally guaranteed fair trial rights relevant to the topic of this thesis. An attempt is made to provide information necessary for the evaluation of the rules of evidence and procedure that are discussed and evaluated in subsequent chapters.

Section 35(3) of the Constitution guarantees the fair trial rights of the accused.[173] In order to judge their constitutional validity, all procedural rules and rules of evidence that affect accused persons must therefore be tested against the fair trial rights of the accused. For this reason it is important to take note of the content of these rights.

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[173] S 35(3) states: "Every accused person has a right to a fair trial..."

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3 2 Fair trial rights of the accused

The right to a fair trial is a residual right, that includes but is not limited to the enumerated rights in sections 35(3)(a)-(o).[174] In *S v Dzukuda*[175] the Constitutional Court considered the right to a fair trial and found that it is a comprehensive and integrated right[176] that embraces the concept of substantive fairness.[177] The rights listed in subsections (a)-(o) of section 35(3) should therefore, according to the court, be seen as mere elements of the right and not as an exhaustive specification of what the right entails.[178] The content of the right should, according to Ackermann J, be established on a case to case basis.[179] The court went on to find that a fair trial cannot only be achieved by one specific system of criminal procedure and that amendments to criminal procedure is acceptable provided that the system effectively secures the right to a fair trial.[180]

Although the right to a fair trial includes at least all the rights enumerated in sections 35(3)(a)-(o), not all of these rights are relevant for purposes of this thesis. Only the relevant rights will be discussed here and only in so far as is necessary.

3 2 1 The right to be presumed innocent

The right to be presumed innocent is central to a just criminal process.[181] It has been described as a "golden thread" running through the criminal justice system,[182] and as "a prime instrument reducing the risk of convictions based on factual error".[183] As such it is regarded as one of the most fundamental rights in any criminal justice system.[184]

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[174] Snyckers "Criminal Procedure" in Chaskalson, Kentridge, Klaaren, Marcus, Spitz, Woolman *Constitutional Law of South Africa* 2nd ed (2003) 27-60B.
[175] *S v Dzukuda; S v Tshilo* 2000 4 SA 1078 (CC).
[176] § [9] 1091C. See also *S v Zuma* 1995 2 SA 642 (CC).
[177] § [9] 1091C.
[178] § [9] 1091C.
[179] § [9] 1091D.
[180] § [10] 1091F.
[181] *S v Baloyi (Minister of Justice and Another Intervening)* 2000 2 SA 425 (CC) § [15] 434E.
[182] *Woolmington v Director of Public Prosecutions* (1935) AC 462 (HL) 481; [1935] ALL ER Rep 1 8.
[183] *In re Winship* 397 US 358 (1970) 364.
[184] See, for example, *R v Ndholvu* 1945 AD 369 380 and 385; *Estelle v Williams* 425 US 501 503 (1976) where Burger CJ expressed the view that "the presumption of innocence, ..., is a basic

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In *S v Manamela*[185] the Constitutional Court also described the purpose of the presumption of innocence as an attempt to minimise the risk that innocent persons may be convicted. However, in *S v Dzukuda*[186] the same court argued that the presumption of innocence arose primarily from considerations of dignity and equality, rather than from the need to avert a wrong conviction. [187]

Whatever the basis for the existence of the presumption of innocence, its primary function is to determine the burden and standard of proof for establishing the guilt of the accused.[188] As has been reiterated by our courts, the presumption of innocence requires that the state bear the onus to prove guilt beyond reasonable doubt.[189] This requirement entails that the prosecution must prove all the essential elements of the charge beyond reasonable doubt.[190] It must therefore prove the absence of a defence, excuse, justification or exception.[191]

As Schwikkard[192] puts it:

> "The scope of the presumption of innocence as a constitutionally entrenched right in s 35(3)(*h*) of the Constitution, requiring the prosecution to prove guilt beyond a reasonable doubt at trial is restricted to proof of those elements of the state's case that must be established in order to justify punishment. The relevance of evidence must also be proved beyond reasonable doubt in order to ensure the consistent application of the reasonable doubt standard. The blameworthiness of the accused is the underlying justification for punishment. Consequently, facts necessary to establish legal guilt but not pertinent to blameworthiness need not be proved beyond reasonable doubt in terms of the presumption of innocence, which reflects society's

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component of a fair trial"; *R v Oakes* (1986) 26 DLR (4th) 200 (SCC) 212 where Dickinson CJC described the presumption of innocence as "a hollowed principle lying at the very heart of criminal law"; *S v Coetzee* 1997 3 SA 527 (CC) § [122] 584C-D where Madala J held the view that the presumption of innocence "plays a pivotal role in our criminal justice system"; *S v Mbatha; S v Prinsloo* 1996 2 SA 464 (CC) § [19] 475E-F; *R v Britz* 1949 3 SA 293 (A) 302.

[185] *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC) § [26] 16F-17A.

[186] *S v Dzukuda and Others; S v Tshilo* 2000 4 SA 1078 (CC).

[187] § [11] 1092C. This view is in line with the Canadian decision of *R v Oakes* (1986) 26 DLR (4th) 200 (SCC) where Dickinson CJC, opined that "[t]he presumption of innocence protects the fundamental liberty and dignity of every person accused by the state…".

[188] Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa* (1998) 321.

[189] See for example *S v Boesak* 2001 1 SA 912 (CC) § [16] 920E; *S v Bhulwana; S v Gwadiso* 1996 1 SA 388 (CC) § [19] 396A; *Scagell v Attorney-General, Western Cape; S v Coetzee* 1997 2 SA 368 (CC) § [7] 373I-J; *S v Baloyi (Minister of Justice and Another Intervening)* 2000 2 SA 425 (CC) § [15] 434E; *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC) § [26] 16F; *S v Strauss* 1995 5 BCLR 623 (O) 628I

[190] *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC) § [26] 16F.

[191] Chaskalson "Evidence" in Chaskalson, Kentridge, Klaaren, Marcus, Spitz, Woolman *Constitutional Law of South Africa* 2nd ed (2003) 26-8.

[192] Schwikkard *Presumption of Innocence* (1999) 83-84.

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> tolerance of erroneous acquittals in an attempt to ensure that only the blameworthy are convicted. However, there may be circumstances where the value given to other rights demands that the reasonable doubt rule be applied independently of the presumption of innocence. The constitutional right to be presumed innocence (sic) is specified in relation to the right to a fair trial. It therefore does not apply to proceedings outside the definition of a criminal trial. However, when imprisonment as a form of punishment is a possible result of 'other proceedings' the residual content of the s 12(1) right to freedom and security, requiring procedural fairness, may well require the application of the reasonable doubt standard".

Any rule or provision that either lowers the standard of proof required of the prosecution or that places a burden of proof on the accused offends against the presumption of innocence and will have to pass the scrutiny of the limitations clause[193] in order to survive. It should be noted that a distinction can be drawn between provisions that place an evidentiary burden on the accused[194] as opposed to provisions that place a burden of proof on the accused or that create a rebuttable presumption of law.[195]

The Constitutional Court has, on a number of occasions, been asked to consider the constitutional validity of so-called "reverse onus provisions".[196] The reverse onus provisions most often take on the form of a rebuttable presumption of law which requires certain facts to be assumed until the contrary has been proven.[197] This means that the presumed fact is taken as proven unless it is disproved on a balance of probabilities. The reverse onus provisions relieve the prosecution of proving all the elements of the charge beyond reasonable doubt and therefore lower the standard of proof required of the prosecution. The result is that a finding of guilty may follow in cases where reasonable doubt as to the guilt of the accused exists, but where the accused has failed to disprove the presumed fact. This infringes the right to be presumed innocent.[198] Although the court in *Zuma*[199] was at pains to point out that not all reverse onus provisions would be unconstitutional, the

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[193] S 36 Constitution.
[194] *S v Zuma* 1995 2 SA 642 (CC) § [41] 657H.
[195] Chaskalson in Chaskalson *et al* (eds) *Constitutional Law* 26-9.
[196] See for example *S v Zuma* 1995 2 SA 642 (CC); *S v Bhulwana; S v Gwadiso* 1996 1 SA 388 (CC); *S v Julies* 1996 2 SACR 108 (CC); *Scagell v Attorney-General, Western Cape; S v Coetzee* 1997 2 SA 368 (CC); *S v Coetzee* 1997 4 BCLR 437 (CC); *S v Ntsele* 1997 2 SACR 740 (CC); *S v Mello* 1998 3 SA 712 (CC).
[197] Chaskalson in Chaskalson *et al* (eds) *Constitutional Law* 26-9.
[198] Snyckers in Chaskalson *et al* (eds) *Constitutional Law* 27-85; Chaskalson in Chaskalson *et al* (eds) *Constitutional Law* 26-9; Steytler *Constitutional Criminal Procedure* 322.
[199] *S v Zuma* 1995 2 SA 642 (CC).

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Constitutional Court in subsequent cases left little room for the justification of a reverse onus presumption.[200]

Evidential burdens, on the other hand, require the court, upon proof of one fact, to assume another fact unless there is sufficient evidence to raise doubt about the truth of the assumed fact.[201] The accused is not required to disprove the assumed fact on a balance of probabilities, but needs merely to adduce evidence that creates a reasonable doubt about the assumed fact,[202] in which case the accused will be entitled to the benefit of the doubt. Chaskalson[203] is of the opinion that evidential burdens intrude on the presumption of innocence since they require the court to proceed from the assumption that the assumed fact is true in the absence of evidence that either supports or contradicts the assumed fact.[204] However, Steytler[205] argues, on the basis of the decision in *Scagell*,[206] that a provision which places an evidential burden on the accused does not violate the right to be presumed innocent. He argues that such provisions do not create the possibility of conviction based merely on the inability of the accused to adduce evidence that creates reasonable doubt about the assumed fact. Therefore, in cases where reasonable doubt as to the guilt of the accused exists, the fact that the accused has not succeeded in creating doubt about the assumed fact does not increase the possibility of conviction. De Waal[207] argues that an evidential burden does not affect the burden of proof. It seems therefore that he does not view the presumption of innocence as being infringed by provisions that create a mere evidential burden.

The difficulty in distinguishing between a burden of proof and a mere evidentiary burden can be illustrated with reference to proposed amendments with regard to the definition of the crime of rape, as included in the Criminal Law (Sexual Offences)

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[200] De Waal, Currie & Erasmus *Bill of Rights Handbook* 4th ed (2001) 634. *S v Zuma* 1995 2 SA 842 (CC); *S v Bhulwana; S v Gwadiso* 1996 1 SA 388 (CC); *S v Mbatha; S v Prinsloo* 1996 2 SA 464 (CC); *S v Julies* 1996 2 SACR 108 (CC); *Scagell v Attorney-General, Western Cape*; *S v Coetzee* 1997 2 SA 368 (CC); *S v Ntsele* 1997 2 SACR 740 (CC); *S v Mello* 1998 3 SA 712 (CC).
[201] Chaskalson in Chaskalson *et al* (eds) *Constitutional Law* 26-9.
[202] De Waal *et al Bill of Rights Handbook* 631.
[203] Chaskalson in Chaskalson *et al* (eds) *Constitutional Law* 26-10.
[204] Chaskalson in Chaskalson *et al* (eds) *Constitutional Law* 26-10.
[205] Steytler *Constitutional Criminal Procedure* 322.
[206] *Scagell v Attorney-General, Western Cape; S v Coetzee* 1997 2 SA 368 (CC).
[207] De Waal et al Bill of Rights Handbook 631.

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Amendment Bill.[208] At common law, the crime of rape consists of a man having unlawful intentional sexual intercourse with a woman without her consent.[209] Therefore, the absence of consent is an element of the crime and must be proved by the prosecution. Section 2(2) of the Criminal Law (Sexual Offences) Amendment Bill[210] states that an act of penetration is *prima facie* unlawful if committed in coercive circumstances, under false pretences, by fraudulent means or in respect of a person who is incapable in law of appreciating the nature of the act which causes penetration. Therefore, unlawfulness will be presumed if one of these circumstances is proved by the prosecution. This in itself does not create a problem, since it is clear that the prosecution is still required to prove the unlawfulness of the action, by proving the existence of one of the circumstances mentioned in the Bill. The only thing required of the accused is to create doubt as to the truth of the assumed fact. However, it was clear that the Commission had in mind that the accused must prove the defence of consent. This can be seen from the comments made by the Law Commission[211] where is was opined that

> "[o]nce unlawfulness is established by proof that the rape took place in certain circumstances the *onus* must be on the accused to prove his or her defence, which may, or may not, be based on consent as a justification for his or her actions"

Therefore, it appears that the Law Commission has in mind that the accused must prove any defence alleged by him or her, but the wording of section 2(2) places nothing more than an evidential onus on the accused.[212]

Having had regard to the comments made by, *inter alia*, Van der Merwe and Schwikkard,[213] the Law Commission was satisfied that section 2(2) places no more than an evidential burden on the accused. Therefore, if the court is satisfied that the prosecution has not succeeded in proving guilt beyond reasonable doubt, it is possible for the accused to be acquitted despite not having adduced evidence. Nonetheless, the Commission found it necessary to mention that the proposals do

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[208] B50-2003.
[209] Milton *South African Criminal Law and Procedure* (Volume II) (1996) 435.
[210] B50-2003.
[211] SA Law Commission *Sexual Offences: The Substantive Law* Project 107 Discussion paper 85 (1999) § 3.4.7.3.8.
[212] Van der Merwe "Redefining rape: Does the Law Commission really wish to introduce a reverse onus?" 2001 *SACJ* 66.
[213] SA Law Commission *Sexual Offences* Project 107 Report (2002) Chapter 3 33.

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not alter the standard of proof required when the accused adduces evidence in rebuttal, and recommended that section 2(9) be inserted in the Bill. Section 2(9) reads:

> "Nothing in this section may be construed as ... [adjusting] the standard of proof required for adducing evidence in rebuttal."

Despite unlawfulness being presumed after the proof of certain circumstances, the accused needs do no more than create doubt as to his guilt. The burden will still be on the prosecution to disprove any defence raised by the accused, including a defence based on consent.[214] The right of the accused to be presumed innocent will, therefore, not be infringed by the incorporation of section 3(2) in the Bill.

3 2 2 The right to a public trial before an ordinary court

Although section 35(3)(c) should be seen as a unit requiring the right to a public trial before an ordinary court, the two components "public trial" and "ordinary court" will be discussed separately.

3 2 2 1 Public trial

In the 1924 case of *R v Sussex Judges, Ex Parte McCarthy,*[215] Lord Hewart succinctly described the reasons for the requirement that a criminal trial should be a public trial when he said: "Justice must not only be done, but must manifestly be seen to be done".

Section 35(3)(c) guarantees, as part of the right to a fair trial, the accused's right to a public trial. This guarantee is also reflected in section 152 of the Criminal Procedure Act.[216] Section 152 requires that, unless otherwise provided for by the Act, criminal proceedings must take place in an open court. This requirement stems from the need to ensure the legitimacy of the criminal justice system and is an important safeguard of impartiality.[217] The court in *K v Regional Court Magistrate NO*[218] expressed the view that the requirement of a public trial amounts to the

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[214] Schwikkard *Presumption of Innocence* 19.
[215] [1924] 1 KB 256 259.
[216] 51 of 1977.
[217] De Waal *et al Bill of Rights Handbook* 622.
[218] 1996 (1) SACR 434 (E) 447*b*.

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constitutionalisation of the long-recognised principle of transparency in criminal proceedings.[219] The purpose of a public trial, according to the court, is to enable the public to be fully informed of the evidence so that the judgement of the court can be properly evaluated.[220]

The right to a public trial is not absolute. There are exceptions to the requirement of a public trial. Section 153 of the Criminal Procedure Act[221] contains a number of exceptions to the requirement of a public trial. It empowers a court in which criminal proceedings are pending to deviate from the requirement of a public trial if it appears to the court that it would be in the interests of the security of the State or good order or public morals or the administration of justice. In such cases the court may order that the proceedings be held behind closed doors or it may direct that the public or any class of the public may not be present at the trial. In circumstances specified in the act the court also has the discretion to direct that certain witnesses may testify behind closed doors or that the identity of the witness may not be revealed.[222]

In an *obiter dictum* the court in *Nel v Le Roux NO*[223] remarked that there are "well-recognised exceptions in our criminal procedure to the general rule that criminal proceedings are to be conducted in open court".[224] The court cited section 153 of the Criminal Procedure Act[225] as an example. Although in practice appeals are heard in open court, it is not required by the section 35(3)(c) right.[226]

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[219] See *S v Leepile (1)* 1986 2 SA 333 (W); *S v Baleka (2)* 1986 4 SA 200 (T); *Botha v Minister van Wet en Orde* 1990 3 SA 937 (W).
[220] 447*b*.
[221] 51 of 1977.
[222] Ss 153(2) and 153(3).
[223] *Nel v Le Roux NO* 1996 3 SA 562 (CC).
[224] § [17] 573A-B.
[225] 51 of 1977.
[226] See *S v Pennington* 1997 4 SA 1076 (CC).

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3 2 2 2 Ordinary courts

Section 165(2) of the Constitution requires the courts to be independent and apply the law impartially and without fear, favour or prejudice. An "ordinary" court is therefore a court that complies with this requirement.[227]

In *President of the Republic of South Africa v South African Rugby Football Union*[228] the Constitutional Court formulated the test for impartiality as follows:

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

As similar approach was followed in *S v Roberts*[229] where the Supreme Court of Appeal found that a suspicion that the judicial officer might be biased must exist,[230] and the suspicion must be based on reasonable grounds. The suspicion must also be that of a reasonable person in the position of the accused or litigant and that such a reasonable person must in fact have such a suspicion.[231]

Both these decisions were accepted by the Constitutional Court in *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd.*[232]

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[227] Snyckers in Chaskalson *et al* (eds) *Constitutional Law* 27-68 – 27-69.
[228] *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) § [48] 177B.
[229] 1999 4 SA 915 (A).
[230] The court does not require that there must be suspicion that the presiding officer would be biased, but merely that he or she might be biased.
[231] The fact that the reasonable person might have such a suspicion in insufficient. It is required that the suspicion must in fact exist.
[232] *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) § [13] 714B.

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3 2 3 The right to be present when tried

Section 35(3)(e) guarantees the right of the accused to be present when being tried. The purpose of this right can be traced back to the need for the effective exercise of the right to challenge and adduce evidence and other active defence rights.[233] These rights are inextricably linked. The right to be present when being tried is not new to the South African law, since section 158(1) of the Criminal Procedure Act[234] requires that "except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused". This provision is peremptory – the accused must as a rule be present at all times.[235] Moreover, the right requires that there be a confrontation: the accused must be able to see the witnesses and the witnesses must testify in the presence of the accused.[236]

Certain exceptions to this rule are created in the Criminal Procedure Act. Section 159, for example, provides that the trial may proceed in the absence of the accused where the accused, through his behaviour, makes the continuance of the proceedings in his presence impracticable.

Section 158 of the Criminal Procedure Act also creates a number of exceptions to the rule. In terms of section 158(2)(a) a court may, *mero motu* or on application of the prosecution, the accused or a witness, order that a witness or the accused testify via closed circuit television or similar electronic device. Section 158(2)(a) requires that the accused or the witness must consent to this. Section 158(3) stipulates that the court may only make such an order if the facilities are readily available and it seems that the order will prevent unreasonable delay, save costs, be in the interests of the security of the State or of public safety or justice or the public, or prevent the likelihood that prejudice or harm is suffered by any person as a result of being present at such proceedings. Section 158 is discussed in paragraph 6.3 below.

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[233] Steytler *Constitutional Criminal Procedure* 294.
[234] 51 of 1977.
[235] Kriegler & Kruger *Hiemstra: Suid-Afrikaanse Strafproses* 6th ed (2002) 415.
[236] See for example *R v Molatla* 1975 1 SA 814 (T).

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In terms of section 170A of the Criminal Procedure Act[237] the court may , in certain circumstances, order that a child give evidence through an intermediary and that the witness give his evidence in a separate room. Section 170A(3)(c) requires that the court and any person whose participation in the trial is necessary must be able to see and hear the witness during his testimony. Therefore, there is no confrontation in the strict sense of the word, since the witness will not be in a position to see the accused and will therefore not testify in the physical presence of the accused.[238]

3 2 4 The right to challenge and adduce evidence

The right to challenge and adduce evidence is inextricably linked with the right to be present when being tried, since the presence of the accused at the trial ensures that the accused has a meaningful opportunity to challenge the evidence of state witnesses. Section 35(3)(i) of the Constitution guarantees the right of the accused to challenge and adduce evidence. The purpose of the right to challenge and adduce evidence forms the essence of the criminal trial in the sense that it incorporates the *audi alteram partem* rule.[239]

The right to challenge and adduce evidence is a composite right, rather than two separate rights. For example, through cross-examination the accused can challenge the evidence of witnesses called by the prosecution while eliciting favourable evidence from those witnesses.[240] The adducing of evidence by the accused normally has the sole purpose of challenging the evidence brought by the state. It is clear that a meaningful right to challenge and adduce evidence is dependent on, first, the right to cross-examine witnesses[241] and, secondly, the freedom to call witnesses.[242]

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[237] 51 of 1977.
[238] See *infra* § 6.4 for a discussion on s 170A.
[239] Steytler *Constitutional Criminal Procedure* 346.
[240] Pretorius *Cross-examination in South African Law* (1997) 90-92.
[241] *K v Regional Court Magistrate NO* 1996 (1) SACR 434 (E). See also Van der Merwe "Cross-examination of the (sexually abused) child witness in a constitutional adversarial system: Is the South African intermediary the solution" 1995 *Obiter* 16.
[242] Ss 196(1)(a) and 151(1) Criminal Procedure Act.

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3 2 4 1 The right to challenge evidence and cross-examine

Section 161 of the Criminal Procedure Act stipulates that a witness in criminal proceedings must give his evidence *viva voce*. This principle is essential to the right to cross-examine.[243] In terms of section 166(1) of the Criminal Procedure Act the accused has the right to cross-examine any witness called by the prosecution or a co-accused. Where the accused is unrepresented, the court is obliged to inform the accused of his right to cross-examine the witness.[244] This information must be given to the accused before the witness commences with his testimony in chief.[245] However, the right to cross-examine is not absolute. Certain common law and statutory limitations are of necessity placed on the right of the accused to cross-examine a witness.[246]

One such example is the discretion that the court has to disallow questions that are irrelevant, misleading, vexatious, abusive, oppressive or discourteous.[247] In *Klink v Regional Court Magistrate*[248] Melunsky J found that

> "[v]ital as the right to cross-examination may be, it is not an absolute right, for the trial court retains a discretion to disallow questioning which is irrelevant, unduly repetitive, oppressing or otherwise improper".

A limitation can also be found in section 166(3) of the Criminal Procedure Act.[249] In terms of section 166(3) the court may request the cross-examiner to disclose the relevancy of any particular line of examination and may impose reasonable limits in cases where it appears to the court that the cross-examination is being protracted unreasonably and is causing the proceedings to be delayed unreasonably. Section 166(3) does not violate the right of the accused to challenge evidence, but merely

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[243] Steytler *Constitutional Criminal Procedure* 347. See also Kriegler & Kruger *Hiemstra* 427 and the authority cited there.
[244] *S v Khambule* 1991 2 SACR 277 (W).
[245];*S v Raphatle* 1995 2 SACR 452 (T) 456*g*. and the Namibian case of *S v Wellington* 1991 1 SACR 144 (Nm) 149*f*
[246] Some of these limitations which pertain particularly to the prosecution of sexual offenders against children will be discussed in detail in subsequent chapters.
[247] *S v Mayiya* 1997 3 BCLR 386 (C); *S v Sello* 1993 1 SACR 497 (O); *S v Gidi* 1984 4 SA 537 (C); *Tshona v Regionnal Court Magistrate, Uitenhage* 2001 8 BCLR 860 (E).
[248] *K v Regional Court Magistrate NO* 1996 1 SACR 434 (E).
[249] 51 of 1977. Sub-section (3) was inserted by s 8 Criminal Procedure Amendment Act 86 of 1996.

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gives further form to the court's common law discretion of controlling unreasonable questioning.[250]

Further limitations that are placed on the right of an accused to cross-examine concern the content of the cross-examination and the evidence that the cross-examiner is seeking to elicit. Evidence that is inadmissible cannot, for example, be elicited during cross-examination.[251]

Questions regarding confrontation as part of the right to cross-examination have been raised. In particular, questions have been asked about the constitutionality of section 170A of the Criminal Procedure Act.[252] These questions will be dealt with in chapter 5 with specific reference to evidence in child sexual abuse cases. Attention will also be given to hearsay evidence and the effect thereof on the right to challenge and adduce evidence.

3 2 4 2 The right to adduce evidence

The right to adduce evidence implies that the accused must be given the opportunity to call witnesses in his defence. This right is one of the core principles of the adversarial criminal justice process.[253] In terms of section 151(1) of the Criminal Procedure Act,[254] the accused may call witnesses in his defence[255] and in terms of section 196 of the same Act the accused may elect to testify in his own defence.[256] Where the accused is unrepresented, the court must inform the accused

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[250] Steytler *Constitutional Criminal Procedure* 348. For a general discussion see Van der Merwe "Regterlike Inkorting van Kruisondervraging: 'n gemeenregtelike, statutêre en grondwetlike perspektief" 1997 *Stell LR* 348.

[251] See, for example, *S v Nkwanyana* 1978 3 SA 404 (N). See also *Isrealsohn v Power NO & Ruskin NO (1)* 1953 2 SA 499 (W); *R v Gibixegu* 1959 4 SA 266 (O); *S v Phiri* 1973 3 SA 538 (T).

[252] 51 of 1977.

[253] See *Taylor v Illinois* 484 US 400 408 (1988).

[254] 51 of 1977.

[255] S 151 of the Criminal Procedure Act 51 of 1977 also indirectly affects the order of defence witnesses. S 151(1)(b)(i) provides that where the accused indicates that he intends to testify in his own defence, he must do so before the other witnesses are called on his behalf. The court may, however, allow the accused to testify after having called other witnesses if there is good reason to do so.

[256] This right is also guaranteed in s 35(3)(h).

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of these rights and the court must ensure that the accused is not prejudiced by his own inability.[257]

Although Didcott J in *S v Gwala*[258] held that the "accused has an absolute right to call the witness" which is not "qualified in any way",[259] the right to call witnesses is neither unlimited nor absolute. At common law, the accused is not allowed to offer testimony that is irrelevant or where the prejudicial effect of the testimony outweighs the probative value.[260] For example, evidence of the previous sexual history of the complainant in a sexual offence case, can, in terms of section 227 of the Criminal Procedure Act only be led with permission of the court and then only when the probative value of such evidence outweighs the prejudicial effect thereof.

Furthermore, the right of a co-accused to remain silent can place limitations on the right of the accused to call witnesses in the sense that a witness who would, but for the fact that he is a co-accused, have been available to offer exculpatory evidence on behalf of the accused, may choose to exercise his own right to remain silent and therefore not offer the evidence.[261]

3 3 Conclusion

In this chapter it has been shown that fair trial rights have been part of South African law for a long time. They have withstood changes in society and are generally accepted. All procedural rules and rules of evidence that affect accused persons must be tested against the fair trial rights of the accused, for it is in the upholding of the constitutionally guaranteed fair trial rights of the accused that the integrity of the criminal justice system lies.

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[257] See Kriegler & Kruger *Hiemstra* 385 for a discussion on the obligations of the court in this regard.
[258] 1989 4 SA 937 (N) 938G.
[259] 939B.
[260] Steytler *Constitutional Criminal Procedure* 356 and the authority cited there.
[261] Steytler *Constitutional Criminal Procedure* 357 and the authority cited there.

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CHAPTER 4: VICTIMS' RIGHTS

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4 1 Introduction[262]

In recent years attention has increasingly been drawn to the plight of crime victims in South Africa, especially in so far as their participation in the criminal justice process is concerned.[263] Victims' rights advocates point out that not only does the position of the crime victim compare unfavourably to that of their counterparts in other jurisdictions,[264] but it also compares particularly unfavourably to the position of alleged offenders in the South African Law.[265] In this regard, Meintjies-van der Walt writes that "current victim support strategies are uncoordinated, inadequate, and when in existence, limited and under-utilised."[266] The lack of expressly (or constitutionally) guaranteed victims' rights leads to the conclusion that the criminal justice process is offender-orientated.[267] For this reason there has been a general call for the improvement of the role and rights of crime victims in South Africa.[268]

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[262] It must be pointed out that due to the limited scope of this study, it is unfortunately impossible to cover the body of research relating to victims' rights in its entirety. This section will therefore be limited to a brief discussion of the concept of victims' rights and victims' rights in South Africa. Brief mention will, however, be made of the recognition of victims' rights in international instruments and in other jurisdictions. This will be limited to examples which illustrate certain points.

[263] For a general discussion see Camerer "Victims and Criminal Justice" 1997 *Institute for Security Studies Monograph 12 Policing the Transformation*; Garkawe "Enhancing the role and rights of crime victims in the South African justice system – an Australian perspective" 2001 *SACJ* 131; Meintjies-van der Walt "Towards victim's empowerment strategies in the criminal justice process" 1998 *SACJ* 157; Kgosimore "The Bill of Rights in the Constitution of the Republic of South Africa and its application in the criminal justice system" 2000 *Crime Research in South Africa*; Moolman "Victims' rights in Anglo-American and continental European countries: What can South Africa learn?" 1997 *SACJ* 273; Visser & Potgieter "Some critical comments on South Africa's Bill of Fundamental Human Rights" 1994 *THRHR* 493; Moolman "Rights of crime victims in South Africa: An evaluation and future prospects" 1997*Acta Criminologica* 1997 67; Snyman "The victim impact statement as a means of addressing the victim's needs for rights" 1995 *Acta Criminologica* 30.

[264] Camerer 1997 *Institute for Security Studies Monograph 12*; Moolman 1997 *SACJ* 273*ff;* Garkawe 2001 *SACJ* 131*ff*; Moolman 1997 *Acta Criminologica* 67*ff.*

[265] Camerer 1997 *Institute for Security Studies Monograph 12*; Garkawe 2001 *SACJ* 131; Meintjies-van der Walt 1998 *SACJ* 157; Kgosimore 2000 *Crime Research in South Africa*, Moolman 1997 *SACJ* 273; Visser & Potgieter 1994 *THRHR* 493; Moolman 1997 *Acta Criminologica* 67; Snyman 1995 *Acta Criminologica* 30.

[266] Meintjies-van der Walt 1998 *SACJ* 157 158.

[267] Meintjies-van der Walt 1998 *SACJ* 157 158;

[268] For a general discussion see Camerer 1997 *Institute for Security Studies Monograph 12*; Garkawe 2001 *SACJ* 131; Meintjies-van der Walt 1998 *SACJ* 157; Kgosimore 2000 *Crime Research in South Africa;* Moolman 1997 *SACJ* 273; Visser & Potgieter 1994 *THRHR* 493; Moolman *Acta Criminologica* 1997 67; Snyman 1995 *Acta Criminologica* 30.

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4 2 Grounds for victims' rights

Criminologists advance a number of different arguments in support of the recognition and protection of the rights of victims of crime. While the nature of this study does not justify an in-depth discussion of all these arguments, some need to be examined from a legal point of view.

Historically the penal system developed from one of private vengeance to one of state-administered justice.[269] This resulted in the victim's role being reduced to a secondary role,[270] in which the victim has virtually no say in the decision-making process regarding the offender's fate.[271] In the adversarial model of criminal justice, such as the one used in South Africa, a sexual offence, like any other crime, is considered to be a crime against the state and not against the individual victim of the crime.[272] Therefore, the victim of the sexual offence is considered to be no more than a state witness, whose role in the criminal justice process is limited to testifying for the state and providing part or all of the evidence necessary for the state to secure a conviction.[273] Exclusion of the victim during the investigation and trial phases leads to alienation and powerlessness,[274] which is said to cause the public's negative perception of the criminal justice process.[275]

It is also argued that the criminal justice system shows excessive concern for the rights of the accused person,[276] which results in the needs of victims being neglected.[277] This, in turn, leads to dissatisfaction and frustration on the part of

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[269] Snyman 1995 *Acta Criminologica* 30.
[270] Snyman 1995 *Acta Criminologica* 30.
[271] Moolman 1997 *SACJ* 273.
[272] Fryer "Law versus prejudice: views on rape through the centuries" 1994 *SACJ* 77.
[273] Symonds "The Second Injury" in Kivens (ed) *Evaluation and Change: Services for Survivors* (1980) 36-38; Moolman 1997 *SACJ* 273; Christie "Conflicts as property" 1977 *B. J. of Crim* 17; Shapland "Victims, the criminal justice system and compensation" 1984 *B. J. Crim* 24.
[274] Garkawe 2001 *SACJ* 131 134; Camerer "What about the victims? Suggested changes in the criminal justice system with the aim of promoting a more victim-centric approach" 1999 *De Rebus* 22.
[275] Naude "Dealing with the victims of crime – the role of the legal profession" 1997 *Consultus* 57.
[276] Moolman 1997 *SACJ* 273; Moolman 1997 *Acta Criminologica* 67; Meintjies-van der Walt 1998 *SACJ* 157 158; see in general Kgosimore 2000 *Crime Research in South Africa* where the position of the victim is compared with the constitutionally guaranteed fair trial rights of the accused.
[277] Davis & Saffy "Young witnesses: experiences of court support and court preparation officials" 2004 *Acta Criminologica* 17.

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victims.[278] It has, for example, been argued that, in the absence of expressly recognised rights for victims of crime, the constitutional entrenchment of fair trial rights of the accused has created an inequality between the accused and the victim.[279]

An example of this is the lack of court preparation of the victim-witness. While the accused are usually well prepared by their legal representatives, victim-witnesses are largely left to their own devices and must therefore cope with the unfamiliar court procedure and legal jargon on their own.[280] This increases the stress of the victim-witness and can result in secondary victimisation and the acquittal of the accused as a result of blunders made by the victim during his evidence.

Kgoismore points out that, while the accused is entitled to be present when being tried,[281] the victim's presence in court is required only for the purpose of giving evidence, which means that the victim may not be aware of the eventual outcome of the case.[282] He goes on to argue that the accused's right to challenge and adduce evidence favours the accused over the victim, who has no such right.[283]

Victims' rights advocates are concerned that the victim's involvement in the criminal justice system may result in secondary victimisation.[284] In the aftermath of initial victimisation, it is argued that repeated questioning by police officials[285] and other criminal justice professionals[286] further traumatises victims. Questioning by defence counsel aimed at humiliating witnesses and undermining their credibility is said to contribute to the victim's view of the criminal justice system as being

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[278] Clark, Davis & Booysens "A silver era for victims of crime: Reassessing the role that victim impact statements can play in improving victim involvement in criminal justice procedures" 2003 *Acta Criminologica* 43; Camerer 1999 *De Rebus* 22.
[279] Kgosimore 2000 *Crime Research in South Africa*. The discussion of Kgosimore unfortunately looses sight of the fundamental difference between the position of the accused and that of the victim. The discussion is therefore used only as an illustration of arguments advanced in favour of recognition of rights for victims of crime.
[280] Kgosimore 2000 *Crime Research in South Africa*;
[281] S 35(3)(e) Constitution.
[282] S 35(3)(e) Constitution.
[283] S 35(3)(e) Constitution.
[284] Garkawe 2001 *SACJ* 131 134; Camerer 1999 *De Rebus* 22.
[285] Clark *et al* 2003 *Acta Criminologica* 43.
[286] Garkawe 2001 *SACJ* 131 134.

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stressful and disruptive.[287] Further factors that contribute to the negative experience of victims who become involved in the criminal justice system include delays in completion of the trial, loss of wages due to the postponement of proceedings and poor protection against intimidation.

Recognition of victims' rights will necessarily result in increased victim participation in the criminal justice process. This, it is argued, will reduce the risk of secondary victimization.[288] It is also argued that victim participation will lead to the recognition of the victim as a party to the dispute,[289] which, in turn, will improve victim co-operation and ultimately the efficiency of the criminal justice system.[290]

Although increased victim participation could have its advantages, there are also disadvantages inherent in allowing victim participation in the criminal justice process. Apart from the negative impact it could have on the Due Process fair trial rights of the accused,[291] increased victim participation could burden the victim while raising his expectations unrealistically.[292]

Since few of these arguments are controversial, it can be accepted that victims' rights should be protected. The issue is, however, to what extent this should be done. This question will be discussed in subsequent chapters.

4 3 Classification of victims' rights

When considering the recognition of victims' rights, it is important to note that these rights can, apart from the fundamental rights issue, function on two distinct levels, namely at extra-trial level and at trial level. At extra-trial level it is possible to distinguish between different types of victims' rights: the right to receive support, the right to have a complaint thoroughly investigated and the right to

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[287] Lurigio, Skogan & Davis *Victims of Crime: Problems, Policies and Programs* (1990) 60; Symonds in Kivens (ed) *Evaluation and Changes* 36.
[288] Zedner "Victims" in Maguire, Morgan & Reiner (eds) *The Oxford Handbook of Criminology* 2nd ed (1997) 601.
[289] Chirstie 1977 *B. J. Crim* 1-15.
[290] Zedner in Maguire *et al* (eds) *Handbook of Criminology* 601.
[291] This impact will be discussed in due course.
[292] Reeves "The Victim and Reparation" 1984 *Probation Journal* 136-139.

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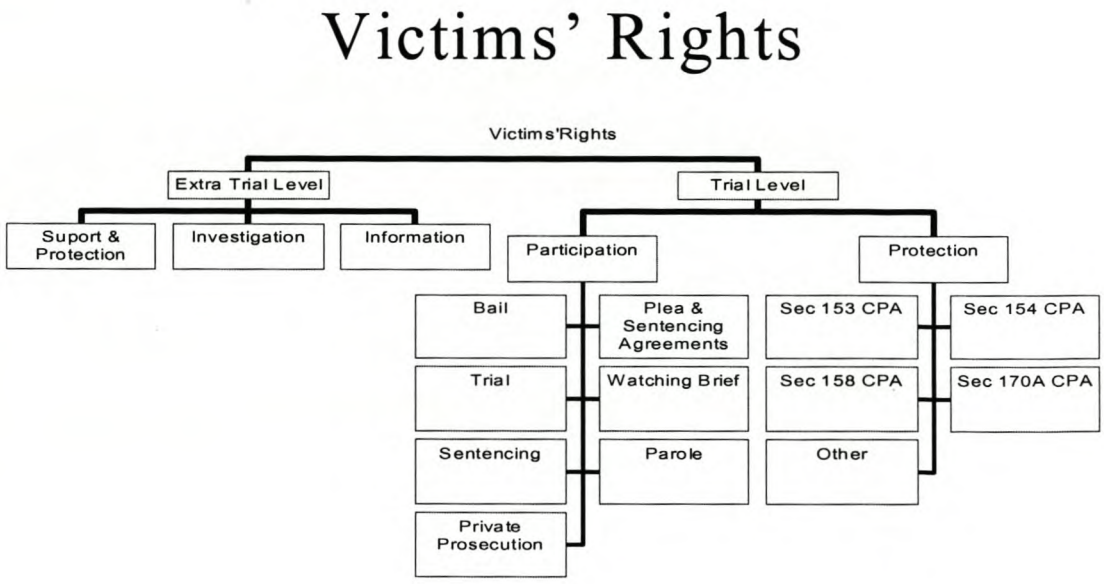
information concerning the investigation and prosecution of the alleged offender. The right to receive support functions at three different stages, namely pre-trial support, (ie, support during the investigation phase), support during the trial phase and post-trial support.

At trial level victims' rights can either be classified as participation rights or protection rights. At this level, participation rights can be sub-divided into the right to participate during bail proceedings, the right to participate during plea and sentencing agreements, the right to participate during the trial of the alleged offender, the right to instruct a legal representative to hold a watching brief, the right to participate during the sentencing phase of the trial and the right to participate at parole hearings. The right to institute private prosecution can also be classified as a participation right on trial level.

The following diagram illustrates the classification of Victims' rights:



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4 3 1 Fundamental rights

Chapter 2 of the Constitution[293] contains the Bill of Rights which entrenches a number of fundamental human rights. Section 7(2) places a positive duty on the state to protect, promote and fulfil the rights contained in the Bill of Rights. While section 10 entrenches the individual's right to dignity, sections 11 and 14 respectively entrench the right to life and the right to privacy. Section 12 entrenches the right to freedom and security of the person and, in terms of section 12(1)(c), everyone has the to be free from all forms of violence, irrespective of whether the source of violence is public or private. The state is therefore under a positive obligation to protect individuals from violence.[294]

In *S v Basson*[295] the Constitutional Court, per Ackermann J, expressed the view that

> "[i]n our constitutional State the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The State must protect these rights through, amongst other things, the policing and prosecution of crime."[296]

Therefore, the fundamental rights of crime victims and potential victims of crime are already protected by the enactment and enforcement of the criminal law.[297]

4 3 2 Extra-trial level

4 3 2 1 Support and protection

Several provisions envisage support for victims at various stages in the criminal justice process. For example, section 3 of the Probation Services Act[298] empowers the Minister to establish programmes which are aimed at the assessment, care, treatment, support, referral for and provision of mediation in respect of the victims

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[293] 108 of 1996.
[294] See also *S v Chapman* 1997 3 SA 341 (A).
[295] 2004 1 SACR 285 (CC).
[296] 2004 1 SACR 285 (CC) § [31] 302*b-c*.
[297] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) §§ [61]-[62] 963H-965B.
[298] 116 of 1991.

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of crime.[299] However, this provision does not envisage an improvement of the role of the victim within the criminal justice process as such, but is aimed at the treatment and support of such victims on an extra-trial level. As far as can be established the Minister has not as yet made use of the powers granted in the Probation Services Act.[300]

Similarly, section 191A of the Criminal Procedure Act[301] empowers the Minister to make regulations relating to the assistance of and support to witnesses at courts,[302] the establishment of reception centres for such witnesses,[303] the counselling of witnesses[304] and any other matter which the Minister deems expedient to prescribe in order to provide services to witnesses at courts.[305] However, as yet no such regulations have been made.

In terms of the Witness Protection Act,[306] a witness may apply to be placed under protection if he has reason to believe that his safety is threatened by reason of him being a witness. Should the application be successful, the witness is held in protective custody during the period of testimony at the trial and, if necessary, is assisted in resettlement at the end of the trial.

In its 2002 Report on Sexual Offences[307] the South African Law Commission accepted that protection of victims in general fell outside the scope of their investigation. However, certain recommendations with regard to the position of the victims of sexual were made. For example, the Commission recommended that persons[308] who sustained injuries, be it physical, psychological or other injuries, should be entitled to treatment at state expense. "Treatment" is, however, not limited to medical treatment. The Commission also recommended that a statutory duty be placed on medical and other health care professionals to advise the victim

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[299] S 3(1)(d) as inserted by the Probation Services Amendment Act 35 of 2002.
[300] 116 of 1991.
[301] 51 of 1977.
[302] S 191A(2)(b).
[303] S 191A(2)(a).
[304] S 191A(2)(c).
[305] S 191A(2)(d).
[306] 112 of 1998.
[307] SA Law Commission *Sexual Offences* Project 107 Report (2002).
[308] In this respect "person" can include not only the victim, but also any other family member who suffered injury as a result of the sexual offence.

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of certain sexual offences of the possibility of being tested for sexual transmitted infections as well as their access to treatment and care.[309]

Since most of these provisions have not been implemented, it is uncertain whether they have any practical value.

4 3 2 2 Investigation

Every citizen has the right to have a complaint investigated thoroughly by the South African Police Service and, if they are not satisfied with the way in which their complaint is being dealt, they are free to complain to the Independent Complaints Directorate.[310] In this respect victims' rights are therefore recognised.

4 3 2 3 Information

There are no provisions in the Criminal Procedure Act[311] obliging the state to provide information about the case to the victim or complainant. But the Promotion of Access to Information Act[312] can be used to obtain such information. In terms of section 11 this Act a requester may be given access to a record of a public body if the request complies with all the procedural requirements set in the Act. "Public body" is defined as

> "(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
> (b) any other functionary of institution when –
> (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation".

Since section 179(5) of the Constitution and section 20 of the National Prosecuting Authority Act[313] empower the prosecuting authority to institute criminal proceedings on behalf of the state, it is clear that the provisions of the Promotion of

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[309] SA Law Commission *Sexual Offences* § 6.3.3.
[310] S 53 South African Police Service Act 68 of 1995.
[311] 51 of 1977.
[312] 2 of 2001.
[313] 32 of 1998.

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Access to Information Act[314] must apply to the prosecuting authority as a public body.

It must be noted that "record" in the Act refers only to recorded information. Therefore, once information has been recorded, in any form whatsoever, the requester may gain access to such record in terms of the Act. However, raw information is not covered by the Act[315] and therefore a request to create or compile a record that does not already exist does not qualify as a "request for a record" as contemplated in the Act.[316]

In terms of Chapter 4 of the Promotion of Access to Information Act[317] certain grounds are laid down in terms of which a public body may refuse to grant access to the requested records. In terms of section 34 of the Act the privacy of third parties is protected. This provision obliges the information officer of a public body to refuse access to information that would involve the unreasonable disclosure of personal information about the third party. This does not, however, apply to information which is already publicly available,[318] nor does it apply to information given to the public body by the person to whom it relates after having been informed that the information may be made available to the public.[319]

Section 39 of the Act relates to the mandatory protection of police dockets in bail proceedings, and the protection of law enforcement and legal proceedings. In terms of this section a request for access to records may be denied if the prosecution of an alleged offender is being prepared, is about to commence or is pending, and the disclosure of the record could reasonably be expected to impede the prosecution[320] or would result in a miscarriage of justice.[321] Likewise, a request may be denied if

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[314] 2 of 2001.
[315] Currie & Klaaren *The Promotion of Access to Information Act Commentary* (2002) 41
[316] Currie & Klaaren *AIA* 41
[317] 2 of 2001.
[318] S 34(2)(c).
[319] S 34(2)(b).
[320] S 39(2)(b)(ii)(*aa*).
[321] S 39(2)(b)(ii)(*bb*).

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disclosure of the record could reasonably be expected to prejudice or impair the fairness of a trial or the impartiality of an adjudication.[322]

Although, in principle, the Promotion of Access to Information Act[323] can be used by the complainant or victim to obtain information about the case against the alleged offender, this solution is not without its problems. For example, the requestor may be required to pay access fees in terms of section 22(6) of the Act. This will necessarily hamper such requests where the victim is indigent. Furthermore, information regarding the rights created in the Act may not be readily available to potential requestors and therefore, despite the existence of the provisions, access to information may be limited.

In an attempt to accommodate the victim of a sexual offence section 9 of the Namibian Combating of Rape Act[324] places two specific duties on the prosecutor in sexual offence cases. First, the prosecutor must ensure that all relevant information has been obtained from the complainant. This includes the duty to obtain information relevant to the question of whether the accused should be granted bail and, if so, whether any bail conditions should be imposed.[325] Second, the prosecutor is tasked with the duty to provide to the complainant all information that is "necessary to lessen the impact of the trial on the complainant". Schedule 1 of the Criminal Law (Sexual Offences) Amendment Bill[326] makes provision for similar rights for victims of sexual offences in South Africa.

4 3 3 Trial level

4 3 3 1 Participation

4 3 3 1 1 Bail

In terms of section 60 of the Criminal Procedure Act[327] an accused may be released on bail of the court is satisfied that the interests of justice permit his release. As a

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[322] S 39(2)(b)(iii)(*ee*).
[323] 2 of 2001.
[324] 8 of 2000.
[325] S 9(a).
[326] B50-2003.
[327] 51 of 1977.

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general rule the onus rests on the prosecution to prove that the interests of justice do not permit the release of the accused.[328] Where the accused is charged with an offence listed in schedules 5 or 6 of the Criminal Procedure Act[329] the onus is on the accused to prove that in the case of a schedule 5 offence, the interests of justice permit his release[330] or, in the case of a schedule 6 offence, that there are exceptional circumstances which justify his release in the interests of justice.[331] Where a bail application in respect of matters referred to in sections 60(11)(a) and (b) is not opposed by the prosecution, the prosecution must place its reasons for not opposing the application on record.[332]

Section 60(4) of the Criminal Procedure Act[333] lists a number of circumstances in which the interests of justice will not permit the release of the accused. In terms of section 60(4)(c) the interests of justice do not permit the release of the accused where there is a likelihood that the accused will attempt to influence or intimidate the witnesses or to conceal or destroy evidence. Section 60(4)(c) therefore provides a measure of protection for the victim-witness against the possibility of intimidation by the accused. Where the victim therefore fears the possibility of intimidation by the accused he can have such evidence placed before the court by the prosecution.

Although the Criminal Procedure Act[334] does not make specific provision for the participation of the victim during bail proceedings, the prosecution may bring any relevant evidence to the attention of the court. Therefore, the prosecution may ascertain the views of the victim and place such evidence before the court. However, the victim does not have the right to oppose the bail application where the prosecution refuses to do so. Likewise, the victim does not have the right to have his views made known where the prosecution decides not to place such

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[328] Du Toit, De Jager, Paizes, Skeen, & Van der Merwe *Commentary on the Criminal Procedure Act* (1987) (Revision Service 30 2003) 9-41.
[329] 51 of 1977.
[330] S 60(11)(b).
[331] S 60(11)(a).
[332] S 60(2)(d).
[333] 51 of 1977.
[334] 51 of 1977.

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evidence before the court. But a court, acting inquisitorially, may call for the views of the victim.

Section 12 of the Namibian Combating of Rape Act[335] inserts section 60A in the Criminal Procedure Act.[336] In terms of this section certain rights are given to the complainant in a rape case.[337] Section 60A(1)(a) gives the complainant the right to attend any proceedings relating to the granting of bail or the imposition, amendment or supplementing of bail conditions. Section 60A(1)(b) makes provision for indirect participation at bail proceedings. In terms of this section the complainant has the right to request the prosecutor to present to the court any information or evidence relevant to the proceedings.

Section 60A(2) places an obligation on the person in charge of the facility where the accused is being held. In terms of this section such a person must inform the complainant of the place, date and time of the accused's first appearance in court as well as the complainant's right to be present at and to participate indirectly in the proceedings. In terms of section 60A(3) an obligation is placed on the defence to inform the complainant of an intention to apply for bail on a date and time of which the complainant has not yet been informed.

Where the complainant is present at bail proceedings and the proceedings are to be postponed, the court is required to inform him of the date and time to which the proceedings are to be postponed and to remind him of his right to be present at those proceedings.[338] Where the complainant is not present, the court is required to enquire into the question whether the complainant of informed of the proceedings. If the court is satisfied that it is likely that the complainant knows about the

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[335] 8 of 2000.
[336] 51 of 1977.
[337] The relevant section specifically states that a "complainant of rape" has the rights listed in the section. However, S 2(a) of the Act defines "rape" as the intentional committing or continuance of commission under coercive circumstances of a "sexual act" with another person. "Sexual act" is defined as "(a) the insertion (even to the slightest degree) of the penis of a person into the vagina or anus or mouth of another person or (b) the insertion of any other part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus or mouth of another person… or (c) cunnilingus or any other form of genital stimulation." Therefore, the rights listed in S 60A will accrue to the victim of any physical sexual offence.
[338] S 60A(6).

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proceedings, the proceedings can continue in the absence of the complainant.[339] Should the court not be satisfied that the complainant has been informed of the proceedings, the proceedings must be postponed until such a time as the complainant's presence can be obtained.[340] If, however, it is in the interests of justice for the matter to be dealt with immediately the court may order that the proceedings proceed in the absence of the complainant.[341] In deciding whether such an order will be in the interests of justice, the court must have due regard to the interests of the complainant. Section 60A(8) places a duty on the prosecutor to inform the complainant of the outcome of bail proceedings in cases where the complainant was not present at those proceedings. Section 13 of the Namibian Combating of Rape Act[342] inserts section 62(2) into the Criminal Procedure Act.[343] In terms of this section the court must, in the case of a charge of rape, add any bail conditions necessary to ensure that the accused does not make contact with the complainant.

Similar provisions have been included in schedule 1 of the Criminal Law (Sexual Offences) Amendment Bill.[344]

4 3 3 1 2 Plea and sentencing agreements

In terms of section 105A of the Criminal Procedure Act[345] a prosecutor may enter into plea and sentencing agreements with an accused. In terms of such an agreement an accused will agree to plead guilty either to the offence with which he is charged or to an offence recognised as a competent lesser verdict to the offence with which he was charged, in exchange for a just sentence,[346] or a suspended[347] or a postponed sentence.[348] When entering into plea and sentencing agreements with the accused, the prosecutor has a duty to afford the plaintiff (either in person or through his representative) the opportunity to make representations regarding

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[339] S 60A(7)(a).
[340] S 60A(7)(b).
[341] S 60A(7)(b).
[342] 8 of 2000.
[343] 51 of 1977.
[344] B50-2003.
[345] 51 of 1977. S 105A was inserted by the Criminal Procedure Second Amendment Act 62 of 2001.
[346] S 105A(1)(a)(ii)(*aa*).
[347] S 105A(1)(a)(ii)(*bb*) read with S 297(1)(b).
[348] S 105A(1)(a)(ii)(*cc*) read with S 297(1)(a).

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either the content of the agreement[349] or the inclusion of a provision in the agreement relating to compensation or rendering of benefits to the complainant in lieu of compensation for pecuniary loss.[350]

Section 105A(1)(b)(ii) provides that the prosecutor may enter into a plea and sentencing agreement after affording the complainant or his representative an opportunity of making representations. However, this is qualified by the words "where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant". Despite this, the complainant or his representatives would be entitled to make representations to the prosecutor even in the absence of a formal invitation to do so. These representations should not be ignored by the prosecutor.

Where the court is satisfied that the prosecution indeed consulted with the investigating officer and that the victim was afforded an opportunity to make representations, the court must ask the accused to plead to the charge and order that the contents of the plea and sentencing agreement be disclosed in court.[351]

It is obvious that victim participation in plea and sentencing agreements seeks to accommodate the personal interests of the victim. However, its value is not limited only to this. As Bekker[352] puts it:

> "The other interests advanced by giving the victim a right to participate in the plea bargain are society's interests. Society benefits from victim participation in plea bargains in two ways. The first is that according to the victim the right to participate will result in more information being provided to the decision-maker. The second benefit which accrues to society from victim participation in plea bargains is that it promotes the effective functioning of the criminal justice system. The theory is that if victims are not consulted regarding the plea bargain and so feel irrelevant and alienated they will not cooperate in reporting and prosecuting a crime. As a result, the system, which is dependent on them, functions less effectively. Therefore, making victims feel their contributions critical, regardless of its actual value, will motivate the victim to continue to report crime and cooperate in its investigation and prosecution."

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[349] S 105A(1)(b)(iii)(*aa*).
[350] S 105A(1)(b)(iii)(*aa*).
[351] S 150A(5) Criminal Procedure Act 51 of 1977.
[352] Bekker "Plea Bargaining in the United States of America and South Africa" 1996 *CILSA* 168 169

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The provisions of section 105A are therefore aimed at encouraging victim participation during plea and sentencing agreements.[353]

4 3 3 1 3 Trial

In the adversarial model of the criminal justice process such as the one found in South Africa, crimes are committed against the state[354] and therefore the obligation to prosecute crime rests with the state.[355] The victim of the crime is not a party to criminal proceedings and is therefore not entitled to active participation in the trial. However, the victim plays an important role in the prosecution of crime in that the victim testifies on behalf of the prosecution. In this respect the victim of a crime is, in principle, a competent and compellable witness for the prosecution.[356] Therefore, where a victim has been subpoenaed to testify, he must do so.[357]

4 3 3 1 4 Watching brief

It is generally accepted that a person who is not himself a party to proceedings before the court may appoint a legal representative to hold a so-called "watching brief". The task of the legal representative on a watching brief is merely to observe the proceedings and to report to his client. The legal representative on a watching brief is not entitled to address the court and is not entitled to call witnesses or cross-examine witnesses called by the parties to the proceedings. However, there is nothing that precludes the legal representative who is holding a watching brief to confer with the prosecution. Therefore, it is possible for the victim of a crime to appoint a legal representative on a watching brief and in such a way participate, albeit indirectly, in the proceedings before the court.

Since the victim will be liable for the costs of the legal representative, this does not provide a workable solution in all cases. Where the victim is affluent, he will be in

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[353] Directive no 11 of the set of directives issued by the National Director of Public Prosecutions on 14 March 2002 determines that "in the case of homicide, the relatives of the victim are to be consulted". Therefore, in the case of homicide, "victim" is read to include the relatives of the deceased victim. This directive therefore seeks to ensure that even in the absence of the "victim" there should be some sort of "victim participation".

[354] Fryer 1994 *SACJ* 77.

[355] See S 179(5) Constitution 108 of 1996 and S 20 National Prosecuting Authority Act 32 of 1998.

[356] S 192 Criminal Procedure Act 51 of 1977.

[357] S 187 Criminal Procedure Act 51 of 1977.

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a position to appoint such a legal representative. However, where the victim is less affluent or even indigent, this does not provide a solution.

4 3 3 1 5 Sentencing

In terms of section 274 of the Criminal Procedure Act[358] the court may receive any evidence that it deems necessary to inform itself as to the proper sentence to be passed.[359] Before sentencing, both the accused and the prosecution may address the court on the matter of sentencing.[360] In *S v Rabie*[361] the court set out the general principles of sentencing:

> "Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances."

It has long been held that in deciding on a sentence the court must consider not only the crime and the interest of the criminal, but also the interests of society.[362] Although nothing precludes the submission and acceptance of a victim impact statement during the sentencing phase of the trial, there are no measures that *require* such statements to be submitted. Therefore, it is possible for the prosecution (or the accused) to submit a victim impact statement during sentencing proceedings, although neither is compelled to do so.

The South African Law Commission has on a number of occasions had the opportunity to consider the desirability of admission of victim impact statements. For example in the Issue Paper on *Sentencing: Restorative Justice* [363] it was proposed that impact statements should be generally admissible during sentencing proceedings.[364] The proposal was confirmed in a later discussion paper on *Sentencing (A New Sentencing Framewok)*[365] where the commission found that it was necessary to include a provision in the Sentencing Framework Bill to formally recognise the use of victim impact statements during the sentencing phase. In the

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[358] 51 of 1977.
[359] S 274(a).
[360] S 274(b).
[361] 1975 4 SA 855 (A) 862G.
[362] See, for example, *S v Serumala* 1978 4 SA 811 (NC) 812A; *S v Zinn* 1969 2 SA 537 (A) 540G; *S v J* 1998 (2) SA 984 (A) 997A.
[363] SA Law Commission *Sentencing: Restorative Justice* Project 82 Issue Paper 7 (1997).
[364] § 4.7.
[365] SA Law Commission *Sentencing (A New Sentencing Framework)* Project 82 Discussion Paper 91 (2000).

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Sentencing Framework Bill the obligation is placed on the prosecution to consider the impact of the crime on the victim, while no such obligation is placed on the court.[366]

It is therefore clear that although there are no specific provisions that allow for the admission of victim impact statements during the sentencing phase, the prosecution may bring such a statement to the attention of the court, thereby increasing victim participation.

The prosecutor plays and important role in assisting the court during the sentencing phase.[367] In this respect Part 31 of Policy Document of the National Prosecuting Authority lays down certain guidelines for prosecutors. In terms of these guidelines the prosecutor must, in the case of serious crimes, lead evidence regarding the impact of the crime on the victim, as well as its impact on the family of the victim and the community. Where the charge concerned the sexual abuse of a child, the prosecutor is required to lead evidence about the negative impact of the sexual abuse on the child.

Therefore, although submission of victim impact statements is not required by existing legislation, prosecutors are required to lead evidence about the impact of the crime. One such way would be to submit a victim impact statement.

4 3 3 1 6 Parole

In terms of section 75(4) of the Correctional Services Act[368] a complainant or relative who is entitled in terms of the Criminal Procedure Act[369] to make representations to or to attend the meeting of the Correctional Supervision and Parole Board, must be notified in writing when and to whom representations must be made and when and where the meeting of the Board will take place.

As yet the Criminal Procedure Act[370] has not been amended to make provision for victim participation during parole proceedings. However, such an amendment is

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[366] For a discussion see Clark *et al* 2003 *Acta Criminologica* 43.
[367] Kriegler & Kruger *Hiemstra Strafprosesreg* 6th ed (2002) 690.
[368] 111 of 1998.
[369] 51 of 1977.
[370] 51 of 1977.

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envisaged by section 6 of the Judicial Matters Second Amendment Bill.[371] Section 6 envisages the insertion of section 299A in the Criminal Procedure Act.[372] Section 299A will read:

> **"Right of complainant to make representations in certain matters with regard to placement on parole, on day parole, or under correctional supervision**
>
> 299A. (1) When a court sentences a person to imprisonment for-
> *(a)* murder or any other offence which involves the intentional killing of a person;
> *(b)* rape;
> *(c)* robbery where the wielding of a fire-arm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is involved;
> *(d)* assault of a sexual nature;
> *(e)* kidnapping; or
> *(f)* any conspiracy, incitement or attempt to commit any offence contemplated in paragraphs *(a)* to *(e)*,
> it shall inform-
> (1) the complainant; or
> (ii) in the case of murder or any other offence contemplated in paragraph *(a)*, any immediate relative of the deceased,
> if he or she is present that he or she has a right, subject to the directives issued by the Commissioner of Correctional Services under subsection (4), to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board.
> (2) If the complainant or a relative intends to exercise the right contemplated in subsection (1) by making representations to or attending a meeting of the parole board, he or she has a duty-
> (i) to inform the Commissioner of Correctional Services thereof in writing;
> (ii) to provide the said Commissioner with his or her postal and physical address in writing; and
> (iii) to inform the said Commissioner in writing of any change of address.
> (3) The Commissioner of Correctional Services shall inform the parole board in question accordingly and that parole board shall inform the complainant or relative in writing when and to whom he or she may make representations or when and where a meeting will take place."

These provisions will go a long way to increasing victim participation. However, it is imperative that the view of the victim not be the overriding consideration in the decision on the granting of parole.

4 3 3 1 7 Private prosecution

In terms of section 7(1) of the Criminal Procedure Act[373] any person who "proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission" of an offence may institute and conduct a private prosecution of the alleged offender.

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[371] B 41B-2003.
[372] 51 of 1977.
[373] 51 of 1977.

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However, the private individual may only conduct such prosecution in cases where the National Director of Public Prosecutions has refused to prosecute the alleged offender and a certificate *nolle prosequi* has been provided.[374] The process used in such a case is the same as in the case of state prosecution.

In its 2002 *Report on Sexual Offences*[375] the South African Law Commission did not recommend any changes to the existing legal position. Therefore, victims' rights in this regard have not been enhanced, but neither have they been reduced.

Although the Criminal Procedure Act[376] provides for the institution of private prosecution in certain circumstances, it does not markedly improve the position of victims in general. The reason being that the private prosecutor is required to pay the costs of the process,[377] his own costs and expenses,[378] and could in limited instances, possibly be ordered to pay the costs of the accused should the latter be acquitted.[379] Therefore, this option is open only to the affluent members of society.

4 3 3 2 Protection

4 3 3 2 1 Section 153 Criminal Procedure Act

In terms of section 153 of the Criminal Procedure Act[380] the court is empowered to order that criminal proceedings or part thereof take place *in camera* under certain defined circumstances. For example, where the proceedings relate to a charge of an indecent act having been committed the court may, at the request of the complainant or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the

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[374] *Phillips v Botha* 1999 2 SA 555 (A).
[375] SA Law Commission *Sexual Offences*.
[376] 51 of 1977.
[377] S 14 Criminal Procedure Act 51 of 1977.
[378] S 15(1) Criminal Procedure Act 51 of 1977. Where the accused is convicted he may, in terms of s 15(2) be ordered to pay the costs of the private prosecutor. In certain circumstances the state can be ordered to pay the costs of the prosecution.
[379] S 16 Criminal Procedure Act 51 of 1977.
[380] 51 of 1977.

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proceedings.[381] The court may also direct that proceedings take place *in camera* where there is a likelihood that the witness may suffer harm if he testifies.[382]

Therefore, it can be said that the provisions of section 153 of the Criminal Procedure Act[383] are aimed at protecting witnesses from possible harm that may be caused by his involvement in the criminal justice system. Where the victim therefore testifies, the provisions of section 153 provide a certain degree of protection against the possibility of secondary victimisation.

4 3 3 2 2 Section 158 Criminal Procedure Act[384]

Similarly section 158 of the Criminal Procedure Act[385] empowers the court to order that a witness may testify via closed circuit television or similar electronic media. Section 158(3)(e), for example, states that such an order may be made to prevent the likelihood that prejudice or harm might result to the witness if he testifies or is present at criminal proceedings. Section 158 therefore provides another example of a provision which is aimed at protecting the victim-witness from secondary victimisation.

4 3 3 2 3 Section 170A Criminal Procedure Act[386]

In terms of section 170A of the Criminal Procedure Act[387] the court may order that a child under the age of 18 years testify through an intermediary if it appears that the child will suffer undue mental stress if he were to testify in the presence of the accused. The provisions relating to the appointment of an intermediary are unique in the sense that they allow for a deviation of the requirement that the witness must testify in the presence of the accused. Where an intermediary is appointed, the witness testifies in a separate room, but also through an intermediary who is empowered to convey the general purport of the question to the witness instead of its *ipsissima verba*.

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[381] S 153(3)(a).
[382] S 153(2).
[383] 51 of 1977.
[384] See the discussion on S 158 below 6 3.
[385] 51 of 1977.
[386] For a detailed discussion on S 170A see below 6 4.
[387] 51 of 1977.

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The provisions of section 170A clearly strive to protect the youthful witness from the possibility of (secondary) traumatisation.

4 3 3 2 4 Other

There are also other provisions in the Criminal Procedure Act[388] that are aimed at providing protection for the victim. For example, in terms of section 185 of the Act a witness may be detained if his life is in danger and in terms of section 153 of the Act, the court may direct that witness may testify *in camera* and that his identity not be revealed. In terms of section 179 of the Act a witness is entitled to be notified in writing that his presence is required in court to give evidence. Despite these provisions it is argued that these "rights" which are ostensibly accorded to the victim are accorded to the victim, not in his own right, but in his capacity as witness for the prosecution.[389] Be that as it may, the victim-witness is still afforded a measure of protection by these provisions.

4 4 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[390]

South Africa is a signatory to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[391] The declaration provides that victims should have access to justice and fair treatment. Victims should therefore be treated with compassion and their dignity protected. Further, they should be entitled to access to mechanisms of justice and prompt redress for the harms they have suffered.[392] Article 6 of the Declaration provides that the needs of victims should be facilitated by

> "(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
>
> (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

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[388] 51 of 1977.
[389] Kgosimore 2000 *Crime Research in South Africa*.
[390] Adopted by the General Assembly of the United Nations resolution 40/34 of 29 November 1985.
[391] Accepted by the General Assembly of the United Nations in December 1985.
[392] Article 4.

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(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims."

Despite the fact that South Africa is a signatory to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[393] the victim is not, by virtue of his status as the victim of crime, entitled to be present at the trial. The victim is not entitled to address the court,[394] unless the court is of the opinion that his evidence is needed in order to decide on a sentence.[395] In terms of international law, declarations are intended to serve as guidelines and do not have the force of law.[396] Therefore, despite the fact that South Africa is a signatory to the declaration, crime victims cannot rely on the declaration to lay claim to any specific rights.

4 5 Other jurisdictions

Victims' rights have received different measures of recognition in other jurisdictions. For example, in Canada the *Canadian Statement of Basic Principles of Justice for Victims of Crime* provides that the victims of crime should be treated with courtesy, compassion and with respect for their dignity and privacy and that they should suffer the minimum of necessary inconvenience from their involvement in the criminal justice system. It also provides that information should be made available to victims about their participation in criminal proceedings and scheduling, progress and the ultimate disposition of the proceedings. The views and concerns of victims should be ascertained and assistance should be provided throughout the criminal process. Where the personal interests of the victim are affected the views or concerns of the victim should be brought to the attention of the court. This must, however, be done in a manner consistent with the criminal law and procedure. Victims and their families should be protected from

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[393] Accepted by the General Assembly of the United Nations in December 1985.
[394] S 175 of the Criminal Procedure Act 51 of 1977 provides that the prosecutor and the defence may address the court in closing after all the evidence has been led.
[395] S 274(1) Criminal Procedure Act 51 of 1977.
[396] Dugard *International Law: A South African Perspective* 2nd ed (2000) 36.

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intimidation and retaliation and victims should be informed of the availability of health and social services.

In England, for example, the *Victims' Charter*[397] provides the victim with certain entitlements. Victim are entitled to have a complaint investigated and to receive information about the outcome of the investigation, to have the opportunity to explain the impact of the crime on them and to have their interests taken into account, to be treated with sensitivity, to be offered emotional and practical support and to be given information about the likelihood of the offender being released from prison.

In March 2001 the European Union adopted a *Council Framework Decision* on the standing of victims in criminal proceedings.[398] In terms of this framework victims of crime have certain entitlements. Article 2 provides that victims are entitled to be treated with due respect for their dignity. Article 3 places an obligation on member states to safeguard the possibility for victims to be heard during proceedings and to supply evidence. Article 4 requires member states to ensure that victims have access to information relevant for the protection of their interests. The framework lays down certain minimum requirements with regard to information to which the victim is entitled. The victim is entitled to, *inter alia*, information about the type of services or organisations to which they can turn for support, the type of support they can obtain, where and how they can report an offence, how and under which circumstances they can receive protection. Victims who have expressed the wish to be kept informed are entitled to information about the outcome of their complaint and the court's sentence. They are also entitled to receive information about "relevant factors enabling them... to know the conduct of the criminal proceedings". However, this right may be limited where the "proper handling of the case will be adversely affected". Where a sentenced offender is to be released, the relevant authority may notify the victim if necessary. Article 8 places a duty on member states to ensure a suitable level of protection for victims and their families, particularly as far as their privacy and safety are concerned. Member states are

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[397] Victims Charter (1997) http://www.homeoffice.gov.uk. Accessed 10 November 2005.
[398] European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings *Official Journal of the European Communities* L82/1 22.3.2001.

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required to ensure that contact between the victim and the offender is avoided, unless such contact is necessary for the proceedings. In this respect progressive measures must be taken to provide victims with separate waiting areas at courts. Article 8(4) provides that where necessary victims may be entitled to testify in a manner aimed at protecting vulnerable witnesses. This entitlement, however, only follows on a decision of the court.

Section 24 of Article 1 of the Michigan Constitution[399] provides for the rights of crime victims. In terms of this section victims of crime have the following rights: The right to be treated with fairness and respect for their dignity and privacy; the right to timely disposition of the case following the arrest of the accused; the right to be reasonably protected from the accused throughout the criminal justice process; the right to notification of court proceedings; the right to attend the trial and other court proceedings the accused has the right to attend; the right to confer with the prosecution; the right to make a statement to the court prior to sentencing; and the right to information about the conviction, sentence and release of the accused.

4 6 Recommendations of the South African Law Commission

In its 2002 report[400] the South African Law Commission recommended that certain objectives should be included in the Sexual Offences Bill. These objectives contain normative values that underpin the draft Bill and serve as indicators as to how, and in which context, the Bill should be interpreted and applied.[401] The objectives could be used in judicial review of the application of the Bill.[402] The following objectives were included in Schedule 1 of the Bill that was tabled before parliament in August 2003:[403]

> *"(a)* Complainants should not be discriminated against, either directly or indirectly, on the grounds of race, colour, ethnic or social origin, birth, status, sex, gender, sexual orientation, age and developmental level, disability, religion, conscience, belief, culture or language;

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[399] Michigan Constitution of 1963.
[400] SA Law Commission *Sexual Offences*.
[401] SA Law Commission *Sexual Offences* § 2.2.
[402] SA Law Commission *Sexual Offences* § 2.2.
[403] Criminal Law (Sexual Offences) Amendment Bill B50-2003.

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(b) complainants should be treated with dignity and respect;

(c) complainants should be ensured access to the mechanisms of justice;

(d) complainants should be informed of their rights and the procedures within the criminal justice system which affect them;

(e) complainants should have the right to express an opinion, to be informed of all decisions, and to have their opinion taken seriously in any matter affecting them;

(f) in addition to all due process and constitutional rights, complainants should have the right—

(i) to have present at all decisions affecting them a person or persons important to their lives;

(ii) to have matters explained to them in a clear, understandable manner appropriate to their age and in a language and manner which they understand;

(iii) to remain in the family, where appropriate, during the investigation and whilst awaiting a final resolution of the matter and, if a child is removed from the family, to have the placement periodically reviewed;

(iv) to have procedures dealt with expeditiously in timeframes appropriate to the complainant and the offence;

(g) complainants should have the right to confidentiality and privacy and to protection from publicity about the offence;

(h) the vulnerability of children should entitle them to speedy and special protection and provision of services by all role-players during all phases of the investigation, the court process and thereafter;

(i) since the family and the community are central to the well-being of a child, consideration should be given, in any decisions affecting a child, to—

(i) ensuring that, in addition to the child, his or her family, community and other significant role-players are consulted;

(ii) the extent to which decisions affecting the offender will affect the child, his or her family and community;

(iii) the particular relationship between the offender and the child;

(iv) keeping disruptive intervention into child, family and community life to a minimum in order to avoid secondary victimisation of the child;

(j) restorative and rehabilitative alternatives should be considered and applied unless the safety of the complainant and the interests of the community requires otherwise;

(k) a person who commits a sexual offence should be held accountable for his or her actions and should be encouraged to accept full responsibility for his or her behaviour;

(l) in determining appropriate sanctions for a person who has been found guilty of committing a sexual offence—

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(i) the sanctions applied should ensure the safety and security of the victim, the family of the victim and the community;

(ii) the sanctions should promote the recovery of the victim and the restoration of the family of the victim and the community;

(iii) where appropriate, offenders should make restitution which may include material, medical or therapeutic assistance to victims and their families or dependants;

(iv) the child sexual offender should receive special consideration in respect of sanctions and rehabilitation;

(v) the possibility of rehabilitating the sexual offender should be taken into account in considering the long-term goal of safety and security of victims, their families and communities;

(vi) the interests of the victim should be considered in any decision regarding sanctions;

(m) in order to avoid systemic secondary victimisation of the victim of sexual offences, binding inter-sectoral protocols following an inter-disciplinary approach should be followed;

(n) all professionals and role-players involved in the management of sexual offence cases should be properly and continuously trained after going through a proper selection and screening process; and

(o) cultural diversity should be taken into account in all matters pertaining to the victim, the offender and to their communities. The existence of cultural differences should be no justification for or licence to commit a sexual offence or to exclude a criminal justice process."

It is clear that victims' rights values underpin all these objectives.

4 7 Conclusion

Although it is important to recognise the fact that victims of crime have an interest in the prosecution of the alleged offender – at the very least an indirect interest – and it is important to provide protection for such victims, it is equally important to ensure that the integrity of the criminal justice process is not undermined by the protection, and maybe even the participation, of the victims of crime.

Further, although child victims of sexual abuse are particularly worthy of protection, it is important to bear in mind that it is imperative that the constitutionalfair trial rights of the accused are not infringed by measures aimed at the protection of child victims. The reason is two-fold: First, should the rights of the accused be infringed, the integrity of the criminal justice system could be

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undermined and, second, if the rights of the accused are infringed, a guilty verdict may be set aside and ultimately the interest of society as a whole will be damaged.

From the preceding discussion it is clear that the recognition of victims' rights is necessary and is receiving increasing attention both nationally and internationally. It is also clear that victims' rights which have received recognition nationally and internationally do not undermine the integrity of the criminal justice process. However, measures designed to further victims' rights may have such an influence.

In the following chapters rules of procedure and evidence applicable in the prosecution of alleged sexual offenders against children will be discussed. Proposed amendments to these rules will be evaluated against the backdrop of the values identified in Chapter 2 and the fair trial rights of the accused and victims' rights as discussed in Chapter 3 and 4 respectively. It will be shown that while some of the proposed amendments will not have any influence on the fair trial rights of the accused, others will.

It will be shown that while the recognition of victims' rights is essential, the integrity of the criminal justice process demands that the fair trial rights of the accused be upheld. Therefore, attempts to further the rights of victims of crime should not be of such a nature that due process rights are adversely affected.

In the following two chapters measures aimed at enhancing victim participation at trial level and measures aimed at providing protection for the victim of a sexual offence at the same level are be discussed and the possible effect of these provisions on the fair trial rights of the accused, considered.

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CHAPTER 5: VICTIM PARTICIPATION

5 1 Introduction

In Chapters 3 and 4 the enhancement of victims' rights and the fair trial rights of the accused were discussed. It was argued that while the enhancement of victims' rights is important, measures aimed at achieving this purpose may have a negative influence on the fair trial rights of the accused and that the integrity of the criminal justice system may be undermined by such measures. In the chapter relating to victims' rights it was shown that victims' rights can function on different levels and serve various purposes. In this chapter measures aimed at enhancing victim participation in the criminal justice process are discussed and the possible effect of such measures on the fair trial rights of the accused is considered. While some of the measures discussed in the chapter concern the active participation of the victim during the trial, for example, the competency test, others concern the participation of the victim in the criminal justice process in the sense that the version of the victim is placed before the court without the victim testifying himself. An example of this is the admission hearsay evidence. Others, still, concern the effective participation of the victim. In these cases it can be argued that while the victim is permitted to actively participate in the trial, his participation is rendered ineffective

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by certain rules of evidence, such as the various cautionary rules. Chapter 6 focuses on measures aimed at protection of victims at trial level.

5 2 Competency of children as witnesses

A witness is competent if he is lawfully allowed to give evidence.[404] Section 192 of the Criminal Procedure Act[405] contains the general rule with regard to competency of witness. It states:

> "Every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings"

Section 193 states that the court in which criminal proceedings are conducted shall decide any question concerning the competency or compellability of any witness to give evidence. This section therefore complements section 192 of the Act. With regard to the competency of a witness, section 206 provides that unless otherwise provided, the law as it was on 30 May 1961 is applicable. Since South African law does not prescribe a minimum age for a witness[406] and the Criminal Procedure Act[407] is silent on this question, the question of competency is left to regulation by the common law. In terms of the common law the main factor for deciding on the competency of a witness is whether, in the opinion of the court, the witness can understand what it means to tell the truth.[408] Should the child, in the opinion of the court, not have the intelligence to distinguish between the truth and a lie, the child will be considered an incompetent witness[409] and, as such, not permitted to testify.[410] Other factors that are taken into account when judging the competency of

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[404] Müller *The Child Witness in the Accusatorial System* (1997) Unpublished LLD 267.
[405] 51 of 1977.
[406] Oosthuizen & Verschoor "Jeudigheid by getuinislewering en verhoorbaarheid" 1996 *SACJ* 9 23.
[407] 51 of 1977.
[408] Schwikkard "The abused child: A few rules of evidence considered" 1996 *Acta Juridica* 148; Zeffertt, Paizes & Skeen *The South African Law of Evidence* (2003) 671; Zieff "The child victim as witness in sexual abuse cases – A comparative analysis of the law of evidence and procedure" 1991 *SACJ* 4 22. Kriegler & Kruger *Hiemstra: Suid-Afrikaanse Strafproses* 6th ed (2002) 490.
[409] Zeffertt *et al Evidence* 671. *S v L* 1973 1 SA 344 (C); *S v T* 1973 3 SA 794 (A).
[410] Le Roux & Engelbrecht "The Sexually Abused Child as a Witness" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 345.

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a witness include the ability to communicate effectively and sufficient intelligence.[411]

From the earliest times the competency test has been linked, although not necessarily expressly so, to the credibility of the witness.[412] Since it is commonly accepted that a child who is unable to articulate the distinction between the truth and a lie might not be a credible witness,[413] the evidence of these witnesses is excluded on the basis that it may lead to the wrong conviction of an accused.[414] However, Spencer and Flin[415] point out that truth and the duty to tell the truth are abstract notions, which a young child may not be able to understand or explain. This does not mean that the child cannot give a reliable account of the events.[416] Conversely, the mere fact that a witness is found to be a competent witness does not necessarily indicate that the witness will be a reliable witness.[417] Schwikkard[418] seems to support this point of view, arguing that despite the provisions of section 192 of the Criminal Procedure Act,[419] the threshold competency test, as applied to child witnesses, can be described as a presumption of incompetence which may operate to exclude testimony which may assist the court in adjudicating the matter.[420]

In its 2002 report[421] the South African Law Commission considered the practical application of the competency test and found that the pre-emptive exclusion of evidence based on the competency test ignores the ability of the presiding officer to make a decision about the weight and credibility which should be attached to the evidence.[422] Taking into account, further, the fact that neither convicted perjurers

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[411] Schwikkard & Van der Merwe *Principles of Evidence* 2nd ed (2002) 393.
[412] Perry & Wrightsman *The Child Witness: Legal Issues and Dilemmas* (1991) 37-40.
[413] Perry & Wrightsman *Child Witness* 37-40.
[414] Spencer & Flin *The Evidence of Children: The Law and the Psychology* 2nd ed (1993) 55.
[415] Spencer & Flin *Law and Psychology* 54.
[416] See also Spencer "Reforming the Law on Children's Evidence in England: The Pigot Committee and After" in Dent & Flin (eds) *Children as Witnesses* (1992) 114 and Reddi "The child witness in the criminal justice system: Suggestions for reform" 1993 *JJS* 128.
[417] Spencer & Flin *Law and Psychology* 57.
[418] Schwikkard 1996 *Acta Juridica* 148.
[419] 51 of 1977.
[420] Schwikkard 1996 *Acta Juridica* 148. See also SA Law Commission *Sexual Offences* Project 107 Report (2002) 99.
[421] SA Law Commission *Sexual Offences*.
[422] § 36.4.2.

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nor persons convicted of a crime involving an element of dishonesty have to pass a similar test the Commission recommended that a witness should not be disqualified from testifying due merely to his inability to define the difference between the truth and a lie.[423]

The Commission therefore recommended that section 164(1)[424] of the Criminal Procedure Act[425] be amended to reflect that all witnesses should be regarded as competent to testify if they can understand the questions put to them and can in return give answers that the court can understand.[426] It also recommended that a new section be inserted in the Sexual Offences Act which clearly establishes that any child in a sexual offence trial is competent to testify.[427] The Commission also recommended the inclusion of a new section (section 192A) in the Criminal Procedure Act,[428] which clearly establishes a presumption of competence of persons below the age of 18 years. In this respect, the Commission recommended that the new provision should read:

> "(1) All persons below the age of 18 years shall be presumed to be competent to testify in criminal proceedings and no such person shall be precluded from giving evidence unless he or she is found, at any stage of the proceedings, not to have the ability or the mental capacity, verbal or otherwise, to respond to questions in a way that is understandable to the court.
>
> (2) The evidence given by a person referred to in subsection (1) shall be admissible in criminal proceedings contemplated in that subsection, and the court shall attach such weight to such evidence as it deems fit.
>
> (3) The court shall note the reasons for a finding in terms of subsection (1) on the record of the proceedings."

However, the Commission pointed out that despite the new presumption of competence, the decision concerning the weight attached to the evidence of the child and the discretion to exclude evidence on the basis that it is irrelevant, are left up to the presiding officer.[429] These recommendations were included in the

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[423] SA Law Commission *Sexual Offences* § 4.3.1.
[424] A discussion on s 164 of the Criminal Procedure Act 51 of 1977 will be included in the section relating to the oath and unsworn testimony below § 5 3.
[425] 51 of 1977.
[426] § 36.4.7.
[427] § 36.4.8.
[428] 51 of 1977.
[429] § 36.4.5.

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Criminal Law (Sexual Offences) Amendment Bill[430] which was tabled before Parliament in August 2003.

It is clear that the Commission abolished the presumption of incompetence and replaced it with an express presumption of competence. Should the court, however, deem it necessary, it can inquire into the competency of the witness at any stage of the proceedings. Where the Court makes a finding of incompetence, the Court is required to note the reasons for the finding on the record of the proceedings. By using the phrase "at any stage during the proceedings" the Commission has indicated that the inquiry should not take place before the proceedings, thereby making it clear that the procedure to be followed is not the same as it is at present.

Further, the Commission makes it clear that where an inquiry into the competency of the witness is necessary, the test should be directed solely at the witness' ability to make himself understandable to the court and should no longer enquire into the capacity of the witness to understand and articulate the difference between the truth and a lie.

The question whether a child witness should pass a competency before being allowed to testify is not unique to South Africa. In Canada, for example, there is a presumption of incompetence with regard to children under the age of 14. Where a witness is below the age of 14 years, the presiding officer must determine not only whether the child understands the nature of the oath or affirmation, but also whether the child has the ability to communicate the evidence.[431] Should the child not have the ability to communicate the evidence, the child is not a competent witness.[432]

In other jurisdictions the traditional competency test which is used to decide the competency of the child witness prior to the commencement of his evidence has been abolished. For example, in England section 33A of the Criminal Justice Act[433] regulates the law regarding the competency of child witnesses in criminal cases.

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[430] B50-2003.
[431] S 16(1) Canada Evidence Act R.S. 1985, c. C-5.
[432] S 16(4).
[433] Criminal Justice Act 1988.

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Section 33A(2A) provides that "a child's evidence shall be received unless it appears to the court that the child is incapable of giving intelligent testimony". According to Tapper[434] it is clear that only if doubts about the competency of the witness arise after the child begins to testify, will the Court have to make a decision about the competency of the witness. Section 2A creates a statutory presumption of competency which the opposing party will have to rebut by showing that the child is incapable of giving intelligent testimony.[435] In *DPP v M*[436] it was found that

> "a child will be capable of giving intelligible testimony if he or she is able to understand questions and to answer them in a manner which is coherent and comprehensible"

Section 33A applies to children under the age of 14 years and therefore children above the age of 14 years are presumed to be competent to give evidence.[437]

In Scots law the Vulnerable Witnesses (Scotland) Act[438] abolished the competence test for witnesses in both criminal and civil proceedings. In terms of section 24(1) of the Act the evidence of a witness is not inadmissible solely because the witness does not understand (a) the nature of the duty of a witness to give truthful evidence, or (b) the difference between truth and lies. The act further stipulates that the court must therefore not, at any time before the witness gives evidence, take any step to establish whether the witness understands those matters.[439] The section does not refer only to child-witnesses.

The early development of the competency test in the United States of America followed that of the United Kingdom. During 1895 in *Wheeler v United States*[440] the United States Supreme Court found that there was no precise age which determines the question of competency and that competency depends on the person's capacity and intelligence and his appreciation of the distinction between truth and falsehood, as well as his appreciation of his duty to tell the truth.

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[434] Tapper *Cross & Tapper on Evidence* 9th ed (1999) 210.
[435] Dennis *The Law of Evidence* (1999) 422.
[436] [1997] 2 Cr App R 70, DC 75.
[437] Dennis *Evidence* 421.
[438] Vulnerable Witnesses (Scotland) Act 2004.
[439] S 24(2) Vulnerable Witnesses (Scotland) Act 2004.
[440] 159 U.S. 523 (1895).

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Although children were still presumed to be incompetent, a party could challenge the presumed incompetence of the child.[441] In *Rosen v United States*[442] the court changed the presumption from one of incompetence to one of competence.[443] There was a shift from responsibility on the judge to decide competency to a responsibility on the jury to decide credibility.[444]

Although each state now has its own rules with regard to the competency of child witnesses, four main categories can be distinguished.[445] Firstly, there are those states which follow Rule 601 of the Federal Rules of Evidence. In terms of Rule 601 of the Federal Rules of Evidence everyone is a competent witness except as otherwise provided in the rules. In theory this should make the traditional competency investigation unnecessary, but in practice trial judges continue to asses and rule on the competency of children.[446] Several states claim to follow the Rule 601 approach, but add one or more of the traditional competence qualifications.[447] For example, the Massachusetts statute states that"[a]ny person of sufficient understanding... may testify",[448] while the Kentucky statute provides that "every person is competent ... unless he be found by the court incapable of understanding the facts concerning which his testimony is offered".[449]

The second category includes those states which presume incapacity to testify in children below a certain age. These children are presumptively incompetent to testify unless the trial judge determines otherwise through questioning. The ages set by the states range from 10 years to 14 years. The mere fact that a presumption of incompetence exists does not mean that children below these ages cannot testify. In fact, in the vast majority of cases children above the age of five years where found to be competent after having been questioned by the court.[450]

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[441] Perry & Wrightsman *Child Witness* 40.
[442] 245 U.S. 467 (1918).
[443] Perry & Wrightsman *Child Witness* 40.
[444] Perry & Wrightsman *Child Witness* 40-41.
[445] There may be overlapping between the different categories.
[446] Perry & Wrightsman *Child Witness* 40-46.
[447] Perry & Wrightsman *Child Witness* 40-46.
[448] Mass. Gen. Laws Ann. Ch. 233, § 20.
[449] Ky. Rev. Stat. Ann. § 421.200.
[450] See for example *People v Rowell* 463 N.Y.S.2d 426 (1983); *Victor v Smilanich* 54 Colo. 479, 131 P.392 (1913); *Berger v People* 122 Colo. 367, 224 P.2d 288 (1950).

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In the third category are states which presume that any person will be competent if he understands the concept of the oath or the duty to tell the truth.[451] The child need not be able to define the term "oath" in order to judged competent.[452]

The last category includes those states which provide that all children are competent witnesses in sexual offence cases. For example, the Utah statute provides that "[a] child victim of sexual abuse under the age of ten is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding".[453]

The recommendations of the South African Law Commission therefore correspond with the position as it is in the United Kingdom and Scotland. Although the recommendations are similar to Rule 601 of the Federal Rules of Evidence of the United States of America, they differ to the extent that the Law Commission recommended that one of the traditional components of the competency test be added to section 192A of the Criminal Procedure Act, namely that the witness must have the ability to make himself understood to the Court.

Evaluation

It must be borne in mind that sexual abuse of children is a very real problem in South Africa, with the result that it is imperative that those guilty of such crimes be tried and convicted. However, since accused people are not necessarily guilty, they need to be protected against wrong convictions. In this respect the constitutionally guaranteed right to a fair trial requires that a conviction follow only where the State has proved the guilt of an accused based on reliable evidence and beyond reasonable doubt.

As mentioned in Chapter Two, the Due Process Model of criminal justice places the emphasis on legal guilt, thereby accepting a reduction in the overall effectiveness of the criminal justice process. The basis for the traditional competency test can, therefore, be found in the Due Process value that, in the

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[451] Perry & Wrightsman *Child Witness* 40-43.
[452] Perry & Wrightsman *Child Witness* 43-44.
[453] Utah Code Ann. § 76-5-410.

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interest of justice, any evidence that creates the risk of a wrong conviction must be excluded. This underscores the presumption of innocence that requires the State to prove the elements of a crime beyond reasonable doubt. The insistence on a prior indication of reliability can have a particularly negative impact on the effective prosecution of alleged sexual offenders against children. As a result of the nature of the offences involved, the child-victim is often the only witness available to the prosecution.[454] If the court finds that such a child-witness is unable to distinguish or articulate the distinction between the truth and a lie, the court is compelled to exclude the evidence, thereby depriving the court of all available evidence.

In contrast, the Punitive Victims' rights Model places the emphasis on factual guilt. The model therefore requires that all evidence that is necessary to enhance the administration of justice and the conviction of the factually guilty be placed before the court. However, in the light of the values that underlie this model, the reliability of evidence cannot be pre-judged. The evidence must therefore be allowed initially and its credibility and veracity judged after it has been heard.

The recommendations of the South African Law Commission reflect Victims' rights values in that all evidence that is necessary to promote the administration of justice and the conviction of the factually guilty is placed before the court. Victim participation will therefore be enhanced. The proposed amendments will make it possible for evidence, which would traditionally have been excluded, to be placed before the Court. This will increase the potential for successful prosecutions and will act as a buttress for the child's constitutional right to security and freedom from abuse, as described in section 28(1)(d) of the Constitution.[455]

It could be argued that the presumption of competence may lead to the admission of unreliable testimony and that the constitutional presumption of innocence could be infringed thereby; however, provided that the accused is afforded the opportunity of challenging the evidence of the witness, the abolition of the competence test should not infringe on the accused's right to a fair trial, as defined

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[454] Spencer & Flin *Law and Psychology* 54-55; Reddi 1993 *JJS* 128. See also *S v T* 1973 3 SA 749 (A). See also SA Law Commission *Sexual Offences* 99 and Spencer in Dent & Flin (eds) *Children as Witnesses* 114.

[455] Schwikkard 1996 *Acta Juridica* 151.

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in section 35(3) of the Constitution.[456] Bearing in mind also that the weight attached to the evidence of the child is left to the discretion of the presiding officer, there should be no grounds for arguing that the inclusion of the evidence of the child-witness infringes the accused's right to a fair trial.

Therefore, the recommendations of the South African Law Commission enhance Victims' Rights by providing for increased victim participation at trial level. The conflict between the Due Process claims of the accused, on the one hand, and Victims' rights claims, on the other, is resolved by the discretion of the presiding officer to determine the weight to be attached to the evidence. Since the Law Commission's recommendations do not affect this discretion, the initial admission of the evidence will not detract from the rights of the accused.

5 3 The oath and unsworn testimony

Once competency has been determined, the next enquiry is whether the child has sufficient intelligence to understand the nature and import of the oath.[457]

At common law it was required that a witness must testify under oath.[458] This requirement is restated (with certain exceptions) in section 162 of the Criminal Procedure Act.[459] Section 162(1) contains a peremptory provision that no one may be questioned in criminal proceedings unless under oath.[460] Two exceptions are allowed: the witness may testify without having taken the oath where the affirmation as provided for in section 163[461] has been taken or where the witness is permitted to give unsworn testimony in terms of section 164. The oath or

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[456] Schwikkard 1996 *Acta Juridica* 151.
[457] Le Roux & Engelbrecht in Davel *Child Law* 346.
[458] SA Law Commission *Sexual Offences* 98.
[459] 51 of 1977.
[460] *S v B* 2003 1 SA 552 (A) § [11] 561H and § [14] 562C. See also *S v Ndlela* 1984 1 SA 223 (N) 225G-H; *S v Mashava* 1994 1 SACR 224 (T) 228*f-g* and *j*; *S v N* 1996 2 SACR 225 (C) 227*c*.
[461] S 163 of the Criminal Procedure Act 51 of 1977 makes it possible for an affirmation to be given in lieu of the oath in cases where the witness objects to taking the oath or to taking it in the prescribed form as a result of the witness not considering the oath binding on his conscience or where the witness either has no religious belief or feels that the taking of the oath is contrary to his religious belief. The affirmation has the same legal force as if the person making it had taken the oath. It is the responsibility of the witness to inform the Court about any objections he or she may have with regard to the oath. If the witness does not object to the taking of the oath, it is accepted that he or she considers it to be binding on his or her conscience. The Court may not *mero moto* decide to use the s 163 affirmation instead of the oath. It is furthermore unnecessary for the Court to ask the witness whether he or she considers the oath to be binding on him or herself.

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affirmation may only be administered if the witness understands the distinction between the truth and a lie.[462] If, after an investigation, it is apparent that the witness does not understand the difference between the truth and a lie, the witness is not a competent witness and admission of the witness' testimony after a warning to tell the truth amounts to an inconsistency.[463] If a witness should not understand the nature and import of the oath or the affirmation as a result of ignorance arising from youth, defective education or another cause, the person may be permitted to give evidence in criminal proceedings without taking the oath or making an affirmation.[464] This may only be done once the person has been admonished by the presiding officer to speak the truth, the whole truth and nothing but the truth.[465]

The requirements relating to the oath or affirmation also apply to child-witnesses.[466] Since there is no set age at which a child is deemed to understand the nature and import of the oath or affirmation, the court will have to decide the issue, based on the intelligence that the child displays in the answering of questions posed to the child by the presiding officer or legal representatives.[467]

Although in theory the inquiry into the ability of the witness to understand the nature and import of the oath or affirmation should be made after the competency inquiry, the two inquiries are often made together. Courts have held that the fact that section 164 requires a finding that the witness does not understand the nature and import of the oath or affirmation, implies that an investigation be held beforehand.[468] If no express investigation has been held, the evidence is inadmissible.[469] For example in in *S v Kondile*[470] the court found that where a court

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[462] Kriegler & Kruger *Hiemstra* 423. *S v Mashava* 1994 1 SACR 224 (T) 228*c-d*; *S v Stefaans* 1999 1 SACR 182 (C) 185*j*-186*a*; *S v Vumazonke* 2000 1 SACR 619 (C) §§ [6] – [8] 621*c* – 622*d*; *S v Pienaar* 2001 1 SACR 391 (C). *S v N* 1996 2 SACR 225 (C) 229*e-g*.

[463] *S v V* 1998 2 SACR 651 (C) 652*g-j*.

[464] In terms of s 164 Criminal Procedure Act 51 of 1977.

[465] S 164 Criminal Procedure Act 51 of 1977. S 164(1) "Any person who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth, the whole truth and nothing but the truth"

[466] *S v Seymour* 1998 1 SACR 66 (N) 71*b-c*.

[467] Kriegler & Kruger *Hiemstra* 425.

[468] *S v Mashava* 1994 1 SACR 224 (T) 228*g-h*; *S v Vumazonke* 2000 1 SACR 619 (C) 622*f-g*.

[469] *S v Mashava* 1994 1 SACR 224 (T) 228*g-h*; *S v Vumazonke* 2000 1 SACR 619 (C) 622*f-g*.

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concludes that a witness does not understand the nature and import of the oath or admonition due to ignorance arising from youth, defective education or some other cause, it is necessary to establish whether or not the witness understands what it means to speak the truth, is able to distinguish between the truth and falsehood and is aware that it is morally wrong, in the sense of it being wicked or sinful, to lie.[471] In this case the magistrate did not question a ten-year-old as to whether she understood the consequences of not telling the truth. On appeal the court found that this questioning formed part of the enquiry to be conducted into determining whether the child was a competent witness and that in the absence of that being established, it would be improper to hold that the child was competent to testify.[472]

However, in *S v B*,[473] the Supreme Court of Appeal expressed the view that the construction placed on section 164 by other courts is too narrow. In this case, a man was accused of repeatedly raping his thirteen-year-old daughter. At the trial in the regional court, the child testified through an intermediary.[474] The child was asked whether she understood what it meant to swear to tell the truth and what it meant if someone said that they would tell the truth.[475] After answering in the affirmative, she was admonished to tell the truth and her evidence was admitted. The accused was convicted of rape and the case was referred to a High Court for sentencing in terms of section 52(1)(b) of the Criminal Law Amendment Act.[476] However, since she had not taken the oath, the Court found that the evidence of the child was inadmissible. The High Court found that an enquiry had not been held with regard to the child's ability to understand the nature and import of the oath and that the warning in terms of section 164 accordingly amounted to an irregularity.[477] Having made this finding, the Court found that the remaining evidence was insufficient to convict the accused and it set aside the conviction. The court reserved two questions of law. The relevant question was whether the absence of an investigation and consequent finding by a trial court that a witness

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[470] 2003 2 SACR 221 (Ck).
[471] § [6] 223*g* - *h*.
[472] § [8] 224*c* - *e*.
[473] 2003 1 SA 552 (A) § [15] 562F.
[474] Appointed in terms of s 170A of the Criminal Procedure Act 51 of 1977.
[475] § [2] 558D.
[476] 105 of 1997.
[477] § [15] 562F *ff*.

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did not understand the nature and import of the oath due to ignorance arising from youth or other cause, necessarily had the effect that the evidence of the witness could not be regarded as evidence.[478]

In response to this question, the Supreme Court of Appeal, per Streicher JA, found that a construction that section 164 requires an investigation that precedes a finding with regard to the ability of the witness to understand the nature and import of the oath,[479] was too narrow.[480] The Court decided that the mere youthfulness of a child could justify a finding in terms of section 164. Nothing more was required than that the presiding officer form an opinion that the witness did not understand the nature and import of the oath as a result of ignorance arising from youth, defective education or other cause.[481] However, on the facts, the Court concluded that since the possibility that the child could understand the nature and import of the oath or affirmation existed, the evidence should have been given under oath. Her evidence was accordingly inadmissible.[482]

Whether the evidence of a child is given under oath or affirmation or whether it is given subsequent to a warning in terms of section 164, the Court has to make a decision as to the weight to be attached to the evidence based on the intelligence and honesty of the child.[483]

It is clear that an error in the inquiry by the presiding officer and a subsequent decision on whether a child should testify under oath or whether he should merely be admonished to speak the truth, often results in an appeal being upheld. It is for this reason, *inter alia*, that the South African Law Commission investigated the need for reform in this regard.

The Commission accepted that the emphasis placed on making the witness aware of the importance of telling the truth stems from an inherent fear that the witness may fabricate events or evidence. In terms of the traditional test, evidence of

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[478] § [4] 559B. The second question of law is not important for purposes of this thesis.
[479] As was found by the court *a quo*.
[480] § [15] 562F *ff*.
[481] § [15] 562F *ff*. See also *S v Chalale* 2004 2 SACR 264 (W) § [3] 266*a-c*.
[482] See also *S v Chalale* 2004 2 SACR 264 (W) § [3] 266*a-c*.
[483] *R v Manda* 1951 3 SA 158 (A) 163A. See a discussion on the credibility of the evidence of children *infra*. Kriegler & Kruger *Hiemstra* 425.

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children who cannot articulate the difference between the truth and a lie is, however, excluded without the presiding officer assessing whether or not the child can understandably relay the events that are at issue in the proceedings.[484] Based on recent research the Commission concluded that the memory of children is as accurate as that of adults, that children do not lie more than adults and that they can discern fact from fantasy, particularly in the context of acts of abuse.[485]

Therefore, the Commission, in its 2002 Discussion Paper,[486] expressed the view that the exclusion of evidence based on the requirements set in sections 162, 163 and 164 of the Criminal Procedure Act[487] not being met "seems to run contrary to the goal of bringing all relevant evidence before the court".[488] Accordingly, the Commission recommended that section 164 of the Criminal Procedure Act[489] should be amended to reflect that all witnesses should be regarded as competent to testify if they can understand the questions put to them and can, in turn, give understandable answers to the questions.[490] In cases where there is doubt as to whether the child is capable of communicating effectively, the presiding officer should call for an expert assessment of the witness and in such cases, the witness must give unsworn testimony[491] and should merely be admonished to speak the truth.[492]

Despite this recommendation, the presiding officer may still exclude unsatisfactory evidence on the basis that the evidence is irrelevant.[493] The presiding officer also retains the discretion to decide what weight should be attached to evidence which is admitted after an admonition to speak the truth.[494]

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[484] § 36.4.1.
[485] § 36.4.3.
[486] SA Law Commission *Sexual Offences* Discussion Paper 102 § 36.4.5.
[487] 51 of 1977.
[488] § 36.4.5.
[489] 51 of 1977.
[490] § 36.4.7.
[491] § 36.4.5.
[492] § 36.4.5.
[493] § 36.4.5.
[494] § 36.4.5.

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Sections 162 and 163 of the Criminal Procedure Act[495] have been left unchanged by the proposals of the South African Law Commission. Therefore, unless the new requirements of section 164 of the Criminal Procedure Act[496] are met, any *viva voce* evidence placed before the court, must therefore either be given under oath or affirmed by the witness.

Since the Law Commission recommended the deletion of the provision relating to the reasons underlying the decision to admonish the witness instead of requiring the witness to take the oath or make the affirmation, the operation of section 164 will no longer be limited to cases where the witness cannot, as a result of youth, defective education or other cause, understand the nature and import of the oath. The proposed amendments will, therefore, make it unnecessary for the court to enquire into the witness' ability to understand the nature and import of the oath or the affirmation. Accordingly, the possibility of a challenge against the admission of the evidence on this basis will be minimised.

The only requirement set for application of the amended section 164 is that the witness must be able to understand questions put to him or her and to respond to such questions in a manner which is intelligible. This requirement is substantially lower than the one set in the existing wording of section 164 of the Criminal Procedure Act. Although the Commission recommended that the admonition to speak the truth be retained, it recommended the deletion of the words "the whole truth and nothing but the truth" from section 164.

Section 164 should, according to this recommendation, read as follows:

> "(1) Any person may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person is able to understand questions put to him or her and to respond to such questions in a manner which is intelligible; and provided further that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth."

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[495] 51 of 1977.
[496] 51 of 1977.

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The recommendation of the Law Commission has been included in the Criminal Law (Sexual Offences) Amendment Bill[497] tabled before Parliament.

In most jurisdictions the requirement that the witness take the oath has been relaxed so some extent or another, especially in so far as child witnesses are concerned. In England, for example, the general common law rule was that the testimony of a witness to be examined *viva voce* in a criminal trial was not admissible unless he had previously been sworn to speak the truth.[498] In terms of section 1 of the Oaths Act[499] a person taking the oath is required to place their hand on the Bible and say "I swear by Almighty God that..." In terms of section 28 of the Children and Young Persons Act[500] a child is not required to use the word "swear" but may say that "I promise by Almighty God". Section 5 of the Oaths Act[501] makes it possible for a witness to make an affirmation where he or she objects to taking the oath.

Section 33A of the Criminal Justice Act[502] makes it possible for a child witness to give unsworn testimony. In terms of this section the unsworn testimony of a child under the age of fourteen years[503] must be received unless it appears to the court that the child is incapable of giving intelligent evidence. Section 33A dispenses with the need for an inquiry into whether the child understands the nature of the oath. Section 52(s) of the Criminal Justice Act[504] repealed section 38(1) of the Children and Young Persons Act,[505] thereby making it unnecessary for a presiding officer to satisfy him or herself that the child has sufficient intelligence to give evidence and understands the duty to speak the truth before he or she can allow the child to testify.

It must be pointed out that in England the Court has no discretion to reject the testimony of the child, unless it appears to the Court that the child is incapable of

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[497] B50-2003.
[498] Richardson (ed) *Archbold: Criminal Pleading, Evidence & Practice* (2002) § 8-26.
[499] Oaths Act 1978.
[500] Children and Young Persons Act 1963.
[501] Oaths Act 1978.
[502] Criminal Justice Act 1988.
[503] S 33A(3).
[504] Criminal Justice Act 1991.
[505] Children and Young Persons Act 1933.

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giving intelligent testimony.[506] The Court must determine the ability of the child to give intelligent evidence by questioning the child or by watching a videotaped interview with the child.[507]

In *R v Hampshire*[508] the Court found that, although it is not a legal requirement, it may be appropriate for the presiding officer to remind the child, in the presence of the defendant and the jury, of the importance of telling the truth.

With regard to the testimony of children above the age of fourteen years, section 55 of the Youth and Criminal Evidence Act[509] provides that when deciding whether a witness in criminal proceedings may be sworn for purposes of giving evidence on oath, the witness may not be sworn unless he or she has attained the age of 14 years[510] and has a sufficient appreciation of the solemnity of the occasion and of the particular responsibility that is involved in taking an oath.[511] If the witness is able to understand the questions put to him or her and give understandable answers to those questions, he or she will be presumed to have sufficient appreciation of the above mentioned matters.[512]

Section 56 of the Youth Justice and Criminal Evidence Act[513] makes it possible for a competent witness who is not permitted to be sworn for purposes of giving evidence on oath, to give unsworn evidence. In such cases section 56(5) provides that "no conviction, verdict or finding in those proceedings shall be taken unsafe for purposes of appeal by reason only that it appears that the witness should have given his or her evidence on oath."

In the United States of America various different provisions with regard to the oath apply in different states. Rule 603 of the Federal Rules of Evidence states that

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[506] Richardson (ed) *Archbold* § 8-34 1036.
[507] Richardson (ed) *Archbold* § 8-34 1036. See also Müller *Child Witness* 76 and the authority cited there.
[508] [1995] 2 Cr. App. R. 319.
[509] Youth and Criminal Evidence Act 1999.
[510] S 55(2)(a).
[511] S 55(2)(b).
[512] S 55(3) read with s 55(7).
[513] Youth and Criminal Evidence Act 1999.

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> "[b]efore testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with a duty to do so"

At common law it was accepted that there was a certain age below which the capacity to take the oath was non-existent. This notion has since been rejected and at present there is no specific age below which the capacity to take the oath will always be wanting.[514] What needs to be determined is whether the child has the capacity to understand the distinction between the truth and lies and whether the child understands that he will be punished if he lies.[515] If the child can understand this, the child may take the oath or make the affirmation. The administering of the oath does not need to take on a particular form and a promise to tell the "absolute truth" may be sufficient.[516] Should the child not be able to understand the concept of the oath, the Court may instruct the child on the meaning of the oath.[517]

There are, however, a number of states which allow a child to testify without taking the oath or making an affirmation.[518] Examples of these are Florida, where the Court has the discretion to allow a child to testify without taking the oath if the Court is satisfied that the child understands the obligation to speak the truth.[519] In New York a child under the age of twelve may give unsworn evidence if the court is satisfied that the child has sufficient intelligence and capacity. The rider is that the accused may not be convicted on uncorroborated, unsworn testimony.[520]

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[514] Chadbourn *Wigmore on Evidence* (1976) Volume 6 § 1821.
[515] Chadbourn *Wigmore* § 1821. See also Müller *Child Witness* 182 and Perry & Wrightsman *Child Witness* 43-45.
[516] See *Burkett v State* 439 SO.2D 737 (Ala. Crim. App. 1983).
[517] Chadbourn *Wigmore* § 1821.
[518] Müller *Child Witness* 182.
[519] Müller *Child Witness* 182.
[520] S 60.20 (3) New York State Consolidated Laws: Criminal Procedure. S 60.20 reads:

> "1. Any person may be a witness in a criminal proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence.
> 2. Every witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath. If in either case the court is not so satisfied, the witness may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof. A witness understands the nature of an oath if he or she appreciates the difference between truth

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In terms of section 13 of the Canada Evidence Act[521] a judge may administer an oath to every witness who is called to give evidence before that court. Section 14 makes provision for the making of an affirmation instead of taking an oath. The making of the affirmation has the same effect as the taking of an oath.[522]

Section 16 of the Canada Evidence Act[523] states that where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court must, before permitting the person to give evidence, conduct an inquiry to determine (*a*) whether the person understands the nature of an oath or a solemn affirmation; and (*b*) whether the person is able to communicate the evidence.[524] If the person understands the nature of an oath or a solemn affirmation and is able to communicate the evidence, that person must testify under oath or solemn affirmation.[525] Should the witness not understand the nature of an oath or a solemn affirmation but have the ability to communicate the evidence, the witness may testify on promising to tell the truth.[526] A person who does not understand the nature of an oath or a solemn affirmation or who is unable to communicate the evidence may not testify.[527]

With regard to a witness above the age of 14 years, there exists a presumption that the witness has the necessary capacity to understand the nature of the oath or affirmation and that the witness has the capacity to communicate the evidence. The party who wishes to rebut this presumption bears the burden of proof.[528]

In Scotland the rule that all witnesses had to give evidence under oath and that girls under the age of 12 and boys under the age of 14[529] were forbidded to take the oath and therefore disqualified from testifying, was abolished by the Evidence Act

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and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished.

3. A defendant may not be convicted of an offense solely upon unsworn evidence given pursuant to subdivision two."

[521] R.S. 1985, c. C-5.
[522] S 14(2).
[523] R.S. 1985, c. C-5.
[524] S 16(1).
[525] S 16(2).
[526] S 16(3).
[527] S 16(4).
[528] S 16(5).
[529] So-called "pupils".

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(Scotland)[530] in 1840. Where the witness has the ability to understand the nature of the oath, the witness is required to take the oath, while in cases where the witness lacks this ability, the taking of the oath is merely dispensed with altogether.[531]

Evaluation

The reasons for the taking of the oath are to be found in the need to convince the witness to tell the truth because "God would damn his soul forever if he lied".[532] Where this purpose cannot be achieved as a result of some or other pre-disposition of the witness, the legislature prescribes an affirmation or admonishment to tell the truth. Since the basis for sections 162, 163 and 164 of the Criminal Procedure Act[533] is to be found in the need to have only truthful testimony placed before the court, thereby ensuring that neither a wrong conviction nor a wrong acquittal is made, it reflects Due Process values.

As mentioned before, Punitive Victims' rights values place the emphasis on factual rather than legal guilt, in terms of which it would be unacceptable for otherwise potentially reliable evidence to be excluded merely as a result of the wrong procedure being used. Viewed from this perspective, the problem with the oath does not lie in the existence of the provisions relating to the oath, affirmation or admonition, but rather in their practical application. As is apparent from *S v B*[534] the danger exists that the evidence of a witness can be excluded on appeal on the basis that the presiding officer in the trial court should have seen to it that the witness take the oath or make the affirmation instead of issuing a warning to the witness.[535] The converse is also true: where the presiding officer allows the witness to take the oath without investigating whether the witness understands the nature and import of the oath, the evidence might also be excluded on appeal.[536] Although

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[530] Evidence Act (Scotland) 1840.
[531] Spencer & Flin *Law and Psychology* 67.
[532] Spencer & Flin *Law and Psychology* 48.
[533] 51 of 1977.
[534] 2003 1 SA 552 (A).
[535] See also *S v Mashava* 1994 1 SACR 224 (T) 228*j*-229*a*; *S v Vumazonke* 2000 1 SACR 619 (C) 625*h-j*; *S v Pienaar* 2001 1 SACR 391 (C) 396*c*; *S v Stefaans* 1999 1 SACR 182 (C) 186*b-c*.
[536] See *S v N* 1996 2 SACR 225 (C) 230*c-g*. In that case the witness took the oath after the magistrate had investigated the competency of the witness. The magistrate did not, however, enquire into the ability of the witness to understand the nature and import of the oath before she

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the court in *S v Mashava*[537] found that the admission of such evidence is not an irregularity in the true sense of the word[538] for purposes of section 309 of the Criminal Procedure Act,[539] the court's decision to disregard the victim's evidence in this case[540] resulted in the exclusion of the only evidence linking the accused to the crime.[541] It also added to the lack of certainty created by previous findings. Kriegler & Kruger are of the opinion, for example, that in cases where there is doubt a warning in terms of section 164 is to be preferred, since this would most probably have a deeper impact on the child.[542]

The court in *S v Mashava*[543] was correct in finding that an error by the presiding officer in his decision regarding the desirability of applying section 164 does not *per se* constitute an irregularity which results in a failure of justice. Such an error will also not necessarily infringe the fair trial rights of the accused, an infringement of which will depend on the circumstances of each case. Therefore, the mere fact that such an error was made will not necessarily be fatal. What needs to be established is whether the inconsistency resulted in an infringement of the fair trial rights of the accused.

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took the oath, although the magistrate did establish that the witness was a regular churchgoer. See also *S v Seymour* 1998 1 SACR 66 (N) 71*d*.

[537] 1994 1 SACR 224 (T).

[538] 227*j* – 228*a*.

[539] S 309 of the Criminal Procedure Act provides for appeal from a lower court to a higher court. The appeal can be based on a point of law or on the factual finding of the presiding officer. S 309(3) provides that "[t]he provincial or local division concerned shall thereupon have the powers referred to in s 304 (2), and, unless the appeal is based solely upon a question of law, the provincial or local division shall, in addition to such powers, have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence: Provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to such division that a failure of justice has in fact resulted from such irregularity or defect.

[540] 228*j*. The same approach was followed in *S v Vumazonke* 2000 1 SACR 619 (C), *S v Pienaar* 2001 1 SACR 391 (C), *S v Seymour* 1998 1 SACR 66 (N), *S v N* 1996 2 SACR 225 (C) and *S v B* 2003 1 SA 552 (A)

[541] See *S v Mashava* 1994 1 SACR 224 (T) 228*j*-229*a* where the conviction of the accused was set aside on the basis that the evidence of the witness is inadmissible and that there is no other evidence linking the accused to the crime. See also *S v Vumazonke* 2000 1 SACR 619 (C) 625*h-j*.

[542] Kriegler & Kruger *Hiemstra* 425.

[543] 1994 1 SACR 224 (T).

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The proposed amendments of the South African Law Commission largely resemble the position in England.[544] In Scotland, USA and Canada, the presiding officer is required to inquire into the witness's ability to understand the nature of the oath. Where the witness can understand the nature of the oath, these jurisdictions require that the child take the oath or make the affirmation.

It is clear that the amendments proposed by the South African Law Commission are based on Victims' rights values which prioritise conviction of the factually guilty. The retention of the admonition in the proposed section 164, however, still reflects the suspicion with which evidence is viewed and therefore still reflects Due Process values.

The practical effect of the new provision will be that where the presiding officer merely admonishes the witness to speak the truth, the fact that the witness did in fact have the ability to understand the nature and import of the oath or affirmation will not result in the evidence of the witness being excluded on appeal. However, where the presiding officer does allow the witness to take the oath or make the affirmation, testimony given by the witness may still be excluded on appeal should it appear that the witness did not understand the nature and import of the oath. Therefore, despite the fact that the presiding officer is no longer required to enquire into the ability of the witness to understand the nature and import of the oath, it is important that he satisfy himself that the witness does in fact understand the nature and import of the oath or affirmation before resorting to sections 162 or 163.

Despite the shift from Due Process to Victims' rights values, there is, in this context, no real opposition between Due Process claims and Victims' Rights values in this context. Any opposition which might have existed is eliminated by the retention of the discretion of the presiding officer not only with regard to the initial admission of the evidence, but also with regard to the weight to be attached to the evidence. Therefore, the proposed amendments should not have a significant impact on the rights of the accused. Whether or not there has been an infringement

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[544] Save that S 33A of the Criminal Justice Act 1988 sets an age requirement of 14 years or younger and that the witness need not necessarily be admonished to speak the truth, although the latter is preferable.

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of the fair trial right depends on the circumstances of the case. However, it is clear that the mere fact that the wrong provision was used does not, in itself, constitute and infringement of these rights.

5 4 Cautionary rules and corroboration

Ever mindful of the fact that a wrong conviction of an accused is possible, certain rules of practice have been developed over time by courts in the law of evidence. These rules of practice do not have the force of law, but were created with a view to helping the judicial officer in the evaluation of evidence[545] and can be described as cautionary rules.[546] What a cautionary rule in effect does, is to remind the judicial officer that the "facile acceptance of the credibility of certain witnesses may be dangerous".[547] Application of the cautionary rule requires, first, that the court remind itself to be careful when considering certain evidence and, second, to seek some or other safeguard reducing the risk of a wrong finding based on the suspect evidence.[548] One of the ways in which the risk of a wrong finding can be reduced is by corroboration of the evidence to which the cautionary rule is applied.[549] Possible safeguards are, however, not limited to corroboration, and any factor which, in the ordinary course of human experience, can reduce the risk of a wrong finding, will suffice.[550]

The basis of the development of cautionary rules is clearly to be found in the need to prevent wrong convictions. Zeffertt *et al*[551] describe the basis of cautionary rules as follows:

> "The cautionary rules have been evolved because the collective wisdom and experience of judges has found that certain kinds of evidence cannot be safely relied upon unless accompanied by some satisfactory indication of trustworthiness."

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[545] Schmidt & Rademeyer *Schmidt Bewysreg* 4th ed (2000) 121.
[546] Cautionary rules have, in the past, been applied to a number of scenarios, for example cases where a party relies on the testimony of a single witness, where children testify, where the witness is the complainant or plaintiff in sexual cases, where evidence of identification is heard and where the testimony of an accessory is heard, to name but a few.
[547] Schwikkard & Van der Merwe *Principles* 513.
[548]. Schwikkard & Van der Merwe *Principles* 513.
[549] Schmidt & Rademeyer *Bewysreg* 122.
[550] Schwikkard & Van der Merwe *Principles* 513.
[551] Zeffertt *et al Evidence* 799.

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At common law three different cautionary rules would have applied to the victim of a sexual offence where the victim was a child and the only witness to the offence. In the following section attention will be drawn to these three cautionary rules. Despite the abolition of the rule applicable to the evidence of the victim of a sexual offence, this rule will be discussed as a basis for the argument in favour of the abolition of the cautionary rule relating to the evidence of children.

5 4 1 Sexual offences

The first cautionary rule is that which applied to the evidence of complainants in sexual cases.[552] It is believed that the cautionary rule with regard to the evidence of a complainant in a sexual offence case originates from a statement made by Lord Chief Justice Hale during the 17th century.[553] Lord Hale expressed the following opinion:

> "Rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."[554]

Various reasons have been given for the application of the cautionary rule with regard to the evidence of complainants in sexual offences.[555] In the first instance, sexual offences often occur in private and leave no outward traces, thereby making it very difficult to refute an assertion that there was no consent.[556] This problem is compounded by the allegation that women "frequently lie about being raped".[557]

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[552] The general cautionary rule in this regard has since been abolished. See the discussion on *S v J* 1998 2 SA 984 (A) *infra*.

[553] Fryer "Laws versus prejudice: views on rape through the centuries" 1994 *SACJ* 74.

[554] Bronstein "The Cautionary Rule: An Aged Principle in Search of Contemporary Justification" 1992 *SAJHR* 557 and the authority cited there.

[555] See in general: Bronstein 1992 *SAJHR* 557; Labuschagne "Versigtigheidsreël by Seksuele Sake: Opmerkinge oor die Menseregtelike Begrensing van die Bewysreg" 1992 *Obiter* 131; Schwikkard "Sexual Offences – The Questionable Cautionary Rule" 1993 *SALJ* 46; Jagwanth & Schwikkard "An Unconstitutional Cautionary Rule" 1998 *SACJ* 87; Chinner "Stawing en Versigtigheidsreëls in die Strafreg" 1995 *THRHR* 73; Viljoen "Die Redelikheid en Onrustigheid oor die Versigtigheidsreël by Verkragting" 1993 *TSAR* 173; Fouche "Die Versigtigheidsreël in Gevalle van Seksuele Wangedrag" 1993 *Consultus* 50; Wilmot "The Cautionary Rule in Sex Crimes" 1992 *SACJ* 211; Viljoen. "Removing Insult from Injury: Reviewing the Cautionary Rule in Rape Trails" 1992 *TSAR* 743.

[556] Jagwanth & Schwikkard 1998 *SACJ* 88.

[557] Fryer 1994 *SACJ* 61 and the authority cited there.

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Schreiner JA in *R v Rautenbach*[558] was of the opinion that

> "[i]t is not only the risk of conscious fabrication that must be guarded against; there is also the danger that a frightened woman, especially if inclined to hysteria, may imagine that things have happened which did not happen at all"

In *R v W*,[559] Watermeyer CJ found that in addition to the reasons mentioned by Schreiner JA, evidence in cases of sexual assault should be treated with caution because

> "[w]here pregnancy has supervened and in that way it has become necessary for the girl to explain her condition, she may be tempted to shield some young friend who is the actual wrongdoer and to implicate someone of relatively sound financial standing who may be better able than the actual father of the child about to be born to provide it with maintenance".

Financial considerations, spite, sexual frustration or other unpredictable emotional causes, may be the motive behind the bringing of a charge against an alleged offender.[560] Even where the motive for the bringing of the charge may not be readily apparent, there can, according to Botha JA, be no doubt that the risk of false accusation may be present.[561]

For these reasons, *inter alia*, the cautionary rule with regard to the evidence of complainants in sexual cases was applied in the South African Law.[562] However, the application of this cautionary rule was abolished in South Africa in 1998 by the Supreme Court of Appeal in the case of *S v J*.[563] In *J* the appellant was found guilty of attempted rape and sentenced to 18 months imprisonment. After an unsuccessful appeal to the Cape Provincial Division, the accused appealed to the Supreme Court of Appeal. It was argued on behalf of the appellant that the trial court had misdirected itself in not truly applying the cautionary rule in respect of the evidence of complainants in sexual cases.[564] It was contended that the magistrate merely paid lip service to the rule. The court, per Olivier JA, found that the rule is

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[558] 1949 1 SA 135 (A) 143.
[559] 1949 3 SA 772 (A) 780.
[560] Hoffmann & Zeffertt *The South African Law of Evidence* 3rd ed (1986) 455.
[561] *S v F* 1989 3 SA 847 (A) 853I-J.
[562] See *R v M* 1947 4 SA 489 (N); *R v S* 1948 4 SA 419 (GW); *R v Ncanana* 1948 4 SA 399 (A); *R v Rautenbach* 1949 1 SA 135 (A); *R v W* 1949 3 SA 772 (A); *R v D* 1951 4 SA 450 (A); *R v J* 1966 1 SA 88 (SR); *S v Snyman* 1968 2 SA 582 (A); *S v Balhuber* 1987 1 PH H22 (A); *S v F* 1989 3 SA 847 (A); *S v M* 1992 2 SACR 188 (W); *S v Ncanywa* 1992 2 SA 182 (Ck).
[563] *S v J* 1998 2 SA 984 (A).
[564] 1006H-I.

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based on the notion that women are habitually inclined to lie about being raped.[565] The court found that this justification lacks any factual or reality-based foundation and that it can be exposed as a myth.[566] The court undertook a brief comparative analysis of the continued use of the cautionary rule and found that

> "the cautionary rule in sexual assault cases is based on an irrational, out-dated perception."[567]

Accordingly, it found that, although the evidence in a particular case may call for a cautionary approach, this was a far cry from the application of a general cautionary rule.[568]

In endorsing the guidance provided by the English Court of Appeal in *R v Makanjuola; R v Easton*,[569] the court in *J* offered some guidance as to when caution should be applied. This includes cases where, *inter alia*, the witness has been shown to be unreliable, where the witness has been shown to have lied, to have made previous false complaints or to bear the accused some grudge.[570] The court emphasised that, although it may be appropriate to exercise caution in a particular case, this will not be simply because the witness is a complainant in a sexual case. There must be an evidential basis for suggesting that the evidence of the witness may be unreliable and not a mere suggestion to that effect by cross-examining counsel.[571] This finding has since been applied in *Director of Public Prosecutions v S*[572] and in the Zimbabwean case of *S v Banana*.[573]

In *S v Jones*[574] the court followed the approach suggested in *S v J*[575] with regard to the evidence of the complainant in a sexual offence matter and came to the conclusion that, since the victim is a single witness and there are unusual features in her testimony, caution should be applied in the assessment of her evidence. Here

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[565] 1007F.
[566] 1007G.
[567] 1009E.
[568] 1009F.
[569] [1995] 3 All ER 730 (CA).
[570] 1010A.
[571] 1010E.
[572] 2000 2 SA 711 (T).
[573] 2000 3 SA 885 (ZS).
[574] 2004 1 SACR 420 (C) 427*f*.
[575] *S v J* 1998 2 SA 984 (A).

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the court stressed that the cautionary rule does not require that the evidence must be free of all criticism, but that it must either be satisfactory in relation to material aspects, or that it must be corroborated.

In its discussion paper, the South African Law Commission opined that although the Supreme Court of Appeal in *S v J*[576] removed the *obligation* to treat evidence of victims of sexual offences with caution, the *discretion* to do so still remains.[577] Although the guideline for the exercise of the discretion is that there needs to be an evidential basis suggesting that the evidence of the witness may be unreliable and must therefore be approached with caution, the Commission opined that this approach holds the danger that, in establishing the evidential basis, the issues in dispute may be broadened and evidence that would otherwise be irrelevant might need to be introduced.[578] Therefore, the Commission recommended that a clause providing for the abolition of the cautionary rule in sexual offences should be included in the Sexual Offences Act.[579]

After evaluating comments on the Discussion Paper and after having re-studied the judgement of the Supreme Court Appeal in *S v J*,[580] the Commission was of the opinion that the court in *S v J*[581] made it clear that a complainant's evidence should not be treated with caution merely because of the nature of the offence and that the application of caution would need to be preceded by an evidential basis for suggesting that the witness may be unreliable.

Therefore, the Commission was of the opinion that in light of the rejection of the cautionary rule with regard to the evidence of the complainant of a sexual offence by the Supreme Court of Appeals in *S v J*[582] legal reform is clearly not necessary. However, the Commission was of the opinion that "there can be no harm in giving legislative confirmation to the repeal of the common law".[583] Accordingly, the

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[576] *S v J* 1998 2 SA 984 (A).
[577] § 31.2.4.5. Emphasis in the original.
[578] § 31.2.4.5.
[579] § 31.2.4.10.
[580] *S v J* 1998 2 SA 984 (A).
[581] *S v J* 1998 2 SA 984 (A).
[582] *S v J* 1998 2 SA 984 (A).
[583] SA Law Commission *Sexual Offences* Report § 5.2.2.

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Commission recommended the inclusion of section 20 in its Draft Sexual Offences Bill. Section 18(a) of the Draft Sexual Offences Bill reads:

> "Notwithstanding the provisions of the common law, any other law or any rule of practice, a court shall not treat the evidence of a witness in criminal proceedings pending before that court with caution and shall not call for corroboration of evidence merely because that witness is –
>
> (a) the complainant of a sexual offence. . ."

With regard to the retention of a discretion to apply caution where it is warranted, the Commission was of the opinion that this did not amount to the retention of a residual cautionary rule allowing the presiding officer to generally apply the rule if he or she should so decide.[584] The Commission was mindful of the fact that a particular case may call for a cautionary approach, but was of the opinion that legislation prohibiting the general use of the cautionary rule would not preclude the court from following a cautionary approach where necessary.[585]

The approach followed by the South African Law Commission and the abolition of the general cautionary rule with regard to the evidence of the complainant of a sexual offence, are in line with the recent developments in case law. Considering that the cautionary rule was a common law rule of practice, which had already been abolished by the Supreme Court of Appeal in *S v J*[586] it is, at first glance, difficult to see why the Commission still found it necessary to include section 20(a) in the Bill. However, in *S v Van der Ross*[587] the court found that

> "[t]he judgment in *S v J* 1998 (1) SACR 470 (SCA) (1998 (2) SA 984) does not mean that trial courts are free to convict in an indiscriminate and reckless manner where the charge is of a sexual nature. It also does not mean that in those cases courts no longer have to be cautious. On the contrary, criminal courts should be encouraged to exercise extreme caution before they convict people on serious charges, such as rape, especially with the introduction of prescribed sentences by the Legislature. All that the judgment in *S v J* means is that a general, immutable cautionary rule does not have to be applied to the evidence of the complainant in such cases. The evidence in a particular case may call for a cautious approach. It will depend on the facts and the

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[584] SA Law Commission *Sexual Offences* Report § 5.2.2.
[585] SA Law Commission *Sexual Offences* Report § 5.2.2.
[586] *S v J* 1998 2 SA 984 (A).
[587] 2002 2 SACR 362 (C).

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> circumstances of each individual case as to whether such an approach is necessary or not."[588]

As a result of the court's approach in *Van der Ross*[589] Schwikkard[590] expressed the opinion that if the judgement in *S v J*[591] is open to such interpretation, the Law Commission's recommendation relating to the statutory abolition of "this iniquitous rule"[592] should be acted upon. Similar to the Law Commission's recommendation, section 5 of the Namibian Combating of Rape Act[593] contains a statutory abolition of the cautionary rule applicable to the evidence of the complainant in a sexual offence.

Evaluation[594]

When the abolition[595] of the general cautionary rule in respect of the evidence of a victim of a sexual offence is evaluated, one comes to the undeniable conclusion that the interests and rights of the victim (and in this case, the child witness) are served by the abolition. As Steyn[596] puts it, "[a]ny treatment of sexual complainants as witnesses, other than that meted out to ordinary witnesses, is no longer justified". Although the court in *S v J*[597] did not base its finding on the constitutional rights of children,[598] nor on the equality clause,[599] it is submitted that the effect of the abolition of this archaic rule is the realisation of these very rights. Therefore it can be said that Punitive Victims' rights values underlie the abolition of the rule.

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[588] 365*f-i*. Quotation taken from the headnote of the case. See further *S v Jones* 2004 1 SACR 420 (C).
[589] 2002 2 SACR 362 (C).
[590] Schwikkard "Evidence" 2003 *SACJ* 89 94-95.
[591] 1998 2 SA 984 (A).
[592] Schwikkard 2003 *SACJ* 89 95.
[593] 8 of 2000.
[594] Since the general cautionary rule with respect to the evidence of a complainant in a sexual offence trial has been abolished, this evaluation will focus only on the position as it presently stands. The focus will, accordingly, be on the impact that the abolition of the rule has on the rights of the accused and on the rights and/or interests of the child witness.
[595] Although the South African Law Commission was of the opinion that the court in *S v J* 1998 2 SA 984 (A) merely reformulated the existing rule, this view will be discussed *infra*, and for purposes of this evaluation, this is disregarded.
[596] Steyn "Witnesses in South Africa, The Stepchildren of the Criminal Justice System" (1999) Unplublished LLM thesis 111.
[597] 1998 2 SA 984 (A).
[598] See s 28(1)(d) which guarantees the child's right to be protected from abuse and degradation.
[599] S 9.

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Viewed against Due Process values and the accused's right to a fair trial,[600] it may be argued that the abolition of this general cautionary rule may infringe the right to a fair trial[601] since this may, in many cases, force the accused to testify at his own trial in order to rebut the testimony of the only other eye-witness. However, although this may be the practical effect of the abolition of the cautionary rule, the purpose served by the abolition of the rule, namely the equal treatment of complainants in sexual offence cases, can be regarded as a rational and justifiable measure for purposes of limitation of the accused's rights. After all, the accused may still choose to remain silent and not to testify.

Subsequent to the judgement in *S v J*[602] the evidence of a complainant in cases of a sexual nature may not be approached with circumspection merely because the offence is sexual in its nature. Where the evidence available to the prosecution, however, is only that of a single witness, the same caution would still apply as would be the case in all other matters where the prosecution seeks to rely on the evidence of a single witness. In the result, the accused is still afforded the same measure of protection he would have where the charge is not sexual in nature. This, coupled with the presumption of innocence,[603] will afford sufficient protection to the accused, and therefore, the abolition of the cautionary rule with regard to the evidence of the complainant will not have a significant negative impact on the rights of the accused.

5 4 2 Children

The second cautionary rule that has developed is a rule of practice that requires a presiding officer to remind him or herself consciously to be careful when considering the evidence of children and to seek some sort of safeguard to reduce the risk of a wrong finding based on suspect evidence.[604] Although it is not a fixed

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[600] S 35(3) Constitution.
[601] Specifically the right to be presumed innocent, to remain silent and not to testify during the trial, as enumerated in s 35(3)(h) of the Constitution.
[602] *S v J* 1998 2 SA 984 (A).
[603] S 38(h) Constitution.
[604] Schwikkard & Van der Merwe *Principles* 513. See also *S v Artman* 1968 3 SA 339 (A).

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rule of law that the evidence of children needs to be corroborated,[605] the courts often require such corroboration.[606] Even where this does not happen, judicial officers are reminded that the evidence of children must be approached with caution.[607]

The development of this rule of practice is underpinned by the "inherent dangers in the testimony of children".[608] The court in *R v Bell*[609] expressed the opinion that such dangers occur especially if the substance of the testimony has reference to sexual matters and that the court should not ordinarily convict the accused unless the evidence of the child has been treated with due caution. What these dangers are is not entirely clear.[610] In *R v Manda,*[611] the court viewed the imaginativeness and suggestibility of children as two of a number of reasons why their evidence should be "scrutinized with care amounting, perhaps, to suspicion".[612] Schreiner JA did not elaborate on the other elements to which he had eluded, but in *R v J*[613] it was noted that a complaint in a sexual case involving a child may be a mere figment of the child's imagination,[614] or a false allegation of rape against an innocent person in order to cover up wilful indulgence in some form of sexual experience with another child or adolescent.[615]

It is possible to identify a gradual decline over the years in the application of the cautionary rule with regard to the evidence of children. In 1933, for example, in *R v De Beer*,[616] Grindley Ferris J refused to accept the testimony of a six-year old witness, finding that, although she was a competent and reliable witness, there was

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[605] Zieff 1991 *SACJ* 4 28. See also *R v Manda* 1951 3 SA 158 (A) 162H and *Woji v Santam Insurance Company Ltd* 1981 1 SA 1020 (A) 1027H-1028A.
[606] Le Roux "Kinders en die versigtigheidsreël" 1990 *The Magistrate* 148 and the authority cited there.
[607] Le Roux 1990 *The Magistrate* 148 and 150. See also *S v Artman* 1968 3 SA 339 (A) and *De Beer v R* 1933 NPD 30.
[608] *R v Manda* 1951 3 SA 158 (A).
[609] 1929 CPD 478 480.
[610] Schwikkard 1996 *Acta Juridica* 151.
[611] 1951 3 SA 158 (A).
[612] 163C. The question of the suggestibility and imaginativeness of children was also raised in *R v J* 1958 3 SA 699 (SR) 702.
[613] *R v J* 1966 1 SA 88 (SR) 91G-H. See also *R v Bell* 1929 CPD 478 480.
[614] *R v J* 1966 1 SA 88 (SR) 91G-H. See also *R v Bell* 1929 CPD 478 480.
[615] *R v J* 1966 1 SA 88 (SR) 99F-G.
[616] 1933 NPD 30.

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no corroborative evidence and therefore rejection of the evidence was justified.[617] In the 1948 decision of *R v S*[618] the court found that the degree of corroboration required before the evidence of a young child could be accepted depended on the circumstances of the case. In this case the court found that where an intelligent ten year old child gave evidence in a convincing manner, both in chief and under cross-examination, the degree of corroboration required would be less than would be the case if, for example, a six year old were testifying. Later in *R v Manda*[619] the court, per Schreiner J, found that

> "the nature of the evidence given by the child may be of a simple kind and may relate to a subject matter clearly within the field of his understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility. In such circumstances it might perhaps be unfortunate if the courts acted upon a rigid rule that corroboration should always be present before the child's evidence is accepted".[620]

However, the court went further and expressed the view that "the dangers inherent in reliance upon the uncorroborated evidence of a young child must not be underrated".[621] In 1968 the court in *S v Snyman*[622] stressed that the exercise of caution should not be allowed to displace the exercise of common sense.[623] In *Woji v Santam Insurance Company Ltd*[624] the court, per Diemont JA, noted that

> "[t]he question which the trial court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness ... depends on factors such as the child's powers of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each case the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears 'intelligent enough to observe'. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion 'to remember what occurs' while the capacity of narration or communication raises the question whether the child has the 'capacity to understand the questions put, and to frame and express intelligent answers' ... There are other factors as well which the court will take into account in assessing the child's trustworthiness ... Does he appear to be honest – is there a consciousness of the duty to speak the truth? Then also 'the nature of the evidence given by the child may be of a simple kind and may relate to a subject-

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[617] See Le Roux 1990 *The Magistrate* 149.
[618] 1948 4 SA 419 (GW).
[619] 1951 3 SA 158 (A).
[620] 163A-C.
[621] 163C.
[622] 1968 2 SA 582 (A).
[623] 585G-H.
[624] 1981 1 SA 1020 (A).

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> matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility".[625]

He went further, however, to say that

> "[a]t the same time the danger of believing a child where evidence stands alone must not be underrated."[626]

Before the decision in *Woji,* corroboration was often required in cases where a child testified, or later, where a child testified about something that does not fall clearly within the field of his understanding. Even though *Woji* was still based on the premise that children are inherently less reliable than adults as witnesses,[627] this case was the first to recognise the individuality of children.[628] In *S v Sauls*[629] the Appellate Division[630] found that "the cautionary rule... may be a guide to a right decision but it does not mean 'that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded".[631]

According to Zieff,[632] the incidents and degrees of caution applied by the courts generally depend on the circumstances of each case. Schwikkard & Van der Merwe refer to this notion, noting that any factor should suffice that in the ordinary course of human experience can reduce the risk of a wrong finding.[633]

In *Director of Public Prosecutions v Hendrik Jacobus Swartz*[634] Kirk-Cohen J changed the approach to the evidence of children in sexual cases when he found

> "It is so that children lack the attributes of adults and, generally speaking, the younger, the more so. However it cannot be said that this consideration *ipso facto* requires of a court that it apply the cautionary rules of practice as though they are matters of rote... [I]t cannot be said that the evidence of children, in sexual and other cases, where they are single witnesses, obliges the court to apply the cautionary rules before conviction can take place..."

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[625] 1028A-E.
[626] 1028E.
[627] Schwikkard 1996 *Acta Juridica* 152.
[628] Schwikkard 1996 *Acta Juridica* 152.
[629] 1981 3 SA 172 (A) 180G.
[630] As it then was.
[631] This case concerned the evidence of a single witness, but the principle expressed by Diemont JA is just as valid in cases where it concerns the evidence of a child.
[632] Zieff 1991 *SACJ* 4 29.
[633] Schwikkard & Van der Merwe *Principles* 513-514.
[634] Unreported 2 September 1999 Transvaal Provincial Division (case A 907/98).

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The court was prepared to acknowledge that the evidence in a particular case might call for a cautionary approach,[635] but found that such an approach would depend on the facts in each case, for which it was impossible to lay down guidelines.

The South African Law Commission investigated the need for the abolition of the general cautionary rule with regard to the evidence of children and in its Discussion Paper[636] it stated that it could find no proof that children are prone to lie more than adults, that they have more sexual fantasies than adults or that they have more motive than adults to lay false charges.[637] Since the Commission was of the opinion that the cautionary rule relating to children is so entrenched in the daily application of law in our courts, it recommended that the proposed Bill should clearly state that this rule should no longer be applied.[638]

After evaluation of comments made in respect of the proposals in the Discussion Paper, the Law Commission expressed the opinion that the general application of the rule of practice is inherently discriminatory in that children are disadvantaged merely on the basis of their age.[639] Furthermore, the Commission made it clear that its recommendation is largely aimed at terminating the general application of the cautionary rule in cases where it is applied as a result of out-dated beliefs regarding the cognitive ability and credibility of children.

As far as corroboration of the evidence of children is concerned, the Commission noted that presiding officers mostly insist that the testimony of children be corroborated in some way.[640] In Discussion Paper 102 the Commission argued that corroboration is often impossible in sexual offence matters, since medical evidence or eye-witness testimony is often non-existent. In light of research the Commission further concluded that the evidence of children is no less reliable than that of adults

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[635] Referring to *S v J* 1998 2 SA 984 (A).
[636] SA Law Commission Discussion Paper 102 Project 107.
[637] §§ 31.3.4.3, 31.3.4.5 and 31.3.4.6 the authority cited there.
[638] § 31.3.4.7.
[639] § 5.2.2.
[640] It is doubtful whether this statement of the Law Commission can be accepted as the absolute truth. While it cannot be denied that corroboration of the evidence of children is *often* required by presiding officers, it cannot with certainty be said that corroboration is *mostly* required. Corroboration will, generally, be required where the evidence of the child is not in all respects satisfactory.

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and for this reason it recommended that a clause prohibiting the practice of requiring corroboration for the evidence of children be included in the draft Bill.

The Commission was prepared to accept that the requirement of corroboration is not a rule of evidence, but rather a rule of practice, but was of the opinion that it was necessary to provide legislative confirmation of the fact that corroboration of the complainant's evidence is not necessary before a conviction can follow. This, the Commission felt, would be in line with legislative provisions in other jurisdictions, notably Australia. Accordingly, section 20 was included in the draft Sexual Offences Bill.

Section 20(b) of the draft Sexual Offences Bill reads:

> "Notwithstanding the provisions of the common law, any other law or any rule of practice, a court shall not treat the evidence of a witness in criminal proceedings pending before that court with caution and shall not call for corroboration of evidence merely because that witness is -
>
> (a) ...
>
> (b) a child"

Although no specific mention is made of a discretion to apply caution in cases where it is warranted with regard to the evidence of children, the Commission approved the retention of this discretion with regard to the evidence of the complainant in a sexual matter. In light of the fact that the Commission included both the abolition of the cautionary rule with regard to the evidence of the complainant as well as the abolition of the cautionary rule with regard to the evidence of a child in section 18 of the Bill, it is submitted that it can be assumed that a retention of such a discretion with regard to the evidence of children was accepted by the Commission.

Evaluation

Although it is not entirely clear from case law what the "inherent dangers"[641] in the testimony of children are, it is clear that the purpose of the rule with regard to the evidence of children is to reduce the risk of a wrong conviction. Due Process

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[641] *R v Manda* 1951 3 SA 158 (A).

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values and the presumption of innocence therefore underlie this rule. The tension between these Due Process values and Punitive Victims' rights values which require that the rights of crime victims be protected, is clear. Since the rights of crime victims include the constitutionally guaranteed right to dignity[642] as well as the right not to be discriminated against on the basis of age,[643] this tension needs to be resolved.

Much has been written about the cautionary rule with regard to the evidence of children in South Africa.[644] What is common cause is that the application of the cautionary rule should be re-evaluated.[645] Schwikkard[646] argues, for example, that the cautionary rule applicable to children is *prima facie* discriminatory in that the witness is disadvantaged on the basis of age. She adds that in order to pass the limitation criteria[647] the infringement of a right must be reasonable.[648] Reasonableness, in turn, demands that the limitation must be rationally connected to its objective. In order for such a rational connection to exist, the measure itself must have a rational basis. If this is not the case, there would be no need to enquire into the rationality of the connection between the rule and the objective. Therefore the question is whether the cautionary rule which applies to the evidence of children has a rational basis.

Spencer and Flin[649] discuss six main objections to relying on the evidence of children. The first objection is that children's memories are unreliable. The second is that children are egocentric, the third that they are highly suggestible, the fourth that they have difficulty distinguishing between fact and fantasy. In the fifth place, children are said to make false allegations, particularly with respect to sexual assault. Lastly, children do not understand the duty to tell the truth. With reference

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[642] S 10 Constitution.
[643] S 9 Constitution.
[644] See in general Schwikkard 1996 *Acta Juridica* 152; Zieff 1991 *SACJ* 4; Le Roux 1990 *The Magistrate* 148; Struwig "Evaluation the evidence of the child witness – a common sense approach" 2001 *THRHR* 596; Nicholas "Credibility of witnesses" 1985 *SALJ* 32.
[645] See Struwig 2001 *THRHR* 602; Le Roux 1990 *The Magistrate* 151-152; Schwikkard 1996 *Acta Juridica* 154. See also *S v S* 1995 1 SACR 50 (ZS) 59*h*.
[646] Schwikkard 1996 *Acta Juridica* 154.
[647] S 36 Constitution. Schwikkard refers to s 33 Interim Constitution.
[648] Schwikkard 1996 *Acta Juridica* 154.
[649] Spencer & Flin *Law and Psychology* 285*ff*.

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to existing empirical studies, the authors discredit each one of these objections individually.

Research has shown, for example, that children generally have a good recall of central events but a poorer memory for detail and evidence of surrounding occurrences.[650] With regard to the second objection, they point out that while very young children may be morally under-developed, the ability to make simple but reasonable inferences about what other people feel, intend and think, develops somewhere between the ages of four and five.[651] The so-called cognitive weakness of young children, described as an inability to understand another person's point of view and a selective memory for information of personal significance, is equally true of adults.[652] Reliable research also shows that children may be susceptible to suggestion, but so are adults.[653] The degree of suggestibility must therefore be minimised in both cases by posing questions designed to overcome known pitfalls.[654]

The authors also point out children do not fantasise about things that are beyond their own direct or indirect experience.[655] Interestingly also, although children are said to be prone to magnifying incidents, studies indicate that victims tend to under-report the type and amount of abuse rather than to exaggerate.[656] Spencer and Flin's estimate that the incidence of false allegations of sexual abuse accounts for less than 5% of the total of allegations,[657] also counters the allegation that children are more prone to lying than adults.[658] In addition, research suggests that they have the ability not only to distinguish between the truth and a lie from as young as three years of age,[659] but also to understand the duty to tell the truth in court from five or six years of age.[660] This shows that the existence of the cautionary rule with regard to the evidence of children has no rational scientific

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[650] Spencer & Flin *Law and Psychology* 289-301.
[651] Spencer & Flin *Law and Psychology* 301-302.
[652] Spencer & Flin *Law and Psychology* 302.
[653] Spencer & Flin *Law and Psychology* 302-309.
[654] Spencer & Flin *Law and Psychology* 302*ff*.
[655] Spencer & Flin *Law and Psychology* 317-318.
[656] Spencer & Flin *Law and Psychology* 318 and the authority cited there.
[657] Spencer & Flin *Law and Psychology* 325.
[658] Spencer & Flin *Law and Psychology* 329.
[659] Spencer & Flin *Law and Psychology* 333 and the authority cited there.
[660] Spencer & Flin *Law and Psychology* 334.

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basis. Thus there can be no rational connection between the infringement of the child's right to equality and the objective sought to be achieved, namely reduction of the possibility of a wrong finding and protection of the accused's right to a fair trial. In these circumstances, there is no justification for the limitation of a child's constitutionally guaranteed right to equality in favour of the accused's right to a fair trial. As with the abolition of the cautionary rule that applied to victims of sexual offences, the abolition of the cautionary rule that applies to the evidence of children will therefore not have a significant impact on the fair trial rights of the accused. Other measures, notably the cautionary rule with regard to the evidence of the single witness, continue to exist and offer protection to the rights of the accused.

5 4 3 Single witnesses

In terms of section 208 of the Criminal Procedure Act[661] an accused may be convicted of any offence on the evidence of any single competent witness. The word "competent" does not refer to the quality of the witness, but merely to the requirement of competence set in section 193 of the Act.[662] Kriegler & Kruger[663] point out that although the provision in section 208 is unqualified, courts follow a cautious approach when the conviction of the accused is dependent on the evidence of a single witness. In *R v Mokoena*[664] De Villiers JP found that

> "the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction ... but ... that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect."

This strict approach has often been criticised,[665] but in a similarly named case of several years later, *R v Mokoena,*[666] Fagan JA pointed out that it was improbable that De Villiers JP had intended to lay down a requirement of law that must be

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[661] 51 of 1977.
[662] Kriegler & Kruger *Hiemstra* 519.
[663] Kriegler & Kruger *Hiemstra* 519.
[664] 1932 OPD 79.
[665] *R v Abdoorham* 1954 3 SA 163 (N) 165D-E; *R v Mokoena* 1956 3 SA 81 (A) 86A-B.
[666] 1956 3 SA 81 (A) 86B.

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strictly complied with. In *R v Nhlapo*[667] Schreiner JA noted that while the dictum of De Villiers JP in *Mokoena* might be a useful guide to a correct decision, it did not mean that "an appeal must succeed if any criticism, however slender, of that witness' evidence were well founded". Likewise, the court in *R v T*[668] found that although the remarks of De Villiers JP remain appropriate, they did not constitute a rule of law. This was accepted in *S v Sauls*[669] where Diemont JA found that

> "[t]here is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers, JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" (Per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

Although there is no rule of law requiring the court to approach the evidence of a single witness with caution the dictum of De Villiers JP, as qualified by the court in *S v Sauls,*[670] can still be used as a guide in assessing the evidence of a single witness.

Section 208 of the Criminal Procedure Act[671] clearly states that an accused may be convicted on the single evidence of any competent witness. But despite this provision the evidence of a single witness, particularly in sexual offence matters, has been treated with the utmost caution by courts.[672] The Commission opined that

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[667] Unreported Appellate Division decision of 10 November 1952. Quoted in *R v Bellingham* 1955 2 SA 566 (A) 569G.

[668] 1958 2 SA 676 (A) 678B.

[669] 1981 3 SA 172 (A) 180E-G. See also *S v Kubeka* 1982 1 SA 534 (W) and *S v Banana* 2000 2 SACR 1 (Z).

[670] 1981 3 SA 172 (A) 180E-G.

[671] 51 of 1977.

[672] See for example, in *S v Joors* 2004 1 SACR 494 (C) 504*g* where the court questioned the trial court's application of the cautionary rule in this regard; *S v Makeba* 2003 2 SACR 128 (A) § [9] 131*a-b* where the court found that "[i]t is trite that the evidence of a single witness must, in order to lead to a successful conviction, be clear and satisfactory in every material respect." In *S v Mpuhle* 2002 1 SACR 550 (W)552*d* the court held that "[a] court would only be entitled to convict on the evidence of a single witness if it is satisfied beyond a reasonable doubt that such evidence is true." Likewise, in *S v Hlongwa* 2002 2 SACR 37 (T) 49*a* the court found that "[t]o justify a conviction, his evidence [that of the single witness] had to pass the test of being clear and satisfactory in all material respects". See also *S v Ndika* 2002 1 SACR 250 (A) § [19] 256*f.* § 31.4.3.1.

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the court should have the opportunity of weighing the evidence of the single witness, without first cautioning itself of the fact that the witness is a single witness.[673] The court should, according to the Commission, consider the merits and demerits of the evidence of the single witness and, having done so, decide whether it is satisfied that the truth has been told.[674] On this basis, the Commission proposed that a clause should be included in the draft Bill stipulating the abolition of the cautionary rule that applies to single witnesses.[675]

This proposal of the Commission was met with much resistance. It was pointed out in the Report on the Preliminary Investigation into the Review of the Rules of Evidence[676] that the cautionary rules applicable to complainants in sexual offence cases and children are flawed because their existence is largely based on an irrational belief as to the truthfulness of such witnesses. On the other hand, it was argued, the single witness rule is not based on the premise that certain categories of witnesses are more mendacious than other, but that it merely constitutes a recognition of the difficulties in assessing the credibility of the evidence in the absence of an independent measure.

Furthermore, it was argued that the retention of the single witness rule should not be open to constitutional challenge on the basis that it discriminates against a specific group, but even if it is accepted that it is discriminatory, it would amount to a reasonable and justifiable limitation which is allowed in terms of section 36 of the Constitution.

The Commission expressed the view that recent developments in case law indicate that a presiding officer may not caution himself as a matter of course and that the court should weigh the evidence of the single witness and consider its merits and demerits and, having done so, decide whether or not the truth has been told.[677]

Against this background the Law Commission withdrew its original recommendation that the cautionary rule applicable to single witnesses be

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[673] § 31.4.3.1.
[674] § 31.4.3.1.
[675] § 31.4.3.2.
[676] 26.
[677] *S v Sauls* 1981 3 SA 172 (A) 180F; *Director of Public Prosecutions v S* 2000 2 SA 711 (T).

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abolished by the Sexual Offences Act. Therefore, the cautionary rule applicable to the evidence of a single witness will continue to exist subject to the qualification that the presiding officer may not caution himself as a matter of course and must consider the merits and demerits of the evidence of the witness in each individual case.

Evaluation

In the case of the so-called cautionary rule regarding the evidence of a single witness a conflict exists between Due Process values, which require that a conviction only follow on reliable evidence, and Victims' rights values, which require conviction of the factually guilty in an attempt to protect the rights of victims and potential victims of crime. This tension is especially noticeable in the prosecution of sexual offences where the victim is often the only witness for the prosecution. However, based on the fact that the cautionary "rule" is not a rule of law, but merely a guideline to be used in assessing the evidence of a single witness, there can be no real objection to the exercise of a cautionary approach.

5 5 Hearsay

In the prosecution of sexual offences against children, the child victim is often not able to testify or does not want to testify at trial. The reasons for this are manifold. For example, where the child is very young and has limited articulation ability, the court may through the application of the competency test, refuse to permit the complainant to testify.[678] Other reasons include the need to protect the child victim from the possibility of secondary victimisation by the criminal justice system or from the possibility of trauma caused by his participation in the criminal justice process and the inability of the child to later recall the events which gave rise to the charge. The admission of hearsay evidence can therefore play an important role in the prosecution of alleged sexual offenders against children in the sense that

[678] While the value of out-of-court statements of a child with limited articulation ability can be questioned, it must be pointed out that while the court may find that the child's articulation ability is not satisfactory for purposes of testifying, it does not mean that the child will not be able to communicate with other persons, such as a parent.

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evidence that would not otherwise have been placed before the court can be brought before the court.

In terms of the Law of Evidence Amendment Act,[679] hearsay evidence is defined as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence".[680] As a general rule hearsay evidence is inadmissible. This is primarily as a result of the constraints that the admission of the evidence places on cross-examination.[681]

Section 3 of the Law of Evidence Amendment Act[682] provides for certain exceptions[683] to the rule against the admission of hearsay evidence.[684] In terms of section 3(1)(c) of the Act, the court has a discretion and may, taking into account the factors stipulated in section 3(1)(c)(i)-(vii), admit the evidence if it is of the opinion that admission of the evidence is in the interests of justice. According to the court in *Metedad v National Employers' General Insurance Co Ltd*[685] the purpose of the amendment of the common law regarding the admission of hearsay evidence was to permit hearsay evidence in certain circumstances where the application of the rigid common law principles might frustrate the interests of justice.[686] Here the court expressed the opinion that the exclusion of hearsay evidence in cases where the testimony of an otherwise reliable person cannot be obtained might result in a greater injustice that would its admission.[687] Further, the court was of the opinion that the fact that hearsay evidence is untested by cross-

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[679] 45 of 1988.
[680] S 3(4).
[681] Schwikkard & Van der Merwe *Principles* 256.
[682] 45 of 1988.
[683] The first two exceptions provided for in s 3(1)(a) and (b) will not be discussed here, since they fall outside of the scope of this study.
[684] S 3(1)(a) provides that hearsay evidence is admissible if each party against whom the evidence is to be adduced agrees to the admission thereof, while s 3(1)(b) provides that such evidence is admissible if the person upon whose credibility the probative value of the evidence depends testifies at the proceedings. Neither of these exceptions creates specific problems as far as the prosecution of sexual offences against children is concerned and they will therefore not be discussed in this study.
[685] 1992 1 SA 494 (W).
[686] 498I.
[687] 498I-A.

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examination is a factor which must be taken into account when the probative value of the evidence is assessed.[688]

The factors listed in section 3(1)(c)(i)-(vii) are the following: (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which may be caused by the admission of such evidence; and (vii) any other factor which should be taken into account in the opinion of the court. It is clear that this confers a wide discretion on the court, since the court may take into account any other factor which it considers should be taken into account.[689] The wording of section 3(1)(c), specifically the use of the word "and" between subsections 3(1)(c)(vi) and 3(1)(c)(vii), makes it clear that the court may not merely consider one or some of the factors when deciding whether it is in the interests of justice to admit the evidence.[690]

Although the Law of Evidence Amendment Act[691] changed the common law and the court is now vested with a discretion to admit hearsay evidence, the Law Commission found that the prevailing view is that children's hearsay evidence in sexual offence matters is not readily received and that a case will rarely be prosecuted if the child victim is unable to testify.[692] For this reason, the Law Commission investigated the position regarding hearsay evidence of child victims of sexual offences.

In Discussion Paper 102 the Commission noted that section 3(1)(c) of the Law of Evidence Amendment Act[693] provides the court with a discretion to admit hearsay evidence if it is in the interests of justice to do so.[694] However, the Commission conceded that it is uncertain whether the presiding officer will exercise his

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[688] 499A.
[689] See *Mnyama v Gxalaba* 1990 1 SA 650 (C) 653B.
[690] Paizes "Evidence" in Du Toit, De Jager, Paizes, Skeen, & Van der Merwe *Commentary on the Criminal Procedure Act* (1987) 24-49.
[691] 45 of 1988.
[692] Discussion paper 102 § 35.1.
[693] 45 of 1988.
[694] § 35.4.4.

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discretion in terms of section 3(1)(c) to admit the hearsay evidence of children who do not testify at the proceedings.[695] Due to the relative lack of reported judgments in this regard, it is uncertain whether a problem indeed exists in practice and, if so, what the exact cause of the problem is.

The Law Commission was of the opinion that the existing legal mechanism for the admission of hearsay evidence is in line with, if not ahead of, international moves to admit hearsay evidence, especially hearsay evidence of children who fall victim to sexual offences.[696] The Commission stated that it was not in favour of recommending legislative amendment stating the obvious, nor could it see the need to create an additional statute to regulate the admission of extra-curial statements of sexual offence victims due to the fact that such evidence may already be admissible in terms of section 3(1)(c) of the Law of Evidence Amendment Act[697] and the fact that it would be highly unlikely that a presiding officer would convict an accused solely on hearsay evidence. The Commission was of the opinion that the hearsay evidence would have to be corroborated before a conviction can follow. [698]

Despite the Commission's recommendation that no legislative amendments relating to the admission of hearsay evidence be made, the Commission acknowledged that there is an apparent disparity between the *de facto* and *de iure* position and welcomed further submissions pertinent to the issue.[699]

In its final report on Sexual Offences[700] the South African Law Commission's did not discuss hearsay evidence. Therefore, the existing legal position will remain unchanged and hearsay evidence of child victims of sexual offences will be admissible, if in taking into account the factors listed in section 3(1)(c) the court is of the opinion that it would be in the interests of justice to admit such evidence.

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[695] § 35.4.6.
[696] § 35.4.7.
[697] 45 of 1988.
[698] § 35.4.7.
[699] § 35.4.8.
[700] Report project 107.

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In the case of *R v Khan*[701] the Canadian Supreme Court developed a special exception to the rule against hearsay. This exception applies in cases where the evidence sought to be led relates to a statement made by a child. In *Khan* it was held that hearsay statements by a child regarding the issue at trial may be admitted in evidence provided that admission of the statement is necessary and the hearsay statement is reasonably reliable. The court explained that the admission is "necessary" if the court decides that the child is incompetent to give either sworn or unsworn evidence, the child is unable or unavailable to testify or if the judge is satisfied, based on psychological assessments of the child, that giving evidence might be traumatic for the child or harm the child.[702] In *R v P (J)*[703] the court found that the admission of hearsay evidence was necessary as a result of the extreme youth of the victim.[704] While in *Khan v College of Physicians and Surgeons of Ontario*[705] the inability of a young child to give a coherent or comprehensive account of the events necessitated the admission of hearsay evidence.

Based on the Canadian approach it can be argued that the requirement of "necessity" is similar to the requirement in South Africa that the admission of the hearsay evidence must be "in the interests of justice". On this basis, hearsay evidence relating to statements made by the child should be admitted where the child is incompetent to testify, is very young, or cannot give a coherent or a complete account of the events.

Evaluation

The rule against the admission of hearsay evidence is linked to the importance of oral evidence, which is reflected in the requirement that the evidence be given under oath and subject to cross-examination. In fact, the primary reason for the exclusion of hearsay evidence is found in the constraints that it places on cross-examination.[706] At least in criminal cases, therefore, the rule is based on Due

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[701] (1990) 2 SCR 531.
[702] 546.
[703] (1992) 74 CCC (3d) 276 (Quebec Court of Appeal) aff'd (1993) 1 SCR 469.
[704] The victim was 2 and a half years old at the time of the alleged offence and five years old at the time of the trial.
[705] (1992) 9 OR (3d) 641 (Ontario Court of Appeal).
[706] Schwikkard & Van der Merwe *Principles* 255.

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Process values that require that the matter be adjudicated only after the accused has had full opportunity to discredit the case against him.

Because the admission of hearsay evidence in terms of section 3 is dependent on its being in the interest of justice, which, in turn, is dependent on the particular circumstances of the case, it is not possible to classify the exception created in section 3(1)(c) as Due Process or Victims' Rights. However, one can identify Due Process and Victims' rights values in the way in which the courts interpret the requirement that admission of the evidence must be in the interests of justice. For example, in *S v Staggie*[707] Victims' rights values dictated the admission of hearsay evidence in an application in terms of section 153 of the Criminal Procedure Act,[708] while in *S v Ramavhale,*[709] Due Process values militated against the admission of the hearsay evidence.

The question of balancing the Due Process constitutional fair trial rights of the accused against Victims' rights claims is particularly important in the context of prosecution of alleged sexual offenders against children where the child complainant is often not capable of testifying in court. In this context it may, in the opinion of the trial court, be in the interests of justice to allow hearsay evidence. It is, however, important to consider the implications of admission of such evidence on the fair trial rights of the accused. Although an accused person has the right to challenge and adduce evidence in terms of section 35(3)(i) of the Constitution,[710] hearsay evidence, by its very nature, denies the accused his right to cross-examine the declarant, ie, the non-witness.[711]

The constitutional validity of section 3 of the Law of Evidence Amendment Act[712] was challenged in *S v Ndhlovu.*[713] On behalf of the appellants it was argued that section 3 violates the right to a fair trial as guaranteed in section 35(3) of the Bill of Rights and, more specifically, that it violates the right to adduce and challenge

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[707] 2003 1 SACR 232 (C) 241*b*.
[708] 51 of 1977.
[709] 1996 1 SACR 639 (A).
[710] 108 of 1996.
[711] *S v Ramavhale* 1996 1 SACR 639 (A) 649*g-h*.
[712] 45 of 1988.
[713] 2002 2 SACR 325 (A).

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evidence.[714] However the court, per Cameron JA, concluded that the Law of Evidence Amendment Act[715] "provides a constitutionally sound framework for the admission of hearsay evidence."[716] Despite the caution expressed in *S v Ramavhale*[717] the court found that a trial court should be "scrupulous to ensure respect for the accused's fundamental right to a fair trial". A number of safeguards were therefore identified to assist the court in this task.[718]

Firstly, the presiding officer generally has the duty to keep inadmissible evidence out and to prevent a witness from giving hearsay evidence. Secondly, the provisions of the act cannot be applied against an unrepresented accused unless the significance of its provisions has been explained to him. Thirdly, the court finds a safeguard in the fact that the accused cannot be ambushed by the "late or unheralded admission of hearsay evidence".[719] A further safeguard can, according to the court, be found in the fact that a decision on the admissibility of evidence is one of law and that a court of appeal can therefore overrule such a decision by a lower court if it considers it to be wrong.[720] The court also found that making the admission of hearsay evidence "subject to broader, more rational and flexible considerations" is in keeping with developments in other democratic societies based on human dignity, equality and freedom.[721]

Respect for the accused's fundamental right to a fair trial includes the right to adduce and challenge evidence. In this regard the court found that the Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination, but contains the right (subject to limitation in terms of section 36) to "challenge evidence".[722] In the case of hearsay evidence, the court considers the right to challenge evidence as encompassing the entitlement to resist the admission

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[714] S 35(3)(i).
[715] 45 of 1988.
[716] § [26] 341*b*.
[717] 1996 1 SACR 639 (A) 649*d-e*.
[718] § [17] 337*d ff*.
[719] § [18] 338*a*. In this respect, the court found that the prosecution must clearly signal its intention to invoke the provisions of the Act before closing its case and the trial Judge must rule on its admissibility at that stage so that the accused can appreciate the "full evidentiary ambit he ... faces". § [17].
[720] § [22] 339*e*.
[721] § [23] 339*h* – 340*a*.
[722] § [24] 340*d-e*.

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of the hearsay and to scrutinise its probative value, including its reliability.[723] As the interests of justice require the admission of hearsay evidence, the right to challenge evidence does not encompass the right to cross-examine the original declarant.[724] On this basis, the court found that no constitutional right is infringed where hearsay evidence is admitted in terms of section 3(1)(c).[725]

Although there can be little doubt that the provisions of section 3(1)(c) have passed constitutional muster it is significant that the court in *Ndhlovu*[726] adopted an approach in terms of which the question of admissibility of evidence and the right to challenge evidence are conflated. The court seems to accept that reliability of the hearsay evidence is sufficient fulfilment of the right to challenge evidence and therefore does not find it necessary to explore the content of the right to challenge evidence or, more importantly, the role played by cross-examination in the fulfilment of the right.[727]

However, the role of cross-examination cannot be over-emphasised. Although the purpose of cross-examination is primarily to test the testimony offered[728] so that the court may be in a position to asses the value of the evidence, cross-examination has a number of subsidiary goals, which include the eliciting of evidence that is favourable or advantageous to the cross-examiners' side,[729] to demolish evidence given in chief,[730] to undermine the probative value of evidence given,[731] to attack and undermine the credibility of the witness,[732] to elicit facts which may be used to cross-examine others,[733] and to put the cross-examiner's case to the witness for

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[723] § [24] 340*e*.
[724] § [24] 340*f*.
[725] § [24] 340*e*.
[726] 2002 2 SACR 325 (A).
[727] Schwikkard "The Challenge of Hearsay" 2003 *SALJ* 63 70.
[728] *S v Gobozi* 1975 3 SA 88 (E).
[729] Ferreira *Strafproses in die Laer Howe* 2nd ed (1979) 366; Daniels *Morris Technique in Litigation* 5th ed (2003) 202; Wrottesley *The Examination of Witnesses in Court* 3rd ed (1961) 781; *S v Langa* 1963 4 SA 941 (N); *S v Engelbrecht* 1967 1 PH H177 (SWPA); *Caroll v Caroll* 1947 4 SA 37 (N). Kriegler & Kruger *Hiemstra* 420 goes as far as stating that this is the only objective of cross-examination.
[730] Ferreira *Strafproses* 366; Daniels *Technique* 202.
[731] Ferreira *Strafproses* 366; Daniels *Technique* 202.
[732] Ferreira *Strafproses* 386; Daniels *Technique* 202.
[733] *Distillers Corporation v Kotze* 1956 1 SA 357 (A) 361D-E.

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purposes of eliciting reactions and explanations.[734] By emphasising reliability and not exploring the essential content of the right to challenge evidence the court in *Ndhlovu*[735] created the risk of a narrow interpretation being placed on the right to challenge evidence.[736]

As the court's finding in *S v Ndhlovu*[737] that no constitutional right is infringed where hearsay evidence is admitted in terms of section 3(1)(c)[738] creates the risk of a narrow interpretation being placed on the right to challenge evidence, it is open to criticism. The risk could however be obviated by applying the two-stage approach adopted by the Constitutional Court in *S v Makwanyane.*[739] In the first stage the court could have considered the content of the right in order to determine whether an infringement had in fact existed. Only if it had, would the court have been required to proceed to the second, limitations stage. Since the right to challenge evidence must, at least, include the right to cross-examination, the court in the *Ndhlovu*[740] case would undoubtedly have had to find that the use of hearsay evidence by the State violated the accused's right to challenge evidence through cross-examination.[741] After coming to this conclusion, the court would have had to proceed to the second stage of the enquiry to consider whether the infringement on the right to challenge evidence could have been justified in terms of the limitations clause.[742] In light of the safeguards built into section 3(1)(c), a limitation of the right to challenge evidence would have been reasonable and justifiable and would therefore have passed constitutional scrutiny.

The balance between the Due Process rights of the accused on the one hand, and Victims' Rights values on the other, therefore lies in the strict application of the

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[734] Daniels *Technique* 202.
[735] 2002 2 SACR 325 (A).
[736] Schwikkard 2003 *SALJ* 63 71.
[737] 2002 2 SACR 325 (A).
[738] § [24] 340*e*.
[739] 1995 3 SA 391 (CC) § [26] 410B and § [102] 435I – 436A.
[740] 2002 2 SACR 325 (A).
[741] Snyckers "Criminal Procedure" in Chaskalson, Kentridge, Klaaren, Marcus, Spitz, Woolman *Constitutional Law of South Africa* 2nd ed (2003) 27-94A.
[742] S 36 Constitution.

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requirements set in section 3(1)(c) of the Law of Evidence Amendment Act.[743] Legislative interventions in this regard are therefore unnecessary.

5 6 Previous consistent statements

"Previous consistent statement", the third aspect discussed in this chapter, refers to "a written or oral statement made by a witness on some occasion prior to testifying and which corresponds with or is substantially similar to his or her testimony in court".[744] As a general rule, a witness is not allowed to refer to a previous statement that is consistent with his testimony in court.[745]

The reason for the exclusion of previous consistent statements is to be found in its lack of relevance.[746] This can, in turn, be attributed to the cumulative effect of a number of factors.[747] First, because it is commonly accepted that a lie can be repeated as often as the truth,[748] the probative force of a previous consistent statement is very low.[749] The danger of easy fabrication of evidence or so-called "self-made" evidence also influences admissibility.[750] Thirdly,[751] since it can be accepted that a witness's evidence will in all probability to consistent with what he previously said about the same topic or incident, evidence of previous consistent statements would be superfluous. Fourthly, as it would merely duplicate the evidence already given by the witness, proof of a previous consistent statement makes no probative contribution to the case.[752] Lastly, the rule against self-

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[743] 45 of 1988.
[744] Schwikkard & Van der Merwe *Principles* 100.
[745] *R v Rose* 1937 AD 467; *S v Bergh* 1976 4 SA 857 (A) 865G; *S v Mkohle* 1990 1 SACR 95 (A) 99*c-d*; *S v Moolman* 1996 1 SACR 267 (A) 300*c*.
[746] Schwikkard & Van der Merwe *Principles* 101.
[747] Schwikkard & Van der Merwe *Principles* 101.
[748] *R v Rose* 1937 AD 467 473. See also Van Wyk in Ferreira *Strafproses in die Laer Howe* 2nd ed (1979) 442.
[749] *S v Mkohle* 1990 1 SACR 95 (A) 99*d*.
[750] Schwikkard & Van der Merwe *Principles* 101 and the authority cited there. It is argued by van Wyk in Ferreira *Strafproses* 442 that the witness might retell his story to a number of different people with the view to calling those people to confirm his evidence.
[751] Tapper *Cross and Tapper* 272.
[752] *Holtzhausen v Roodt* 1997 4 SA 766 (W) 774D.

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corroboration[753] limits the probative value of the statement to such an extent that it has little probative force.[754]

Despite the rule against the admissibility of previous consistent statements, a number of exceptions have been developed. Relevant to this study is the one that relates to the complaint of a victim of a crime of a sexual nature.[755] This makes it possible to lead evidence with regard to a voluntary complaint made by the victim within a reasonable time after the commission of the alleged offence.[756] The requirements[757] that are set for the admission of previous consistent statements are that the complaint must be voluntary,[758] it must have been made at the first reasonable opportunity, the victim must testify, and must be a victim of a sexual offence.

A voluntary complaint in sexual offences cannot result from leading or suggestive questions,[759] nor from intimidation.[760] In *R v C*,[761] for example, the accused was found guilty of rape of a five year old girl, even though the complaint had been made pursuant to questions by the mother of the victim. Since the questions were neither of a suggestive nor leading in nature, the court found that the evidence of the complaint had been correctly admitted.[762] The decision on the character of the question is therefore a matter that must be left to the discretion of the presiding officer.[763] In *R v Osborne*[764] the court, per Ridley J, was of the opinion that evidence would be inadmissible if the facts indicated that, but for the questioning, there would have been no voluntary complaint. However, evidence regarding the

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[753] For a discussion see Schwikkard & Van der Merwe *Principles* 497*ff*. See also Schmidt & Rademeyer *Bewysreg* 397*ff* and Zeffertt *et al Evidence* 403-404.
[754] Schwikkard & Van der Merwe *Principles* 101.
[755] Due to the limited scope of this study, the discussion on the exceptions to the rule against the admissibility of previous consistent statements will be limited to the exception regarding the complaint in sexual cases where there is a victim.
[756] For a discussion on the origin of the exception see Harms "*Res Gestae* in the Suid-Afrikaanse Reg" 1965 *THRHR* 257 268-269; Van der Merwe "Die toelatingsgrond en bewyswaarde van klagtes in seksmisdade" 1980 *Obiter* 86 87*ff;* Labuschagne "Die klagte by seksmisdade" 1978 *De Jure* 18*ff*.
[757] *R v C* 1955 4 SA 40 (N) 40G-H.
[758] *S v T* 1963 1 SA 484 (A) 486H.
[759] *R v Norcott* 1971 KB 347; *R v C* 1955 4 SA 40 (N) 40G.
[760] *R v Osborne* 1905 1 KB 551 556; *R v Gannon* 1906 TS 114.
[761] 1955 4 SA 40 (N).
[762] 41D.
[763] *R v Osborne* 1905 1 KB 551 556.
[764] 1905 1 KB 551.

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complaint would be admissible where the question merely anticipated a statement that the complainant was about to make.[765] The question of the voluntariness of a complaint is therefore a factual question that depends solely on the circumstances of the case.

The question of intimidation and its effect on the admissibility of evidence was also raised in *S v T*.[766] In *T* the accused, who had been convicted of the rape of a child under the age of 12 years, appealed against the conviction. His main ground for the appeal related to the admission in evidence of the complaint of the alleged victim. On the facts it appeared that the complaint had been made only after the mother of the complainant had threatened to hit her if she refused to tell the truth. The court, per Hoexter JA, found that a complaint may not be admitted if made as a result of intimidation[767] and that the evidence *in casu* should therefore not have been admitted at the trial.[768] The decision has not escaped criticism. It has, for example, been noted that the court should have considered the fact that the accused had allegedly threatened to kill the victim and her family if she reported the incident, since this evidence has a bearing on the question of voluntariness of the complaint. [769] Arguing that merely the voluntariness of the complaint and not the questioning that precedes it, should be considered, Labuschagne[770] adds that there may be circumstances where, despite the existence of an element of intimidation, the voluntariness of the complaint is not affected. Where the risk of false accusation has been eliminated, the complaint should be admissible despite the fact that it may not have been made voluntarily.[771]

The second requirement for the admissibility of previous consistent statements in this context is that evidence regarding the complaint may only be admitted if the victim testifies at the trial. In *R v Kgaladi*,[772] the Appellate Division[773] found that "when the evidence of the complainant is not before the court, neither the

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[765] *R v Osborne* 1905 1 KB 551 556.
[766] 1963 1 SA 484 (A).
[767] 487D.
[768] 482E.
[769] Schwikkard & Van der Merwe *Principles* 104.
[770] Labuschagne 1978 *De Jure* 242 247.
[771] *Ibid.*
[772] 1943 AD 255 261.
[773] As it then was.

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particulars of the complaint made by her... nor the mere fact that the complaint was made, can be given in evidence". In coming to its decision, the court referred to the judgement of Hawkins J in *The Queen v Lillyman*[774] where is was said that

> "[t]he complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains."

The court in *Kgaladi*[775] further found that the victim's whole statement containing her alleged complaint should be submitted to the jury as part of the case for the prosecution, in so far as it related to the charge against the accused.[776] Where a victim does not testify, neither the content of the complaint, nor the mere fact that a complaint was made may be admitted as evidence.[777]

Since it would result in the inadmissibility of evidence of the complaint where the child is found to be an incompetent witness,[778] this requirement, combined with the competency test applicable to youthful witnesses, presents a problem in the case of child victims. In *Smith v Malete,*[779] for example, the court refused to admit the evidence of the complainant's mother with regard to the particulars of the complaint, finding that "[i]f a child of three years cannot give evidence in court, how can she give evidence through her mother?" The only option available to the prosecution would therefore be to attempt to persuade the court to receive the hearsay evidence of the complaint in terms of section 3(1)(c) of the Law of Evidence Amendment Act[780] on the grounds that it may be in the interests of justice to admit the evidence. [781] In *S v R*[782], however, the court admitted evidence relating to the complaint in a sexual case despite the fact that the victim suffered from amnesia and could therefore not testify about the incident which gave rise to the charge. This judgment creates the impression that it is sufficient for the victim

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[774] 1896 2 QB 167 170.
[775] 1943 AD 255 261.
[776] This case was applied in *R v Osborne* 1905 1 KB 551.
[777] *R v Wallwork* 1958 2 Cr App Rep 153; *The Queen v Lillyman* 1896 2 QB 167.
[778] For a discussion see § 5 2 above.
[779] 1907 TH 235.
[780] 45 of 1988.
[781] Schwikkard & Van der Merwe *Principles* 104. This solution is not without its difficulties. For a discussion on the admission of hearsay evidence in terms of s 3(1)(c) of the Law of Evidence Amendment 45 of 1988 see § 5 5 above.
[782] 1965 2 SA 463 (W).

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to testify during the trial and not necessary for the victim to testify about the statements or the content of the complaint.

The requirement that a complaint in sexual offences must have been made at the first reasonable opportunity[783] raises the question as to what a reasonable time would amount to. Schmidt[784] ascribes the answer to two factors. The first is the presence or absence of a person to whom the victim could reasonably be expected to have complained, and the second is the question whether the victim realised the immoral nature of the act.[785] For example, in *R v Gow*,[786] the court accepted that it would not be unreasonable for a girl who had allegedly been assaulted on a train to wait until she saw her mother before she complained instead of making the complaint to the ticket examiner. Likewise, in *S v S*,[787] the Zimbabwean Supreme Court, per Ebrahim JA, was prepared to accept that it was reasonable for an 11-year old rape victim not to report the incident at school. In *R v S*,[788] the court also accepted that it was quite natural for a child not to make a complaint to his stepfather when he saw him directly after the incident, but rather to wait until he saw his mother.

A number of examples exist in case law where courts also considered various lapses of time before the making of the complaint, especially if the complainant was youthful. In *R v C*,[789] the court accepted evidence of a complaint which had been made five days after the incident. In *R v Gannon*[790] a lapse of ten days between the incident and the making of the complaint was found to be reasonable, while in *R v T*[791] the court accepted that even after a lapse of six weeks the complaint had been made at the first reasonable opportunity. In *R v S*[792] the court was required to decide on the admissibility of two complaints of two separate incidents made by the same complainant. The complaint relating to the second

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[783] *S v De Villiers* 1999 1 SACR 297 (O).
[784] Schmidt & Rademeyer *Bewysreg* 409.
[785] See also Zeffertt *et al Evidence* 406.
[786] 1940 2 PH H148 (C).
[787] 1995 1 SACR 50 (ZS).
[788] 1948 4 SA 419 (GW).
[789] 1955 4 SA 40 (N).
[790] 1906 TS 114.
[791] 1937 TPD 389.
[792] 1948 4 SA 419 (GW).

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incident, which took place two months after the first, was made within an hour of the incident and was, according to the court, made "timeously"[793] and was therefore admissible. However, since the complaint relating to the first incident was made only after the second incident, the court found that it was not admissible.[794]

In *S v S*[795] the accused was charged with the rape of an eleven year old girl. The child did not report the rape to the first available sympathetic witness and when she did report the incident to her mother, she merely reported that the accused had been "'touching' her breasts, her buttocks and the front of her body".[796] The court gave the following reasons for its acceptance of the evidence: the child testified that she had not reported the incident at school because she wanted to tell her mother first, which the court found to be a natural reaction,[797] the reason given by the complainant for her failure to report the incident to her mother in detail was found to be plausible, and when the complainant had formed the intention to tell her mother, she was bleeding from her vagina, although it had stopped by the time she arrived home. [798] The court also found that the child had not realised that the actions of the accused had been unlawful and had regarded it merely as a form of punishment.[799] For these reasons, despite the fact that the complaint had been made neither immediately nor in detail, the court admitted the evidence.

The fourth requirement set for the admissibility of a complaint in sexual offences is that the complaint must have been made by the victim of such an offence. Although the exception originally applied only to rape cases,[800] it has been extended to include indecent assault of both male and female victims.[801] The exact definition of the crime is not relevant, as long as the crime concerns some sort of

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[793] 423.
[794] 423.
[795] 1995 1 SACR 50 (ZS).
[796] 52*f*.
[797] 56*d*.
[798] 56*g*.
[799] 56*g-h*.
[800] Van der Merwe 1980 *Obiter* 86 87 and the authority cited there.
[801] Labuschagne 1978 *De Jure* 242 245. See also *R v Burgess* 1927 TPD 14; *R v Komsane* 1929 EDL 423; *R v T* 1937 TPD 389; *R v Camerelli* 1922 2 KB 122.

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physical sexual element.[802] In *R v Dray*[803] for example, the court held that although the accused was charged merely with assault, the assault appeared to be of a sexual nature and therefore the previous consistent statement was held to be admissible in terms of this exception. It is important to note that the requirement refers to a "victim" of a sexual offence. This includes persons who voluntarily participated in the sexual offence, but who cannot in law give consent.[804] Despite the fact that they purport to have consented to the sexual contact, children below the age of consent will therefore qualify as victims of a sexual offence.

This exception relating to the admissibility of previous consistent statements regarding a complaint in a sexual offence has not escaped criticism, both from the bench and from academics. For example, Hiemstra CJ described the rule as one of the less clear and haphazard rules inherited from the English law of evidence.[805]

Arguing that exceptions to the general rule against previous consistent statements have developed in order to admit evidence that is highly relevant but would be excluded as a result of the rule, Müller[806] points out that the purpose of the exceptions is frustrated by strict adherence to the rigid requirements set for the admissibility of such evidence.[807] On the other hand, however, the need to admit all relevant evidence often forces the courts to strain the original ambit of the requirements, despite the rigid requirements set for the admissibility of such evidence.[808] In *R v T,*[809] for example, the court was willing to accept that the complaint of a five-year-old had been made at the first reasonable opportunity despite the fact that a period of six weeks had lapsed between the incident and the complaint, while in *S v S*[810] several months had lapsed between the incident and the

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[802] Labuschagne 1978 *De Jure* 242 245. See also in general *S v Thuys* 1974 2 PH H82 (C); *R v Gloose* 1936 PH F155 (SWA) and *Westmeyer v R* 1911 NLR 197.
[803] 1925 AD 553 554.
[804] Schwikkard & Van der Merwe *Principles* 106.
[805] *S v M* 1980 1 SA 586 (B) 587H. "[E]en van die minder duidelike en lukrake erfenisse uit die Engelse bewysreg".
[806] Müller *Child Witness* 311.
[807] This point of criticism will be referred to in the evaluation of the rule.
[808] Müller *Child Witness* 312.
[809] 1937 TPD 389.
[810] 1995 1 SACR 50 (ZS).

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making of a detailed complaint, despite which the court accepted that the complaint had been made at the first reasonable opportunity.[811]

Further, since it is difficult to determine when the first reasonable opportunity would be, strict adherence to this requirement is particularly problematic. The Law Commission report indicates, for example, that it may be difficult to establish the presence of a person to whom the victim can reasonably be expected to complain.[812] The reason for this is two-fold. The first relates to psychological factors,[813] while the other relates to the reality of modern life in which people often have no confidant.[814]

As far as psychological factors that influence the decision to complain are concerned, Müller[815] notes that studies have shown that up to seventeen out of nineteen rapes go unreported. This can be attributed to a number of psychological and social factors.[816] The Law Commission's 1985 report[817] indicates that many victims of rape drum up the courage to make a complaint about an incident only years later. According to this report,[818] studies relating to the effects of rape have shown that shock, feelings of guilt and depression are common effects of rape that often disrupt the victim's life. Therefore, it is argued, the absence of a complaint or the delay in making a complaint cannot be a reliable criterion in assessing credibility of the complainant.[819] The court in *Holtzhausen v Roodt*[820] gave some recognition to these and other psychological factors that play a part in the non-reporting of rape. In this case Satchwell J remarked that she doubted the ability of judicial officers to comprehend fully "the kaleidoscope of emotion and experience of both rapist and rape survivor".

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[811] For a discussion of the reasons given in support of the court's decision see *supra*.
[812] SA Law Commission *Women and Sexual Offences* Project 45 Report (1985) 51.
[813] Psychological factors will be discussed below.
[814] SA Law Commission *Women and Sexual Offences* Report 51.
[815] Müller *Child Witness* 312 and the authority cited there.
[816] Schwikkard "A critical overview of the rules of evidence relevant to rape trials in South African law" in Jagwanth, Schwikkard & Grant (eds) *Women and the Law* (1994) 201 and the authority cited there.
[817] SA Law Commission *Women and Sexual Offences* Report 51.
[818] SA Law Commission *Women and Sexual Offences* Report 51 and the authority cited there.
[819] Schwikkard in Jagwanth *et al* (eds) *Women and the Law* 201. See also Müller *Child Witness* 312.
[820] 1997 4 SA 766 (W) 778E.

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Tapper argues that since the accused is prohibited from leading similar evidence, the admission of evidence relating to the complaint unfairly favours the complainant.[821] This, in turn, would by necessary implication favour the prosecution. However, the converse can also be argued: the exception prejudices the complainant because it enables the defence to exploit the complainant's failure to complain timeously. It has, for example, been argued that the court in *R v M,*[822] clearly established the rule that an adverse inference may be drawn from the fact that the complaint had not been made within a reasonable time after the alleged incident.[823] This, Schwikkard argues,[824] reflects attitudes "formulated in a time when there was little understanding of the psychology of a rape victim".[825] It is in light of this realisation, as well as that of Satchwell J in *Holtzhausen*,[826] that the delay in the making of the complaint and the reasonableness of the delay must be assessed.

In addition to these arguments, the Law Commission's 1985 report[827] indicates that while the defence may use the fact that the complaint was not made within a reasonable time to impeach the credibility of the complainant, the state may not use the evidence relating to the complaint as corroboration for the evidence of the complainant.[828] The practical effect is that the state gains little from the fact that

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[821] Tapper *Cross & Tapper on Evidence* 9th ed (1999).
[822] 1959 1 SA 352 (A).
[823] Schwikkard in Jagwanth *et al* (eds) *Women and the Law* 201. This interpretation of the court's dictum is open to criticism. In *R v M* 1959 1 SA 352 (A) 358C-D the court expressed the view that the "evidence [of the complainant] was certainly open to the major criticism arising out of the delay in complaining *and* the positive deception practised by the complainant. The trial Court, however, took the right factors into account in considering the issues. It appreciated the risks involved in relying on a young girl complainant in a rape charge and it realised that those risks were heightened by her subsequent behaviour. Having regard to the trial Court's findings and to the probabilities appearing from the record it is impossible for this Court to say that the verdict was wrong." (Emphasis added). It is submitted that the dictum does not indicate that a negative inference can be drawn *solely* from the fact that there was a delay in the making of the complaint. What the court did find, although not expressly, is that the fact that there was a delay in making the complaint is but *one* of the factors that should have been considered in evaluating the evidence of the complainant. The deception practised by the complainant being another factor. Therefore, it is submitted, that the only rule that can be construed from this dictum is that where there has been a delay in the making of the complaint *and* the complainant acted deceptively, these factors should be taken into account in the assessment of the complainant's evidence.
[824] *R v M* 1959 1 SA 352 (A) 358C-D.
[825] Schwikkard in Jagwanth *et al* (eds) *Women and the Law* 201.
[826] 1997 4 SA 766 (W) 778E.
[827] SA Law Commission *Women and Sexual Offences* Report 51.
[828] It seems that the Law Commission's statement is based on a misunderstanding of the term "corroboration". Skeen in Zeffertt, Paizes & Skeen *The South African Law of Evidence* (2003) 810

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the complaint was in fact made within a reasonable time, while the defence stands to gain much if it was not. The Law Commission points out that it is unrealistic to assume that the complaint can be used to prove consistency on the part of the victim, while the fact-finder ignores the fact or the complaint or the content thereof for "corroborative" purposes.[829]

The fact that the exception is limited to sexual offences, is also criticised by Müller.[830] Based on the cautionary rule that applies to the evidence of children,[831] any evidence that assists in establishing the credibility of the child should therefore be placed before the court, irrespective of the type of offence concerned.

As a general rule, previous consistent statements are inadmissible because of their low probative value and the fact that such evidence is easy to manufacture.[832] Müller argues that the law relating to previous consistent statements (and by necessary implication the exception to the rule) must be repealed and that "relevance", as it relates to the admissibility of all other evidence, should be the only guiding principle.[833] This, together with the argument that the absence of a complaint is an unreliable criterion leads one to agree with Schwikkard: [834] it is difficult to comprehend why the exception is retained in our law.

In Discussion Paper 102 the South African Law Commission considered the complaint exception to the rule against previous consistent statements and opined that the practical application of the rule is problematic since the defence often succeeds with an argument that a negative inference should be drawn from a delay in making the complaint.[835]

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defines corroboration as "independent evidence which confirms the testimony if a witness". By its very nature evidence of a previous consistent statement cannot be said to be independent evidence, since it originates from the same source as the evidence being led, namely, the complainant. The Law Commission's statement could be correct if "corroboration" is seen as *any* evidence which *supports* the evidence sought to be corroborated. However, it is submitted that this is not correct.

[829] SA Law Commission *Women and Sexual Offences* Report 52.

[830] Müller *Child Witness* 313.

[831] See § 5 4 2

[832] See § 5 6.

[833] Müller *Child Witness* 313.

[834] Schwikkard in Jagwanth *et al* (eds) *Women and the Law* 201.

[835] § 34.4.1.1.

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Despite the fact that the Law Commission in its 1985 report on Women and Sexual Offences[836] came to the conclusion that the application of the rule could in no way prejudice the rape victim, the Commission came to the conclusion that this cannot be correct. The Commission felt that the fact that courts are prepared to draw a negative inference from the fact that the complaint was not made within a "reasonable time" reflects certain assumptions about the psychological effects of sexual offences, which assumptions are not borne out by empirical studies.[837] The Commission opined that studies that indicate that there are many psychological and social factors which may inhibit the complainant from making a report "within a reasonable time" militate against the theory that the absence of an earlier complaint should, of necessity, have bearing on the credibility of the complainant.[838]

The Commission was of the opinion that it is necessary to retain the requirement that the complaint should have been made at the first reasonable opportunity, but that the possibility of drawing a negative inference *solely* from the timing of the complaint should be eliminated. In this way the timing of the complaint will only have bearing on the question of admissibility of the complaint and not on the question of credibility of the complainant.[839] Therefore, the Commission recommended that provisions that clearly state that a negative inference may not be drawn only from the absence of a complaint or a delay in making the complaint should be included in the Sexual Offences Bill.[840] The fact that no complaint was made or that there was a delay in making the complaint should, according to the recommendation of the Commission, only be one of the factors the presiding officer should consider in weighing the evidence.[841]

Commenting on the recommendations in the Discussion Paper, Burchell & Schwikkard recommended that the sexual offence matters exception to the rule against admission of previous consistent statements be abolished while the common law exception relating the rebuttal of an allegation of recent fabrication be

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[836] SA Law Commission *Women and Sexual Offences* Report § 3.50.
[837] § 34.4.2.1.
[838] § 34.4.2.1.
[839] § 34.4.3.1.
[840] § 34.4.3.2.
[841] § 34.4.3.1.

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retained.[842] Schwikkard opines that this would ensure that adjudicators are not deprived of relevant evidence, while eliminating the possibility of an attack on the credibility of the complainant.[843] The Law Commission, however, was of the opinion that the recommendation of Burchell & Schwikkard would result in the inadmissibility of a first report of a sexual offence during the leading of the complainant's evidence.[844]

Although the Commission was prepared to concede that the origin of the sexual offence matters exception is based on a perception that the evidence of a complaint in sexual offence cases must be treated with suspicion and that this is unacceptable, it was of the opinion that the rule has evolved and that evidence of the first complaint is now routinely admitted during the state's case.[845] Therefore, the Commission recommended that in order to avoid confusion it was necessary to include a provision stating that a negative inference cannot be drawn solely from the fact that a previous consistent statement does not exist. The Commission accordingly recommended the inclusion of the following provision in the draft Sexual Offences Bill:

> A court, in criminal proceedings involving the commission of a sexual offence, may not draw any inference only from –
>
> (a) the fact that no previous consistent statements have been made;
>
> (b) the length of any delay between the alleged commission of such offence and the reporting thereof.

In Namibia section 6 of the Combating of Rape Act[846] provides that all previous consistent statements by a complainant in a sexual offence matter are admissible. However, the section contains a provisio: no inference may be drawn from the fact that no previous consistent statements have been made. Section 6 of the Act therefore dispenses with the requirement that the complaint should have been made at the first reasonable opportunity as well as the requirement that the complainant

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[842] SA Law Commission *Sexual Offences* § 5.4.3.
[843] SA Law Commission *Sexual Offences* § 5.4.3.
[844] SA Law Commission *Sexual Offences* § 5.4.3.
[845] SA Law Commission *Sexual Offences* § 5.4.3.
[846] 8 of 2000.

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testify at trial. Section 7 of the Combating of Rape Act[847] further provides that no inference may be drawn only from the length of the delay between the alleged commission of the sexual offence and the laying of a complaint. In Namibia the exception to the admissibility of previous consistent statements therefore still applies, albeit without the further requirements set in South African law.

Evaluation

The exception to the rule against the admission of previously consistent statements finds its roots in the medieval requirement that a woman who was raped, had to raise "the hue and cry" immediately if a charge of rape was to succeed.[848] By the 18th century, this was no longer essential to prove a charge of rape, but it was still a strong presumption against a woman if she did not make a complaint within a reasonable time.[849] However, in the development of the modern rule, the medieval "hue and cry" requirement is hardly recognisable.[850] The reasons for the admission of this evidence can be found in the traditional suspicion with which the complainant in sexual crimes was viewed. This suspicion was nothing less than a veiled attack on the credibility of the victim.[851] In light of this suspicion and the cautionary rule that applied to the evidence of complainants in sexual crimes, evidence relating to the making of the complaint and the content of the complaint became relevant, since proof of consistency could rebut the suspicion cast on the evidence of the victim. Therefore, it became a question of credibility and, consequently, relevant to the matter before the court.

If this argument is accepted, it is clear that the values underlying the admission of evidence relating to the complaint in sexual crimes are Victims' rights values which seek to prevent re-victimisation inevitably caused by a credibility challenge. However, the fact that a negative inference can be drawn from the fact that the victim did not complain timeously reflects Due Process values which require a conviction to be based on reliable evidence. In this instance the delay in the

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[847] 8 of 2000.
[848] Zeffertt *et al Evidence* 405. See also Schwikkard & Van der Merwe *Principles* 103; Van der Merwe 1980 *Obiter* 86 87; Labuschagne 1978 *De Jure* 18 *ff.*
[849] Zeffertt *et al Evidence* 405.
[850] Van der Merwe 1980 *Obiter* 86 87.
[851] Van der Merwe 1980 *Obiter* 86 89.

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making of the complaint is used to discredit the witness and therefore impeach the reliability of the testimony.

The question arises whether, in light of the abolition of the cautionary rule which applied to the evidence of the complainant in sexual offences and the reasoning of the court in *S v J*[852] with regard to the traditional suspicion with which victims of sexual offences are viewed, the continued existence of the exception relating to the admission of the complaint in sexual offences can be justified. If the reasoning of the court in *S v J*[853] is applied in this context, the exception should be abolished.

Abolition of the complaint exception would mean that failure on the part of the complainant to complain timeously cannot be used to impeach the credibility of the witness. This would give effect to Victims' rights values. Such a measure would also eliminate the tension between Due Process values and Victims' rights values.

5 7 Conclusion

This chapter concentrated on the enhancement of victim participation during the trial phase.

In this Chapter it was shown that the proposed legislative changes to the traditional competency test and to the provisions relating to the taking of the oath will enhance victim participation in the trial phase, while having no significant influence on the fair trial rights of the accused. It was shown that the retention of the discretion relating to the weight to be attached to evidence acts as a safeguard for the fair trial rights of the accused.

It was also shown that effective victim participation is enhanced by the abolition of the cautionary rule applicable to the victim of a sexual offence and the cautionary rule relating to the evidence of the child victim. It was shown that abolition of the cautionary rule applicable to the evidence of the victim of a sexual offence will probably not have a significant impact on the fair trial rights of the accused. It was also shown, firstly, that the retention of the cautionary rule applicable to the

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[852]. *S v J* 1998 2 SA 984 (A). For a discussion see § 5 4 1*supra*.
[853]. *S v J* 1998 2 SA 984 (A). For a discussion see § 5 4 1*supra*.

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testimony of children cannot be justified and, secondly, that the abolition of this rule of practice would not significantly impact on the rights of the accused, since other measures, notably the cautionary rule which applies to the evidence of single witnesses, provide sufficient protection for the fair trial rights of the accused. Further, relating to the cautionary rule applicable to the evidence of a single witness, it was shown that although there is tension between the rights of the accused and the interests of society and the child-victim in this respect, there can be no real objection to the rule, since the rule merely requires the court to seek some kind of safeguard and to satisfy itself that the evidence of the single witness is reliable. Therefore, there is no possibility of an infringement of the fair trial rights of the accused. Neither is the practical application of the rule likely to impact on the rights and interests of the child-victim negatively.

In the discussion of the admissibility of hearsay evidence under the exception created in section 3(1)(c) of the Law of Evidence Amendment Act,[854] it was shown that although the court has a wide discretion to admit hearsay evidence when it would be in the interests of justice to do so, the admission of hearsay evidence is not without problems. Firstly, although there is a possibility that the admission of such evidence could infringe the fair trial rights of the accused, such an infringement may, in normal circumstances, be justifiable in terms of section 36 of the Constitution, owing to the safeguards built into section 3(1)(c). Secondly, courts often exclude hearsay evidence that is necessary to secure a conviction because they choose to follow a conservative approach in such matters. Here it was argued that this provision can be used as a mechanism to promote indirect victim participation in the criminal justice process.

With regard to the admission of previous consistent statements and the complaint exception it was shown that there is much criticism of the exception, especially of the fact that a negative inference can be drawn from a delay in the making of the complaint. It was also argued that abolition of the first reasonable opportunity requirement would give effect to Victims' rights values, since this would mean that a delay in the making of the complaint could not be used to attack the credibility of

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[854] 45 of 1988.

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the victim and would therefore maximise the possibility of securing a conviction, while minimising the re-victimisation of the victim. On the other hand, since the rule against the admissibility of previous consistent statements in general would promote Due Process values, it should be retained.

The next chapter is dedicated to a discussion of the provisions that are aimed at providing protection for the victim of a sexual offence during the trial phase, thereby enhancing victims' rights. The possible effect of these provisions on the fair trial rights of the accused will be considered.

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CHAPTER 6: PROTECTION OF VICTIMS

6 1 Introduction

The previous chapter dealt with provisions aimed at enhancing victim participation in the trial phase of the criminal justice process. The present chapter investigates provisions aimed at protection of the victim from secondary victimisation, caused by the victim's involvement in the criminal justice process. Several provisions aimed at providing such protection already exist in South African law. However, the South African Law Commission has proposed changes to these provisions and has investigated the possibility of providing increased protection for victims.

The existing provisions and the proposed changes are discussed in this chapter. Attention is also drawn to similar provisions in other jurisdictions. Four additional provisions considered by the South African Law Commission are also examined.

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Finally, these provisions are analysed with reference to the values identified in Chapter 2 and the rights identified in Chapters 3 and 4 respectively.

6 2 Vulnerable witnesses

Despite the fact that certain categories of persons may, as a result of their personal characteristics, be more vulnerable than others to the possibility of re-victimisation by the criminal justice system, South African law does not automatically provide protection for such categories of persons.[855] Although a variety of protective measures are available, each case is dealt with on an *ad hoc* basis and witnesses are frequently not even aware of the protective measures at their disposal.[856]

In light of this, the South African Law Commission investigated the possibility of creating a special category of witnesses to whom protective measures should automatically be made available.[857] The Commission considered it necessary to align itself with international trends that automatically make special protective measures available to all victims of sexual offences who are required to testify at trial.[858] This, according to the Commission, promotes the interests of justice.[859] In South Africa, the matter was taken further, with the Commission recommending that such a category should be extended to include not only the victim of the sexual offence, but also any other witness to a sexual offence.

Legislative identification of a special category of vulnerable witnesses would require the court to formally consider the desirability of implementing special measures. This, according to the Law Commission, would result in meeting the needs of those persons identified as vulnerable witnesses.[860] Since decisions in this regard would be binding judicial decisions, the witness would know in advance of the trial what assistance he would receive and how he would be giving his evidence.[861] This, in turn, would significantly reduce the possibility of secondary

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[855] SA Law Commission *Sexual Offences* Project 107 Discussion Paper 102 (??) § 20.2.5.
[856] SA Law Commission *Sexual Offences* Discussion Paper 102 § 20.5.1.
[857] SA Law Commission *Sexual Offences* Discussion Paper 102 §§ 20.1 and 20.2.
[858] SA Law Commission *Sexual Offences* Discussion Paper 102 § 20.5.2.
[859] SA Law Commission *Sexual Offences* Discussion Paper 102 § 20.5.2.
[860] SA Law Commission *Sexual Offences* Discussion Paper 102 § 20.5.3
[861] SA Law Commission *Sexual Offences* Discussion Paper 102 § 20.5.3.

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victimisation by the criminal justice process.[862] The values underlying the recommendation of the Law Commission are therefore clearly orientated towards Victims' Rights.

After considering the position of the accused, the Commission concluded that since numerous protective measures were already afforded to accused persons, both by the Constitution[863] and the Criminal Procedure Act,[864] it was unnecessary to include the accused as vulnerable witnesses.[865] This too reflects the Victims' Rights approach.

In the light of this approach, the Commission recommended the inclusion of a special provision relating to vulnerable witnesses in the draft Sexual Offences Bill. In terms of section 15 of the Criminal Law (Sexual Offences) Amendment Bill,[866] the court, in criminal proceedings involving the alleged commission of a sexual offence, is required to issue a declaration of vulnerability in respect of a child witness[867] or the complainant in a sexual offence.[868] This declaration must follow automatically.

While section 15(1) deals with child witnesses and alleged victims of sexual offences, section 15(2) deals with witnesses who are neither children nor complainants in a sexual offence matter. In terms of this provision, a court may declare such witnesses vulnerable if, in the opinion of the court, they are likely to be vulnerable on account of (a) age; (b) intellectual, psychological or physical impairment; (c) trauma; (d) cultural differences; (e) the possibility of intimidation; (f) race; (g) religion; (h) language; (i) the relationship of the witness to any party to the proceedings; or (j) the nature of the subject matter of the evidence.

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[862] SA Law Commission *Sexual Offences* Discussion Paper 102 § 20.5.3.
[863] 108 of 1996.
[864] 51 of 1977.
[865] SA Law Commission *Sexual Offences* Discussion Paper 102 §§ 20.5.6 and 20.5.7.
[866] B50-2003.
[867] For purposes of this provision, s 2 of the Bill defines a "child" as a person below the age of 18 years.
[868] S 15(1) Criminal Law (Sexual Offences) Amendment Bill B50-2003. The Commission was of the opinion that there is merit in investigating the possibility of extending this provision to all child witnesses in criminal and not only those involved in sexual offence proceedings and recommended as such in § 4.4.3 of the Report. This question, however, falls outside of the scope of this study.

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The Commission declined to define the factors of "age" and "trauma" further, finding that the present formulation makes it possible for the court to consider any trauma or aspect of the witness's age that could make the witness particularly vulnerable. In this way, the Commission felt, the needs of the elderly or persons with a pre-existing condition that makes them particularly vulnerable could be accommodated.[869] Because of a reluctance of witnesses to testify in the presence certain groups of people, such as family elders, the Commission considered the relationship between the witness and other parties in the proceedings important.[870] Inclusion of the factor relating to the subject matter of the evidence was also considered necessary since the graphic or incriminating nature of the evidence is said to have the potential to render the witness particularly vulnerable.[871]

Section 15(2)(k) empowers the court to take into account any other factor that it considers relevant. This provision was considered necessary to ensure that the list of factors to be taken into account was not limited. The reason is that a limitation on the list factors would defeat the object of assisting persons who may not necessarily have been entitled to protective measures in the past.[872] In cases where there is doubt whether the witness should be declared vulnerable or not, the court is empowered to summon "any knowledgeable person" to advise the court in this regard.[873]

Section 15(4) reads as follows:

> "Upon declaration of a witness as a vulnerable witness in terms of this section, the court must, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -
>
> (*a*) allowing that witness to give evidence by means of closed-circuit television as provided for in section 158 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), irrespective of any additional qualifying criteria prescribed by that section;
>
> (*b*) directing that the witness must give evidence through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), irrespective of any additional qualifying criteria prescribed by that section;

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[869] SA Law Commission *Sexual Offences* Project 107 Report (2002) § 4.4.3.
[870] SA Law Commission *Sexual Offences* Report § 4.4.3.
[871] SA Law Commission *Sexual Offences* Report § 4.4.3.
[872] SA Law Commission *Sexual Offences* Report § 4.4.3.
[873] S 15(3) Criminal Law (Sexual Offences) Amendment Bill B50-2003.

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> (*c*) directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), irrespective of any additional qualifying criteria prescribed by that section;
>
> (*d*) prohibiting the publication of the identity of the complainant as provided for in section 154 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or
>
> (*e*) any other measure which the court deems just and appropriate."

Despite submissions questioning the Commission's recommendation that the court be empowered to direct that the witness be protected by measures listed in the section without regard to the requirements inherent to the relevant provisions in the Criminal Procedure Act,[874] the clause "irrespective of any additional qualifying criteria prescribed by that section" in sub-sections 16(1)(a)-(d) was included. No coherent reason was advanced for the non-acceptance of the submissions.

In terms of section 15(5), the court will be obliged to appoint an intermediary in respect of a child witness who has been declared vulnerable. Although this provision is peremptory, the court is given a limited discretion to refuse the appointment of an intermediary if the interests of justice justify such an action. In these circumstances the court is required to record the reasons for its decision.

Section 15(6) lists a number of circumstances which must be taken into account by the court when determining which one or more of the protective measure should be applied to the witness. The provision states that the court must have regard to all the circumstances of the case including (a) any views expressed by the witness; (b) those expressed by a knowledgeable person who is acquainted with or has dealt with the witness; (c) the need to protect the witness's dignity and sense of safety and to protect the witness from traumatisation; and (d) the question whether any protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings. Where the court considers the views expressed by the witness, the court is required to accord such views the weight it considers appropriate in view of the witness' age and maturity.

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[874] 51 of 1977.

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The Law Commission felt that it was important to direct the court's attention to the listed considerations in view of the fact that the clause introduces what it calls "an entirely different focus" and therefore the possibility exists that the object of the clause could be defeated if a court did not do so. In terms of the proposed clause, the court is therefore required to consider at least all the listed factors, but is also empowered to consider factors which are not listed.

In terms of section 15(7), a court may *mero motu*[875] or upon the request of the prosecution revoke or vary a direction given in terms of section 15(4). In light of the fact that not every child or adult victim or witness of a sexual offence will necessarily be vulnerable if required to give evidence by conventional means, a provision was included that makes it clear that the automatic provision of protective measures can be waived.[876]

The section in the Criminal Law (Sexual Offences) Amendment Bill[877] that contains the above recommendations is virtually a verbatim repetition of the provision recommended by the Law Commission in its 2002 report. The omission of the recommended provision relating to the appointment of a support person is therefore interesting.[878]

Section 14 of the Criminal Law (Sexual Offences) Amendment Bill[879] places an obligation on the prosecutor to inform a potential witness (or his parents) of the possibility that he may be declared a vulnerable witness in terms of section 15 and that he can be protected by one or more of the measures provided for in that section. This must be done before the witness commences his testimony. In several other jurisdictions legislative provisions have been adopted in terms of which the vulnerability of victims has been recognised and measures aimed at protecting such persons, have been incorporated. For example, in England the Youth Justice and Criminal Evidence Act[880] acknowledges the vulnerability of certain witnesses. A

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[875] In these circumstances the court is required to furnish reasons for the revocation or variation of the direction.
[876] SA Law Commission *Sexual Offences* Discussion Paper 102 § 20.5.5.
[877] B50-2003.
[878] This is discussed in § 6 7 3below.
[879] B50-2003.
[880] Youth Justice and Criminal Evidence Act 1999.

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number of measures have also been identified to help these witnesses. In terms of section 16 of this Act, a witness under the age of 17 years or who suffers from a mental incapacity is eligible for assistance, while section 17 regulates the category of vulnerable witnesses who, on grounds of fear or distress in connection with testifying in the proceedings, are eligible for protection. It also describes who is entitled to protection if the court is of the opinion that the quality of his evidence is likely to be diminished for this reason.[881] In determining whether a witness is entitled to protection in terms of section 17, the court must take a number of factors into account, including the nature and alleged circumstances of the offence,[882] the age of the witness,[883] the social and cultural background and ethnic origins of the witness,[884] the domestic and employment circumstances of the witness,[885] any religious beliefs or political opinions of the witness,[886] the behaviour of the accused,[887] family members or associates of the accused[888] or any other person who is likely to be an accused or witness in the proceedings,[889] towards the witness. The Court must also consider the views of the witness.[890] In terms of section 17(4), the complainant in respect of a sexual offence is automatically entitled to protection in terms of the Act, unless he indicates that he does not wish to be eligible for protection.

Sections 23 to 30 of the Youth Justice and Evidence Act[891] provide for certain protective measures. These include the following:

- That the witness be screened from the accused;
- That the evidence be given through live link *via* closed circuit television;
- That the evidence be given in private;

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[881] S 17(1).
[882] S 17(2)(a).
[883] S 17(2)(b).
[884] S 17(2)(c)(i).
[885] S 17(2)(c)(ii).
[886] S 17(2)(c)(iii).
[887] S 17(2)(d)(i).
[888] S 17(2)(d)(ii).
[889] S 17(2)(d)(iii).
[890] S 17(3).
[891] Youth Justice and Criminal Evidence Act 1999.

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- That the officers of the court remove their wigs and gowns while the witness testifies;
- That the evidence in chief and/or cross-examination and/or re-examination of the witness be given by way of a video recording;
- That the witness is examined through an intermediary and
- That the court may direct that the witness be provided with devices necessary to enable questions or answers to be communicated to or by the witness.

The provisions in Scotland are similar. Section 29 of the Crime and Punishment (Scotland) Act[892] makes special provision for vulnerable witnesses. In terms of section 29(12), a child under the age of 16 years and persons suffering from significant impairment of intelligence and social function *inter alia* qualify as "vulnerable persons". In terms of section 29 of the Act, the court may direct that a commissioner be appointed to take the evidence of the vulnerable witness,[893] that the witness testify *via* live television link[894] or that a screen be used to conceal the accused from the sight of the witness.[895] It is important to note, however, that the witness is not automatically entitled to protection in one of these ways. A separate application must be brought for an order in terms of which the witness is entitled to such protection.

On 4 March 2004 the Scottish Parliament passed the Vulnerable Witnesses (Scotland) Act 2004. In terms of this Act, provision is made for the use of special measures for the purpose of taking the evidence of children and other vulnerable witnesses in criminal and civil proceedings. Section 1(1) of the Act amends section 271[896] of the Criminal Procedure (Scotland) Act[897]. In terms of the new section 271, a witness will be considered vulnerable if the person is under the age of 16

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[892] Crime and Punishment (Scotland) Act 1997.
[893] S 29(1).
[894] S 29(5).
[895] S 29(6).
[896] The rest of this discussion will make reference to the amended version of s 271 of the Criminal Procedure (Scotland) Act 1995 (c46).
[897] 1995 (c. 46).

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years[898] or where there is a significant risk that the quality of the evidence to be given by a witness will be diminished by reason of mental disorder[899] or by reason of fear or distress in connection with giving evidence at trial.[900] In determining whether a witness, other than a child-witness, is vulnerable, the court must take into account the nature and circumstances of the alleged offence,[901] the nature of the evidence to be given,[902] the relationship between the accused and the witness,[903] the witness's age and maturity,[904] and any behaviour towards the witness on the part of the accused,[905] family members or associates of the accused[906] and any other person who is likely to be an accused or a witness in the proceedings.[907] The court must also take into account the social and cultural background and ethnic origins of the person,[908] the person's sexual orientation,[909] the domestic and employment circumstances of the person,[910] any religious beliefs or political opinions of the person[911] and any physical disability or other physical impairment which the person may have.[912] In addition, section 271(4) makes it clear that the reference to the quality of evidence is a reference to quality in terms of completeness, coherence and accuracy.

Regarding child witnesses, special measures are outlined in the Act.[913] These include the taking of evidence by a commissioner,[914] the use of a live television link,[915] a screen,[916] or a supporter,[917] giving evidence-in-chief in the form of a prior

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[898] S 271(1)(a).
[899] S 271(1)(b)(i).
[900] S 271(1)(b)(ii).
[901] S 271(2)(a).
[902] S 271(2)(b).
[903] S 271(2)(c).
[904] S 271(2)(d).
[905] S 271(2)(e)(i).
[906] S 271(2)(e)(ii).
[907] S 271(2)(e)(iii).
[908] S 271(2)(f)(i).
[909] S 271(2)(f)(ii).
[910] S 271(2)(f)(iii).
[911] S 271(2)(f)(iv).
[912] S 271(2)(f)(v).
[913] S 271A(1).
[914] S 271H(1)(a) and s 271I.
[915] S 271H(1)(b) and s 271J.
[916] S 271H(1)(c) and s 271K.
[917] S 271H(1)(d) and s 271L.

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statement,[918] or any other legislatively prescribed measure.[919] The Act makes further special provisions for child-witnesses under the age of 12.[920] Section 271B applies where such a child is to give evidence at a trial in respect of certain offences,[921] which include murder, culpable homicide and a number of sexual offences listed in section 288C of the Criminal Procedure (Scotland) Act.[922] Sexual offences include rape, sodomy, indecent assault, abduction with the intent to rape and a number of statutory offences against children.

Where section 271B applies, a court may not make an order in terms of which the child-witness is required to be present in the court room or the court building where the trial is taking place unless the requirements of section 271B(3) have been met. In terms of section 271B(3) the court must be satisfied that (a) the child has expressed the wish to be present and it is appropriate for the child to do so, or (b) that the absence of the child would give rise to a significant risk of prejudice to the fairness of the trial or to the interests of justice and that the risk significantly outweighs the risk of prejudice to the interests of the child witness.

In the United States of America, the vulnerable position of the child-victim of sexual abuse is recognised. To address the issues raised by children's participation in the criminal justice process, Congress has enacted the Victims of Child Abuse Act[923]. The Act contains extensive amendments to the criminal code, which affect the treatment of child victims and child witnesses by the federal criminal justice system. Its objectives include the protection of the confidentiality of child victims and the provision for alternatives to live in-court testimony for child victims.

The Attorney General Guidelines for Victim and Witness Assistance 2000[924] state that Justice Department personnel should "be aware of the trauma child victims and child witnesses experience when they are forced to relive the crime during the

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[918] S 271H(1)(e) and s 271M.
[919] S 271H(1)(f). This subsection may only be used if a draft of the statutory instrument containing the order has been approved by the Scottish Parliament. S 271(H)(2).
[920] S 271B.
[921] S 271B(1)(a) and (b).
[922] 1995 (c. 46) as inserted by s 1 Sexual Offences (Procedure and Evidence) (Scotland) Act 2002.
[923] Victims of Child Abuse Act of 1990 (VCAA) (Pub.L. 101-647).
[924] Attorney General Guidelines for Victim and Witness Assistance 2000, US Department of Justice, Office of the Attorney General, Washington D.C. 2000.

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investigation and prosecution of a criminal case, particularly while testifying in court".[925] Officials are therefore required to reduce the trauma caused by contact with the criminal justice system.

In addition to these measures, the United States Code provides for the protection of the privacy of child victims and witnesses,[926] the appointment for a Guardian *ad litem*,[927] and for the use of multidisciplinary Child Abuse Teams to minimize the number of interviews to which the child victim is subjected, to reduce the risk of suggestibility in the interviewing process,[928] to provide needed services to the child[929] and to monitor the child's safety and well-being.[930] By permitting the use of two-way closed circuit television links[931] and the admission of a videotaped deposition of the child,[932] the Code further provides for alternatives to live in-court testimony.[933]

While it cannot be denied that protection of victims from secondary victimization by the criminal justice process is an important objective and that the provisions in section 15 of the Criminal Law (Sexual Offences) Amendment Bill[934] seek to achieve this objective, child victims cannot be protected at the expense of the fair trial rights of the accused. In the following section four types of protective measures in the Criminal Procedure Act,[935] which illustrate the tension between the need to protect victims (and other witnesses) of sexual offences and the need to uphold the constitutionally guaranteed fair trial rights of the accused, are discussed in more detail.

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[925] Attorney General Guidelines Article VI § A.
[926] 18 U.S.C. § 3509(d).
[927] 18 U.S.C. § 3509(h).
[928] Attorney General Guidelines Article VI § C.
[929] Attorney General Guidelines Article VI § C.
[930] Attorney General Guidelines Article VI § C.
[931] 18 U.S.C. § 3509(b)(1).
[932] 18 U.S.C. § 3509(b)(2).
[933] 18 U.S.C. § 3509(b).
[934] B 50-2003.
[935] 51 of 1977.

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6 3 Evidence by means of closed circuit television or other similar electronic media

In terms of section 158 of the Criminal Procedure Act[936] all criminal proceedings in any court must take place in the presence of the accused. This provision is peremptory.[937] The accused must be present at all relevant times[938] and absence amounts to an irregularity.[939] Where evidence is given in the absence of the accused, it cannot simply be read back to the accused.[940]

There are however exceptions to this general rule,[941] as indicated by section 158(2).[942] In terms of this section a court may, on its own initiative or on application by the public prosecutor, the accused or the witness, order that a witness or an accused give evidence *via* closed circuit television or similar electronic media. Section 158(2)(a) requires that the witness or accused with respect to whom such an order is made must consent to it. Such an order may also be made only if the facilities are readily available or obtainable, and if to do so would:

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

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[936] 51 of 1977.
[937] *S v Roman* 1994 1 SACR 436 (A) 442*i*; *S v Eyden* 1982 4 SA 141 (T) 146E.
[938] *S v Staggie* 2003 1 SACR 232 (C) 248*a*. See also Kriegler & Kruger *Hiemstra Suid Afrikaanse Strafproses* 6th ed (2002) 415 and Müller & Tait "Section 158 of the Criminal Procedure Act 51 of 1977: A potential weapon in the battle to protect child witnesses" 1999 *SACJ* 58 and the authority cited there.
[939] *R v Blackbeard* 1925 TPD 965.
[940] *R v Ntombela* 1956 2 SA 127 (N).
[941] S 158(1).
[942] Ss 158(2)-(4) Criminal Procedure Act 51 of 1977 were inserted by s 7 Criminal Procedure Amendment Act 86 of 1996.

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In addition, to ensure a fair and just trial, section 158(4) gives the court a wide discretion to impose conditions on the giving of evidence in this manner. Although the proviso contained in section 158(4) is that the prosecution and the defence may not be deprived of their right to question the witness or the opportunity to observe the demeanour of the witness, the court in *S v F*,[943] per Albertus AJ, expressed the opinion that "allowing a witness to testify outside the presence of the accused might very well encroach upon [the accused's] rights in the sense that it could diminish the forcefulness and effect of cross-examination".[944] For this reason, the court held that it was the intention of the legislature that the requirements set in paragraphs (a), (b) and (c) co-exist with each other and with either paragraph (d) or paragraph (e).[945] The court found that it was "wholly inconceivable" that the legislature could have intended that any one of the requirements set in paragraphs (a)-(e) would be sufficient, since the result would be that the "obtaining of an order in terms of section 158, and hence the potential encroachment upon the rights of the accused [would be] far too easy".[946]

However, in *S v Staggie*,[947] the court found, per Sarkin AJ, that the decision in *F* was "clearly wrong".[948] In this case the prosecution had brought an interlocutory application for the evidence of a 19-year-old complainant in a rape case to be given both *in camera*[949] and *via* closed-circuit television.[950] Having rejected the finding in *F*, the court held that the paragraphs in section 158(3) must be read disjunctively.[951] In other words, in determining whether one or more of the various requirements are present, the court is bound to consider all the circumstances. The court therefore based its finding on the intention of the legislature, which provides

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[943] 1999 1 SACR 571 (C).
[944] 577*j*-578*a*.
[945] 578*d*-*e*.
[946] 579*b*.
[947] *S v Staggie* 2003 1 SACR 232 (C).
[948] 248*g*.
[949] In terms of s 153 Criminal Procedure Act 51 of 1977.
[950] In terms of s 158(2) Criminal Procedure Act 51 of 1977.
[951] 248*g*.

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greater protection for complainants and witnesses in sensitive and difficult cases.[952] The type of approach adopted in *S v F* would render this objective ineffective.[953]

After the decision of Sarkin AJ in *Staggie*, the courts were left with "diametrically opposed interpretations" of section 158. In *S v Domingo*[954] the court therefore found it necessary to settle the matter authoritatively. In a full bench decision delivered by Erasmus J,[955] the court found that the wording of section 158(3) made it clear that the legislature had envisaged the application of the section in a variety of circumstances aimed at serving the interests of justice.[956] Further, section 158 complimented section 170A of the Act,[957] in that it provided greater protection for complainants and witnesses in sensitive and difficult cases.[958] Keeping the purpose of the enactment of section 158(2)-(4) in mind, the court concluded that

> "[r]eading subsection (3) in the manner decided in *S v F* may result in potentially thwarting the interests of justice and blunting one of the principle purposes of the section, namely, to facilitate the evidence of persons involved in crimes of violence and abuse".[959]

The court also pointed out that, despite the suggestion in *S v F* that the mere existence of one of the five circumstances identified in section 158(3)(a)-(e) was, in itself, "sufficient for the granting of an order in terms of section 158(2)",[960] the section was not peremptory, but created a discretion.[961] Although the existence of at least one of the five circumstances empowered the court to exercise its discretion, the court would still be required to satisfy itself that the application had not been made on trivial grounds and that the particular circumstance relied upon "was of sufficient seriousness to outweigh potential harm to the rights of the accused."[962] Section 158(2) had therefore been enacted for the potential benefit of

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[952] 250*f*.
[953] 250*g*.
[954] 2003 2 BCLR 213 (C) 220E
[955] Louw J concurring.
[956] 218A.
[957] S 170A of the Act provides for the giving of evidence through an intermediary. This aspect will be discussed later.
[958] 218E.
[959] 218E-F.
[960] *S v F* 1999 1 SACR 571 (C) 579*a*.
[961] 218H.
[962] 218J.

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all the participants in a criminal trial.[963] A disjunctive reading of the relevant paragraphs of section 158(3), along with proper emphasis on and the judicial exercise of the discretion conferred by section 158(2) would have the effect of making the potentially useful provisions available to both the prosecution and the defence, while properly safeguarding their respective interests.[964]

With regard to the possibility of diminished effectiveness of cross-examination in cases where the witness does not testify in the physical presence of the accused, the court referred to section 158(4). This section expressly protects the right of both the prosecution and the defence to question the witness and observe the reaction of the witness. Here the court referred to *K v The Regional Court Magistrate NO,*[965] where it was decided that even in cases where the witness could not be seen at all, there was no infringement of the rights of the accused.[966] Based on this reasoning, the court found that the decision in *S v F* was clearly wrong and should be overruled.[967]

In response to submissions relating to the conjunctive reading[968] of the requirements in section 158(3) of the Criminal Procedure Act,[969] the South African Law Commission recommended that section 158(3) be amended to the effect that a court may order the use of closed-circuit television where one or more of the criteria exist.[970] This recommendation was included in the Criminal Law (Sexual Offences) Amendment Bill.[971]

In England, section 51 of the Criminal Justice Act[972] provides that a witness may testify *via* live television link if the court is satisfied that it is in the interests of the

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[963] 219A.
[964] 219D.
[965] 1996 1 SACR 434 (E).
[966] *K v The Regional Court Magistrate NO* 1996 1 SACR 434 (E) concerned the constitutionality of s 170A of the Criminal Procedure Act. This aspect will be discussed later.
[967] 219H.
[968] See *S v F* 1999 1 SACR 571 (C). It is important to note that the SA Law Commission *Sexual Offences* Project 107 Report (2002) was published before the decision in *S v Staggie* 2003 1 SACR 232 (C) where the Sarkin, AJ accepted that the requirements should be read disjunctively.
[969] 51 of 1977.
[970] SA Law Commission *Sexual Offences* Report § 4.5.3.3 and § 4.5.3.4.
[971] B50-2003.
[972] Criminal Justice Act 1988.

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efficient or effective administration of justice to do so[973] and the necessary facilities are available.[974] In deciding whether to give an order allowing the witness to testify *via* live television link, the court must consider all the circumstances of the case,[975] in particular the availability of the witness,[976] the need for the witness to attend in person,[977] the importance of the witness's evidence to the proceedings,[978] the views of the witness,[979] the suitability of the available facilities,[980] and whether the direction might tend to inhibit any party from effectively testing the witness' evidence.[981] When a witness testifies *via* live television link the witness must be seen and heard by the accused,[982] the judge and jury,[983] the legal representatives acting in the matter,[984] and any interpreter or other person appointed by the court to assist the witness.[985]

In terms of section 24 of the Youth Justice and Criminal Evidence Act,[986] the court may, as a special measure to protect a vulnerable person, order that the witness testify *via* live link. In terms of section 24(8) of the Act, the presiding officer, jury, legal representatives and interpreter or any other person appointed to assist the witness must be able to see the witness *via* the live link.

Section 29(5) of Scotland's Crime and Punishment Act (Scotland)[987] provides that the court may, on application, authorise the giving of evidence of a vulnerable person *via* live television link. In deciding whether to grant such an order, the court may consider the possible effect on the vulnerable witness if such an order was not made,[988] whether the vulnerable person would be better able to give evidence if the

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[973] S 51(4)(a).
[974] S 51(4)(b).
[975] S 51(6).
[976] S 51(7)(a).
[977] S 51(7)(b).
[978] S 51(7)(c).
[979] S 51(7)(d).
[980] S 51(7)(e).
[981] S 51(7)(f).
[982] S 56(3)(a).
[983] S 56(3)(b).
[984] S 56(3)(c).
[985] S 56(3)(d).
[986] Youth Justice and Criminal Evidence Act 1999.
[987] Crime and Punishment Act (Scotland) 1997.
[988] S 29(7)(a).

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order was made,[989] and the views of the vulnerable person.[990] The court may also take into account the nature of the alleged offence,[991] the nature of the evidence the person will give,[992] the relationship between the vulnerable witness and the accused[993] and, where the witness is a child, the age and maturity of the child.[994]

Although statutes providing for closed-circuit television differ from state to state,[995] more than half of the states in the United States of America currently have statutory provisions that authorise the use of closed-circuit television for child victims who are required to give evidence in sexual offence matters,[996] In some states one-way close circuit television is used, while others make use of two-way closed-circuit television. In the former case the child can be seen by the judge and jury, while in the latter the child can also be seen by the defendant.[997]

In terms of section 486(1) of the Canadian Criminal Code,[998] all criminal proceedings must be held in open court unless the court is of the opinion that it is in the interest of the public morale, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room. Section 486(1.1) clearly states that the "proper administration of justice" includes ensuring that the interests of witnesses under the age of 18 years are properly safeguarded in proceedings in which the accused is charged *inter alia* with a sexual offence, including sexual assault. In terms of section 486(2.1), the court is empowered to order that the complainant or any witness who is under the age of 18 years or who suffers from a mental or physical disability that may influence his ability to communicate evidence, testify outside the court room or behind a screen or other device that would allow the witness not to see the accused. This procedure can be used if the court is of the opinion that the exclusion is

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[989] S 29(7)(b).
[990] S 29(7)(c).
[991] S 29(8)(a).
[992] S 29(8)(b).
[993] S 29(8)(c).
[994] S 29(8)(d).
[995] Myers *Child Witness: Law and Practice* (1987) 395.
[996] Bjerregaard "Televised testimony as an alternative in child sexual abuse cases" 1989 *Criminal Law Bulletin* 164 168.
[997] Myers *Law and Practice* 395.
[998] R.S. 1985, c. C-46.

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necessary to obtain a full and candid account of the Acts that led to the complaint.[999]

In terms of section 486(2.2), the procedure created in section 486(2.1) may not be used unless arrangements have been made for the accused, the judge or justices and the jury to watch the testimony of the complainant or witness by means of closed-circuit television or otherwise. The accused must also be allowed to communicate with his legal representative during the testimony.[1000]

These provisions show that South Africa is not unique in its endeavour to protect witnesses from trauma caused by their participation in the criminal justice process, nor are the provisions relating to the giving of evidence *via* closed-circuit television unique. Similarly, the tension between the protection of witnesses and, in particular, complainants in sexual offence matters is not a problem peculiar to the South African criminal justice process. What does make the South African situation unique is the Law Commission's recommendation that where a witness has been declared a vulnerable witness, the provisions of section 158 should be applicable "irrespective of any additional qualifying criteria prescribed by the section".

Three questions arise. The first is whether the provisions of section 158 of the Criminal Procedure Act[1001] are consistent with the right to a fair trial and particularly the confrontation right which is inherent in the right to a fair trial. If not, can an infringement of the right to a fair trial be justified based on the need to protect the witness - and particularly the victim – in sexual offence cases? Thirdly, what effect – if any – will the recommendations of the Law Commission have on the fair trial rights of the accused?

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[999] S 486(2.1).
[1000] S 486(2.2).
[1001] 51 of 1977.

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Evaluation

The right to confront is generally deemed to be essential for a fair trial[1002] and is clearly based on Due Process values. On the other hand, the values that underlie sections 158(2)-(3) are Victims' rights values as they concern the protection of witnesses from possible further traumatisation.

An analysis of section 158 of the Criminal Procedure Act[1003] raises important questions with regard to the constitutionality of the provision. In *S v Makwanyane*[1004] the Constitutional Court laid down the approach to be followed when considering the constitutionality of a legislative or common law provision. In this respect a two-stage approach is used. The first stage concerns the question whether there is an infringement or a denial of a constitutional right, while the second stage is an enquiry into the constitutional validity of the provision and the limitation issue. In the first stage the burden is on the party alleging an infringement of a constitutional right.[1005] During this stage the court is required to determine the essential content and ambit of the constitutional right in the abstract[1006] and the accused is required to show that an infringement of his right has indeed occurred.[1007] Once this has been established, the second stage of the enquiry is reached. During this stage, the party alleging that the infringement of the right is permissible in light of the limitations clause is required to prove this allegation.[1008] It is only in the second stage that the court is required to consider the purpose and proportionality of the offending provision.[1009]

[1002] Schwikkard & Van der Merwe *Principles of Evidence* 2nd ed (2003) 353.
[1003] 51 of 1977.
[1004] 1995 3 SA 391 (CC).
[1005] Van der Merwe "Cross-examination of the (sexually abused) child witness in a constitutionalized adversarial trial system: is the South African intermediary the solution?" 1995 *Obiter* 194 208.
[1006] Van der Merwe 1995 *Obiter* 194 208.
[1007] During this stage the right should be interpreted in its widest adversarial context. See Van der Merwe 1995 *Obiter* 194 209.
[1008] Van der Merwe 1995 *Obiter* 194 208.
[1009] Schwikkard & Jagwanth "*K v The Regional Court Magistrates NO* 1996 1 SACR 434 (E): the constitutionality of s170A of the Criminal Procedure Act" 1996 *SACJ* 215 218.

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As was shown in Chapter 3, the right to a fair trial is a comprehensive and integrated right that embraces the concept of substantive fairness.[1010] It therefore encompasses more than the rights listed in sections 35(3)(a)-(o). On the basis of this it can be argued that although not listed, the right to a fair trial must, as the essential element of the right to challenge evidence and the right to be present when being tried,[1011] include the right of an accused person to confront his accusers.[1012] In fact, it is generally accepted that the right to confront is an essential element of the right to a fair trial.[1013]

It can also be argued that the right to challenge and adduce evidence includes, by necessary implication, not only the right to cross-examine, but also the right to meaningful and effective cross-examination.[1014] It is generally accepted that the most effective cross-examination is when there is a face-to-face confrontation between the cross-examiner and the witness.[1015] Therefore, if one interprets the right to challenge evidence in its widest adversarial context it should include the right to face-to-face confrontation between the accused (and his legal representative) and the witness.[1016] The right of an accused to confront his accusers is obviously also an essential element of the right to be present when being tried.[1017]

[1010] *S v Dzukuda; S v Tshilo* 2004 4 SA 1078 (CC).
[1011] See for example *R v Molatla* 1975 1 SA 814 (T).
[1012] Van der Merwe 1995 *Obiter* 194 208.
[1013] Schwikkard & Van der Merwe *Principles* 353.
[1014] Van der Merwe 1995 *Obiter* 194 208.
[1015] Pretroius *Cross-examination in South African law* (1997) 80, 88 and 99 and the authority cited there.
[1016] See also Watney "Aspkte van getuienisaflegging deur kindergetuies deur bemiddeling van tussengangers" 1998 *THRHR* 423 439.
[1017] In *S v Manzi* 2004 2 SA 133 (N) the prosecution applied for consent for a 14-year-old complainant to give evidence by way of closed-circuit television throught an intermediary. It was agreed between the state and the accused that the complainant would testify *in camera* and that the accused would be removed from the court room. The accused would take up position in the room where the witness and intermediary would have been seated. The accused would hear the evidence *via* the headphones provided. The accused could not see the complainant (142I-143A). On appeal it was argued that, in these circumstances, the accused was deprived of a fair trial. The argument on behalf of the appellant was based on s 158 of the Criminal Procedure Act 51 of 1977 and s 35(3)(e) of the Constitution (143B-D). However, the court held that the representative of the accused was able to observe the demeanour of the complainant and to subject her to extensive cross-examination (144F-G). It was also found that the trial judge had been aware of the rights of the accused and had indeed drawn the attention of the defence to the appellant's right to be present during the testimony of the complainant (144H-145C). Further, in light of the fact that the accused is not a lay person, the court concluded that he was well aware of his right to be present (145D). The court also noted that

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Valuable guidance can be found in foreign case law. The Sixth Amendment to the Constitution of the United States of America[1018] guarantees the accused the right "to be confronted with the witnesses against him". This provision formed the basis of the challenge in *Coy v Iowa*.[1019] In this case, the accused was charged with the sexual assault of two thirteen-year-old girls. In accordance with the Iowa statute, the trial court allowed the victims to testify behind a screen that was erected between the witness box and the accused. The accused could "dimly perceive" the two complainants, while the complainants could not see the accused at all. The accused was convicted, but on appeal to the United States Supreme Court it was argued that the Sixth Amendment right to confront of the accused had been violated. The majority of the court, per Scalia J, found that the right to confront confers "at least a right to meet face-to-face with all those who appear and give evidence at trial".[1020] Since the screens had achieved their purpose of enabling the complainants to testify without viewing the accused, this right was found to have been violated. Despite the State's argument that the erection of screens was necessary to protect victims of sexual offences from trauma, the court found that the statute in question created a "legislative presumption of trauma".[1021] In the absence of a specific finding that the complainants indeed needed special protection, the court was not prepared to limit the right to confrontation. The majority therefore decided that the conviction could not be upheld.

By providing for the giving of evidence *via* closed circuit television, the provisions of section 158 of the Criminal Procedure Act[1022] clearly deprive the accused of his right to a face-to-face confrontation with the witness. Therefore there is an

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the issue of non-compliance with s 158(1) was not raised during the trial (145H). Based on these considerations the appeal was dismissed. Although the accused therefore has the right to be present when being tried, the court was prepared to find that the accused may waive his right to be present. *Cf S v Roman* 1994 1 SACR 436 (A)

[1018] There is an obvious difference between the Sixth Amendment of the Constitution of the United States of America and the fair trial right in the South African Constitution in that the Sixth Amendment expressly guarantees the right of an accused to confront his accusers, while s 35(3) does not contain such an express guarantee. However, in light of the Constitutional Court's interpretation of the fair trial right in *S v Dzukuda; S v Tshilo* 2004 4 SA 1078 (CC) this difference in wording does not present any real problems.

[1019] 487 US 1012, 101 Led 2d 857 (1988).

[1020] 487 US 1016.

[1021] 487 US 1020.

[1022] 51 of 1977.

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infringement of the right to a fair trial. The first part of the *Makwanyane*-test has therefore been satisfied. Only now does the question arise whether the infringement can be justified in terms of section 36 of the Constitution.

In terms of section 36, the court must decide whether a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Here the court must take into account the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and the possibility of less restrictive means to achieve the same purpose. Only if, after taking all these factors into account, the court is satisfied that the limitation is justifiable, can the infringement of the right be allowed.

The right to challenge and adduce evidence lies at the heart of criminal trial[1023] and in view of its importance few limitations are readily accepted.[1024] Therefore, the limitation must serve a particularly important purpose before such limitation can be justified.

Section 158 of the Criminal Procedure Act[1025] seeks to protect a witness at a criminal trial from the possibility of trauma which will be caused by his testifying in the physical presence of the accused. The purpose of the provision is particularly important in the context of evidence given by a victim of a sexual offence where the victim is required to recount the details of a particularly embarrassing trauma suffered at the hands of the accused. A face-to-face confrontation in these circumstances significantly increases the risk of secondary trauma. Where the victim is youthful this risk is increased even more. Therefore, it can be said that the objective sought to be achieved by the provision in the context of sexual offences is of cardinal importance.

[1023] See for example *Chambers v Mississippi* 410 US 284 294 (1973) where Powell J remarked that "to confront and cross-examine witnesses and to call witnesses on one's own behalf have long been recognized as essential to due process".

[1024] Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of thr Republic of South Africa* (1998) 346.

[1025] 51 of 1977.

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The provisions of section 158 may have the result that the witness is unable to see the accused at all times. The accused, his legal representative, the prosecution and the presiding officer are, however, able to see the witness and his demeanour while he testifies. The prosecution and defence counsel question the witness directly. Therefore, the extent of the infringement is limited to the fact that there is no face-to-face confrontation between the witness and the accused. This may have an effect on the effectiveness of cross-examination.[1026] However, the effect will be limited since the cross-examiner can still use voice inflections as a tool in cross-examination. Further, such a "virtual reality" trial *via* electronic media can only be held either with the consent of the accused or pursuant to a court order.[1027]

When considering the relationship between the limitation and its purpose the court is required to consider whether there is a rational connection between the purpose sought to be achieved by the provision and the way in which the provision seeks to achieve this purpose. In the case of section 158 of the Criminal Procedure Act[1028] the provision seeks to reduce the possibility of trauma caused by a face-to-face confrontation by removing the witness from a situation where the face-to-face confrontation will take place. Therefore, there is a rational connection between the provision and its purpose.

In *Coy v Iowa*[1029] O'Connor J, in a separate judgement in which she concurred with the majority decision, pointed out that the right to face-to-face confrontation is not absolute and that the right may have to give way to other competing interests in suitable cases. This would be allowed where an important public policy, such as

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[1026] In *S v Ndhlovu* 2002 6 SA 305 (A) 321A the Supreme Court of Appeal expressed the view that the right to challenge evidence does not guarantee "an entitlement to subject all evidence to cross-examination", (*cf S v Van der Sandt* 1997 2 SACR 116 (W) 132*b-f*) but that it merely contains the right to "challenge" evidence. According to the court evidence can be challenged in ways other than cross-examination. (§ [24] 321A) The court did, however, qualify this dictum when it held that "where the interests of justice require that hearsay evidence be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant. (§ [24] 321B) It can, therefore, be argued that this narrow interpretation of the right to challenge evidence only applies to hearsay evidence and that the right to challenge evidence does encompass the right to cross-examination in the normal course of events.

[1027] Steytler *Constitutional Criminal Procedure* 295.

[1028] 51 of 1977.

[1029] 487 US 1012, 101 Led 2d 857 (1988).

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the protection of child witnesses, required the adoption of a procedure where there was no face-to-face confrontation.[1030]

In a dissenting judgement in the same case Blackmun J concluded, however, that the screening procedure did not violate the confrontation clause. Finding that the provision in terms of which the screen had been erected did indeed serve an important public policy, namely the protection of child witnesses, he argued that this outweighed the "preference"[1031] for face-to-face confrontation in the Confrontation Clause.[1032] The child witness had testified under oath and in full view of the jury and had been subjected to unrestricted cross-examination.[1033] He also found that the procedure had not been "inherently prejudicial" and therefore had not violated due process.[1034]

In *Maryland v Craig*[1035] the United States Supreme Court had a second opportunity to consider the effect of the physical separation of victims and accused persons. Here a Maryland statute, which allowed for witnesses to testify *via* one-way closed circuit television if the judge came to the conclusion that testifying in the courtroom would have resulted in serious emotional stress that would hamper the communication ability of the child, came under scrutiny. O'Connor J wrote the majority decision, in which the court found that while the procedure prevents the child from seeing the accused, it preserves all the other elements of the confrontation right. So, for example, the child must be competent to testify and must testify under oath. The accused also retains full opportunity for contemporaneous cross-examination and the judge, jury and accused are able to view the demeanour of the witness, albeit *via* video monitor.[1036] The court concluded that these elements of confrontation adequately ensure that the testimony is both reliable and subject to rigorous adversarial testing.[1037] Therefore,

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[1030] 487 US 1022-1023. This argument would in South African law only come up in the second, limitations, phase of constitutional interpretation.
[1031] 487 US 1028 and 1031.
[1032] 487 US 1031. As is the case with O'Connor's finding, this question only arises in the limitations phase of interpretation.
[1033] 487 US 1033-1034.
[1034] 487 US 1034.
[1035] 497 US 836, 111 Led 2d 666.
[1036] 497 US 851.
[1037] 497 US 857.

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the majority of the court found that where it is necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the accused and would impair the child's ability to communicate, the confrontation clause does not prohibit the use of procedures such as the one in the relevant statute.[1038]

In the Canadian case of *R v Levogiannis,*[1039] the Supreme Court was asked to decide whether the accused's right to a fair trial[1040] was infringed by a provision which allows the testimony of a complainant to be given from behind a screen. The court, per L'Heureux-Dubé J, found that neither the section 7 right nor the section 11(b) right of the accused was violated by the provision authorising the use of screens. Referring to *R v Seaboyer,*[1041] the court found that the fundamental principles of justice provided by section 7 must reflect a diversity of interests, which include the rights of the accused as well as the interests of society.[1042] The court concluded that the purpose of the provision was to assist the trier of fact to "get at the truth"[1043] and that the right to face one's accuser is not an absolute right, but is subject to the interests of justice.[1044] It found that the procedure merely blocks the complainant's view of the accused and not *vice versa* and, since the accused's right to cross-examine the witness remains intact, the section 7 right is not violated. The court expressed the opinion that, since that application of the provision is limited and the provision may only be invoked if it is necessary to obtain a "full and candid account of the act complained of",[1045] it does provide a certain measure of protection for the rights of the accused.[1046] The court also found that the use of a screen does not infringe the presumption of innocence in section

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[1038] 497 US 857.
[1039] (1993) 18 C.R.R (2d) 242.
[1040] Ss 7 and 11(d) *Canadian Charter of Rights and Freedoms* in the Constitution Act 1982. S 7 reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". S 11(d) reads: "Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".
[1041] (1991) 6 C.R.R 35 48.
[1042] 249-250.
[1043] 250.
[1044] 249.
[1045] S 486(2.1) Criminal Code R.S.C. 1985, c. C-46.
[1046] 254.

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11.[1047] L'Heureux-Dubé J stressed that the provision therefore does not require the presiding officer to be satisfied that exceptional or inordinate stress will be caused if the provision is not invoked.[1048]

In view of the decisions in *S v Staggie*[1049] and *S v Domingo*[1050] relating to the disjunctive reading of the provisions in section 158 as well as the Law Commission's acceptance of such an approach, the question arises whether the discretion of the court is not too wide and, therefore, whether the provisions could be invoked too readily. It must be pointed out that the requirements set for invoking the provision are low in comparison with other jurisdictions. For example, in England it is required that court must consider whether a direction that a witness testify *via* closed circuit television might tend to inhibit any party from effectively testing the witness's evidence; and in Scotland the court must consider, amongst other things, the nature of the evidence which will be given and whether the witness will be able to give better evidence if the order was made. However, as the court in *S v Domingo*[1051] pointed out, the mere existence of one of the factors listed in the section is not in itself sufficient justification for invoking the section. It is a matter of discretion which must be exercised judicially after consideration of all the circumstances of the case. Therefore, provided that the court applies its mind to all the circumstances of the case, there should be no increased risk in a disjunctive reading of the provisions. The Law Commission's recommendation that the provisions of section 158 can be invoked "irrespective of any additional qualifying criteria prescribed by [the] section" where a witness has been declared vulnerable may, however, increase the risk of abuse of the section. Based on the dictum in *Coy v Iowa*[1052] relating to the need for a specific finding that trauma would result, it can be argued that the amendments proposed by the Law Commission will constitute an unjustifiable infringement of the fair trial rights of the accused. However, in light of the fact that the accused retains full opportunity

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[1047] 255.
[1048] 254
[1049] *S v Staggie* 2003 1 SACR 232 (C).
[1050] 2003 1 SACR 232 (C).
[1051] 2003 1 SACR 232 (C).
[1052] 487 US 1012, 101 Led 2d 857 (1988).

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of challenging the evidence of the witness, the infringement should pass constitutional scrutiny.

6 4 Evidence through an intermediary

Having had regard to the adversarial nature of criminal proceedings in South Africa and the fact that the exercising of the accused's right to a fair trial (including the right to confront the witness) often traumatises children, the South African Law Commission recommended almost a decade and a half ago, that provision be made for children to testify through an intermediary.[1053] Consequently, section 170A was inserted in the Criminal Procedure Act[1054] by section 3 of the Criminal Law Amendment Act.[1055]

Section 170A provides:

> "(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary..."

Section 170A(2) further provides that no examination, cross-examination or re-examination of such a witness may take place other than through the intermediary and that the intermediary may convey the general purport of the question to the witness. The court is empowered to direct the intermediary to convey the *ipsissima verba* of the question to the witness where either one of the parties or the court itself deems it necessary. The court may directly communicate with the witness where it finds it necessary to do so. The court must, however, "guard against descending into the arena of examination or cross-examination" of the witness.[1056]

In order to further protect the child witness from secondary trauma, a child in respect of whom an intermediary has been appointed testifies in a separate room, which is often informally arranged to set the witness at ease.[1057] It is important to note that the presiding officer and the parties must be able to see and hear both the

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[1053] SA Law Commission *Protection of Child Witnesses* Project 71 Report (1991).
[1054] 51 of 1977. S 170A came into operation on 30 July 1993.
[1055] 135 of 1991.
[1056] Schwikkard & Van der Merwe *Principles* p 351.
[1057] S 170A(3)(a) Criminal Procedure Act 51 of 1977.

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intermediary as well as the witness, either directly or through electronic media or other devices.[1058]

The use of the word "may" in section 170A(1) implies that the court has a discretion to appoint an intermediary. This means that appointment of an intermediary in cases involving witnesses under the age of 18 years is not automatic.[1059] Section 170A sets certain requirements which must be met. Kriegler and Kruger[1060] list them as follows: (1) the witness must be below the age of 18 years, (2) enough information must be made available for the court to come to a decision, (3) that testifying according to the ordinary process will have the result that (4) the witness is subjected to (5) undue (6) mental stress or suffering. It is clear that the mere youthfulness of a witness is not sufficient to invoke the provision.[1061] What is required is that the court must be satisfied that the youthful witness would suffer undue mental stress if an intermediary were not appointed.

The question is: What is meant by the term "undue mental stress or suffering"? Müller and Tait argue that the wording of the section indicates that the mental stress or suffering experienced by the child must be more than the ordinary stress experienced by witnesses.[1062] From case law, it is clear that the courts approach the construction of the section in the same way. For example, in *S v Stefaans*[1063] the court expressed the opinion that the use of the word "undue" "connotes a degree of stress greater that the ordinary stress to which witnesses, including witnesses in complaints of a sexual nature, are subject".[1064] Likewise, in *S v Mathebula*,[1065] where the magistrate allowed the witness in respect of whom an intermediary was appointed, to sit in the court room after the state had closed its case, it was held that, in the appointment of an intermediary, the magistrate had not heeded the

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[1058] S 170A(3)(c). In *S v T* 2000 2 SACR 658 (CkH) § [24] 664*g-h* the court, per Ebrahim J, remarked that where the record of trial proceedings does not indicate that the magistrate, prosecution and defence could personally observe the demeanour and hand gestures of the witness testifying through an intermediary, the situation does not lend itself to justice being seen to be done.
[1059] Müller & Tait "Little witnesses: A suggestion for improving the lot of children in court" 1999 *THRHR* 244.
[1060] Kriegler & Kruger *Hiemstra* 445.
[1061] See for example *S v Mathebula* 1996 2 SACR 231 (T).
[1062] Müller & Tait 1999 *THRHR* 245.
[1063] 1999 1 SACR 182 (C).
[1064] 187*c*.
[1065] 1996 2 SACR 231 (T).

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requirement of "undue mental stress or suffering" as required by section 170A. Stafford J remarked that it was difficult to understand why she was allowed to attend the rest of the case, if the mere presence of the accused would have upset her to such an extent as to cause undue mental stress.[1066]

In *S v F*[1067] the prosecution applied for consent for a 17 year old rape victim to give evidence through an intermediary and by means of closed circuit television. The court held that section 170A could only be applied if it appeared to the court that the witness would otherwise have been exposed to undue mental stress or suffering. The court was of the opinion that the words "if...it appears to the court" in section 170A(1) should be interpreted as meaning "nothing less than proof on a balance of probabilities".[1068] On the facts, therefore, the court held that since there was no indication that the witness would have been spared undue mental stress if an intermediary were to be appointed,[1069] it was therefore impossible for the court to find on a balance of probabilities that testifying in the normal course would expose the witness to undue mental stress or suffering.[1070] This "no difference"[1071] approach has been criticised as being too strict.[1072]

In *S v Stefaans*,[1073] the court, per Mitchell AJ, found that it would be advisable to lay down some guidelines as to how and in what circumstances section 170A should be invoked.[1074] However, it was emphasised that despite the guidelines, each case must be dealt with on its own merits.[1075] Adherence to these guidelines, it was believed, would reduce the risk of the accused not receiving a fair trial.[1076] The following were stated: Firstly, the court should be mindful of the "inherent dangers" in the use of an intermediary which might prejudice the fair trial rights of

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[1066] 234*f*.
[1067] 1999 1 SACR 571 (C).
[1068] 583*h*.
[1069] 584*d*.
[1070] 584*c*.
[1071] Schwikkard & Van der Merwe *Principles* 361.
[1072] Schwikkard "Evidence" 1999 *SACJ* 259 262.
[1073] 1999 1 SACR 182 (C).
[1074] Schwikkard reviewed these guidelines in "Evidence" 1999 *SACJ* 259. She points out that although some of the guidelines may be useful, "others seem to be based on that mysterious type of judicial experience that justified invoking the cautionary rule applicable to complainants in sexual offence cases".
[1075] 187*i*.
[1076] 188*i*.

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the accused.[1077] These include the fact that cross-examination through an intermediary may be less effective than direct cross-examination, that the accused has a *prima facie* right to confront his accusers and to be confronted by them, and that human experience has shown that it is easier to lie about someone behind his back than to his face.[1078] Secondly, the provisions of the section should more readily find application in cases involving physical or mental trauma or insult to the witness than in any other cases.[1079] Next, although giving evidence in court is inevitably a stressful experience, the court should be satisfied that the stress would be in excess of the normal stress involved in testifying. This finding was based on the view that the younger and more emotionally immature the witness, the greater the likelihood that testifying would lead to undue stress.[1080] In the fourth place, it is less likely that a witness who knows the accused and is known by him will experience undue stress than would a witness who is unknown to the accused, although this factor needs to be balanced by the age of the witness.[1081] The next general principle is that unopposed applications are more likely to be granted than opposed applications.[1082] Sixthly, the right to oppose the application must be carefully explained to the unrepresented accused and in cases where there is doubt as to whether the accused understands this right, the matter should be treated as opposed.[1083] The seventh general principle is that in opposed applications all appropriate evidence should be brought before the court to enable the judicial officer to exercise proper discretion.[1084] Lastly, where the section is invoked, the judicial officer should be aware that the efficiency of cross-examination may be reduced by the intervention of the intermediary and should therefore be prepared to

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[1077] See Schwikkard 1999 SACJ 259 260 where this guideline is criticized. Schwikkard points out that Mitchell AJ does not balance the possible prejudicial effect of the use of an intermediary on the rights of the accused with "a judicial reminder as to the purpose of s 170A, namely to facilitate the ascertainment of the truth and further the Constitutional right of equality before the law".

[1078] 188*a-b*.

[1079] 188*b*.

[1080] 188*c*.

[1081] 188*d*. *Cf* Schwikkard 1999 *SACJ* 259 261 where she points out that the view of Mitchell AJ does not appear to be supported by research, but that research rather suggests that children are frequently intimidated by persons whom they know.

[1082] 188*e*.

[1083] 188*e-f*.

[1084] 188*f-g*.

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intervene to insist that the exact question rather than the intermediary's translation be conveyed to the witness.[1085]

It is clear that courts insist on strict compliance with the requirements set in section 170A. From the judgement in *S v F*,[1086] it appears that in cases where there is doubt as to the need for the appointment of an intermediary the court should follow a conservative approach and refuse the application.

In England section 29 of the Youth Justice and Criminal Evidence Act[1087] makes provision for the appointment of an intermediary for a person in respect of whom an order of vulnerability was issued in terms of section 19 of the Act. Before granting such an order the court must determine whether the measure would be likely to improve the witness's testimony. The court must also consider whether the measure would be likely to inhibit the effective testing of the evidence. Therefore there is a certain amount of protection for the rights of the accused, since the court would have to refuse such an order if the testing of the evidence would be inhibited.

In Discussion Paper 102 the South African Law Commission identified a number of problem areas relating to the use of intermediaries. Although the majority of the submissions made to the Commission were in favour of the use of an intermediary, it became resoundingly clear that the system is not working effectively.[1088] The problems mentioned include the fact that many courts do not have a system in place to deal with the giving of evidence through an intermediary and those that do have the facilities are frequently beset with practical problems. It also seems that courts often refuse an application for the appointment of an intermediary on the grounds that the procedural rights of the accused will be infringed. This, according to the submissions, causes the needs and rights of the child to be negated. In addition, persons that are competent to act as intermediaries are often not available, or where an intermediary is appointed, the person often does not arrive at court promptly and sometimes does not arrive at all, which results in delays that can be

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[1085] 188*h*.
[1086] 1999 1 SACR 571 (C).
[1087] Youth Justice and Criminal Evidence Act 1999.
[1088] § 26.3.2.

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distressing to the child. The child may also not be comfortable with the appointed intermediary, especially if the intermediary belongs to a different racial group.

Other reasons given for the ineffective functioning of the system relate to the criteria for the appointment of intermediaries and to ineffective counsel on the part of the prosecution. Harsh cross-examination by defence counsel is also blamed for the ineffectiveness of the system.

After taking the submissions into account, the Commission therefore made the following recommendations:

1. That courts be empowered to call for expert input into the question whether it is necessary, beneficial or appropriate to appoint an intermediary to assist the witness, and that the court have the capacity to do this *mero motu*, or at the request of the prosecution or the witness concerned.[1089]

2. That an intermediary should automatically be appointed for a child witness in criminal proceedings involving a sexual offence, unless exceptional circumstances justify not appointing an intermediary, in which case such exceptional circumstances must be specified by the court.[1090]

3. That the intermediary should act as facilitator and, as such, should be in a position to convey to the court when a witness is tired, fatigued or stressed and to request a recess.[1091]

4. That the prosecutor or the intermediary should be required to explain to the court the reasons for the failure of an intermediary to be available or to appear and that a warrant of arrest should be issued when such an intermediary has been subpoenaed.[1092]

5. That, unless there are exceptional circumstances justifying the non-appointment of an intermediary, a court must, subject to certain provisions,

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[1089] § 26.5.2.4.
[1090] § 26.5.3.5.
[1091] § 26.5.6.1.
[1092] § 26.5.7.1.

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appoint an intermediary where the court has declared a witness below the age of 18 years a vulnerable witness.

6. That certain issues, such as the criteria to assess competence for appointment as an intermediary,[1093] be referred to the Department of Justice and Constitutional Development for secondary legislation:[1094]

The Commission therefore recommended that section 170A of the Criminal Procedure Act[1095] be amended by the addition of the following sections.

> "(5) If a court has directed that a vulnerable witness as referred to in section 13 of the Sexual Offences Act, 20.. (Act No. xx of 20..), should be allowed to give evidence through an intermediary, such intermediary may -
>
> (a) convey the general purport of any question to the relevant witness;
>
> (b) inform the court at any time that the witness is fatigued or stressed; and
>
> (c) request the court for a recess.
>
> (6) An intermediary referred to in subsection (5) shall be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit."

This recommendation was included in the Criminal Law (Sexual Offences) Amendment Bill.[1096]

Despite these attempts to enhance victims' rights, acceptance of the recommendations do not seem likely to address the questions raised earlier. Are the provisions of section 170A of the Criminal Procedure Act[1097] consistent with the right to a fair trial? Can an infringement of the right to a fair trial be justified? What effect will these recommendations have on the fair trial rights of the accused?

[1093] In this respect the Commission recommended certain criteria to be considered.
[1094] § 26.6.
[1095] 51 of 1977.
[1096] B50-2003.
[1097] 51 of 1977.

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Evaluation

An investigation into provisions such as section 170A clearly indicates the conflict between Due Process values Victims' Rights values. While Victims' Rights values require that the victim of crime be protected from further victimisation, Due Process values and the concomitant right to a fair trial demand that the accused have the right to challenge and adduce evidence.[1098] The question is whether the infringement of the Due Process constitutional right to challenge and adduce evidence can be justified in favour of Victims' Rights Values.

The question of the constitutionality of section 170A was raised in *K v Regional Court Magistrate.*[1099] In this case an 18-year-old was charged with the rape of a 16-year-old complainant. The prosecution's application in terms of section170A was opposed by the defence. A clinical psychologist testified that the complainant was in a fragile state and that making her testify in open court might precipitate a complete breakdown. Despite the opposition by the defence, an intermediary was appointed and the matter was postponed to enable the defendant to bring an application challenging the constitutional validity of section 170A.

The challenge was not based on the physical separation between the witness and the defence, but rather on the fact that she would have to testify through an intermediary. It was argued that the appointment of an intermediary "impaired, limited – or even excluded – proper cross-examination of the witness and therefore impaired the right of an accused to a fair trial as guaranteed by section 25 of the Interim Constitution".[1100] The physical separation of the witness from the accused was raised merely in support of this contention.

The question before the court therefore was

> "[w]hether s 170A of the Criminal Procedure Act, in attempting to achieve its laudable purpose – the protection of child witnesses in certain types of criminal trials – overshoots the mark and has resulted in an unreasonable and unnecessary limitation of the fundamental right of an accused person to a fair trial."[1101]

[1098] S 35(3)(i) Constitution.
[1099] *K v The Regional Court Magistrate NO* 1996 1 SACR 434 (E).
[1100] 200 of 1993.
[1101] 440*e*.

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The court purported to follow the two-staged approach as adopted by the Constitutional Court in *S v Makwanyane*,[1102] in terms of which the applicant bears the initial *onus* to establish that a constitutionally guaranteed right is infringed, while the party seeking to uphold the limitation of the right bears the *onus* of establishing the justification for the limitation of the right.

Considering section 25 of the Interim Constitution,[1103] the court found that although the section does not mention the right to cross-examine, the right to challenge and adduce evidence includes the right to cross-examine.[1104] Even at common law, the right to cross-examine was regarded as so fundamental that a denial of the right would almost invariably lead to prejudice.[1105] The provisions of section 170A do not exclude the right to cross-examine; they expressly permit such a right.[1106] However, the argument advanced on behalf of the applicant was that questioning through an intermediary could destroy its effectiveness, particularly in light of subsection (2)(b), which provides that the intermediary may convey the general purport of the questions, unless the court directs otherwise.[1107]

Despite finding that the right to cross-examination was "a powerful weapon",[1108] the court retained the discretion to disallow questioning which was irrelevant, unduly repetitive, oppressive or otherwise improper and therefore not an absolute right.[1109] The purpose of cross-examination, according to the court, is first to elicit favourable information and second, to cast doubt on the accuracy of evidence-in-chief against the cross-examining party.[1110] The question whether or not the curtailment or limitation of cross-examination has resulted in a negation of the right to a fair trial depends on the circumstances of the case.[1111]

[1102] 1995 3 SA 391 (CC) 410B and 435I – 436A.
[1103] 200 of 1993.
[1104] 441*i*.
[1105] 441*i-j*.
[1106] 442*a*.
[1107] 442*c*.
[1108] 442*c*.
[1109] 442*c*.
[1110] 442*f-g*.
[1111] 442*h*.

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With regard to section 170A, the court found that nothing precludes an accused from representing himself or from being represented by legal counsel,[1112] and that neither is prevented from asking questions in cross-examination.[1113] When the section is applied, questions are put through the intermediary and the intermediary acts, in a sense, as an interpreter,[1114] which, according to the court, does not appear to be a limitation of the right to cross-examination.[1115] It was therefore accepted that to achieve his goal, the "armoury of the cross-examiner" not only consisted of the content of the questions,[1116] but also of intonations of voice and nuances. It was also accepted that it is possible for the forcefulness and effect of cross-examination to be blunted by the use of the intermediary.

However, since the court was of the opinion that it was required to take account of the proportionality of the provision in the first stage of the enquiry into its constitutionality, it did not view the impact of section 170A on cross-examination as depriving the accused of his right to a fair trial.[1117] It was therefore required to take account of the interest of the child witness at this stage.[1118]

The court went on to find that although the principles of fundamental justice require that criminal trials should be unscrupulously fair, a modification of the accepted rules of evidence is not necessarily open to objection.[1119] Referring to *R v Levogiannis,*[1120] the court found that the criminal justice process must enable the trier of fact to get at the truth of the case, while at the same time allowing the accused to make a full defence. It argued that rules of evidence and procedure are

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[1112] 444*b-c*.
[1113] 444*c*.
[1114] 444*d*. This is, however, a false analogy. Although both the interpreter and the intermediary convey questions and answers between the examiner or cross-examiner and the witness, there is a fundamental difference between their functions. The interpreter is required to convey the *ipssisima verba* of the question to the witness, albeit in a different language. Although the questions are conveyed to the witness by the interpreter, the witness hears the original question and sees the examiner or cross-examiner. The negative impact of the use of an interpreter is therefore limited. In contrast, the intermediary need only convey the general thrust of the question to the witness. The witness does not hear the original question, nor does he see the examiner or cross-examiner. The negative impact on the effectiveness of cross-examination is therefore increased.
[1115] 444*e*.
[1116] 444*d-e*.
[1117] 444*e-f*.
[1118] 444*e-f*.
[1119] 444*g*.
[1120] (1993) 18 CRR 242 (2d).

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designed to assist the trier of fact in getting to the truth of the case and at the same time ensuring fairness of the trial.[1121] Based on these considerations, the court found that the use of the intermediary, in itself, neither affects the fundamental fairness of the trial nor impairs the right to challenge evidence.[1122] It also found that the intermediary may play an important role in balancing the interests of the accused with those of the child witness by allowing the witness to form part of the criminal justice process without disturbing the fundamental fairness of the process.[1123]

Based on the same considerations, the court found that the fact that the intermediary need only convey the general purport of the questions to the child witness, does not infringe the right to a fair trial, since the intermediary may not change the content of the question, but may merely phrase it in such a way that the witness can understand it.[1124] As the court acknowledged that the application of section 170A may give rise to unfairness in certain situations, it warned that courts should be on their guard to ensure that no unfairness results.[1125]

The right to confront is generally deemed to be essential for a fair trial[1126] and is clearly based on Due Process values. On the other hand, the values that underlie section 170A are Victims' rights values as they concern the protection of witnesses from possible further traumatisation. An analysis of section 170A raises three important questions: Does the provision infringe the accused's right to a fair trial? If so, can an infringement of the fair trial rights be justified by the Victims' Rights values served by the provision? And what will the effect of the South African Law Commission's recommendations be?

As was argued in the context of section 158 of the Criminal Procedure Act,[1127] the right to a fair trial must, as the essential element of the right to challenge evidence

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[1121] 444*h*.
[1122] 444*i* – 445*a*.
[1123] 444*j*-445*a*.
[1124] 445*c*.
[1125] 445*i*.
[1126] Schwikkard & Van der Merwe *Principles* 353.
[1127] 51 of 1977.

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and the right to be present when being tried,[1128] include the right of an accused person to confront his accusers.[1129] It was also argued that the right to challenge and adduce evidence includes, by necessary implication, not only the right to cross-examine,[1130] but also the right to meaningful and effective cross-examination.[1131] It is generally accepted that the most effective cross-examination is when there is a face-to-face confrontation between the cross-examiner and the witness.[1132] Therefore, if one interprets the right to challenge evidence in its widest adversarial context it should include the right to face-to-face confrontation between the accused (and his legal representative) and the witness.[1133] The right of an accused to confront his accusers is also an essential element of the right to be present when being tried.

Although the court in *K v Regional Court Magistrate*[1134] was prepared to accept that the forcefulness and effect of cross-examination may be limited by the use of an intermediary, the court found that there was no infringement of the right to a fair trial. This decision cannot be correct. The measures provided for in section 170A of the Criminal Procedure Act[1135] have the result that where an intermediary is appointed there is a physical separation between the accused and the witness and no examination or cross-examination of the child may take place other than through the intermediary. As long as he conveys the general purport of the question to the witness, the intermediary need not convey the *ipssisima verba* of the question. Despite the fact that the court can order that the original question be put to the witness verbatim the right to the opportunity of attempting meaningful and effective cross-examination is infringed by the fact that the intermediary may generally convey the general purport of the questions to the witness.[1136] Describing the intermediary as a "true or a psychological barrier" between the cross-examiner

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[1128] See for example *R v Molatla* 1975 1 SA 814 (T).
[1129] Van der Merwe 1995 *Obiter* 194 208.
[1130] See fn 1026.
[1131] Van der Merwe 1995 *Obiter* 194 208.
[1132] Pretorius *Cross-examination in South African law* 80, 88 and 99 and the authority cited there.
[1133] See also Watney 1998 *THRHR* 423 439.
[1134] 1996 1 SACR 434 (E).
[1135] 51 of 1977.
[1136] Van der Merwe 1995 *Obiter* 194 208.

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and the witness,[1137] Van der Merwe argues that the intervention of the intermediary can ultimately impact adversely on the effectiveness of cross-examination.[1138] Further, despite the fact that the provision makes it clear that the court, prosecution, defence and accused must be able to observe the child and the intermediary during the testimony of the child, the provision which makes it possible for the witness to testify in a different room infringes the right to a face-to-face confrontation.[1139] The fair trial rights of the accused are clearly infringed by section 170A.[1140] It is here that the limitations question arises. Is section 170A a constitutionally permissible limitation?

While an argument in favour of limitation in the context of section 158 of the Criminal Procedure Act[1141] was relatively easy to make, the provisions of section 170A create more problems. The reason is that the provision not only allows for a physical separation between the accused and the victim, but also for the appointment of an intermediary through whom all examination and cross-examination must take place. Therefore, not only is the right to confront infringed, but also the right to meaningful and effective cross-examination. The extent of the limitation is therefore greater than in the case of section 158. Although the arguments that were advanced in support of justification of the limitation in the context of section 158 apply *mutatis mutandis* in this context, it is important to note that in light of the difference in the extent to which the provisions infringe the right to a fair trial, more emphasis must be placed on this factor during the balancing process in the limitations phase. It is submitted that it is for this reason that the legislation requires more stringent requirements to be met before the provisions of section 170A can be invoked. As a result of these stricter requirements, the limitation of the fair trial right by the mechanism created in section 170A will pass constitutional scrutiny[1142] in the same way as will the provisions of section 158.

[1137] Van der Merwe 1995 *Obiter* 194 208.
[1138] Van der Merwe 1995 *Obiter* 194 208.
[1139] Van der Merwe 1995 *Obiter* 194 209.
[1140] Schwikkard & Jagwanth 1996 *SACJ* 215 218. Watney 1998 *THRHR* 423 439.
[1141] 51 of 1977.
[1142] See Schwikkard & Jagwanth 1996 *SACJ* 215 218*ff* and Watney 1998 *THRHR* 423 440*ff*.

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The South African Law Commission recommended that unless exceptional circumstances justify the non-appointment of an intermediary, an intermediary should automatically be appointed for a child witness in criminal proceedings involving a sexual offence. It also recommended that the role of the intermediary be extended so that the intermediary could act as a facilitator between the court and the witness. Therefore the intermediary's role would no longer be limited to merely conveying questions to the witness.

Due to the nature of sexual offences the victim of the offence is often the only witness who can directly testify about the events. It is therefore crucial for the defence to be able to test the version of the victim. Where the effect of cross-examination is blunted by the use of an intermediary, this becomes increasingly difficult. Therefore, strict requirements are set by section 170A for the appointment of an intermediary; and therefore intermediaries are usually appointed only in exceptional circumstances. However, the Law Commission's recommendation will result in the automatic appointment of an intermediary. Therefore, although the presiding officer still retains the discretion not to appoint an intermediary this discretion can only be exercised in exceptional circumstances.

Based on the dictum in *Coy v Iowa*[1143] relating to the need for a specific finding that trauma would result, it can be argued that the amendments proposed by the Law Commission increases the risk of an unjustifiable infringement of the fair trial rights of the accused. Along with this comes the increased risk of constitutional challenges based on the provision and the increased risk of convicted sexual offenders being acquitted on appeal. This, is it submitted, is not in the interests of justice.

6 5 *In camera* hearings

All criminal proceedings must, in terms of section 152 of the Criminal Procedure Act,[1144] be conducted in an open court. Section 153 of the Act creates an exception to this rule by providing that a court may, in certain circumstances, order that the

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[1143] 487 US 1012, 101 Led 2d 857 (1988).
[1144] 51 of 1977.

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proceedings take place *in camera*. Section 153(2) empowers the court to allow a witness to testify *in camera* and to order that the witness's identity be protected where there is a likelihood that the witness will suffer harm as a result of his involvement in the criminal justice process.[1145] Witnesses should be free to testify without fear of retaliation[1146] and this provision is aimed at ensuring that this can happen. The onus of satisfying the court that such special circumstances are present rests upon the party who alleges such circumstances and who brings an application that the basic rule be dispensed with.[1147] Where the prosecution seeks to invoke the measures contained in this provision it is necessary to bring a separate application in respect of each witness.[1148] The application must be brought in open court and reasons must be furnished.[1149] The court must be convinced that there is a reasonable likelihood of harm and not merely a "remote far-fetched or fantastic one".[1150] However, it must be stressed that the test is whether there is a reasonable possibility and not whether there is a probability that harm will result.[1151] The court has a discretion to grant or refuse the application. The harm may take any form and the nature thereof is one of the considerations which would be considered in exercising the discretion conferred by the section.[1152]

Section 153(3) provides a measure of protection for the complainant in sexual offences.[1153] In terms of this section the court may, at the request of the complainant or the parents or guardian of a minor complainant, order that the proceedings take place *in camera* or that certain persons be excluded from the proceedings. However, the judgement and sentence must still be delivered in open court.

In terms of section 153(3A), the court is compelled to exclude all persons whose presence is not necessary at the proceedings while the complainant in a sexual offence testifies, unless the complainant or his parents, guardian or a person acting

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[1145] *S v Mothopeng* 1978 4 SA 874 (T).
[1146] *S v Mothopeng* 1978 4 SA 874 (T).
[1147] *S v Pastoors* 1986 4 SA 222 (W) 224C. See also *S v Sekete* 1980 1 SA 171 (N).
[1148] *S v Sekete* 1980 1 SA 171 (N).
[1149] *S v Sekete* 1980 1 SA 171 (N).
[1150] *S v Madlavu* 1978 4 218 (E) 222G.
[1151] *S v Madlavu* 1978 4 218 (E) 222G; *S v Pastoors* 1986 4 222 (W) 224E.
[1152] *S v Pastoors* 1986 4 222 (W) 224D.
[1153] S 153(3)(a) and (b).

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in loco parentis requests otherwise. Section 153(3A) therefore differs from the other provisions in the sense that the court is not given a discretion. This provision is aimed at protecting the complainant from secondary victimisation which may be caused by testifying in public.

The South African Law Commission considered the provisions relating to *in camera* hearings and found that although the provisions as such were adequate, the enforcement thereof was problematic.[1154] However, no legislative intervention was recommended.[1155]

Although a public trial in an open court is the norm, provision is made for *in camera* hearings in most other jurisdictions. For example in England section 37 of the Children and Young Persons Act[1156] makes provision for a child to testify *in camera* where the case relates to of offence against decency or morality. This provision applies to children below the age of 18 years.

Section 14 of the Namibian Combating of Rape Act[1157] amends section 153 of the Criminal Procedure Act.[1158] The amended version of section 153 largely resembles section 153 in the South African Criminal Procedure Act.[1159]

Evaluation

Section 153(2) is aimed at protecting witnesses from possible harm that may result from their involvement in the criminal justice system. Sections 153(3) and 153(3A) are specifically aimed at protecting the victim of a sexual offence. Therefore, these provisions in the Criminal Procedure Act[1160] reflect Victims' Rights values. However, the question is whether the provisions infringe the constitutional right to a "public trial before an ordinary court".[1161]

[1154] SA Law Commission *Sexual Offences* Report § 4.5.5.2.
[1155] SA Law Commission *Sexual Offences* Report § 4.5.5.4.
[1156] Children and Young Persons Act 1933.
[1157] 8 of 2000.
[1158] 51 of 1977.
[1159] 51 of 1977.
[1160] 51 of 1977.
[1161] S 35(3)(c).

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In the first stage of the constitutional enquiry it is necessary to establish the essential content of the right. In Chapter 3 it was shown that a public trial serves two purposes. As American Chief Justice Burger stated in *Press-Enterprises Co v Superior Court* II[1162] the right to an open trial is "a shared right of the accused and the public, the common concern being the assurance of fairness". In other words, an open trial protects the accused from secret trials[1163] while enhancing public confidence in the administration of justice.[1164] Therefore, it can be argued that the essential content of the right must include all that is necessary to realise this purpose. In this way it can be argued that the right must therefore include access to the court by all parties who have a direct interest in the trial and as large a portion of the public as is necessary to ensure that the public can be made aware of the conduct and outcome of the trial. Where there is a total exclusion of members of the public from the trial, the right to a public trial must certainly be infringed.

It is therefore necessary to move on to the limitations phase. Here the court must consider the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. As was stated, the right to a public trial serves two purposes, namely protection of the accused from secret trials and enhancing the public perception of the criminal justice process. Despite the importance of these interests, the right to a public trial cannot be absolute. The provisions relating to *in camera* trials seek to protect the victims' of sexual offences and other witnesses from harm that may result from their involvement in the criminal justice process and it does so by excluding the public (or part thereof) from the trial. Since the infringement of the right is relatively limited, it is constitutionally justifiable.

[1162] 478 US 1 7 (1986).
[1163] *K v Regional Court Magistrate NO* 1996 1 SACR 434 (E) 414*g*.
[1164] *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC).

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6 6 Prohibition of publication of certain information relating to criminal proceedings

Section 154 of the Criminal Procedure Act[1165] prohibits the publication of certain information relating to criminal proceedings. The provision is aimed at protecting not only the accused, but also witnesses and victims. For example, in terms of section 154(1) no information relating to an *in camera* trial may be published. This prohibition, however, does not apply to information relating to name and personal particulars of the accused, the charge against him, the plea, the verdict or the sentence. However, the court is empowered to prohibit publication of this information if it will defeat the object of an order made in terms of section 153(1) of the Act.

In the case of *in camera* trials relating to sexual offences or testimony of the complainant in a sexual offence publication of any information that may reveal the identity of the complainant is prohibited in terms of section 154(2). Section 154(3) prohibits the publication of information which may reveal the identity of an accused or a witness under the age of 18 years. However, where it would be just and equitable to do so, the presiding officer may authorise publication of this information.

Section 335A of the Criminal Procedure Act[1166] prohibits the publication of information which would reveal the identity of a person towards or in connection with whom an indecent act has been committed. This section applies prior to the commencement of criminal proceedings.

The South African Law Commission considered the effectiveness of these provisions and came to the conclusion that while the provisions as such are generally adequate, the problem lies in their effective enforcement.[1167] The Commission therefore recommended that the penalties for transgression of the provisions be increased. In addition, it recommended that where information was published in conflict with the provisions, the penalty should be higher in cases

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[1165] 51 of 1977.
[1166] 51 of 1977.
[1167] SA Law Commission *Sexual Offences* Report § 4.5.6.2.

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where the person to whom the information related was below the age of 18 years as opposed to where the person is over 18. It was also recommended that section 154 be amended to provide that where the case that gave rise to the publication of information in contravention of the provisions related to a sexual offence, and the person in respect of whom information was published suffered physical, psychological or other injury or loss of income, the provisions of section 300 of the Criminal Procedure Act[1168] should apply.[1169]

Section 15 of the Namibian Combating of Rape Act[1170] amends section 154 of the Criminal Procedure Act.[1171] The amended version of section 154 largely resembles section 154 in the South African Criminal Procedure Act.[1172]

Evaluation

The provisions of section 154(2) and (3) of the Criminal Procedure Act[1173] are aimed at protecting the identity of the complainant in a sexual offence. This serves to uphold the complainant's right to privacy[1174] and human dignity.[1175] As was stated above, one of the purposes of the right to a public trial is the enhancement of public confidence in the criminal justice process. However, a prohibition on the publication of information that will reveal the identity of the complainant does not affect the right to a public trial and therefore does not infringe on the fair trial rights of the accused.

[1168] 51 of 1977.
[1169] In terms of s 300 of the Criminal Procedure Act 51 of 1977 the court may order damages to be paid to the complainant by the convicted accused.
[1170] 8 of 2000.
[1171] 51 of 1977.
[1172] 51 of 1977.
[1173] 51 of 1977.
[1174] S 14 Constitution.
[1175] S 10 Constitution.

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6 7 Other measures considered by the South African Law Commission[1176]

The South African Law Commission considered a number of other measures aimed at protecting the victim of sexual offences. However, these measures were, with the exception of the support person, rejected by the Commission. Despite the recommendation of the Law Commission, the proposed measures relating to the appointment of a support person were not included in the Criminal Law (Sexual Offences) Amendment Bill.[1177] Due to the fact that none of these provisions were included in the Bill, the discussion will be limited to an outline of the Law Commission's finding. No evaluation of these provisions will be done, since the reasons for the rejection of these measures by the Commission are evident from the discussion.

6 7 1 Video-taped statements

Mindful of the fact that courtroom testimony is a frightening experience and that ways should be found to make this process less traumatizing, the Law Commission investigated the possibility of admitting video taped testimony of child victims of sexual offences at trial. In Discussion Paper 102 the Law Commission stated that although section 158(2) of the Criminal Procedure Act[1178] provides for the use of closed-circuit television "or other similar electronic media", it does not specifically provide that a video of an examination may be used at a later date in place of the witness testifying in court. Therefore, this is not an option in the South African Law.

Video-taped evidence, in principle, offers the potential of using the videotape in the place of live testimony, thereby, theoretically, limiting the potential of secondary traumatisation by limiting the child's exposure to cross-examination. However, the Commission noted that video-taping the testimony of the child victim will not necessarily prevent the child from being subject to cross-

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[1176] In light of the fact that none of the following measures have been included in the Criminal Law (Sexual Offences) Amendment Bill B50-2003 these provisions will be evaluated as a whole. The evaluation will be limited.

[1177] B 50-2003.

[1178] 51 of 1977.

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examination. In this respect the Commission considered three possibilities. Firstly, if cross-examination of the victim is recorded at the same time as the examination-in-chief and the child's testimony does not stand up to the cross-examination, the videotaped evidence could be submitted by the defence to secure an acquittal.[1179] Secondly, if the victim is not cross-examined at the time of making the video-recording, the witness will in all likelihood be called for cross-examination by the defence. This presents two difficulties: (a) the videotaped evidence could be used to discredit the victim in the event that, as a result of a lapse of time, the victim's testimony under cross-examination differs from his video-taped testimony and (b) the victim will in any event suffer the trauma associated with giving evidence in court.[1180] Thirdly, the manner in and the circumstances under which the recording was made could become the subject of dispute.[1181]

Further, it was suggested that child witnesses should not be exposed to multiple interviews as this serves to increase the child's emotional distress.[1182] However, experience has shown that it is best to videotape later rather than earlier interviews,[1183] and therefore the option of videotaping the evidence of the child does not serve to decrease the number of interviews the child must endure.[1184]

Furthermore, the Commission considered the impact that videotaping the evidence of the child victim will have on him.[1185] First, the Commission noted that the quality of the videotaped account may negatively affect the credibility of the child's testimony.[1186] Further, there is a potential risk of the focus being shifted away from what the child said to the manner in which the questions were asked, thereby undermining the prosecution of sexual offences.[1187] The possibility that contradictory statements, which occur in the nature of explaining an event, will be

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[1179] § 25.5.1.2.
[1180] § 25.5.1.2.
[1181] § 25.5.1.2.
[1182] § 25.5.2.2.
[1183] § 25.5.1.3.
[1184] § 25.5.1.4.
[1185] § 25.5.3.
[1186] § 25.5.3.1.
[1187] § 25.5.3.1.

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used by the defence to its advantage also undermines prosecution of sexual offences.[1188]

The Commission was also mindful of the fact that personnel resources with the necessary skill to conduct interviews of a sufficiently high standard to secure a conviction are lacking.[1189] Therefore, the Commission recommended that resources should be allocated to improving basic interviewing skills.[1190]

Other practical issues considered by the Commission include the substantial risk of the witness contradicting himself should he be called to clarify certain issues,[1191] the risk that challenges will be made to the authenticity of the videos[1192] and the fact that there are problems with the technology already in use.[1193]

Therefore, the Commission was not convinced that the current circumstances allow for the introduction of pre-recorded videotaped testimony as evidence at trial,[1194] nor that videotaped evidence would succeed in protecting victims in South Africa.[1195] The Commission recommended that the Department of Justice and Constitutional Development should take the steps necessary to ensure that the protective measures already provided for in the Criminal Procedure Act are properly implemented.[1196]

6 7 2 Surrogate witness

In 1955 the "surrogate witness" approach was adopted in Israel[1197] with the aim of protecting the child victim from the trauma of testifying. In essence the "surrogate witness" approach entails that a child victim of a sexual offence is interviewed by a

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[1188] § 25.5.3.1.
[1189] § 25.5.3.3.
[1190] § 25.5.4.3.
[1191] § 25.5.4.1.
[1192] § 25.5.4.2.
[1193] § 25.5.4.4.
[1194] A problem that was not addressed by the Law Commission relates to the rule against the admissibility of previous consistent statements. Where an interview has been video-taped, the staments made by the child during the interview will amount to a previous consstent statement and therefore the child cannot, as a general rule, refer to such statements during his testimony at trial. Therefore, the video-taped statements will serve little purpose.
[1195] § 25.6.
[1196] § 25.6.
[1197] For a general discussion on the approach, see Harnon "Examination of children in Sexual Offences – the Isreali law and practice" 1988 *Criminal Law Review* 263.

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"youth interrogator". The interrogator decides whether or not the child should testify at the trial and, should the child testify, the interrogator may indicate that continuation of the examination may cause emotional harm to the child, in which case the court may excuse the child. Should the interrogator decide that the child must not testify, the interrogator testifies in his place and may be cross-examined by the defence. If the child does not testify, the accused may not be convicted on the evidence of the interrogator alone and corroborating evidence is required.[1198]

The South African Law Commission considered the possibility of including a provision to this effect in the Sexual Offences Act. In Discussion Paper 102 the Commission considered the advantages of this approach and came to the conclusion that the major advantage would be that it generally restricts the exposure of the child to proceedings which may be harmful, that the courts do not directly supervise the examination of the child and that the courts have to rely on the interrogator for interpretation and assessment of the evidence.[1199]

Disadvantages of this approach include the fact that it appears to have impeded prosecution of perpetrators and that the rights of defendants were seriously compromised which lead to them not receiving fair trials.[1200]

Despite the obvious advantages of the surrogate witness system, the Commission came to the conclusion that the implementation of such a system in South Africa would result in the infringement of the constitutionally guaranteed fair trial rights of accused persons.[1201] This infringement could, in the opinion of the Commission, not be justified in an open and democratic society.[1202] The reasons advanced by the Commission for this conclusion are the following: that the court will not be able to asses the demeanour of the complainant, that the interrogator may not have put to the child all the questions that the defence may wish to cover, that such an option

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[1198] Harnon 1988 *Criminal Law Review* 263*ff*.
[1199] § 28.4.1.
[1200] § 28.4.2.
[1201] § 28.4.4.
[1202] § 28.4.4.

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would be costly and that there are other less drastic and more workable alternatives which can be used to protect the child witness.[1203]

Therefore, the Commission recommended that the surrogate witness system not be included in the draft Sexual Offences Bill. Here, clearly, Due Process values outweighed Victims' Rights values.

6 7 3 Support persons

In Discussion Paper 102 the Law Commission defined a "support person" as "someone who accompanies either a witness or the accused through the criminal justice process".[1204] The purpose of the appointment of such a support person would be to "strengthen and encourage the witness emotionally" by his physical presence.[1205]

Although the Criminal Procedure Act[1206] makes provision for the support of certain witnesses,[1207] no specific provision is made for a support person for witnesses not falling into those specific categories. On the basis that a support person mat render a service to both the witness and the court, the Commission considered it necessary to investigate the possibility of introducing specific primary legislative provisions that establishes the court's power to authorise the presence of a support person.

After evaluation of submissions made to the Commission, the Commission recommended that provision be made in the new Sexual Offences Act for the use of support persons by all witnesses.[1208]

[1203] § 28.4.4.
[1204] § 29.1.1.
[1205] § 29.1.1.
[1206] 51 0f 1977.
[1207] S 153(3A) which provides that a complainant may request that certain persons remain in court in cases where the court orders the *in camera* hearing of the evidence of a complainant in a sexual offence matter; s 73(3) which provides for the support of an accused under the age of 18 years by his parent or guardian or any other accused who, in the opinion of the court requires assistance; s 74 which provides for the warning of the parent or guardian of an accused under the age of 18 years to be present at criminal proceedings and s 191A which authorises the Minister of Justice to make regulations relating to the assistance of and support to witnesses in court. No such regulations have been made as yet.
[1208] § 29.6.3. The Commission was mindful of the fact that it is important to reduce secondary trauma not only for the victim of a sexual offence, but also for all other witnesses in sexual offence

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The Commission was of the opinion that the obvious advantage of the support person system would be that it would reduce the trauma to the witness without placing any additional financial burden on the criminal justice system.[1209]

As far as the qualification of the person to be appointed as support person is concerned, the Commission noted that since the purpose of the support person is to put the witness at ease, it would defeat the object of the section if a list of qualifying criteria were set.[1210] Furthermore, the setting of a list of qualifying criteria would, in the opinion of the Commission, result in an unreasonable delay in the trial process owing to the compliance with regulations and tests for competence to act as a support person.[1211] However, the Commission felt that the court should retain a discretion to disapprove of a support person if it is satisfied that it would not be in the interests of justice to appoint such person.[1212]

The role of the support person should, according to the recommendations by the Commission, be limited to providing emotional support to the witness and therefore the support person should not be allowed to speak to the witness either in or outside court while the witness is still under oath.[1213] In addition, the support person should not be allowed to interfere with the witness while the latter is giving evidence.[1214] The Commission recommended that the court should explain the role of the support person to him.[1215]

The Commission recognised that the entire process, from reporting of the offence through to the finalisation of the trial, is difficult for a witness. For this reason the Commission recommended that the support person be able to accompany the witness at all relevant times in this process.[1216]

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matters and therefore recommended that the provisions relating to the appointment of support persons not be limited to the victim only.

[1209] § 29.6.4.
[1210] § 29.6.5.
[1211] § 29.6.5.
[1212] § 29.6.5.
[1213] § 29.6.6.
[1214] § 29.6.6.
[1215] § 29.6.6.
[1216] § 29.6.7.

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In relation to child witnesses the Commission considered it important that the child's input should be heard and therefore recommended that a provision should be included affording the child the opportunity the express his opinion on whether or not he wants a support person present in court and who that person should be.[1217]

Owing to the limited mandate of the Commission, it clearly stated that the recommendations made relate only to the appointment of support persons in sexual offence matters and that it does not propose to extend the proposed provision to all witnesses.[1218]

Lastly, the Commission recognised the fact that transport costs to and from court may be prohibitive and therefore recommended that the State bear the transport costs, in the form of a transport allowance, for one support person per witness who is giving evidence in court.[1219]

After considering submissions, the Commission recommended that the following clause be included in the draft Bill:

> "**17.** (1) The police official responsible for the investigation of a charge relating to the alleged commission of a sexual offence shall, at the commencement of such an investigation, inform the complainant in such charge and any child witness or his or her parent, guardian or a person *in loco parentis*, of their right to be accompanied by a support person of the complainant's or witness's choice while making any statement, undergoing any examination, medical or otherwise, being interviewed or being questioned.
>
> (2) A support person referred to in subsection (1) is not appointed by the court and may accompany the complainant or witness during any of the investigative steps contemplated in that subsection.
>
> (3) Whenever criminal proceedings involving the alleged commission of a sexual offence are pending before any court and a child witness, including any complainant, is to give evidence in such court, the court may at any time on its own initiative or upon request by
>
> the prosecutor direct that such witness be accompanied by a support person of the witness's choice when giving evidence in court.
>
> (4) If the court has appointed a support person in respect of a witness in terms of subsection (3) on its own initiative, such witness may waive the appointment

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[1217] § 29.6.9.
[1218] § 26.6.11.
[1219] § 29.6.12.

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of such support person: Provided that the court shall accord such waiver the weight it considers appropriate in view of the witness's age and maturity.

(5) The court may, notwithstanding a request in terms of this section, refuse the appointment of a support person of the witness's choice if the court is of opinion that the appointment of such person will not be in the interests of justice, and may, after consultation with such witness and upon furnishing reasons for its refusal, appoint another person as support person.

(6) A support person appointed in terms of this section may accompany and be seated with the relevant witness while such witness is making statements to any person, being interviewed or giving evidence in court.

(7) The court may, if it deems it to be in the interests of justice and in the best interests of the witness, at any time revoke the appointment of a support person and may appoint another person in his or her place.

(8) Whenever a witness in respect of whom a support person has been appointed is to give evidence in court, such person shall affirm to the court prior to giving support that he or she will -

(a) assist the witness to the best of his or her ability; and

(b) not in any manner interfere with the witness or the evidence being given.

(9) The State shall pay to a support person appointed in terms of this section the prescribed witness fees for the duration of the period that such person is required to assist a witness giving evidence in court."

Section 17 does not specifically list the witnesses who are entitled to be accompanied by a support person. However, section 16(1) of the draft Bill[1220] requires the court to declare certain witnesses vulnerable witnesses,[1221] while section 16(2) gives the court a discretion to declare any other witness other than the accused, the complainant and a child witness, a vulnerable witness. In terms of section 16(4)(a) of the draft Sexual Offences Bill[1222] a court may, after declaring a witness a vulnerable witness direct that such a witness be accompanied by a support person. Therefore, the appointment of a support person as contemplated in section 17 is not limited to specific witnesses, but is determined with reference to declaration as a vulnerable witness.[1223]

Section 17(1) refers to the right to be accompanied by a support person while making any statement, undergoing any examination, medical or otherwise, being interviewed or being questioned. Section 17(2) makes it clear that no formal

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[1220] S 15 Criminal Law (Sexual Offences) Amendment Bill B50-003.
[1221] The complainant and a child must be declared vulnerable.
[1222] For a discussion see § 6 2 above.
[1223] SA Law Commission *Sexual Offences* Report § 4.5.2.3.

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application needs to be made for the appointment of a support person in the pre-trial phase.[1224]

Section 17(1) furthermore places a duty on the investigating officer to inform the complainant, or in the case of a child witness him or his parent, guardian or person *in loco parentis*, of this right. Although the application of section 17 is not limited to complainants and children, the wording of section 17(1) suggests that only complainants and child witnesses have the right to be accompanied by a support person during the pre-trial phase. This is borne out by the fact that any other witness must first be formally declared a vulnerable witness in terms of section 16 before a support person can be appointed for such a witness.[1225]

In terms of section 17(3) a court may *mero motu* or upon request of the prosecution appoint a support person for a child, including the complainant. Section 17(3) makes no mention of the appointment of a support person for a witness other than a child and it must therefore be assumed that irrespective of any provision in section 16, this provision would apply only to the appointment of a support person for a child witness.

Section 17(4) empowers a child in respect of whom a support person was appointed in terms of section 17(3) to waive the appointment of such a support person, but provides that the court must accord the waiver the weight it considers appropriate in view of the witness's age and maturity. Therefore, in principle the child is empowered to waive such an appointment, but the court is not necessarily required to accept such a waiver.

In terms of section 17(3) a support person of the witness's choice must be appointed. But section 17(5) provides that the court may refuse to appoint the

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[1224] SA Law Commission *Sexual Offences* Report § 4.5.2.3.

[1225] The question is whether a witness other than the complainant or a child witness has the right to be accompanied by a support person during the pre-trial phase and if not, whether such a witness can during the pre-trial phase bring an application to be declared a vulnerable witness. It is subimitted that this should not be possible. Considering that there is technically no sexual offence *matter* before a court during the pre-trial phase and any person being interviewed at that stage is not yet a witness in a sexual offence matter, but merely a potential witness in such a matter, it would be difficult to argue that such a person could, at that stage, be declared a vulnerable witness. This, however, falls outside of the scope of this study.

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support person of the witness's choice if it is of the opinion that the appointment of such person will not be in the interests of justice. In this case the court may, after consultation with the witness, appoint another person as support person. This is to prevent the possibility of alleged offenders abusing their position in relation to a child victim to exert pressure on the child and to be appointed as the support person of the child they allegedly abused.[1226]

Section 17(6) provides that the support person may accompany and be seated with the witness in respect of whom he was appointed while the witness is making statements to any person, being interviewed or giving evidence. In terms of section 17(1) certain witnesses have the right to be accompanied by a support person during the pre-trial phase. Section 17(6) reiterates this and merely adds that the support person may be present while the witness is giving evidence.

The court may revoke the appointment of a support person and appoint another person in his place if it is in the interests of justice to do so.[1227] Although the provision is silent on the issue, it must be assumed that the court, in the appointment of a replacement support person, should consult with the witness as is required in section 17(5). Should this not be required, the provision in section 17(5) can be subverted by the initial appointment of the support person of the witness's choice and a subsequent revocation of the appointment and appointment of a replacement support person.

In an indirect manner, section 17(8) defines the role of the support person. Section 17(8) requires the support person to make an affirmation (before giving support to the witness is respect of whom he has been appointed) that he will assist the witness to the best of his ability and that he will not in any manner interfere with the witness or the evidence being given.

Section 17(9) places a duty on the State to pay the prescribed witness fees to a support person for the duration of the period that such a person is required to assist the witness. It must be noted that the Law Commission recommended the inclusion

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[1226] SA Law Commission *Sexual Offences* Report § 4.5.2.3.
[1227] S 17(7).

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of the provisions relating to support persons on the basis that they do not place a financial burden on the State.[1228] However, this provision could result in a substantial financial burden being placed on the State.

The wording of the proposed section is problematic. On the one hand, section 16 of the draft Bill refers to the possibility of the appointment, in terms of section 17 of the draft Bill, of a support person for any witness who has been declared a vulnerable witness, while on the other hand section 17 only mentions two possible categories of witnesses for whom a support person may be appointed, namely the complainant[1229] and a child witness.[1230] Therefore, despite the provisions of section 16, appointment of a support person is limited by the wording of section 17 to children and complainants. This is so despite the fact that the Law Commission indicated that it did not wish to limit the group of witnesses in respect of whom a support person could be appointed.[1231]

It is interesting to note that the Criminal Law (Sexual Offences) Amendment Bill[1232] does not mention the possibility of appointing a support person for any category of witnesses. It must therefore be assumed that this recommendation of the Law Commission was rejected when the Bill was drafted. However, in terms of section 15(4)(e) the court is empowered to direct that a witness who has been declared a vulnerable witness in terms of section 15(1) be protected by any measure that the court deems just and appropriate. The question is whether the court is empowered, in the absence of a specific provision creating a support person system, to appoint a support person in respect a vulnerable witness. In light of the fact that the Criminal Procedure Act[1233] makes only limited provision for support for certain witnesses, it is submitted that the court does not have the authority to do so. It is submitted that if the legislature intends otherwise, it would in this regard have to include a specific empowering provision.

[1228] SA Law Commission *Sexual Offences* Discussion Paper 102.
[1229] Only for the pre-trail phase in terms of s 17(1).
[1230] S 17(3).
[1231] SA Law Commission *Sexual Offences* Report § 4.5.2.3.
[1232] B50-2003.
[1233] 51 of 1977.

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6 7 4 Legal representation

The South African legal system considers sexual offences to be crimes against the State and not crimes against the victim.[1234] Therefore, despite the personal nature of the crime, the victim is no more than a State witness who forms part of the "chain of evidence" and is, accordingly, not entitled to actively participate or have legal representation at the trial. In practice the victim is seldom given information about the investigation, trial dates, bail conditions and so forth[1235] and, due to the workload of the prosecutors, victims are seldom given the opportunity to meet with the prosecutor before the trial.[1236] As a result, the victim is not informed about what is expected of him and what he should expect during the trial.[1237] Further, the witness is often exposed to harsh cross-examination and, while the presiding officer is empowered to intervene to limit excessive questioning, such questioning is frequently allowed to continue.[1238]

It is for these reasons that the South African Law Commission decided to investigate the possibility of allowing the victim to actively participate during the trial and to allow legal representation for the victim at the trial. The legal representative could then explain the process to the victim, bring pressure on the State and defence to meet the time frames set and generally advise the victim of remedies he would be entitled to should, for example, the accused attempt to intimidate him.[1239] Furthermore, the legal representative could act to protect the interests of the victim during the trial by, for example, objecting to excessive cross-examination.[1240]

In Discussion Paper 102 the Commission noted that with regard to the investigation and prosecution of sexual offences the interests of the State differ from those of the victim.[1241] While the State's objective is to prove the guilt of the accused beyond reasonable doubt, the victim's interest lies in the obtaining of

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[1234] Snyman *Criminal Law* 4th ed (2002) 6.
[1235] SA Law Commission *Sexual Offences* Discussion Paper 102 § 16.5.2.
[1236] SA Law Commission *Sexual Offences* Discussion Paper 102 §§ 16.6.1 and 16.5.4.
[1237] SA Law Commission *Sexual Offences* Discussion Paper 102 § 16.5.4
[1238] SA Law Commission *Sexual Offences* Discussion Paper 102 § 16.6.3.
[1239] SA Law Commission *Sexual Offences* Discussion Paper 102 § 16.5.5.
[1240] SA Law Commission *Sexual Offences* Discussion Paper 102 § 16.6.3.
[1241] SA Law Commission *Sexual Offences* Discussion Paper 102 § 16.9.1.

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satisfaction for the personal suffering that resulted from the sexual offence and to be protected from further trauma during the trial process. Therefore, the Commission opined, it is necessary to ensure that the interests of the victim are properly protected.[1242] However, the Commission was of the opinion that active participation by and legal representation for the victim at the trial is *not the only way* in which to protect the victim and accordingly improve the quality and experience of testimony in sexual matters.[1243] In the Commission's view it would be sounder to introduce measures aimed directly at the harmful and often unhelpful rules and regulations that present obstacles in the protection of the victim's interests at the criminal trial.[1244] Furthermore, the Commission was of the opinion that the recommendations in the Discussion Paper would go a long way to achieving this goal.[1245]

Although the Commission accepted that victims of crime suffer individual harm, crimes are committed against society as a whole and therefore it is fitting that it is the State and not the victim who prosecutes the crime.[1246] On this basis the Commission declined to recommend the introduction of complainants as ancillary prosecutors in sexual offence trials.[1247] This implies that not only is the victim not entitled to actively participate in the prosecution, but also that the victim is not entitled to be represented by counsel.

6 8 Conclusion

This chapter concentrated on those measures aimed at protecting the victim of sexual offences against the possibility of secondary victimisation which may result from their involvement in the criminal justice process. It was shown that while measures designed to achieve this purpose have already been implemented, the South African Law Commission recommended that requirements for the application of certain of these measures be reviewed in an attempt to provide increased protection for such victims.

[1242] SA Law Commission *Sexual Offences* Discussion Paper 102 § 16.9.1.
[1243] SA Law Commission *Sexual Offences* Discussion Paper 102 § 16.9.4.
[1244] SA Law Commission *Sexual Offences* Discussion Paper 102 § 16.9.4.
[1245] SA Law Commission *Sexual Offences* Discussion Paper 102 § 16.9.4.
[1246] SA Law Commission *Sexual Offences* Discussion Paper 102 § 16.9.10.
[1247] SA Law Commission *Sexual Offences* Discussion Paper 102 § 16.9.11.

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It was shown that while the existing measures provided for in section 158 and 170A of the Criminal Procedure Act[1248] infringe the fair trial rights of the accused, the infringement can be justified on the basis of the purpose served by the infringement. It was, however, also argued that the requirements inherent in the respective sections are aimed at providing protection for the fair trial rights of the accused and that strict adherence to these requirements is therefore essential. It was pointed out that the recommendations of the Law Commission will reduce the protection of the fair trial rights of the accused and will therefore increase the possibility of acquittal based on a successful constitutional challenge.

As far as *in camera* hearings are concerned, it was shown that where there is a total exclusion of the public from the trial, the right to a fair trial is infringed. However, in light of the purpose of the infringement, namely the protection of the victim, the infringement should pass constitutional scrutiny. The prohibition placed on the publication of certain information relating to criminal justice proceedings does not affect the fair trial rights of the accused.

It is submitted that the Law Commission quite rightly rejected measures such as video-taped statements, surrogate witnesses and the appointment of legal representation for the victim of a sexual offence, since the prejudicial effect of these measures outweighs their potential value. Despite the Law Commission's recommendation relating to the appointment of support persons, this measure was not included in the Criminal Law (Sexual Offences) Amendment Bill.[1249] In light of this, it is unnecessary to consider the possible constitutional implications of this measure.

[1248] 51 of 1977.
[1249] B50-2003.

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CHAPTER 7: CONCLUSION

7 1 Conclusion

Underlying the research question was the concern that although the existing framework within which alleged child abuse offenders are prosecuted is insufficient, particularly in so far as the rights of the child victim and the interests of society as a whole in the prosecution of alleged offenders are concerned, the amendments proposed in the Criminal Law (Sexual Offences) Amendment Bill[1250] might not have the desired effect, namely the effective prosecution of alleged child abuse offenders. It may, quite possibly, rather have the effect of infringing on the rights of the accused to a fair trial and consequently be contrary to the interests of society.

The aim of this study was to identify threats to the fair trial rights of the accused posed by measures aimed at enhancing victim participation and protection of victims' of sexual offences against children and to propose ways of balancing the rights of the accused person with those of the child victim. The effect of measures aimed at enhancing Victims' Rights on the fair trial rights of the accused was therefore investigated. The study departed from the view that neither of the two possible extremes, *viz* upholding the fair trial rights of the accused at all costs and upholding Victims' Rights at the expense of fair trial rights, posed a solution to the problems encountered in the prosecution of sexual offences against children.

In the introductory chapter, attention was drawn to the possible competing rights of sexual offenders and child victims. A number of internal tensions that exist in any criminal justice process[1251] were identified and it was argued that the outcome of the balancing process of these tensions depends on the values that underlie the particular criminal justice system.[1252]

[1250] *Supra.*
[1251] § 1 2.
[1252] § 1 3.

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In Chapter Two attention was given to two different models of criminal procedure that represent different value systems, namely the Due Process Model[1253] and the Punitive Victims' Rights Model[1254]. It was shown that although the South African criminal justice system is largely based on Due Process values, values that underlie the Punitive Victims' rights Model can be identified in the Criminal Law (Sexual Offences) Amendment Bill.[1255] The Chapter served as a background to the evaluation of the rules of procedure and evidence that followed in Chapters Five and Six. The significance of Chapter Two was that the values identified were used to clearly define the tension between the constitutionally guaranteed fair trial rights of the accused and the interests of society and the child-victim of the sexual offence. This assisted in finding a balance between these rights and interests.

Chapter Three was dedicated to an exposition of a selection of the constitutionally guaranteed fair trial rights of the accused in South Africa and provided information regarding the content of the fair trial rights of the accused. This information is necessary when the question of constitutional validity is judged. It was also argued that the integrity of the criminal justice system lies in the upholding of these rights.

In Chapter Four the focus was shifted to Victims' Rights. Victims' Rights were divided into two groups[1256] based on the level at which they operate, namely Extra-trial Level and Trial Level. Both groups were the subdivided into categories based on the purpose sought to be achieved by the rights. Important for this study are Victims' Rights which operate at trial level. These rights can be divided into two categories, namely those aimed at enhancing victim participation[1257] at trial level and those aimed at protecting[1258] the victim from secondary victimisation during their participation in the criminal justice process. In this chapter it was shown that there have been increased calls for enhancement of Victims' Rights in the criminal justice process. It was argued that although it is important to recognise that victims of crime have an interest in the prosecution of the alleged offender and that it is

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[1253] § 2 4.
[1254] § 2 5.
[1255] See the discussion above.
[1256] § 4 3.
[1257] § 4 3 3 1.
[1258] § 4 3 3 2.

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important to provide protection for such victims, it is equally important to ensure that the integrity of the criminal justice process is not undermined by measures aimed to achieve this goal. It was shown that there has been increased recognition of Victims' Rights and that such recognition does not necessarily infringe fair trial rights. The question that was posed, however, is whether the measures envisaged by the South African Law Commission would infringe the fair trial rights of the accused. The following two chapters consisted of a discussion and an evaluation of measures aimed at enhancing victim participation at trial level and measures aimed at providing protection for the victim of a sexual offence at the same level.

Chapter 5 considered measures aimed at enhancing victim participation at trial level. It was shown that the proposed legislative changes to the traditional competency test[1259] and to the provisions relating to the taking of the oath[1260] will enhance victim participation in the trial phase, while having no significant influence of the fair trial rights of the accused. Effective victim participation was shown to have been enhanced by the abolition of the cautionary rule applicable to the victim of a sexual offence[1261] and the cautionary rule relating to the evidence of the child victim.[1262] Neither of these measures would have a significant impact on the fair trial rights of the accused.

As far as the cautionary rule applicable to the evidence of a single witness[1263] is concerned, Chapter Five showed that although there is tension between the rights of the accused and the interests of society and the child-victim in this respect, there can be no real objection to the rule, since the rule merely requires the court to seek some kind of safeguard and to satisfy itself that the evidence of the single witness is reliable. Proof beyond reasonable doubt controls the situation. Therefore, there is no possibility of an infringement of the fair trial rights of the accused. Neither is the practical application of the rule likely to impact negatively on the rights and interests of the child-victim.

[1259] § 5 2.
[1260] § 5 3.
[1261] § 5 4 1.
[1262] § 5 4 2.
[1263] § 5 4 3.

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Chapter Five also included a discussion of the admissibility of hearsay evidence.[1264] In this discussion it was shown that although the court has a wide discretion in terms of section 3(1)(c) of the Law of Evidence Amendment Act[1265] to admit hearsay evidence when it would be in the interests of justice to do so, the admission of hearsay evidence is not without problems. The first problem identified related to the possibility of an infringement of the constitutional rights of the accused, while the second related to the conservative approach generally followed by courts in the admission of hearsay evidence. It was argued that the provision in section 3(1)(c) of the Law of Evidence Amendment Act[1266] could be used as a mechanism to promote indirect victim participation in the criminal justice process. However, care should be taken to safeguard the fair trial rights of the accused.

With regard to the admission of previous consistent statements and the complaint exception,[1267] Chapter Five indicated that there is much criticism of the exception, especially of the fact that a negative inference can be drawn from a delay in the making of the complaint. It was also argued that abolition of the first reasonable opportunity requirement would give effect to Victims' rights values. However, it was also argued that since the rule against the admissibility of previous consistent statements in general would promote Due Process values, it should be retained.

While Chapter Five dealt with provisions aimed at enhancing victim participation in the trial phase of the criminal justice process, Chapter Six investigated provisions aimed at protection of the victim from secondary victimisation which could be caused by the victim's involvement in the criminal justice process. A number of provisions that are aimed at providing such protection already exist in South African law. However, the South African Law Commission has proposed changes to these provisions and has investigated the possibility of providing increased protection for victims. In the course of the Chapter is was shown that while measures designed to achieve this purpose have already been implemented,

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[1264] § 5 5.
[1265] 45 of 1988.
[1266] 45 of 1988.
[1267] § 5 6.

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the South African Law Commission recommended that requirements for the application of certain of these measures be reviewed in an attempt to provide increased protection for such victims. A discussion of sections 158[1268] and 170A[1269] of the Criminal Procedure Act[1270] indicated that these provisions undoubtedly infringe the fair trial rights of the accused. However, in light of the purpose served by the provisions, the infringement is constitutionally justifiable. It was argued that the requirements inherent in the respective sections are aimed at providing protection for the fair trial rights of the accused and that strict adherence to these requirements is therefore essential. It was pointed out that the recommendations of the Law Commission will reduce the protection of the fair trial rights of the accused and will therefore increase the possibility of acquittal based on a constitutional challenge.

As far as *in camera* hearings[1271] are concerned, it was argued that where there is a total exclusion of the public from the trial, the right to a fair trial is infringed. However, in light of the purpose of the infringement, *viz* the protection of the victim, the infringement should pass constitutional scrutiny. The prohibition placed on the publication of certain information relating to criminal justice proceedings[1272] does not affect the fair trial rights of the accused.

It is submitted that the Law Commission quite rightly rejected measures such as video-taped statements,[1273] surrogate witnesses[1274] and the appointment of legal representation for the victim of a sexual offence,[1275] since the prejudicial effect of these measures outweighs their potential value. Despite the Law Commission's recommendation relating to the appointment of support persons,[1276] this measure was not included in the Criminal Law (Sexual Offences) Amendment Bill.[1277]

[1268] § 6 3.
[1269] § 6 4.
[1270] 51 of 1977.
[1271] § 6 5.
[1272] § 6 6.
[1273] § 6 7 1.
[1274] § 6 7 2.
[1275] § 6 7 4.
[1276] § 6 7 3.
[1277] B50-2003.

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This study showed that while the enhancement of victims' rights is an important consideration, the effect of such measures on the fair trial rights of the accused should always be investigated before the implementation of the measures. Equilibrium between the rights of the accused and the rights of the victim is vital.

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