The Testimonial Competence of Children: A Need for Law Reform in South Africa

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Abstract

Modern-day research studies conducted on the victimisation of children in South Africa show that South African children in particular experience and witness exceptionally high levels of crime and consequently represent a significant portion of the victims and witnesses that have to appear in court to testify about these crimes. In South Africa, as in many other countries, a child is, however, permitted to testify in a criminal court only once the presiding officer is satisfied that the child is competent to be a witness. The competency test, though, presents a critical initial challenge for child witnesses, as it focuses on their ability to answer questions about the concepts of truth and lies. These inquiries can be intimidating and confusing, especially to younger children, and may result in children who would otherwise have been capable of giving evidence being prevented from giving their testimony. Various legal and psychological fraternities have accordingly called for the abolition or amendment of the truth-lie competency requirement. Recent psychological research about the potential of a child to lie has once again raised fundamental questions about the competency inquiry, suggesting that an assessment of children's understanding of truth and lies has no bearing on whether the child will in fact provide truthful evidence in court. These empirical findings precipitated the amendment of competency rules by various countries such as the United Kingdom and Canada. The findings likewise raise serious questions and or doubt about the suitability of the South African competency requirements. The purpose of this paper is to review the current South African position with a view to proposing suggestions for meaningful legal reform.

Keywords

Testimonial competence of children; sections 162, 164 and 170A of the Criminal Procedure Act 51 of 1977; intermediary; truth-lie test.

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1 Introduction

Contemporary research studies conducted on the victimisation of children in South Africa show that South African children in particular experience and witness exceptionally high levels of crime. The incidence of child rape and sexual assault upon minors, for example, has reached epidemic proportions.[1] Alarmingly, these studies also indicate a trend towards a decrease in the age of these victims, while the use of brute force directed against them is escalating.[2] Population-based prevalence studies show that the most common forms of violence against children reported in South

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1 Paula Barnard, the national director of World Vision South Africa, speaking during National Child Protection Week in May 2017, stated that "Violence against children has reached epidemic proportions and like any other disease, be it HIV/Aids or Ebola, it should be treated as a national disaster and remedied accordingly" (Seeth 2017 http://city-press.news24.com/News/violence-against-children-a-national-disaster-20170529). A national prevalence study published in 2016 provides some data relating to the prevalence of violence against children. This study estimates that 34% of the country's children are the victims of sexual violence and physical abuse before they reach the age of 18 (Artz *et al* 2016 http://www.cjcp.org.za/uploads/2/7/8/4/27845461/08_cjcp_report_2016_d.pdf).

2 According to a shocking revelation in October 2017, it appears that a Soweto school guard allegedly sexually assaulted 87 schoolgirls, some as young as four years old, over a period of ten months. The school principal, who was informed about the incidents, initially failed to take the necessary action (see Fengu 2017 http://www.news24.com/SouthAfrica/News/he-seemed-like-an-angel-20171014).
Recent crime statistics indicate the extent of violence in South Africa. According to Statistics South Africa Victims of Crime Survey 2016/2017, 58 013 individual victims 16 years and older experienced sexual offences, and 307 732 experienced assault (Stats SA 2017 http://www.statssa.gov.za/?p=10521). Unfortunately, although certain categories such as homicide and sexual assault are routinely reported, the statistics were not disaggregated for children in 2016/2017, as had been done in 2011/2012. A paper analysing the 2011/2012 crime statistics indicates that 180 537 contact crimes (defined as crimes that involved physical contact between victims and perpetrators) against women 18 years and older were reported and that 50 688 crimes against children younger than 18 years of age were reported. Of the latter 50 688 cases, 793 involved the murder of children, 758 involved the attempted murder of children, 25 866 involved sexual offences against children, 12 645 involved the common assault of children, and 10 630 children were cases of assault of children with grievous bodily harm (SAPS 2012 http://www.saps.gov.za/statistics/reports/crimestats/2012/downloads/crime_statistics_presentation.pdf). A review of juvenile fatalities conducted from January 2014 to December 2014 on 711 deceased children who passed through the Salt River and Phoenix morgues during that period indicated that 32% of all unnatural deaths were cases of homicide. Most of these cases involved child abuse. More than three-quarters of the children who died from child abuse (78%) were under the age of 5 (Faber *Sunday Times* 12).

Africa are physical and sexual violence in the home and community.[3] If the offenders are apprehended, these child victims and witnesses have to undergo the daunting experience of appearing in court to face the perpetrators. Statistics indicate that a growing number of the victims and witnesses who have to appear in court to testify about these crimes are therefore children.[4]

In South Africa a child is permitted to testify in a criminal court only once the presiding officer is satisfied that the child is "competent" to be a witness.[5] However, the competency test presents a critical initial challenge for child witnesses, as it focuses on children's ability to answer questions about the concepts of truth and falsehood.[6] The truth-lie competency test sets out to determine a child's understanding of truth and lies, and the importance of telling the truth in court. The notion underlying the truth-lie inquiry is that a child who understands the meaning of telling the truth is capable of providing reliable evidence in a criminal proceeding.[7] These inquiries can be intimidating and confusing, especially to younger children, and may result in children who would otherwise have been capable of giving evidence being prevented from giving their testimony.[8]

Various legal and psychological fraternities have accordingly called for the abolition or amendment of the truth-lie competency requirement, citing the legal and psychological dilemmas that children experience in being qualified as competent witnesses.[9] These submissions have been unsuccessful to date. Recent psychological research about the potential of a child to lie once again raised fundamental questions about the competency inquiry, suggesting that an assessment of children's understanding of truth and lies

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3 DSD, DWCPD and UNICEF *Violence against Children* 3; Jamieson, Sambu and Matthews *Out of Harm's Way?* reported that 56% of the children in Mpumalanga and the Western Cape reported a lifetime prevalence of physical abuse by caregivers, teachers or relatives.

4 Artz et al 2016 http://www.cjcp.org.za/uploads/2/7/8/4/27845461/08_cjcp_report_2016_d.pdf. A report by Fang *et al* indicated that the estimated economic value of disability-adjusted life years lost owing to violence against children in 2015 amounted to R196 billion, or 4.9% of South Africa's GDP in 2015 (Fang *et al* 2016 https://www.savethechildren.org.za/sci-za/files/47/47ab7077-1d0d-4c37-8ae2-161b18ae427a.pdf).

5 Section 192 of the *Criminal Procedure Act* 51 of 1977 (hereinafter the *Criminal Procedure Act*).

6 *S v Mokoena, S v Phaswane* 2008 2 SACR 216 (T).

7 *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 2 SACR 130 (CC) para 165 (hereinafter *DPP v Minister of Justice and Constitutional Development*); *S v QN* 2012 1 SACR 380 (KZP); *S v Matshiva* 2014 1 SACR 29 (SCA).

8 *DPP v Minister of Justice and Constitutional Development* para 165.

9 *S v Mokoena, S v Phaswane* 2008 2 SACR 216 (T); SALC *Project 107;* Meintjies 2015 http://www.sapsac.co.za/newsletters/SAPSAC_Newsletter_Vol_15.4.pdf; Kruger, Pretorius and Diale 2016 *CARSA* 1-12.

has no bearing on whether the child will in fact provide truthful evidence in court.[10] The empirical findings that children's understanding of truths and lies does not necessarily correlate with truthful accounts of their experiences precipitated the amendment of competency rules by various countries such as the United Kingdom and Canada.[11] These findings likewise raise serious questions and or/doubt concerning the suitability of the South African competency requirements. The purpose of this paper is to review the current South African position, and to undertake a legal comparison. It is anticipated that this review and legal comparison may assist in providing valuable insights and knowledge, which may in turn give rise to suggestions for meaningful legal reform.

2 Competency of South African child victims and child witnesses to testify

Competence has been described as "central to the workings of the adversarial trial."[12] In terms of the accusatorial system a witness needs to be competent before evidence may be presented to the court. The general rule, in terms of the South African accusatorial system, is that everyone (including a child) is presumed to be a competent witness. In this regard section 192 of the *Criminal Procedure Act*[13] states the following:

> Every person not expressly excluded from this Act from giving evidence shall, subject to the provisions of s 206, be competent and compellable to give evidence in criminal proceedings.[14]

The question of compellability and competence is decided by the court in which the criminal proceedings are to be conducted.[15] This involves a trial-within-a trial at which the witness may be questioned by the presiding officer. Witnesses may also be called to give testimony as to the competence of the witness. No universal test for the determination of competence exists.[16] An investigation into the competence of a witness involves questions of fact

10 Bala *et al* 2010 *Int'l J Children's Rts* 53-77; Bala 2014 *Roger Williams U L Rev* 525-528; Evans and Lyon 2012 *Law & Hum Behav* 195-205.

11 Bala *et al* 2010 *Int'l J Children's Rts* 53-77; Bala 2014 *Roger Williams U L Rev* 525-528.

12 Du Toit *et al Commentary on the Criminal Procedure Act* 22-20A.

13 *Criminal Procedure Act* 51 of 1977.

14 In terms of s 206 of the *Criminal Procedure Act*, the law as to the competency, compellability or privilege of witnesses which was in force in respect of criminal proceedings on the thirteenth day of May 1961 shall apply in any case not expressly provided for by this Act or any other law.

15 Section 192 of the *Criminal Procedure Act*.

16 This is one of the concerns expressed about child witness competency testing. In view of this lacuna, research was conducted by Kruger, Pretorius and Diale to develop a framework for child witness competency testing in order to standardize child witness competency testing procedures (see Kruger, Pretorius and Diale 2016 *CARSA* 1-12).

and usually includes an investigation into whether the witness understands and appreciates the nature of an oath.[17]

Children are regarded as competent witnesses if in the opinion of the court they are able to understand the difference between the truth and a lie and have an appreciation of the seriousness of the occasion and the consequences of lying. In this regard it should be noted that an examination of the South African criminal justice system reveals that age itself is not a discernible factor in the determination of children's competency. Children as young as three or four years have given testimony.[18] In *R v J*,[19] a case of indecent assault, the court found the complainant, a four-year-old girl, to be "a bright little girl who gave her evidence readily without prompting or leading." According to Zeffert and Paizes the question of a child's competency should not be confused with that of whether the child should be required to take the oath or affirmation or be admonished to speak the truth. However, in practice, owing to the requirements of section 162 (that all witnesses must testify under oath) a test for competency has by implication resulted in an enquiry into these aspects.[20]

When a child is called to testify, the presiding officer first has to determine whether the child understands the nature of the oath. In *S v L*[21] the court held that it is the duty of the presiding officer to determine whether the child has sufficient intelligence to appreciate the consequences of the religious obligation and sanctity of the oath, the capacity to understand the difference between the truth and a lie, and the ability to understand the import of telling the truth. Only if a "child is capable of giving a truthful and intelligible account of the matter upon which he is called" should he or she be allowed to testify.[22]

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17 Zeffert and Paizes *Essential Evidence* 259.

18 *R v Manda* 1951 3 SA 158 (A); *R v Bell* 1929 CPD 478; *R v J* 1958 3 SA 699 (SR).

19 *R v J* 1958 3 SA 699 (SR) 701A.

20 A test for competency should include the child's ability to communicate, observe and recall. The examination by the courts seems, however, to be focused on the child's ability to distinguish between a truth and a lie. In *Woji v Santam Insurance Co Ltd* 1981 1 SA 1021 (A) the court accepted the relevance of the aforementioned principles, but attributed them to credibility rather than competence. Also see *S v B* 2003 1 SACR 52 (SCA) para 14; *S v Sikhipha* 2006 2 SACR 439 (SCA) para 13; *DPP v Minister of Justice and Constitutional Development* paras 165-167; *S v Swartz* 2009 1 SACR 452 (C).

21 *S v L* 1973 1 SA 344 (KPA) 348A-H.

22 *S v L* 1973 1 SA 344 (KPA) 348E. Also see *S v T* 1973 3 SA 794 (A); *Chaimowitz v Chaimowitz* 1 1960 4 SA 818 (C); *S v N* 1996 2 SACR 225 (C) 229I; *S v B* 2003 1 SACR 52 (SCA) para 14; *S v Gallant* 2008 1 SACR 196 (E); *DPP v Minister of Justice and Constitutional Development* paras 165-167. The religious sanction of the oath has been watered down since the 19th century in view of the fact that not all children receive religious instruction at school (see Lyon 2000 *S Cal L Rev* 1020).

If the presiding officer is of the opinion that the child does not have a sufficient understanding of the nature and import of an oath, a finding to this effect should be made.[23] It is recommended that this finding (even if it is not a formal one) as well as the reasons therefor should be recorded.[24] The presiding officer then has to determine whether the child is competent to give unsworn testimony in terms of section 164 of the *Criminal Procedure Act*. Section 164 states the following:

> Any person, who 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 officer to speak the truth.

In terms of section 164 a child may nevertheless be a competent witness even if he or she does not understand the nature of the oath, provided the child has been admonished by the court to speak the truth.[25] The fact that the child's evidence is unsworn does not necessarily mean that it will be accorded less weight or that it becomes less reliable.[26] In *Chaimowitz v Chaimowitz*[27] the court reaffirmed that a child must be either sworn or warned to speak the truth and stated with reference to *Scoble*:

> Obviously, a child whose intellect is so immature that he is incapable of giving a rational or coherent account of his observation, or is unable to distinguish the difference between fact and fancy, or cannot realise the necessity of telling the truth, must be regarded as an incompetent witness.

Müller[28] correctly points out that according to *Scoble* the test entails more than just being able to distinguish between truths and lies. The test requires that a child should be capable of making observations and giving a rational and coherent account of these observations. In addition, a child should know the difference between facts and fantasy. The test for a child's

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23 *S v Malinga* 2002 1 SACR 615 (N). In *S v B* 2003 1 SACR 52 (SCA) 563. The court held, however, that an inquiry (although desirable) is not always necessary to make a finding in terms of section 164, as a child's youthfulness may justify such a finding. In *S v Gallant* 2008 1 SACR 196 (E) Revelas J held, however, that a failure to make a finding that the witness was unable to understand the oath or admonition rendered the evidence inadmissible. Also see *S v Williams* 2010 1 SACR 493 (E) where the court relied on *S v B* 2003 1 SACR 52 (SCA). See further *S v Matshiva* 2014 1 SACR 29 (SCA) para 11, where the court stated that a finding in terms of s 164 must be preceded by some form of enquiry. However, in *S v Mali* 2017 JDR 0893 (ECG) the court at para 12 held that the statement in *S v Matshiva* was a manifest oversight, as none of the earlier Supreme Court of Appeal decisions were referred to and the doctrine of judicial precedent required *S v Matshiva* to follow earlier judgments.

24 *S v Stefaans* 1999 1 SACR 182 (C) 185E.

25 *S v BM* 2012 2 SACR 507 (FB); *S v Mali* 2017 JDR 0893 (ECG) para 13.

26 Schwikkard 1996 *Acta Juridica* 149. See also *R v Manda* 1951 3 SA 158 (A); *S v BM* 2012 2 SACR 507 (FB).

27 *Chaimowitz v Chaimowitz* 1 1960 4 SA 818 (C) 819H, 820A.

28 Müller *Judicial Officer* 149.

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

- the child's mental capacity to observe an event;
- the child's capacity to remember the event about which he or she has to testify;
- the child's capacity to communicate about the event;
- the child's possession of sufficient intelligence to appreciate the obligation to speak the truth.[29]

Zeffert and Paizes[30] point out, however, that the competency test entails that:

> … if he [a child] does not have the intelligence to distinguish between what is true or false, and to recognise the danger and wickedness of lying, he is incompetent and incompetence cannot be cured by admonishing him to tell the truth.

According to this test, even though a child may have the capacity to observe, recall and communicate, the child cannot be admonished if he or she does not know the difference between a truth and an untruth. Schwikkard[31] argues that the abovementioned competency test amounts to a presumption of incompetence, as the evidence of children is permissible only once they have been found to be competent witnesses. She correctly contends that no such presumption applies to convicted perjurers or other persons convicted of crimes involving elements of dishonesty. She emphasises that this may lead to reliable testimony being excluded and may inhibit effective prosecution. While the evidence of adults falling into the aforementioned categories would be admissible, even if it is full of lies, inaccuracies and improbabilities, children's evidence would not be admissible. If adults' evidence is found to be unreliable, it would merely be rejected.[32] Erasmus[33] and McEwan[34] make a suggestion which is supported by the writer hereof that this presumption of incompetence may, despite

29 Refer to Müller *Judicial Officer* 149-151 for a detailed discussion of the issues. Also note that in *S v Swartz* 2009 1 SACR 452 (C) para 21 the court held that the competency requirements are not satisfied if a child can give an accurate and coherent account of the events but cannot distinguish between the truth and a lie.

30 Zeffert and Paizes *Essential Evidence* 259.

31 Schwikkard 1996 *Acta Juridica* 149.

32 Schwikkard 1996 *Acta Juridica* 149.

33 Erasmus 2010 *Speculum Juris* 109.

34 McEwan 1988 *CLR* 815.

research findings to the contrary, be the result of the perception that young children are as a rule untruthful. Yet there is no evidence that children are more likely than adults to lie.[35] Ovens *et al* point out, with reference to Quinn,[36] that "children do lie, just as adults do lie", but that "often children make statements that are not factually accurate, but they are not 'lies' because the child lacks the intention to wilfully mislead or deceive."[37] Wigmore likewise draws attention to the fact that one must accept the "rooted ingenuity of children and their tendency to speak straightforwardly what is in their mind."[38]

Schwikkard furthermore calls attention to the fact that truth and the duty to tell the truth are abstract notions which young children may not be able to understand or explain, but that this does not mean that children cannot give a reliable account of the events in question. She advocates that children should still be allowed to testify, stressing that in assessing credibility the court will give little weight to the fact that a witness took the oath or was admonished to tell the truth, but will instead look to factors such as coherence under cross-examination, evidence of surrounding circumstances and demeanour.[39] Wigmore also believes that "the sensible way would be to put the child upon the stand and let it tell its story for what it may seem worth".[40]

This aspect was specifically addressed in *S v Mokoena; S v Phaswane.*[41] In the said case Bertelsmann J reasoned along similar lines to Wigmore and Schwikkard and held the proviso to section 164(1) to be unacceptable and unconstitutional in terms of the *Constitution of the Republic of South Africa*, 1996[42] because it does not:

> … take into account that a witness who, for whatever reason, may not be able to understand or to verbalise an understanding of the abstract intellectual concepts of truth or falsehood, may nonetheless be perfectly able to convey the general experience that has led to the witness becoming involved in the criminal case.[43]

This finding was not confirmed by the Constitutional Court, however. In *DPP v Minister of Justice and Constitutional Development*[44] the court acknowledged that questioning may at times be very confusing and even

35 McEwan 1988 *CLR* 815.
36 Quinn 1988 *Behav Sci & L* 185.
37 Ovens, Lamprechts and Prinsloo 2001 *Acta Criminologica* 29.
38 Wigmore *Evidence in Trials* 719.
39 Schwikkard 1996 *Acta Juridica* 149.
40 Wigmore *Evidence in Trials* 719.
41 *S v Mokeona; S v Phaswane* 2008 2 SACR 216 (T).
42 *Constitution of the Republic of South Africa*, 1996 (hereinafter the *Constitution*).
43 *S v Mokeona; S v Phaswane* 2008 2 SACR 216 (T) para 139.
44 *DPP v Minister of Justice and Constitutional Development* para 165.

terrifying for a child. The court also conceded that some of the questions put to children by judicial officers "are very theoretical and seek to determine the child's understanding of the abstract concepts of truth and falsehood."[45] The result of such questions may leave the judicial officer with the impression that the child does not understand what it means to speak the truth and may lead to a child's being disqualified from giving evidence.[46]

The Constitutional Court pointed out that the reason for receiving evidence under oath or affirmation is to ensure that the evidence given is reliable and does not undermine the accused's right to a fair trial. The court held that the evidence of a child who does not understand what it means to tell the truth is unreliable. Accordingly, when a child cannot convey his or her appreciation of the abstract concepts of truth and falsehood, the solution does not lie in allowing every child to testify in court.[47] The solution, according to the court, lies in the proper questioning of children and in particular of younger children. The purpose of the questioning is to determine whether the child understands what it means to speak the truth and not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood.[48]

The court conceded that this questioning requires special skill and that although some judicial officers may have this skill, they are the minority. In this regard the court underlined the significant role of intermediaries in that "everything seems to turn upon the need for intermediaries when young children testify in court".[49] Properly trained intermediaries have particular skill in questioning and communicating with children. This skill, along with their integrity, is vital in ensuring both that innocent people are not wrongly convicted and that guilty people are held to account. The court therefore concluded that the conclusion by the High Court that the proviso to section 164(1) is inconsistent with the *Constitution* cannot be upheld.[50]

The current legal position is therefore that the presiding officer is still obliged to decide on the competency of a witness before testimony can be

45 *DPP v Minister of Justice and Constitutional Development* para 165.
46 *DPP v Minister of Justice and Constitutional Development* para 165.
47 *DPP v Minister of Justice and Constitutional Development* paras 166-167.
48 *DPP v Minister of Justice and Constitutional Development* paras 166-167. Also see *S v BM* 2012 2 SACR 507 (FB), where the State's case in a prosecution of rape rested on the evidence of a nine-year-old complainant and her eleven-year-old friend. With reference to *DPP v Minister of Justice and Constitutional Development* it was held by the Court of Appeal at para 8.3 that although the two witnesses might not have had an appreciation of the "abstract concepts of truth and falsehood", they were nevertheless able to and in fact did convey to the court *a quo* what had happened to them.
49 *DPP v Minister of Justice and Constitutional Development* para 168.
50 *DPP v Minister of Justice and Constitutional Development* para 169.

accepted.[51] In terms of section 165 of the *Criminal Procedure Act*, this inquiry "may" or "shall" be administered by the presiding officer through an intermediary if the person concerned is to give evidence through an intermediary.[52] It is regrettable that the court, despite highlighting the fact that intermediaries are key to the questioning of children in the determination of competency, did not provide any guidelines in *DPP v Minister of Justice and Constitutional Development* as to the circumstances in which an intermediary should assist in this process.[53] Are we to assume that this will be applicable only in a section 170A application?[54]

Furthermore, although the notion of the use of intermediaries in the determination of competency is supported,[55] it should be noted that this solution fails to address the situation where the questioning of a young witness through an intermediary may be vital, but such an intermediary is not available. It is general knowledge that intermediaries are not always available, and the court even referred to this problem in *DPP v Minister of Justice and Constitutional Development.*[56]

This may nevertheless result in a situation where the truthful and reliable evidence of a child may be excluded as a result of poor, inadequate and

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51 *Mpontshane v S* 2016 4 All SA 145 (KZP); *S v FM* 2016 3 NR 724 (NLD); *S v Mbokazi* 2017 1 SACR 317 (KZP).

52 Note that the heading of section 165 of the Act uses the word "may", whereas the section itself uses the word "shall." This leaves uncertainty as to whether the use of an intermediary in this context is compulsory or subject to the discretion of the presiding officer.

53 The only indication was with reference to "young children." See *DPP v Minister of Justice and Constitutional Development* para 168.

54 See *S v BM* 2012 2 SACR 507 (FB), where the state's case in the prosecution of a rape case rested on the evidence of a nine-year-old complainant and her eleven-year-old friend. At trial the complainant in the case testified with the aid of an intermediary and the magistrate satisfied himself of her competence by "virtue of questions put through the medium of the intermediary" (para 8.2), while the eleven-year-old witness testified in open court in the presence of the accused and the inquiry into the competence of the child witness was conducted by the magistrate (para 8.1). The differentiation in the court's approach between the complainant and the child witness is not explained, since while the complainant testified to the rape, the child witness was called to testify about knowing the accused and about being requested by the accused to call the complainant to the house that the accused visited. One could possibly assume that the presiding officer and/or prosecutor was of the opinion that the child witness would not suffer undue mental stress or suffering as a result of having to testify in open court. Whether this was the case and whether the child witness was in fact assessed prior to the hearing remains unclear from the record of the reported case. The abovementioned question can therefore not be answered with any certainty.

55 In this regard an intermediary may assist the presiding officer with information pertaining to the child's cognitive and emotional developmental level.

56 *DPP v Minister of Justice and Constitutional Development* para 246.

developmentally inappropriate questioning by a presiding officer.[57] This dilemma is further exacerbated by the fact that no standard test for questioning is used in South African courts to determine whether a child understands the difference between truth and lies. This may lead to inconsistencies and increases the danger of haphazard questions with no certain reliability and validity being used. Presiding officers may not even realise that their questioning is inadequate. Banoobhai and Whitear-Nel[58] allude to this problem in their discussion of *S v QN.*[59]

In the said case the court *a quo,* after being satisfied that the witness, owing to her age, did not understand the nature and import of the oath, established her competence by interacting with her in order to determine her understanding of the difference between truth and falsehood. The appeal court approved the way in which the regional magistrate had questioned and established the competence of the witness. The interaction between the regional magistrate and the child witness is encapsulated in the following exchange:[60]

> 'Do your parents ever give you a hiding?' to which N [the witness] replied: 'Yes. My mother assaults me if ever I am naughty at home.' The magistrate continued: '… What do you mean naughty?' to which N replied, 'My mother gives me a hiding when I am telling lies.' This was followed by a question of the magistrate, 'So is it a good or a bad thing to tell lies?' To which the reply was given, 'It's a bad thing, Your Worship'.

Banoobhai and Whitear-Nel[61] point out, and correctly so, that this exchange did not in fact establish that the complainant/witness understood the difference between truth and lies. There was, they contended, "no exploration of what it is to tell a lie which involves deliberate deceiving of another by providing inaccurate, incomplete or otherwise misleading information."[62] They highlight that this need not be done in an overly technical manner, but indicate that international literature[63] suggests the use of simple identification questions.[64] They moreover emphasise that research shows little correlation between a child's performance on the truth-lie test and actual truth-telling behaviour. Conversely, even children who are unable to articulate the distinction between truth and lies are able to identify true and false statements and indicate a preference for the truth. They

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57 See for example *S v Raghubar* 2013 1 SACR 389 (SCA) para 7; see also *S v Tshimbudzi* 2013 1 SACR 528 (SCA), where no enquiry at all was held by the trial court.

58 Banoobhai and Whitear-Nel 2013 *Obiter* 359, 364.

59 *S v QN* 2012 1 SACR 380 (KZP).

60 *S v QN* 2012 1 SACR 380 (KZP) para 11.

61 Banoobhai and Whitear-Nel 2013 *Obiter* 364.

62 Banoobhai and Whitear-Nel 2013 *Obiter* 364.

63 Klemfuss and Ceci 2012 *Dev Rev* 266, 275-277.

64 Banoobhai and Whitear-Nel 2013 *Obiter* 359, 364.

accordingly question the validity of the Constitutional Court's rejection of the abolition of the competency test in *DPP v Minister of Justice and Constitutional Development.*[65]

The response of a 13-year-old complainant in *S v Mbokazi*,[66] which was held on appeal to be sufficient, would probably likewise dismay Banoobhai and Whitear-Nel, if not more so than *S v QN.* When asked by the magistrate what it means to tell the truth the complainant said that: "Telling the truth is saying something that is straight and something that is understandable." When asked what it means to tell lies she answered that: "It's speaking something that is not understandable. Someone … would not even know what you are saying." The court[67] with reference to the Oxford English Dictionary interpreted "straight" as "not evasive; honest: a straight answer" and regarded "something that is not understandable" to mean that "if you lie it is something that you manufactured, a figment of your imagination and something that people will not understand, as it is not in existence or an untruth." It is doubtful whether a child's competency can be determined from this line of questioning and it is submitted that the magistrate, as indicated in the judgment, more correctly determined her competence from the manner in which she gave evidence and answered cross-examination questions.[68]

Although the magistrate's determination of the competency of the complainant may be questionable, her handling of the evidence is commendable. She considered the complainant's ability to understand the questions put to her and the court's understanding thereof. She was mindful of the fact that the complainant's evidence was that of a young child and she guarded "against two elements – suggestibility and imaginativeness." She was also alive to the fact that "she was dealing with the evidence of a single witness."[69] The magistrate furthermore "weighed up all the evidence in its totality, and accepted that the state had proved its case beyond any reasonable doubt."[70] This is precisely the type of action that the South African Law Commission has proposed as acceptable in determining the competency of child witnesses in its discussion paper on sexual offences.[71]

65 Banoobhai and Whitear-Nel 2013 *Obiter* 364, 365.
66 *S v Mbokazi* 2017 1 SACR 317 (KZP).
67 *S v Mbokazi* 2017 1 SACR 317 (KZP) paras 11-12.
68 *S v Mbokazi* 2017 1 SACR 317 (KZP) para 16.
69 *S v Mbokazi* 2017 1 SACR 317 (KZP) para 22.
70 *S v Mbokazi* 2017 1 SACR 317 (KZP) para 22.
71 SALC *Project 107* 99.

3 South African reform proposals

The competency of child witnesses was explored again by the Commission in its discussion paper on sexual offences.[72] The Commission expressed the opinion that the exclusion of the evidence of a witness as a result of that witness' not meeting the requirements of sections 162, 163 or 164 of the *Criminal Procedure Act* seems to run counter to the goal of bringing all relevant evidence before the court. It also ignored the ability of the presiding officer to decide on the weight and credibility to be accorded such evidence.[73] The Commission submitted that all witnesses should be regarded as competent to testify if they are able to understand the questions put to them and the court can understand their answers. If the evidence appears to be unsatisfactory, the presiding officer can exercise his or her statutory power to exclude the evidence as irrelevant. Despite their recommendations, the Commission nevertheless acknowledged the seriousness and solemnity of the proceedings and retained the requirement that a witness be enjoined to tell the truth. The Commission thus recommended that:[74]

> … section 164(1) of the Criminal Procedure Act be amended 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. Further that a new section be inserted in the Sexual Offences Act clearly establishing that any child in a sexual offence trial is competent to testify.

The Commission's proposal therefore entails a completely new test for competency, namely the ability to understand and answer questions. The test focuses largely on the cognitive abilities of a child and relates to language development and communication skills.[75] What is required of the court is to determine whether the child is able to communicate and give a coherent and comprehensible account of matters in relation to his or her testimony. Again, the role of skilled questioners is vital to the successful implementation of such a test.

The proposals of the Commission have not yet been implemented. In *S v Swartz*[76] the court pointed out that an examination of most Anglo-American jurisdictions shows that what these competency tests should account for is the likelihood that the child has an accurate memory of the events, is able to recall those memories and can communicate the recalled information accurately. The court pointed out that our criminal system still requires

72 SALC *Project 107* 99.
73 SALC *Project 107* 99.
74 SALC *Project 107* 100-101.
75 Müller *Judicial Officer* 160.
76 *S v Swartz* 2009 1 SACR 452 (C) para 16.

competency (the ability to distinguish between truth and falsehood) when dealing with child witnesses as opposed to intelligibility, as required by some other Anglo-American jurisdictions.[77] In *S v Swartz*[78] Steyn AJ held that this competency requirement cannot be abandoned simply because it appears to operate unfairly.

Given that some of the Anglo-American jurisdictions have recently amended their position on the competency testing of child witnesses, it is of value to consider a few of these jurisdictions.

4 Statutory reform in other jurisdictions

4.1 Canada

In 2004, the Committee on Justice and Human Rights of Canada's House of Commons considered new legislation dealing with a range of issues related to child victimisation and child witnesses in the criminal justice system. A brief prepared by the Child Witness Project Group on competency enquiry issues was considered.[79] The Committee also heard testimony from one of the members of the Project (Bala) about the psychological research that had been carried out in Canada and elsewhere on the subject of child competency.[80]

As a result of the presentation and research findings, amendments were made to Canadian legislation to align it with the research findings. In terms of the amendment to the *Canada Evidence Act*,[81] which came into force in January 2006, a new approach for children under the age of fourteen was established. Section 16.1 thereof provides as follows:

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77 See for example s 52 of England's *Criminal Justice Act*, 1991.

78 *S v Swartz* 2009 1 SACR 452 (C) para 21.

79 Bala *et al* 2010 *Int'l J Children's Rts* 53-77. The Child Witness Project is an interdisciplinary research team, established in 1999 and based primarily at Queens University in Canada. The research team conducted a number of laboratory experiments, involving hundreds of children, to ascertain whether the legal tests used in Canada for assessing the competency of child witnesses had any validity for identifying children who are more likely to tell the truth.

80 Bala *et al* 2010 *Int'l J Children's Rts* 53-77. The findings of such research suggest that truth-telling behaviour in children is not related to knowing the correct answers to questions about truth and lies, nor is it related to knowing that lying is bad. The findings call into question the belief that a traditional competency inquiry could help a court ascertain whether or not a child is likely to lie when testifying. The research suggests that while the act of promising to tell the truth does not eliminate the possibility that a child will lie, it significantly reduces the frequency of lying. A number of studies have found that having a child promise to tell the truth makes it more likely that a child will tell the truth. Also see Lyon *et al* 2008 *Child Development* 914–929.

81 Section 16.1 of the *Canada Evidence Act* RSC 1985, Chap 5 (enacted as SC 2005, c 32, s 27).

(1) A person under fourteen years of age is presumed to have the capacity to testify.

No oath or solemn affirmation

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

Evidence shall be received

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

Burden as to capacity of witness

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

Court inquiry

(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

Promise to tell truth

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

Understanding of promise

(7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

Effect

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

In terms of section 16.1(1) of the *Canada Evidence Act* all children are presumed to be competent to testify. While children are required in terms of subsection (6) to "promise to tell the truth" before being allowed to testify, subsection (7) specifies that no child shall be "asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether the evidence shall be received by the court." Children under fourteen are also not obliged to take an oath or

affirmation in terms of the new provisions, but need only to be able to understand and respond to questions.[82]

A party who challenges the capacity (competency) of a child under fourteen years of age to communicate in court bears the burden of satisfying the court that this is an issue. In this case, if there is an inquiry, it is restricted to whether the child is able "to understand and respond to questions." The issue of competence thus arises only if there is a real issue about the child's ability to meaningfully answer questions. The central focus under the new tests is whether the child has the basic cognitive and language abilities necessary to enable him or her to answer the questions put to him or her. This is determined by the judge. The questioning by the judge, however, needs to be only relatively brief in determining whether the child has the capacity to remember past events and answer questions about those events. The questions posed must be developmental and age appropriate.[83]

These provisions ensure that children are no longer required to answer questions about the nature of an oath or questions about abstract concepts such as truth and lies. Section 16.1(8) provides that if a child testifies after promising to tell the truth, this shall have the same effect as if he or she testified under oath.

These new provisions have simplified and shortened the process for qualifying children to give evidence in criminal cases in Canada. It has also been positively received by Canadian judges and declared constitutionally valid.[84] In one of the most significant constitutional decisions, *R v JS*,[85] the British Columbia Court of Appeal concluded that section 16.1 of the *Canada Evidence Act* is not only constitutionally valid but also reflects the procedural and evolutionary evolution of Canada's criminal justice system.[86] The Court of Appeal noted that section 16.1 "places the child witness on a more equal footing to adult witness by presuming testimonial competence" and reflects the findings of the Child Witness Project that it is the accuracy of a child's evidence that is of paramount importance, not the ability of a child to articulate abstract concepts.[87]

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82 Section 16.1(2), (3) of the *Canada Evidence Act* RSC 1985, Chap 5 (enacted as SC 2005, c 32, s 27).
83 Bala 2014 *Roger Williams U L Rev* 513, 527.
84 Bala 2014 *Roger Williams U L Rev* 513, 528.
85 *R v JS* 2008 BCCA 401 (Can).
86 *R v JS* 2008 BCCA 401 (Can) para 52.
87 *R v JS* 2008 BCCA 401 (Can) paras 52-53.

4.2 United Kingdom

With the enactment of section 53 of the *Youth Justice and Evidence Act* 1999,[88] England and Wales also reformed their laws governing child witness competency enquiries in criminal proceedings. In terms of section 53, "[at] every stage in criminal proceedings all persons are (whatever their age) competent to give evidence" provided such a person is "able to understand questions put to him as witness, and give answers to them which can be understood". Children of any age can hence be called to testify, as their competence depends upon their understanding and not their age. Although each assessment of competency is witness specific, the same test regarding competency is applied to child witnesses as for adult witnesses.[89]

No presumptions or preconceptions prevail. A child, like any other individual witness, is competent subject to the exception that he or she is able to understand questions and give answers which can be understood.[90] The witness, however, need not understand every single question nor give a readily understood answer to every question.[91]

A question as to the competence of a witness may be raised by a party to the proceedings or the court of its own motion. In the event that an issue arises as to the competence of a child witness, the court will determine the competence of the witness.[92] In *R v Barker*[93] the Court of Appeal gave some guidance in relation to section 53. The Court averred that although the distinction is a fine one, what is required of the court is not the exercise of discretion but the making of a judgment, namely whether the witness fulfils the statutory criteria. The court pointed out that it is not up to the judge to create or impose additional but non-statutory criteria based on the approach of earlier generations to the evidence of small children. Although the chronological age of the child may help to inform the judicial decision about competency, in the end it is a decision about the individual child and his or her competence to give evidence in the particular trial. The purpose of the trial process is to identify that evidence which is reliable and that which is not. If competent, as defined by the statutory criteria, the child witness starts off on an equal footing with every other witness.[94]

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88 *Youth Justice and Criminal Evidence Act*, 1999, c 23.

89 *R v Barker* 2010 EWCA Crim 4 para 38; Crown Prosecution Service 2017 https://www.cps.gov.uk/legal/a_to_c/competence_and_compellability.

90 *Youth Justice and Criminal Evidence Act*, 1999 c 23, s 53; *R v Barker* 2010 EWCA Crim 4 para 38.

91 *R v Barker* 2010 EWCA Crim 4 para 38.

92 *Youth Justice and Criminal Evidence Act* 1999 c 23, s 54.

93 *R v Barker* 2010 EWCA Crim 4 para 39.

94 *R v Barker* 2010 EWCA Crim 4 para 40.

The party calling the witness bears the burden of satisfying the court on a balance of probabilities that the witness is competent. Expert evidence may be received on the question.[95] It should also be noted that the assessment of competency should, where applicable, take into account techniques or measures that can be used to assist the child witness in giving his or her evidence, such as the use of a registered intermediary. The competency test is not failed because of the techniques or methods.[96] The role of the intermediary in this instance is to assist the witness in giving evidence to the best of his or her ability, and not to comment on the credibility or competence of the witness.[97]

4.3 New Zealand

In 1996 the New Zealand Law Commission released proposals for amendments to the evidence law of New Zealand.[98] This included a recommendation that the competency test for children be abolished and that everyone, including children, be deemed eligible to testify.[99] In its recommendation on the abolition of the competency test the Commission noted that "the operation of the present competence rules does not accurately predict whether a witness will give honest or accurate testimony" and that the "most useful way of assessing credibility seems to be that undertaken by the fact finder in making a verdict choice."[100] The Commission hence concluded that on balance it prefers the option of abolishing the competency requirements so that:[101]

- more relevant information is available to the court;
- any concerns about reliability and credibility may be evaluated by the trier of fact; and
- any difficulties relating to communication abilities, psychological vulnerabilities and potential sources of unreliability may be addressed by assisting witnesses to give evidence more effectively and ensuring appropriate support.

95 *Youth Justice and Criminal Evidence Act*, 1999 c 23, s 54(5).
96 *R v Barker* 2010 EWCA Crim 4 para 42.
97 Crown Prosecution Service 2017 https://www.cps.gov.uk/legal/a_to_c/competence_and_compellability; Monaghan *Law of Evidence* 312.
98 New Zealand Law Commission 1996 http://www.lawcom.govt.nz/our-projects/evidence-law-evidence-children-and-other-vulnerable-witnesses.
99 New Zealand Law Commission 1996 http://www.lawcom.govt.nz/sites/default/files/publication/1990/08/Publication_56_163_R55_Vol_1.pdf.
100 New Zealand Law Commission 1996 http://www.lawcom.govt.nz/our-projects/evidence-law-evidence-children-and-other-vulnerable-witnesses para 72.
101 New Zealand Law Commission 1996 http://www.lawcom.govt.nz/our-projects/evidence-law-evidence-children-and-other-vulnerable-witnesses para 75.

In 2006 New Zealand's law of evidence was codified through the *Evidence Act*, which replaced the existing legislation and incorporated many of the Law Commission's 1999 recommendations. In terms of section 71 of the *Evidence Act* of 2006, "any person is eligible to give evidence" in civil or criminal proceedings. The provision accordingly eliminates any objections to the eligibility of a witness based on age. Moreover, while witnesses must still take an oath or make a promise to tell the truth in terms of section 77 of the *Evidence Act* of 2006, section 71 abolishes the common law test of competence for children under 12 years of age.[102] In *R v Jellyman*[103] the Court of Appeal confirmed that section 71 replaced the concept of competency, along with the associated common law test of competency, with that of eligibility.

In terms of section 77 of the *Evidence Act* of 2006, "[a] witness in a proceeding who is under the age of 12 years (a) must be informed by the Judge of the importance of telling the truth and not telling lies; and (b) must, after being given that information make a promise to tell the truth before giving evidence". According to Mahoney *et al*,[104] the requirement that the judge inform a witness under 12 years of age of the importance of telling the truth was instituted in order to ensure that the witness is aware of the solemnity of the occasion; while the reference to not telling lies recognises that it may be easier for a child witness to understand the concept of not telling lies than that of telling the truth.

Mahoney *et al*,[105] however, observe that the requirement to make a promise to tell the truth arguably leaves open the possibility of inquiries into the understanding of the child witness regarding the making of promises and telling lies. In this regard they give the example of *Blagojevich v R*,[106] where the child complainant gave video recorded evidence and the interviewer discussed with her the concept of lies and promises, resulting in the child's promise to tell the truth. In its evaluation of the evidence the Court of Appeal commented on the child's level of understanding, stating that: "[w]hile initially the interview discloses the complainant struggled with the concept of a promise it discloses that she understood the concept of telling the truth."[107]

In its five-yearly review of the *Evidence Act* of 2006 the New Zealand Law Commission reported that it remained of the view that a rule of universal eligibility is desirable. In the event that a person has evidence that is relevant

102 Mahoney *et al Evidence Act 2006* 349-350.
103 *R v Jellyman* 2009 NZCA 532 para 30.
104 Mahoney *et al Evidence Act 2006* 366.
105 Mahoney *et al Evidence Act 2006* 366.
106 *Blagojevich v R* 2011 NZCA 217.
107 *Blagojevich v R* 2011 NZCA 217 para 19.

and probative, the person should be allowed to give evidence as a witness and that evidence should be available to the fact-finder. Any questions as to the quality of the evidence can be answered by the fact-finder and the evidence may be excluded in terms of section 8 of the *Evidence Act* of 2006, which is the general exclusion provision. This, the Law Commission stated, ensures that decisions about admissibility are properly focused on the quality of the evidence rather than the quality of the witness. Also, other provisions in the *Evidence Act* of 2006 (such as alternative ways of giving evidence and communication assistance) are available to enhance the quality of the witness' evidence.[108]

5 Article 12 of the United Nations Convention on the Rights of the Child, 1989: child participation

Although the scope of the paper does not allow an in-depth discussion on international law, it is apposite to consider article 12 of the *United Nations Convention on the Right of the Child* (CRC).[109]

Article 12 of the CRC reads as follows:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 12 of the CRC addresses the legal status of children who on the one hand lack the full autonomy of adults, but on the other are the subjects of individual rights. Article 12 accomplishes this by assuring every child capable of forming his or her views the right to express those views freely in all matters affecting the child, which views should be given due weight in accordance with the age and maturity of the child. Paragraph 2 in particular affords the child this right in any judicial or administrative proceedings affecting the child.

The right of a child to be heard constitutes one of the fundamental core values of the CRC. Not only is the right established in article 12 as a

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108 New Zealand Law Commission 2013 http://r127.publications.lawcom.govt.nz.

109 South Africa ratified the *United Nations Convention on the Right of the Child* (1989) on 16 June 1995.

right in itself but it should also be considered in the interpretation and implementation of other rights, thereby enhancing its importance.[110]

5.1 General Comment 12: the right of the child to be heard

Despite States Parties' commitment to the realisation of article 12, the implementation of the child's right to express his or her views freely continues to be impeded by many long-standing practices and attitudes as well as by political and economic barriers. This is particularly true for certain groups of children, such as younger boys and girls, as well as children belonging to marginalised and disadvantaged groups. In recognition of this fact, the Committee on the Rights of the Child deemed it important and necessary to issue a general comment on article 12.[111] The Committee therefore issued *General Comment No 12 (2009) The right of the child to be heard* (hereafter "GC 12"), which was adopted on 20 July 2009.[112]

According to the Committee the overall objective of the general comments is to support States Parties in their effective implementation of the right. In so doing the Committee seeks to:

> (a) improve understanding of the meaning of article 12 and its implications for States Parties and other stakeholders;
>
> (b) elaborate on the scope of legislation, policy and practice necessary to achieve the full implementation of article 12;
>
> (c) emphasise positive approaches in implementing article 12; and
>
> (d) propose basic requirements for appropriate ways to give due weight to children's views in matters affecting them.[113]

In order to achieve the first objective, namely to have a clear understanding of the meaning of article 12, the Committee provides an in-depth analysis of article 12.[114] Major elements of this analysis are described below.

(a) Paragraph 1 of article 12

(i) "shall assure"

Article 12, paragraph 1 provides that States Parties "shall assure" the right of children to freely express their respective views in all matters affecting them. States Parties are reminded by the Committee that this places a

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110 *Committee on the Rights of the Child General Comment 12 - The Right of the Child to be Heard* (2009) (hereafter GC 12) paras 1-3.

111 GC 12 para 4.

112 *Committee on the Rights of the Child General Comment 12 - The Right of the Child to be Heard* (2009).

113 GC 12 para 8.

114 GC 12 paras 19-38.

positive obligation on them to ensure that mechanisms are in place for children to express their views and for due weight to be given to such views.[115]

(ii) "capable of forming his or her views"

The Committee states that this phrase should not be seen as a limitation, but rather as an obligation on States Parties to assess the capacity of the child as far as possible. In this regard States Parties should presume that a child is capable of expressing his or her views and has the right to express them. In terms of the principles of the article, it is therefore not up to the child to prove his or her capacity.

The Committee furthermore emphasises that article 12 imposes no age limit on the right of the child to express his or her views. States Parties are discouraged from introducing any age limits either in law or in practice that would disqualify children from exercising this right. In this regard the Committee underlines the fact that even very young children are capable of expressing their views and that it not necessary for a child to have a comprehensive knowledge of all aspects of the matter affecting him or her, but rather a sufficient understanding to be able to appropriately form his or her views on the matter.[116]

(iii) "the right to express those views freely"

The Committee points out that "freely" implies that a child can choose whether or not he or she wants to exercise his or her right to be heard. A child should therefore not be manipulated or subjected to undue influence or pressure. States Parties should therefore provide the child with an environment in which the child feels respected and secure when freely expressing his or her views.[117]

(iv) "in all matters affecting the child"

If a matter under discussion affects a child, the child has a right to be heard and must be heard. This basic condition has to be respected and understood by States Parties in a broad sense.[118]

115 GC 12 para 19.
116 GC 12 paras 20-21.
117 GC 12 paras 22-25.
118 GC 12 paras 26-27. It should be noted that the Open-ended Working Group established by the Commission on Human Rights, which drafted the text of the Convention, rejected a proposal to define these "matters" by a list limiting the considerations of a child's or children's views. Instead, it was decided that the right of the child to be heard should refer to "all matters affecting the child."

(v) "being given due weight in accordance with the age and maturity of the child"

The Committee stresses that the term "being given due weight" implies that simply listening to the child is not sufficient; the views of the child have to be taken seriously. In addition they point out that by referring to the age and maturity of the child it is clear that age alone cannot determine the significance of the child's views. The views of each child should therefore be determined on a case-by-case basis, taking the maturity of the child into account.[119]

(b) Paragraph 2 of article 12

(i) The right "to be heard in any judicial and administrative proceeding affecting the child"

The Committee emphasises that the provision applies to all relevant judicial and administrative proceedings affecting the child, without limitation, including, for example, the separation of parents, care and adoption issues as well as whether the child has fallen victim to physical or psychological violence, sexual abuse and other crimes.[120]

(ii) "either directly, or through a representative or an appropriate body"

According to article 12 the child has a right to decide how to be heard, namely either directly or through a representative or appropriate body. The Committee recommends, however, that, where possible, the child should be given the opportunity to express his or her views directly. If the child's hearing is undertaken through a representative, it is of the utmost importance that the child's views should be transmitted correctly to the decision maker by the representative. Such a representative must have sufficient knowledge and understanding of the various aspects of the decision-making process and should be experienced in working with children.[121]

(iii) "in a manner consistent with the procedural rules of national law"

The Committee points out that this clause is not to be interpreted as permitting States Parties the use of procedural legislation which restricts or prevents the enjoyment of this fundamental right. On the contrary, States Parties are urged to comply with the basic rules of fair procedure, such as the right to a defence.[122]

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119 GC 12 paras 28-31.
120 GC 12 paras 32-34.
121 GC 12 paras 35-37.
122 GC 12 para 38.

With regard to the Committee's second objective stated above, namely to elaborate on the scope of the legislation, policy and practice necessary to achieve the full implementation of article 12, the Committee provided a five-step plan that needs to be followed by States Parties. This entails preparation, the hearing itself including the assessment of the capacity of the child (ie evidentiary issues), information about the weight given to the views of the child (feedback) as well as complaints, remedies and redress. In terms of these steps children should be informed of their right to express their views, which views should be taken seriously at the hearing itself.[123]

The Committee also deemed it necessary to remind States Parties of their core obligations in terms of article 12, namely to amend legislation in order to introduce mechanisms providing children with access to appropriate information, adequate support, if necessary, feedback on the weight given to their views, and procedures for complaints, remedies or redress.[124]

In addition the Committee set out specific obligations with regard to judicial (civil and penal) and administrative proceedings that need to be adhered to. Regarding child victims/witnesses in the penal judicial proceedings, the Committee stated that the child victim of a crime must be given an opportunity to fully exercise his or her right to freely express his or her views. This should be done in accordance with the United Nations Economic and Social Council resolution 2005/20 ("Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime").[125]

In keeping with the provisions of article 12 of the CRC, the United Nations Economic and Social Council (the Council) emphasises that every effort should be made to enable child victims and witnesses to express their views or concerns relating to their involvement in the judicial process. In so doing professionals should ensure that child victims and witnesses are appropriately consulted and are able to express their views freely and in their own manner.[126]

Article 12 of the CRC as well as the aforementioned Guidelines thereon stresses the importance of ensuring child participation in judicial and administrative proceedings affecting them. It also lends support to the notion that all witnesses should be regarded as competent and that the focus should not be on whether the child has a "comprehensive knowledge of all aspects of the matter affecting the child" but rather whether the child has "sufficient understanding" to be able to understand the questions put to the child and in return to give answers that the court can understand. Article 12 and the Guidelines furthermore stress the importance of drafting relevant national legislation, policies or protocols involving child victims and

123 GC 12 paras 40-47.
124 GC 12 paras 48-49.
125 ECOSOC 2005 http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf.
126 ECOSOC 2005 http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf para 21.

witnesses in conformity with the principles contained in the Guidelines and the CRC. They serve as a valuable tool to aid governments such as the South African government in so doing, and should accordingly be consulted.[127]

6 Conclusion

The above evaluation of the competency rules utilised by Canada, the United Kingdom and New Zealand illustrates that to a large extent (with the exception of having to promise to tell the truth) these correlate with the earlier recommendations made by the South African Law Commission, namely that section 164(1) of the South African *Criminal Procedure Act* be amended such 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."[128] Such an amendment would also conform to the principles set out in article 12 of the CRC and the aforementioned Guidelines. Regrettably, the recommendations of the Law Commission have not resulted in an amendment to the existing legislation in South Africa. This can perhaps be attributed to a reluctance to move away from an accusatorial judicial system to a more inquisitorial system as well as the fear that the child's testimony may not be reliable.[129]

It is widely submitted,[130] which submission is supported by the writer hereof, that the competency test used in terms of the existing *Criminal Procedure Act* does in fact operate unfairly and that the use thereof warrants serious reconsideration. Current psychological research clearly shows that the ability of a child witness to understand and answer questions represents a more realistic and meaningful criterion to use to determine whether a child is competent to testify than the artificial, abstract inquiry into the child's understanding of concepts such as truth and lies.[131] The proposal put forward by the South African Law Commission is one such test, and its introduction is long overdue.

The test accords with the proposal made by Wigmore and Schwikkard that a child be allowed to testify and that the child's evidence then be assessed for what it may seem to be worth. If the evidence is found to be unreliable,

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127 Note that art 4 of the CRC states that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention." In terms of art 4, governments have a responsibility to take all available steps to make sure children's rights are respected, protected and fulfilled. When countries ratify the Convention, they agree to review their laws relating to children.

128 See para 3 above.

129 *DPP v Minister of Justice and Constitutional Development* para 166.

130 SALC *Project 107* 102 fn 11.

131 Bala *et al* 2010 *Int'l J Children's Rts* 53, 75.

the court may reject it.[132] This proposal assumes that children may be inadequate witnesses just as adults may be inadequate witnesses, but that the court should be allowed to come to an "intelligent conclusion" on the evidence of children as it would on the evidence of adults.[133]

If the courts insist on a competency test of some kind, it is imperative that such an inquiry should be child sensitive, developmental and age appropriate.[134] If this is the case, the child will be a competent witness and as accurate as an adult, if not more so.[135] Cashmore[136] sums up this phenomenon clearly by stating that the competence of children to interact with the legal system is a function of the competence of those dealing with them in that legal system.

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List of Abbreviations

Behav Sci & L	Behavioral Science and the Law
CARSA	Child Abuse Research in South Africa
CLJ	Criminal Law Journal
CLR	Criminal Law Review
CRC	Convention on the Rights of the Child
Dev Rev	Developmental Review
DSD	Department of Social Development
DWCPD	Department of Women, Children and People with Disabilities
ECOSOC	United Nations Economic and Social Council
Int'l J Children's Rts	International Journal of Children's Rights
Law & Hum Behav	Law and Human Behavior
Roger Williams U L Rev	Roger Williams University Law Review
S Cal L Rev	South California Law Review
SALC	South African Law Commission
SAPS	South African Police Service
UN	United Nations
UNICEF	United Nations Children's Fund