

Intermediary services for child witnesses testifying in South African criminal courts

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ABSTRACT

Efforts to reduce the trauma in an adversarial court system are complicated by the arguments that the prosecution of sexual abuse cannot take place in disregard of the rights of the alleged perpetrator. The questioning of a child witness is a very specialised task, and the prosecutors and defence counsel are not trained in these methods. Therefore, intermediary services to the child witness in court are important to reduce the trauma experienced by the child. This article aims to highlight that crimes against children and the subsequent criminal proceedings where the child is required to testify as a witness occurs frequently enough to warrant intermediary services to all child witnesses. Practical implications will be highlighted in order to improve the current intermediary process, regionally, provincially and nationally. Firstly, it will reflect on the intermediary services provided for child witnesses in some areas in the western suburbs of Johannesburg; secondly, it will discuss practical experiences and supportive literature, as well as the Bethany House's experience with the project Child in Crisis Foundation (SA).

Keywords: Child witness - Rights of children - Judgements - Intermediary system - Sexual violence - Victims - Court process - Prevention - Family violence - Assistance to victims

Introduction

According to Coughlan and Jarman¹ the purpose of intermediary services to the child witness is to reduce the trauma experienced by the child. However, efforts to reduce the trauma in an adversarial court system are complicated by the arguments that the prosecution of sexual abuse cannot take place in disregard of the rights of the alleged perpetrator. South Africa made international legal (and human rights) history with the promulgation of Section 170A of Criminal Procedures Act 51 of 1977 which was

introduced through the Criminal Law Amendment Act 135 of 1991. This provides for the appointment of an intermediary for children in cases of sexual abuse for reasons of youthfulness or emotional vulnerability.²

Müller³ says that in evaluating the competency of the child to act as a witness, there are two components to consider. The first requirement is eyewitness ability, i.e. the ability to report the details of an observed event accurately and completely. This relates to the child's cognitive development with consideration of factors that influence the acquisition, retention, retrieval and verbal communication of information. The second requirement is the witness's willingness to tell the truth, i.e. the motivational aspect. Although it is understood that grasping the difference between truth and lies is crucial in testifying, the competency of child witnesses in this regard was investigated by the South African Law Commission in 2001. After evaluating the South African position, the commission recommended that a witness should not be disqualified from testifying due to the fact that he or she is unable to define the difference between telling the truth and lies. It was submitted that all witnesses 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. The proposed test focuses on the cognitive ability of the child. There is little clarity, however as to who will perform these evaluations or how they will be done.⁴

A practical description then of the intermediary process and its necessity is:

In South Africa, an intermediary system is attempting to reduce the trauma and secondary abuse often experienced by child witnesses in court cases involving [sexual] abuse. By separating the child from the formal courtroom and allowing an intermediary to relay questions and answers to the child via closed circuit television, it was hoped that the stress of the experience for these children would be reduced while retaining the rights of the accused to cross-examine witnesses and to a fair trial[...] Protecting the rights of children is an universally accepted principle that influences the development of policy and practice. Where these rights have been violated - such as in sexual abuse, it is imperative that the response from societal institutions (such as justice and welfare) not only seek to protect children from further abuse of their rights but also seek to actively redress some of the violations that have taken place. It is thus essential that when possible, children giving evidence in criminal cases of sexual abuse be protected from further harm. The intermediary system for child witnesses is one such effort.⁵

Coughlan and Jarman⁶ also confirm that a significant body of literature has shown that the experience of giving evidence is emotionally traumatic and sometimes developmentally and cognitively impossible for children as they struggle to remember details over extended periods of time, to cope with the abstract language, and to be exposed to processes and standards that are often meaningless to them. Müller⁷ states that cross-examination is not only traumatic for children, but also results in inaccurate evidence. The child is questioned in a hostile environment, often

about very intimate and emotionally-laden events. The defence is obliged to attack the child's credibility in an attempt to highlight inconsistencies and discredit the child's evidence. In light of this, the questioning of a child witness is a very specialised task, and the prosecutors and defence counsel are not trained in these methods.⁸

This article has two parts. Firstly it will reflect on the intermediary services provided for child witnesses in three magisterial areas in the western suburbs of Johannesburg in the Gauteng Province, South Africa. Secondly, a discussion from practical experiences and supportive literature will be given. Through this article we want to highlight that crimes against children and the subsequent criminal proceedings where the child is required to testify as a witness, occurs frequently enough to warrant intermediary services to all child witnesses. Implications for practice will be highlighted later on in this article, in order to improve the current intermediary process, regionally, provincially and nationally.

A description of the intermediary

The introduction of South Africa's Criminal Law Amendment Act 135 of 1991, which came into effect on 1 August 1993 brought the following about in criminal cases with child witnesses, as summarised in the following table by Viviers:⁹

Table 1. Intermediary responsibilities

<p align="center">Relevant section in the Criminal Procedure Act</p>	<p align="center">Practical Implication</p>
<p>Section 161 (2) – ‘viva voce’ shall in case of a deaf and mute witness, be deemed to include gesture-language and in case of a witness under 18, be deemed to include demonstration, gestures or any other form of non-verbal expression.</p>	<p>Allows child to give testimony in a way appropriate to his/her age by using gestures, demonstrations and other forms of non-verbal communications. It is the task and responsibility of the intermediary to understand gestures, demonstrations and non-verbal communication and to verbalise it to the court.</p>
<p>Section 165 – Where the person concerned is to give evidence through an interpreter or an intermediary appointed under section 170A(1), the oath, affirmation or admonition under section 162, 163 or 165 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be.</p>	<p>The judge or judicial officer may call upon the intermediary for assistance in administration of the oath, affirmation, or admonition. The intermediary may have to present it in such a way that the child understands it, and that the court is satisfied that the child will be able to give testimony on the truth and knows the difference between true and false evidence.</p>
<p>Section 170A(1) – Whenever criminal proceedings are pending before any court and it appears to such a court that it would expose any witness under the age of 18 to undue mental stress or suffering if he testifies at such proceedings, the court may subject to subsection (4), appoint a competent person as an intermediary in order to enable such a witness to give evidence through that intermediary.</p>	<p>The discretion to use an intermediary rests with the court and must be requested by the prosecutor with the judge ruling on its necessity. This calls strongly for social workers to advocate (not instruct) for the use of intermediaries in all cases where child witnesses have to give testimony. It should be noted that age is only one factor to be considered in deciding whether to appoint an intermediary. The mere fact that the witness is a child does not compel the court. Before making a decision it's necessary to afford the parties an opportunity to address it.</p>
<p>Section 170A(2)(a) – No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed and intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.</p>	<p>All questions by the prosecutor, the defence, or any other person in the court must be addressed to the child through the intermediary. Only the Court i.e. the magistrate has the prerogative to ask questions directly to the child witness. In such cases the magistrate has to request the intermediary to convey the question, as asked, to the child, or may address the child directly.</p>

<p style="text-align: center;">Relevant section in the Criminal Procedure Act</p>	<p style="text-align: center;">Practical Implication</p>
<p>Section 170A(2)(b) – The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.</p>	<p>The intermediary is allowed to simplify the questions to the child in such a way that the child understands it, without changing the meaning. The magistrate is the only party who may request the intermediary to convey the question asked in the exact wording to the child. Then the intermediary may not simplify those specific questions. Intermediaries should take care not to interpret the question when it is conveyed to the child, or to analyse / alter the child's response.</p>
<p>Section 170A(3) – The court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his evidence at any place – (a) which is informally arranged to set that witness at ease; (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through a medium of any electronic or other devices, that intermediary as well as witness during the testimony</p>	<p>The child gives her testimony via the intermediary usually in a separate room which is linked to the court usually by close circuit television or by way of a one-way mirror. The child does not see or hear the proceedings but the court sees and hears the child and intermediary.</p>
<p>Section 170A(4)(a) – The Minister may by notice in the Gazette determine the person or the category or class of persons who are competent to be appointed as intermediaries.</p>	<p>In accordance with Government Notice No R.1374, 30 July 1993 issued by the Minister of Justice (Proclamation in Government Gazette no 15024, as amended by Government no 17822 of 28 February 1997, and amended by Government Gazette no 22435 of 2 July 2001), the following persons are competent to be appointed as intermediaries: Social Workers registered in accordance with s17 of the Social Work Act 110, 1978 and who have a minimum of 2 years experience in social work. Persons who hold a masters degree in social work with 2 years experience in social work. Medical practitioners who are registered with The SA Medical and Dental Council under Act 56 of 1974 and who are also registered as paediatricians or psychiatrists. Family Counsellors appointed under s3 of Act 24 the Mediation in terms of Certain Divorce Matter Act of 1987 and who are registered as social workers, or who are classified as teachers in the classification category C to G as issued by the Dept of Education, or who are registered as clinical, educational or guidance psychologists. Child Care Workers who have completed the 2 year training of the National Association for Child Care Workers and with a minimum of 4 years experience. Teachers who have a minimum of four years experience and who have never been suspended or temporarily suspended from teaching. Psychologists who are registered as clinical, educational or guidance under Act 56 of 1974.</p>
<p>Section 170A (4)(b) – An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him as the Minister, with the concurrence of the Minister of Finance, may determine.</p>	<p>The use of the word 'shall' indicates that the Minister of Justice and the Department of Justice are obliged to pay the claims submitted by the intermediary in respect to services rendered.</p>

Combrink and Durr-Fitchen¹⁰ highlighted that persons who are competent to be appointed as intermediaries in terms of categories determined by law will not necessarily be suitable intermediaries. Based on discussion sessions between members of the legal, social work and psychology professions held at the Wynberg Sexual Offences Court, and an analysis of intermediary functioning, it became clear that certain personal requirements have to be complied with. The most basic prerequisites for a suitable intermediary would *inter alia* include the following:¹¹

- a proven ability to relate to children and an ability to develop rapport in a short time
- an awareness of transference with regard to the gender of the intermediary.
- communication skills – be fluent in the child’s language and reflecting clear messages
- interviewing techniques with good observation skills and the ability to convey warmth, empathy and support to the child, while still remaining impartial and objective
- a working knowledge of legal aspects, the dynamics of sexual abuse and developmental stages with related intellectual and verbal abilities
- a comfortable awareness of one’s own sexuality
- the intermediary and therapist should be two different people to decrease the charge that bias increases the risk on appeal.

Description of the intermediary process

Coughlan and Jarman¹² explain that in most instances the intermediary is a social worker who prepares the child for the court appearance and sits with the child in the camera room. Her role is to translate questions posed by the magistrate, attorney, prosecutor, or alleged perpetrator, into language the child will understand, without changing the general purport of the question. The intermediary has the duty of buffering aggression and intimidation and of informing the court when the witness tires or loses concentration in order for the presiding officer to adjourn the court. A closed-circuit television, a microphone, and the intermediary form the basis of the system. A television is in the main courtroom and a camera room that is adjacent to the main courtroom accommodates the child witness and the intermediary. The intermediary is fitted with earphones. Only the intermediary hears the questions, but the persons present in the courtroom hear the answers and anything else that happens in the witness room. This system differs from the English situation in which closed circuit television is used but no intermediary is involved.¹³

The Bethany House Trust was established in 1998 as a project of the Child in Crisis Foundation (SA). It is registered as a Children’s Charity Trust by the High Court and is also registered as a Non Profit and Public Benefit Organisation. The Trust offers Child and Youth Development, Professional Parenting, and Child

Witness Services. In April 2003 Bethany House entered into a public/private partnership with the South African Departments of Justice and Social Development to conduct a pilot project with regard to intermediary services. Although intermediary services were available at that stage, the service was not co-ordinated, intermediaries were not properly capacitated and court officials generally did not use the service. Bethany House trained a core team of intermediaries, launched an awareness and educational campaign in order that all court officials became aware of and started to utilise the service. A 100% child focused service was developed to accommodate all child witnesses, regardless of gender and mother tongue. Challenges included the fact that in the geographic area where the pilot project was launched, 11 different languages are spoken by child witnesses, which necessitated that intermediaries should be conversant in all those languages.

The primary objective of the pilot project was to provide sustained, professional intermediary services to child witnesses. In order to accomplish this, Bethany House developed a unique case management database for the scheduling and tracking of cases. Data derived from this application can be used to inform policy and budget planning in services to children by welfare, police and justice departments. The data used in this article were obtained from this database. Information to populate the database is obtained from the magistrates courts where these cases are heard. A secondary aim was to compile a tentative victim and perpetrator profile for a specific geographic area. However, the data presented in this article have not been compared to population trends. The frustration with regard to developing a database such as the one mentioned above is confirmed by the experience of Coughlan and Jarman¹⁴ who state that to date there is very little, if any, research on the intermediary system's use in South Africa. It is difficult to ascertain if the system has had any impact on conviction rates because the national moratorium on the release of crime statistics and information by the police has made this kind of data gathering impossible. It can therefore be argued that Bethany House's attempt at providing information through the use of a database is ground-breaking in determining the success and status of intermediary services.

Magisterial Districts served

Table 2 gives an overview of the geographic areas where intermediary services have been rendered to child witnesses from April 2003 to September 2006. The magisterial districts (courts) currently served by Bethany House are Randfontein, Roodepoort and Westonaria. In a few cases Bethany House assisted other courts. The table also shows the different police areas within the magisterial districts and the number of reported cases in each.

Table 2. Cases per Magisterial Districts and police areas

Magisterial District	No of cases	Police area	No of cases
Oberholzer Court	7	Carltonville Police Station	29
Krugersdorp Court	7	Krugersdorp Police Station	6
		Kagiso Police Station	1
Protea Glen Court	1	Soweto Police Station	1
Randfontein Court	716	Randfontein/Toekomsrus/Mohlakeng	692
Roodepoort Court	506	Roodepoort Police Station	285
		Dobsonville Police Station	160
		Florida Police Station	26
		Honeydew Police Station	35
Westonaria Court	259	Westonaria	262
Total	1496	Total	1496

In the magisterial districts which Bethany House serves, 1496 cases were handled in 3 ½ years. This clearly illustrates the frequency of court cases and serves as an indication that the service is necessary.

Figure 1 presents a graphic of the number of child witnesses and perpetrators in each magisterial district. The higher number of incidents in Randfontein is noticeable, although these data should be balanced with influencing factors such as varying population density and the fact that prosecutors in some districts do not always request the service.

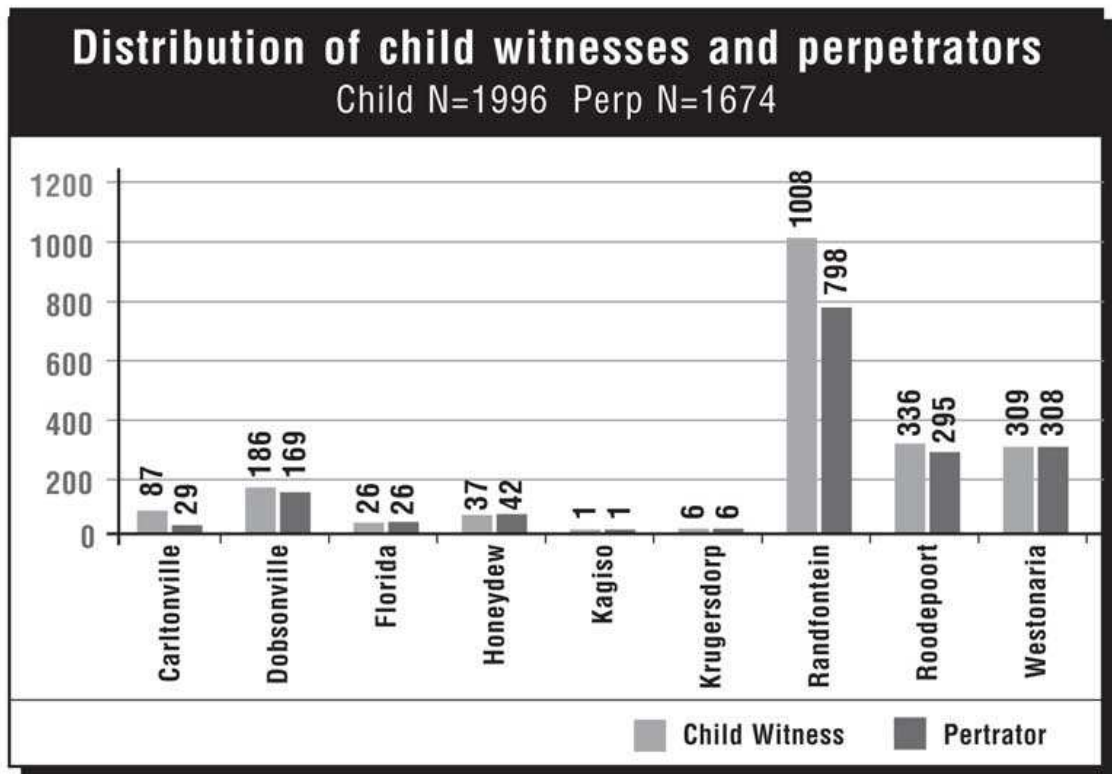


Figure 1. Child witness and perpetrator rates per Magisterial District

Descriptors of child witnesses

Table 3 sets out the gender, ages and mother tongues of the child witnesses who were the victims of crimes explained afterwards in Figure 2. Note that the child witness population is larger than the number of cases discussed in the previous section, since in some cases more than one child gave testimony (multiple victims) in the same case.

Table 3. Demographic details of child witnesses

GENDER		Boys = 297 (15%)					Girls = 1699 (85%)					N=1996
AGE		0-4yrs	5-8yrs	9-12yrs	13-16yrs	17-21yrs	Above 30					N
		117 (5.86%)	483 (24.19%)	702 (35.17%)	551 (27.6%)	56 (2.8%)	9 (0.45%)					1996
MOTHER TONGUE		Afrikaans	English	Sepedi	Sesotho	Shangaan	Swazi	Tsonga	Tswana	Venda	Xhosa	Zulu
		469	67	16	155	7	11	18	680	6	233	334

Table 3 gives the following demographic detail regarding child witnesses that can be used to offer a profile of the typical child client in the Bethany House service area:

- Eighty-five percent of the witnesses are girls.
- The biggest age cluster is children between the ages of 9 and 12 years. It is significant to note that the highest number of children per age was 13 year olds – 259 (13%) of the total children served.
- Significantly more Tswana (34%) and Afrikaans (23.5%) children received intermediary services. This corresponds with the cultural representation in the area.
- Children from a number of cultures (11) are in need of intermediary services. This implies that intermediaries also need to be representative of these cultures to truly assist the child through language and understanding of cultural context.

In the Gauteng Province there are 345 600 girls in the age group 10 to 14 years.¹⁵ If the profile information presented above is considered, the focus for preventive and treatment services should be geared towards the activities of this age group.

Types of crimes against the victims

The Family Violence, Child Protection and Sexual Offences (FCS) units of the South African Police Services (SAPS) are responsible for investigating crimes against children such as assault with the intent to do grievous bodily harm, attempted murder, rape, incest, indecent assault, common assault, kidnapping, abduction, the sexual exploitation of children and adults in terms of the Sexual Offences Act 23 of 1957, relevant crimes in terms of the Prevention of Family Violence Act 133 of 1993, the Domestic Violence Act 116 of 1998 and the Films and Publication Act 65 of 1996.¹⁶ What is significant of this type of crime and case outcome (discussed later) is the number of reported cases vs. the conviction rates. This section gives an overview of the type of crimes the intermediaries in the Bethany House pilot project were involved in.

Figure 2 shows the charge type with regard to the cases the child witnesses were involved in. One can see that there was a significantly larger number of rape and indecent assault cases. With regard to profile identification, the data on the charge type shows that:

- children who were victims of rape (64.52% of total cases) and indecent assault (27.57%) were the biggest witness cluster
- no intermediary services were given in child abandonment and neglect cases

The experience of sexual abuse impacts negatively on the child's development, behaviour and perception of his environment, and is referred to as trauma. The traumatic effects of sexual abuse are argued to be the most complex and most pervasive in terms of the impact on the child's life. When the trauma is inflicted by a person known to the child, the suffering may be more intense and persistent. The sudden, horrifying and unexpected nature of an event also defines trauma.¹⁷

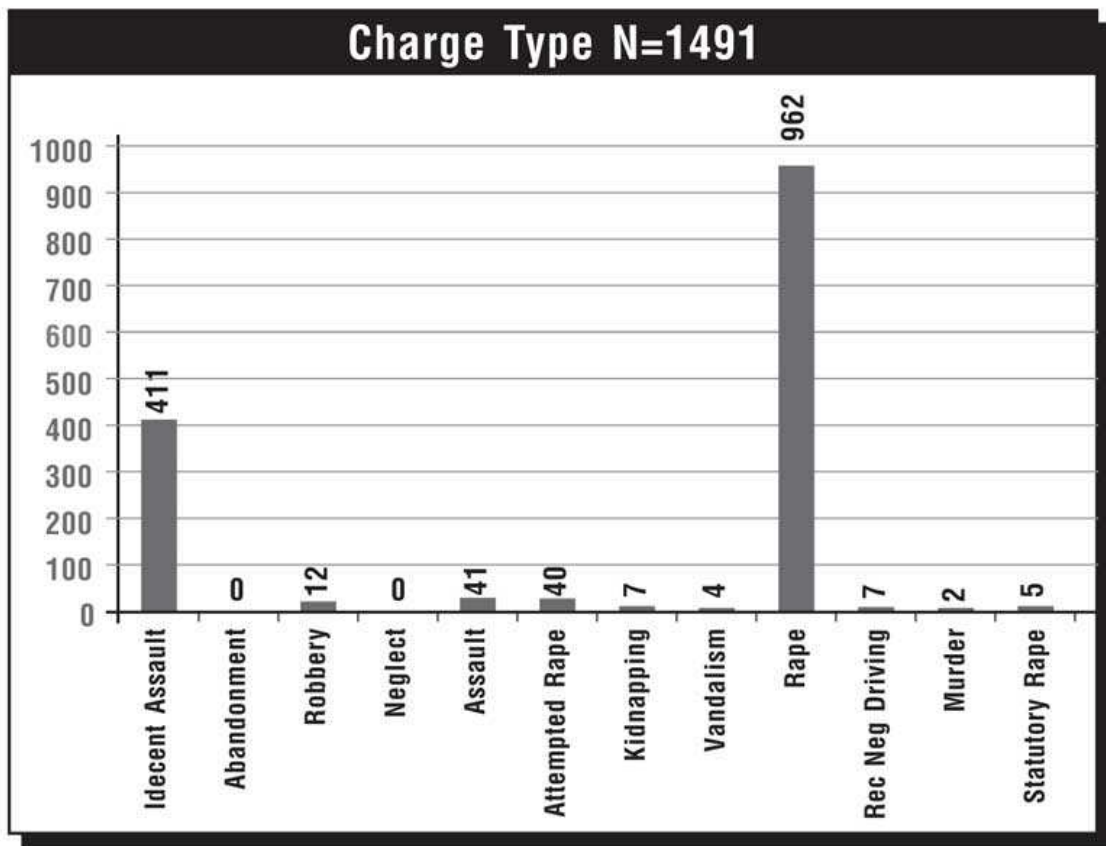


Figure 2. Types of charges in child witnessing cases

The effect on the child may vary in seriousness and be lasting in nature. It includes a loss of childhood, loss of family if the child is removed, and loss of trust which will influence future relationships. The child may also experience complex post-traumatic symptoms such as low self-esteem, fear, misplaced anger and hostility, inappropriate sexual behaviour and attitude, depression, guilt or shame, self-destructive behaviour, powerlessness, blurred role-boundaries and role confusion, pseudo-maturity or developmental regression and dissociation. A court does not have the expertise to conclude on the consequences of indecent assault and rape on child victims. Factual allegations relating to trauma can be proved by the State, or the court can inform itself by calling witnesses in terms of section 274 (1) of the Criminal Procedure Act. A possibility would be to call the mother or teacher to testify about symptoms of trauma such as sleeping, eating and socialising patterns, standard of homework, ability to concentrate, attitude towards discipline and a nervous or fearful state of mind. If this evidence is not challenged, it may be accepted without psychiatric evidence on the effects of rape.¹⁸

Perpetrator relation to child

An interesting reason why most cases do not go to court is 'undetected' cases, which refers to cases where the police have not identified the suspect. Some cases are unsolved because the police have inadequate or no leads to follow up on through no fault of their own. In other cases incomplete or poor police investigation.¹⁹

Figure 3 illustrates the relationship between the perpetrator and the child. In the majority of cases (1755 or 95%) males were the perpetrators. In 62% (1145) of the cases the male was known to the child and in only 33% (610) of the cases was the male a stranger to the child.

The graphic offers the following information about the relationship to the child for purposes of compiling a victim profile:

- In the majority of the cases the perpetrator is a male known to the child: a neighbour (402 or 22%); a biological family member (401 or 22%); step family member (103 or 5.6%); and a male that the child stood in relationship with outside of the family (220 or 12%).
- In descending order the child in need of intermediary services is most at risk in their immediate home and family environment as well as in their social relationships and school.

With cognisance of the fact that the majority of children experienced rape and indecent assault and that a large number of perpetrators were known to the child, it can be assumed that the child witnesses have experienced high levels of trauma. It is the responsibility of the Departments of Welfare and Justice to be sensitive towards this fact and to explore which symptoms of the child will need post-trial treatment.

Describing the perpetrators involved with the crimes against the children will also contribute to the understanding of the intermediary process in the West Rand.

Descriptors of the perpetrator

Table 4 gives information on the gender, age and culture of the perpetrators involved in the cases in the magisterial districts mentioned in Table 1. Cause for concern exists as there is a large percentage of perpetrators who are younger than 19 years.

Useful information from the table below includes:

- The overwhelming majority of perpetrators are male (95%) and most are between 19 and 40 years old.
- Again a larger number of perpetrators come from the Afrikaans and Tswana cultures. A comparative analysis of the population representation in the West Rand area may shed more light on why perpetrators from the Afrikaans and Tswana community constitute the biggest cluster of perpetrators (Note that Afrikaans is the mother tongue of white and coloured persons in the represented communities).

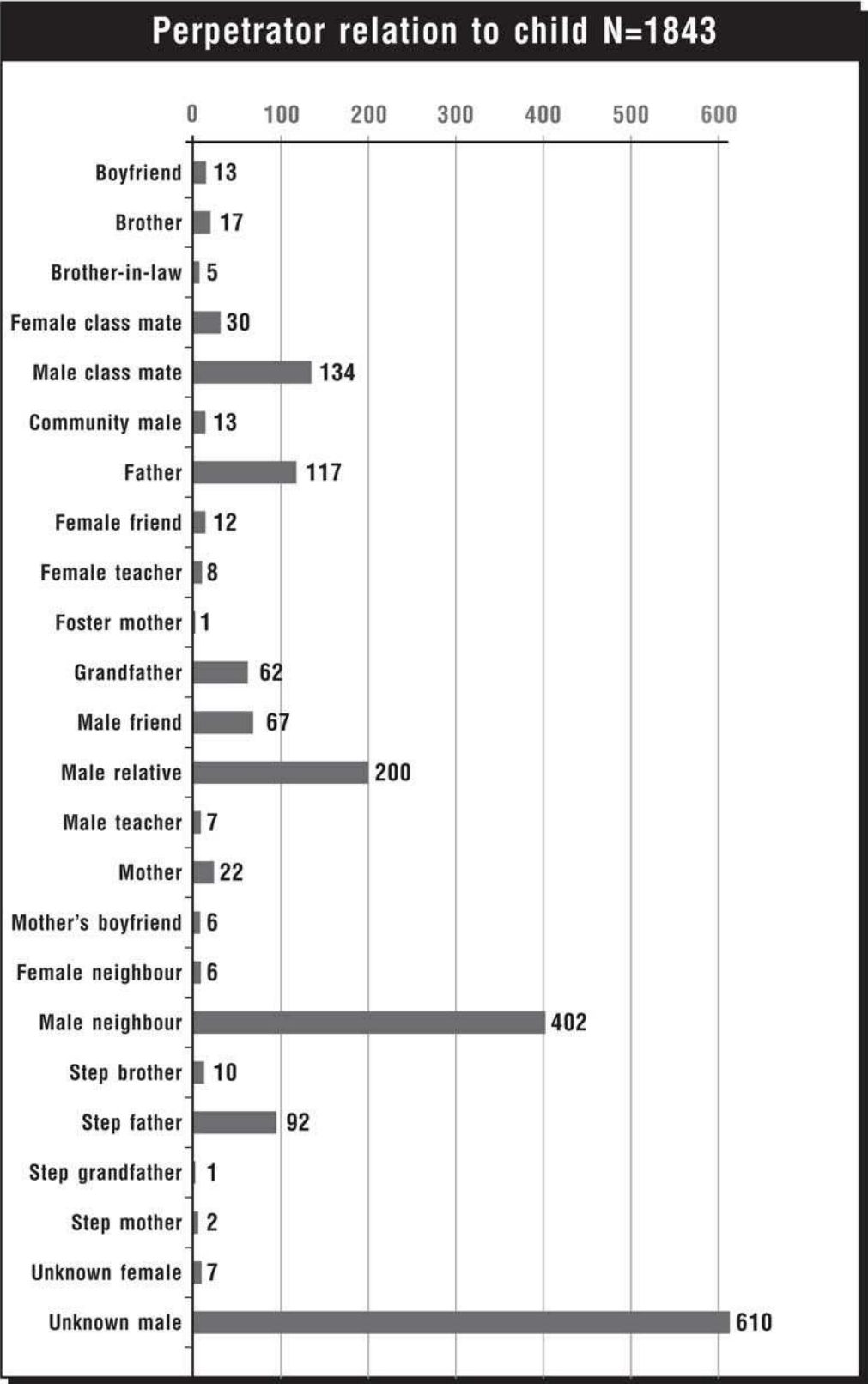


Figure 3. The perpetrator's relation to the child

Table 4. Demographics of perpetrators

GENDER	Male=1589 (95%)						Female=85 (5%)				N=1674	
AGE	Under 19	19 -29yrs	30-39yrs	40-49yrs	50-59yrs	Over 59						
	394 (23.54%)	478 (28.55%)	433 (25.87%)	241 (14.4%)	75 (4.48%)	53 (3.17%)	1674					
MOTHER TONGUE	Afrikaans	English	Ndebele	Sepedi	Sesotho	Shangaan	Swazi	Tsonga	Tswana	Venda	Xhosa	Zulu
	413	30	11	19	134	45	8	32	493	14	199	274

Case outcome

Case outcome is a significant part of the process for the child witness. The very reason for testifying against the perpetrator is to prove his or her guilt. Sentencing implies punishment for wrongdoing and the punishment should fit the crime. Since the interest of intermediary services lies in protecting the child during a criminal process where it is hoped that a fair trial is conducted, it is of interest to reflect on the outcomes of the cases captured on Bethany House's database.

Figure 4 shows the outcome of 384 criminal cases. This is only a small number of the 1 496 cases described in Table 2. In the next section the effectiveness of the process will be discussed and some light will be shed on why so little of the case outcome is known.

What is encouraging about the information gained from the data on the case outcome is that there were no mistrials. The high number of cases withdrawn in the court (143) is of concern. Interrogation of the legal process which leads to cases being withdrawn after a perpetrator was charged and brought before court is necessary. When withdrawn, no decision regarding the guilt or innocence of the perpetrator is made. In the cases handled by Bethany House, no further contact with the child exists after the verdict. It should be asked, however, what the effect of this is on the child witness.

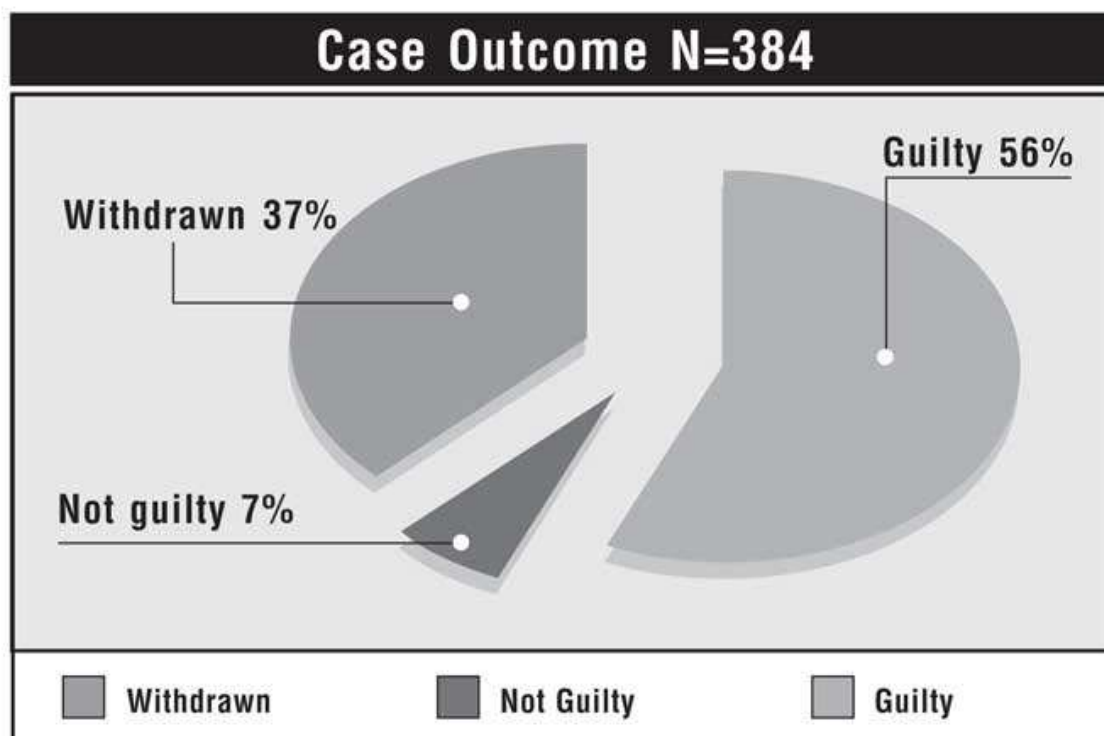


Figure 4. The case outcome of intermediary cases

For the purpose of profile building the information on verdicts gives the following insight:

- The majority of the cases (56%) brought before court have lead to a guilty verdict.

In comparing the statistical trends of the Bethany House pilot project with national police statistics before 2000 one can see that 58% of the reported rape cases involving victims under 18 years, did not go to court. Furthermore, 18% were withdrawn in court and only 9% were found guilty. If you consider the under reporting rate in cases of child abuse – especially those involving family members - the conviction rate compared to actual crimes is poor. Acquittals constitute 9% of the cases before court. It is important to note that the prosecution authority tends to try only those cases with a reasonable prospect of obtaining a conviction. Prosecution resources focus on the most promising cases. Rape is often more difficult to prove than other crimes. Still, child rape cases that went to trial were twice as likely as adult rape charges to result in conviction.²⁰

Clause 47 of the draft Sentencing Framework Bill 2000 proposes the presentation of victim impact statements to courts about harm suffered by the victim in order to learn what impact the crime had in practice. Unlike the trial itself, with sentencing impressions become more important than facts, and considerations which were

irrelevant on the merits now acquire importance, placing the expectation on the court to make a complex value judgement. The issues at stake in exercising the sentencing discretion are the interest of justice. A bad choice of punishment is against the interests of justice and the discretion to impose an appropriate sentence can only be exercised on the basis of all the facts relevant to the matter. Aggravating circumstances also influence the sentence. These are the process of grooming that shows premeditated planning, abuse of an authority position, knowledge of HIV-positive status, and the defencelessness of the victim. Mitigating factors in sentencing can be the youthfulness of the accused, no previous convictions, no weapon, and perception of willingness of victim older than 16.²¹

The Criminal Law Amendment Act 105 of 1997 came into operation in May 1998 and section 51 makes provision for a system of minimum sentencing where more serious crimes are concerned. The purpose of introducing minimum sentences was the need to deal a decisive blow to serious crime through the use of dramatically increased sentences. The minimum sentences in the relation to serious crimes against children are the following:²²

1. life imprisonment shall be imposed in a case of rape where:
 - the victim was raped more than once or by more than one person under common purpose
 - the accused has been convicted of two or more offences of rape without being sentenced yet
 - the accused knew that he was HIV infected
 - the victim is a girl under the age of 16 years
2. imprisonment for a period of 10, 15 and 20 years respectively for first, second and third offenders shall be imposed in the following instances:
 - rape other than in the abovementioned situations (e.g. where the accused had a firearm intended for use or where the victim is over 16 years of age)
 - indecent assault on a child younger than 16 involving the infliction of bodily harm (i.e. every kind of physical injury however trivial it might appear)
 - assault to do grievous bodily harm on a child younger than 16 years.

With cognisance of the proposed framework for sentencing, of the 2 599 family violence and sexual offence cases against children brought before court in 2005/2006, 14 116 years of imprisonment, 146 life sentences, and fines to the value of R474 560 were handed down in judgements.²³

Discussion

The information gained from the statistical data on the Bethany House database from April 2003 to September 2006 provides information that can be used for welfare, judicial and police planning in the West Rand service area. The experiences gained from the pilot project are also significant to inform practice. These are discussed

next. Together with the discussion of Bethany House's experience with intermediary service delivery an article of the experiences of other social workers in South Africa, where they pose the question whether the intermediary system is worth saving, is discussed. Cognisance will also be taken of the work done by Karen Müller on conceptualising the relationship between the judicial officer and the child witness.

According to Coughlan²⁴ the intermediary system is only in use in main city centers of South Africa, such as East London, Cape Town, Port Elizabeth, Johannesburg, Pretoria, Durban and Pietermaritzburg. There are no such facilities in rural courts. In addition, in cities like East London, for all intents and purposes, the service was not provided as social workers at the time refused to continue to offer the service. Experiences of a small number of these intermediaries shed light on the fact that they were inadequately trained and had to deal with anxieties and emotions regarding the court process and the child's trauma. For these experiences they received no debriefing.

First we will summarise the experiences of intermediaries as reflected by Coughlan in 2002²⁵ and then we will focus on our own experiences with the intermediary system in our direct service delivery area. In the light of these we will discuss implications for practice suggested by other authors interested in the child witness situation in South Africa, to add to our own.

Difficulties experienced by intermediaries

Many of the difficulties experienced by Coughlan and Jarman²⁶ related to the environment and process of the court itself. These include the impact of long delays and the stress of a looming trial; the unpredictability of the presence of an intermediary; preserving the rights of the accused versus avoiding further abuse of the child; questioning the child's ability to adhere to adult-defined concepts of truth; lack of consideration of cultural approaches to talking about sexual matters; the potential for errors in translations; requiring the child to repeat the details of the abuse; weighing up whether successful prosecution is worth the trauma experienced by the child; conflict between social worker and intermediary roles; and delays for up to 2 years for cases to be heard because of judicial backlogs.

Müller²⁷ adds that the intermediary was introduced to assist the child witness by removing all hostility and aggression from a question and by changing a question, where necessary, so that it would be more understandable to the child. However, in practice, the use of an intermediary has given rise to a number of problems. The power of the intermediary is very limited, since the intermediary is perceived to be nothing more than an interpreter (and not an expert witness) and the court can at any time insist that the intermediary repeat the question exactly as it was phrased. A further disadvantage of the present system is that the intermediary does not have the authority to comment on a question and give an opinion as to whether a child understands a question or not. The intermediary is powerless to intervene and argue that questions should not be asked in a particular sequence or not phrased in a certain manner.

These authors highlight that the context within which the child offers her witness may be causing more harm than it is worth. There has been disillusionment under those who hoped to act as intermediary in order to make the process easier for the child, only to be faced with age inappropriate expectations of the child and a stern focus on the rights of the accused. The next section shows how Bethany House's own experiences confirm the ineffectiveness of the current process. There is however some hope on the horizon. This glimmer of light will be discussed as changes that may see the light in the next year or so.

Effectiveness of the current process

The effectiveness of the current process can only be described as “user-unfriendly”. This specifically refers to the use of language and the integration of the legal process into the child’s already traumatized world. The time lapse between the time the case is reported to police, the time the case is brought before court for the first time and the time the child gives testimony, can be as long as 2 years. Not only is the judicial process compromised by this, but the child witness remains in limbo as far as the “healing process” is concerned.

	no of cases	no of postponements	% of total
	147	0	29.76
	122	1	24.70
	69	2	13.97
	55	3	11.13
	36	4	7.29
	23	5	4.66
	16	6	3.24
	7	7	1.42
	9	8	1.82
	3	9	0.60
	1	10	0.20
	1	11	0.20
	1	12	0.20
	3	13	0.61
	1	16	0.20
Total	494	107	100.00

The number of times a case is postponed is illustrated in the next table. Apart from increased costs to represent the child victim, the child witness has to attend every hearing. In practice this means that the child is prepared for court (once), then has to be prepped for testimony, attend the hearing and be ready to testify on every occasion. The child victim is thus subjected to undue mental stress even before testifying.

Post testimony services such as therapy can only commence after the child has testified in court, in order to ensure that the child's testimony is not contaminated. In reality there is little intervention afterwards. Therapeutic services are not readily available to child witnesses and more than often parents or caregivers cannot access the limited services available due to economic inhibitors. In the majority of instances, the practical preparation for the court case is the only help available to the child.

If the child was infected by the perpetrator with the HIV/AIDS virus when the crime was committed, the child may also be too ill to testify or may have died before testimony could be given against the perpetrator. Although the South African government has ARV (anti retroviral) programs which can be accessed by child witnesses infected by HIV/AIDS, the child can often not get to the hospitals where the service is available due to huge distances and economic factors such as the cost of transport.

Furthermore, significant under reporting of crimes occur, especially crimes committed within a family unit. The recent de-centralisation of the specialised policing unit responsible for investigating crimes against children, may compound under reporting as the community in general has also lost faith in the state's ability to protect their children.

Of the reported cases a small percentage are eventually brought before court, and even then an unacceptable high percentage of those cases are withdrawn in court. This happens when crucial evidence is lost (e.g. DNA) or when the witness cannot be traced. Because of the long delays, the child witness sometimes moves away without leaving forwarding addresses, compelling the state to withdraw the case in court.

A small percentage of these cases that makes it to and through the criminal court process result in convictions. It can thus be argued that the court process holds little gain for the child. The primary reason/s for criminal prosecution is not necessarily in the best interest of the child. There seems to be little or no correlation between the child's best interest and the expectations of the prosecuting authority.

The effectiveness of an already questionable legal process is further hampered by missing or defective (e.g. ear phones) equipment used to conduct intermediary services, resulting in long delays or postponements. In some instances the court proceedings are moved to another court district where a court with functional equipment can be accessed.

The existence of common findings among intermediaries from towns geographically far removed such as East London in the Eastern Cape Province and the West Rand, a region of the Gauteng Province, warrant further exploration into the intermediary process, taking cognisance of the need to make use of data to plan effective interventions for child witnesses.

Foreseen changes

Project 107 of the South African law commission on Sexual Offences: process and procedure (2002) suggests a strategy of adopting guiding principles (Protocols and Memoranda or Codes of Good Practice) for bringing about changes in the management of sexual offences. The development of this 'national multi-disciplinary' framework should lead to an inter-sectoral binding agreement, forming the basis for provincial or regional multi-disciplinary codes of practice and embodied in legislation to ensure compliance. Brief mention is made here of some of the recommendations that should positively impact on the current legal process. These recommendations are reflected in the discussion document to be found on http://www.doj.gov.za/salrc/dpapers/dp102_prj107/dp102execsum.pdf.²⁸

- Mandated bodies such as organs of government must deliver prompt, sensitive, effective, dependable, fully coordinated and integrated services.
- Budgetary provision must be made for the effective implementation and operation of the national framework.
- A multi-disciplinary coordinating committee should monitor, supervise and evaluate the implementation of such a framework.
- Flexible case-flow management techniques are recommended. The case-flow management strategy must be developed inter-sectorally to reduce delays in the criminal procedure process.
- Appropriate accredited training and debriefing of service providers are also stressed.
- There is ample precedent in South Africa for the creation of joint or inter-agency teams for the investigation and prosecution of high priority crimes.
- Only specially trained medical personnel, police officers, prosecutors, magistrates and counsellors should deal with serious sexual offences.
- Preferably all serious sexual offences cases must be prosecuted in special Sexual Offences courts.
- All child victims in sexual offence cases in need of care and protection should be able to rely on a responsive welfare system.
- South Africa is a country of limited resources, and the provision of PEP to rape victims has accordingly become a contentious issue. It is acknowledged that the cost implications of providing all victims of sexual violence with PEP treatment would be extremely high. However, the cost of not providing PEP will assuredly be much higher and will affect the public health care system and have a ripple effect on the economy. It is the responsibility of the state to provide the financial means to cover the cost of PEP for victims of sexual violence as these complainants have been exposed to a life threatening disease through no choice of their own.
- Protocols for medical practitioners and health care professionals should be developed.

- Police should review procedures for recording and following up “unfounded” cases and cases where the victim wishes to withdraw the matter.
- The Sexual Offences Act should place a positive obligation on the police to accept and register all complaints of sexual offences, and that the police should not have discretion as to whether or not to proceed with an investigation even when requested not to proceed by the victim. The sole discretion not to proceed with an investigation should be that of the prosecuting authority.

Although a lot of work has been done by the SA Law Commission to improve the status quo, the authors reiterate the question of what is needed for this issue to become a legislative and budgetary priority.

Implications for practice and recommendations

We agree with Coughlan and Jarman²⁹ when they state that the profession and government’s welfare officers need to put ongoing training and adequate supervision and opportunities for debriefing in place for intermediaries. For this to take place, the intermediary role has to achieve a higher level of visibility and acceptance than is currently the case. Intermediary work is not recognized as a key function and is thus not provided for in the normal professional and collegial mechanisms set up to support and account for professional practice.

This must be challenged - not only in the interests of the social workers, but also for the children. Given the ad hoc nature of intermediary work, there is no system for support, for accountability, and for a developmental perspective on the pursuit of expertise. Given the extensive restructuring of government social services taking place nationally in South Africa, this is possible only if sufficient senior people make it a priority.

While social workers can ensure that the matter remains on the agenda, they need the legal fraternity and those responsible for setting priorities and procedures in the courts. Child abuse cases should not have to wait more than a couple of months to go to trial. Postponements should be vigorously avoided. Adequate notice should be given so that children can be prepared and so that the social workers are certain to be available.

Recognition of the intermediary service should be given by those in authority for without the cooperation of social workers, the whole system will fail nationally, exposing those involved to charges that the constitutionally protected rights of children are being violated.

Van der Merwe and Müller³⁰ also offered some practical and useful guidelines with regard to judicial management in order to protect the child during the court process. This includes ground rules for attorneys with specific reference to the asking of developmentally appropriate questions.

The judicial officer should also explain the process of questioning to the child and what will happen next, reinforce the need for him/her to tell the truth, give the child witness an idea of what is expected of him/her and interventions from the bench

may be necessary in instances where the child cannot understand the weight attached to a police statement.

A recess should be called when the child shows signs of fatigue, loss of attention, shut down responses (such as “I don’t know” or “I don’t” remember) or unmanageable stress. The presence of a support person has proved to help the child respond better to questioning.

The child has the right to have procedures dealt with expeditiously in time frames appropriate to the victim and the offence. As such non-compliance with the proposed case-flow management strategy should be met with sanction.

It is also suggested that cross-examination of the witness be completed before the child is given the opportunity to go into the court room and identify the accused. Any further questions relating to the identification may then be dealt with.

The authors add to the above the following suggestions.

The use of a database to track the services delivered to children and to offer information that can help with planning is crucial. All the role players need to use / contribute to this database which should be applied provincially and nationally.

The definition and responsibilities of the intermediary should be formalised. It should be governed as a speciality area in social work.

To address the concern of the credibility of evidence presented by child witnesses, De Young’s³¹ conceptual model for judging truthfulness and ‘Statement Validity Analysis’ (SVA), must be adopted as a crucial assessment tool of the validity of statements throughout the witnessing process. Naturally this must then form part of the training of an intermediary to contribute to the process by verifying the credibility of statements to the court.

To truly empathise with the difficulties inherent to the court procedures and disclosure of personal and emotionally-laden information, knowledge of “Child Abuse Accommodation Syndrome”³² must form part of the preparation of the social worker to act as an intermediary.

Proper understanding of the cautionary rule of practice where the factual adjudicator must warn himself to be cautious in evaluating evidence which practice has shown to require circumspection. Cautionary rules that apply in evaluating evidence are single witnesses; collaboration; traps; young children; identity; sexual deviancy; private detectives; prostitutes; and detained witnesses.³³

Information gained from the cases managed by Bethany House (marked with roman numerals throughout this document) should be considered, together with further research, for profile identification that can assist with planning of prevention and treatment of child abuse. The use of “impact statements” of teachers, family and other adults that can testify to the consequences of the abuse on the child, will increase appropriate sentencing of the perpetrator.

The establishing a socio-legal clinic where the legal and social work professions can combine their services to most effectively serve the child-client is crucial. We also urge that recommendations of the SA Law Commission be given priority and that the implementation of those recommendations be accelerated.

Conclusion

This article presents a number of interesting realities with regard to the intermediary system. The question is asked whether a more focused and standardised approach to the system (with the release of more information for planning purposes) would strengthen the cases of children, hopefully leading to more convictions and in the end contribute to safer environments for children. Prominence needs to be given to problems highlighted by a number of authors. It has been more than 10 years since the Criminal Procedure Act was amended to allow for the use of intermediaries. Now is the time to follow through on the steps taken by South Africa to act in the best interest of their children.

NOTES

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