

# Court support workers speak out

## Upholding children's rights in the criminal justice system

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*The prevalence of sexual offences against children in South Africa continues to be among the highest in the world. The quality and accuracy of a child's testimony is often pivotal to whether cases are prosecuted, and whether justice is done. Child witness programmes assist child victims of sexual abuse to prepare to give consistent, coherent and accurate testimony, and also attempt to ensure that the rights of the child are upheld as enshrined in the various laws, legislative frameworks, directives and instructions that have been introduced since 1994. We draw on information from two studies that sought the perspectives of court support workers to explore whether a child rights-based approach is followed in the criminal justice system (CJS) for child victims of sexual abuse. Findings suggest varying degrees of protection, assistance and support for child victims of sexual abuse during participation in the CJS. The findings revealed that the rights of children to equality, dignity and not to be treated or punished in a cruel, inhuman or degrading way were undermined in many instances. Finally, recommendations are given on ways to mitigate the harsh effects that adversarial court systems have on children's rights.*

### Child victims of sexual abuse

Sexual abuse of children has devastating adverse social and mental health effects on victims.<sup>1</sup> Sexual abuse during childhood has long been associated with a range of short- and long-term psychological and behavioural problems such as fear, post-traumatic stress disorders, poor self-esteem and anxiety disorders;<sup>2,3</sup> and the risk of later sexual and

physical abuse and domestic violence,<sup>4</sup> higher rates of substance abuse, binge eating, somatisation, suicidal behaviours, and poor social and interpersonal functioning in adult life.<sup>5</sup> While some child victims of sexual abuse are resilient and able to lead relatively normal lives following the event/s, most often they experience lasting physical, mental and emotional harm.<sup>6</sup> Not only must they cope with these harmful consequences, but should the case be reported and referred to the criminal justice system (CJS), they are forced to deal with the trauma of having to repeatedly relive the violence by retelling their stories of abuse, and through in-court testimony.<sup>7</sup>

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## Extent of sexual offences against children

The prevalence of sexual offences against children in South Africa continues to be among the highest in the world. According to the South African Police Service (SAPS) Annual report, 63 067 sexual offences were recorded in 2012/13; 25 446 of these against children (40.3%).<sup>8</sup> It must be noted that the report indicates that the total number of sexual offence cases reported was 63 067 for that period; however, elsewhere in the report the total number of sexual offences against children and adults is given as 55 374, thus indicating that 46% of offences reported are committed against children.<sup>9</sup> In 2008/09 – the last known detailed, age-disaggregated data – 39,5% of sexual offences committed against children affected those in the age group of 15 to 17 years, 60,5% were committed against children below the age of 15 years, and 29,4% of these sexual offences involved children aged 0 to 10 years.<sup>10</sup> Set against the knowledge that sexual offences against children are grossly under-reported and that reported cases of sexual offences against children are thus considered the tip of the iceberg,<sup>11,12</sup> these statistics are harrowing, and demand not only concerted prevention efforts but also justice for the child victims.

## Sexual offences data

The problem of the lack of disaggregated data on sexual offences cases from the SAPS, specifically those involving children, has been compounded by changes in reporting by the Department of Justice and Constitutional Development (DoJCD) and the National Prosecuting Authority (NPA) that do not disaggregate conviction data for the various sexual offences. The changes have negatively affected our ability to assess the performance of the criminal justice system when responding to sexual offences in general, and sexual offences against children in particular.

Subsequent to the promulgation of the Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007 (the Act), the NPA's annual reports provide one single figure for conviction rates regarding the 59 sexual offences contained in the Act. It consolidates information regarding rape and

sexual assault, specific offences against children (such as the exposure or display of pornography to a child), and specific offences committed against persons with mental disabilities, amongst others, into a single number of 'sexual offences'. Previously, the NPA reported separately on the number of *indecent assault* cases and on the number of *rape* cases, according to the common law definitions.

Interestingly, the NPA Strategic Plan 2013–2018 does disaggregate rape from other sexual offences when referring to SAPS reports between 2008 and 2012, but fails to do so in reference to its own performance.<sup>13</sup>

Furthermore, recent NPA reports (2011/12 and 2012/13) only contain information on the number of sexual offences cases finalised, and the conviction rates. It is unclear from the reports how many cases are referred to the NPA by the SAPS.<sup>14</sup> In the 2012/13 reporting period, the NPA indicates that it finalised a total of 7 092 sexual offences with a conviction rate of 65,8%: this indicates convictions in 4 669 cases.<sup>15</sup> This should be considered against the annual reporting rates provided by the SAPS of approximately 65 000 per year. Although we cannot track actual convictions against cases reported with the data available, there is an indication that the finalisation rate is in the region of 11% of the cases reported to the SAPS, bringing the conviction rate closer to 7,1% of reported cases.<sup>16</sup>

Vetten et al.'s 2008 study shows that the conviction rate for rape tends to be lower than that for other sexual offences.<sup>17</sup> A study on conviction rates published in 2000 that tracked cases through the system indicated that the conviction rate for rape overall was 7% at that stage, with a 9% conviction rate in rape cases involving children.<sup>18</sup> The fact that there is no difference in the conviction rates over the past 14 years raises the serious question of the actual value of the law reforms and programme developments relating to the prosecution of sexual offences over the past two decades.

The only matters in which one can glean a better sense of the percentage of cases that are prosecuted, are those relating to the prosecution and conviction rates for sexual offences reported to Thuthuzela Care Centres (TCCs). The annual reports

include the category '*% of cases reported at a TCC that are referred to court for prosecution*'.<sup>19</sup> While not contained in the 2011/12 report, the 2012/13 report includes the actual reporting figures to TCCs for both of these years. In those years 28 557 and 33 112 cases were reported at TCCs. The conviction rate for the 2012/13 period in relation to the number of cases reported in the same period is thus 4,13%.

In the NPA 2011/12 Annual report the conviction rate given for matters reported to TCCs is slightly lower than the overall conviction rate for sexual offences in that period. This trend continues in the 2012/13 report, which shows a conviction rate of 65,8% for all sexual offences and 61% for sexual offences referred from TCCs.<sup>20, 21</sup> Since the purpose of the TCCs is to improve the management and prosecution of sexual offences matters, including conviction rates,<sup>22</sup> the fact that the conviction rates are lower for cases going through the TCCs is worrying and suggests that they are failing in their primary aim.

The failure to provide disaggregated data across sexual offences obscures an accurate assessment of the performance of the DoJCD and the NPA. It also prevents a proper assessment of the blockages in the system, in terms of both investigations and decisions not to prosecute, and thus hampers the ability to plan and establish effective strategies to address this poor performance.

## **Developments in law and policy since 1994**

### **The children's rights framework in South Africa**

The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child recognise a wide range of children's rights. They require member states to ensure that legislative, administrative, social and educational measures are taken to protect children from a range of forms of violence, abuse, neglect, maltreatment and exploitation, and to put in place measures to ensure their realisation.<sup>23, 24</sup> They also specifically provide that in judicial and administrative proceedings that affect the child, the child must be provided with the opportunity to be heard, either directly or through an impartial representative.

These two instruments were ratified by South Africa in 1995 and 2000 respectively, leading to a priority for law reform in the country. Various laws, legislative and policy frameworks, directives and instructions came into being from early 2000 with the intention of upholding the rights of all children in South Africa, and ensuring their protection from further psychological distress and harm resulting from testifying in open court, in the presence of the accused.

The Bill of Rights in the Constitution of the Republic of South Africa is thus complemented by international law and given effect by legislation and policy. Section 28 of the Constitution specifically addresses the rights of children.<sup>25</sup> It provides the right of children to freedom from maltreatment, neglect, abuse or degradation; to be treated fairly and equitably; and to be protected from unfair discrimination on any grounds. Importantly, section 28(2) of the Constitution states that: 'A child's best interests are of paramount importance in every matter concerning the child.'<sup>26</sup> This is a higher standard than that set in international law.

### **Legislative and policy frameworks**

The past 20 years have seen significant changes in the legislative and policy frameworks relevant to child rights. These include the Children's Act 38 of 2005, the Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007 (SOA), and the Criminal Procedure Act 51 of 1977.<sup>27, 28, 29</sup>

Most significant among these in terms of sexual offences was the promulgation of the SOA at the end of 2007, following a lengthy reform process. The SOA includes as one of its objectives to 'afford complainants of sexual offences the maximum and least traumatising protection that the law can provide.' This Act introduces or strengthens various protective measures to uphold children's rights and to ensure their protection from further psychological distress and harm resulting from engaging as complainants in sexual offences matters. It specifically includes provisions to improve the protection of the child testifying in open court in the presence of the accused.<sup>30</sup> For example, these provisions allow for children below the age of 18 years to testify outside of the court environment

with the assistance of a person who acts as an intermediary; or to give evidence in a separate room linked to the court room via closed-circuit television; or to have court proceedings conducted in camera.

In addition, regulations and directives have been developed for police officers and prosecutors when investigating and prosecuting sexual offences cases.<sup>31</sup> Within these regulations and directives are measures intended to ensure the safety and protect the rights of child victims of sexual offences throughout the criminal justice process. The National Instruction for police officers when dealing with cases of sexual abuse highlights the issue of the particular vulnerability of victims of sexual abuse.<sup>32</sup> Other portions of this document attempt to ensure that victims' rights are protected at all times; for example, taking steps to protect the privacy and dignity of the victim (section 7 (4)), respecting how victims describe the event and writing down everything that is said (section 5 (3)f and g), interacting with victims in a non-judgemental way (section 5 (5)), making a thorough and professional investigation of the case (section 9 (1)), and ensuring the safety of the child (section 9 (2)b).<sup>33</sup>

The directives issued in terms of section 66 (2) (a) and (c) of the Sexual Offences Act are also constructed with the particular vulnerability of victims of sexual abuse in mind.<sup>34</sup> For example, the directives recommend the selection of dedicated prosecutors who are experienced, skilled and sensitised, and that prosecutors 'should endeavour to reduce the trauma caused by the complainant's contact with the CJS by following a sensitive, victim-centred approach'.<sup>35</sup> At trial, prosecutors should ensure that sexual offence cases receive priority and proceedings are expedited, especially in cases where the complainant is a child. Furthermore, 'efforts should be made to ensure that the complainant and other witnesses wait in a comfortable and private victim-friendly environment where contact with the accused can be avoided'.<sup>36</sup>

In September 2013, five years later than it was due, the National Policy Framework on Management of Sexual Offences (NPF) was published in the *Government Gazette*.<sup>37</sup> The NPF is based on the principles of ensuring a 'victim centred approach to sexual offences'; adopting multidisciplinary

and inter-sector responses; providing specialised services in these matters; and ensuring 'equal and equitable access to quality services'.<sup>38</sup> The NPF provides a number of new measures that may improve the implementation of existing laws and policy. Firstly, it recognises a range of factors that increase the vulnerability of victims 'due to gender power imbalances, age, disability, sexuality and cultural dynamics'.<sup>39</sup> Secondly, it requires that budget allocations and expenditure on sexual offences must be separately tracked to monitor this and ensure sufficient resources are made available.<sup>40</sup> It also requires the development of SAQA-accredited training, allowing for improved standards in training.<sup>41</sup> Perhaps most importantly, the NPF provides that 'psycho-social services and practical assistance must be provided as an integrated part of support services at all stages'.<sup>42</sup> Other key developments in the past 20 years include the establishment of specialist Sexual Offences Courts (SOCs) in 1993 and the introduction of TCCs in 2000.

## Sexual Offences Courts

Although officially established in 1993, there was only one SOC based in Wynberg, Cape Town until 1999. At that stage the DoJCD made a decision to roll these courts out across the country by 2003.<sup>43</sup> The implementation of this was delayed and the national strategy to roll out SOC's was only agreed on in 2003.<sup>44</sup>

These courts were intended to deal exclusively with sexual offences cases. They included the requirement to appoint victim assistants, case managers, court preparation officials and magistrates dedicated to hear matters in these courts. Each court was also to be staffed by two prosecutors to improve preparation in these matters. In 2005 a blueprint for the management of these courts was developed, setting out the various requirements for infrastructure to minimise distress associated with the court environment and exposure to the accused in the court building and the court room.<sup>45</sup>

At the same time that the blueprint was finalised in 2005, a moratorium was called on the establishment of SOC's. Subsequently many of the infrastructural and staffing gains made with the establishment of the courts were lost.

In 2012, a Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (MATTSO) was established. This task team released its report in August 2013. The report strongly recommended the re-establishment of SOCs. In addition, the MATTSO recommendations are consistent with many of the recommendations made in a submission to parliament in April 2013 by a group of civil society organisations working with sexual offence survivors and the CJS.<sup>46</sup>

In response to the report, the Judicial Matters Second Amendment Act of 2013 was passed. This provides a legal framework for the establishment of SOCs.<sup>47</sup> At a minimum, this new law safeguards the future existence of these courts. However, the Act does not provide adequate direction to the DoJCD regarding the pace of implementation of the courts and resourcing, nor standards for infrastructure, staffing or functioning of these courts. Without this, there is no assurance that what will be established as an SOC is anything more than a name on the door of the court. Given the history of inconsistencies in standards in these courts, this is concerning.

### **Thuthuzela Care Centres**

After the first TCC was established in 2000, the DoJCD has continued to roll out TCCs. By 2012 the DoJCD reported that 30 TCCs had been established.<sup>48</sup> The NPA plans to increase that number to 60 by the 2017/18 financial year.<sup>49</sup> These centres are set up as one-stop facilities, housing police, health and psycho-social support services to assist victims at the point of entry into the system. However, very few TCCs do in fact provide psycho-social services.<sup>50</sup>

### **Child witness and advocacy programmes**

The quality and accuracy of a child's testimony is often pivotal in whether cases are prosecuted, and whether the court reaches a finding. Yet, research and anecdotal evidence from across the world relate how child testimony is often complicated by a number of factors. Most often the nature of child sexual abuse means that there is little supporting evidence, and the court proceedings are based on the word of the child against that of the (usually) adult perpetrator. Children often have difficulty in

recalling and verbalising events and sometimes have difficulty telling adults about their abuse.<sup>51, 52</sup> They may be plagued by shame, guilt, fear and/or embarrassment,<sup>53</sup> particularly if the perpetrator is known to them, which is most often the case.<sup>54</sup> Finally, young children may be developmentally unable to disclose abuse or have difficulty in understanding that what has occurred is in fact abuse.<sup>55</sup> The abuse itself may have hindered their normal cognitive and emotional development, affecting their ability to recall and/or relate the event/s.

Child witness and child advocacy programmes assist child victims of sexual abuse in preparing for consistent, coherent and accurate testimony, which in turn has the potential to affect the outcome of the court process. Central to these services is informing witnesses about court processes and role players, reducing secondary victimisation, strengthening victims' coping strategies, and providing psycho-social support and referral to counselling services.<sup>56</sup> In South Africa, court preparation services for children are largely delivered by non-profit organisations (NPOs), either on site at the courts, or as part of broader psycho-social services provided off-site.<sup>57</sup> There is no available information on the number of court preparation personnel employed by NPOs in South Africa. The NPA Annual report for 2012/13 indicates in respect of its Ka Bona Lesedi Court Preparation Programme that there are '140 Court Preparation Official (CPO) posts' in operation in 76 lower courts and two high courts.<sup>58</sup> However, the report does not comment on how many posts are filled, and it must be noted that these CPOs do not specialise in sexual offences and undertake preparation of all witnesses. The report goes further to note that these NPA CPOs conducted 91 050 witness sessions in the period under review. It does not indicate the actual number of witnesses they worked with, just the sessions. Nor does it indicate how many witnesses were children in sexual offences matters.

### **Child Witness Project**

In this article, we focus on one child witness support programme: the Child Witness Project (CWP), initiated by Resources Aimed at the Prevention of

Child Abuse and Neglect (RAPCAN), which has been providing services to child victims of sexual abuse and their families in five SOCs in Atlantis, Cape Town, Khayelitsha, Paarl and Wynberg since 1999.<sup>59</sup> The CWP is delivered in cooperation with the National Prosecuting Authority, the Department of Justice and Constitutional Development and the Western Cape Department of Social Development. An average of 500 children access the programme on a monthly basis. The CWP service is provided primarily by lay court support workers, who are supported and supervised by specialised social workers. Each child and his/her caregiver and other family members may have several interactions with court support workers. The CWP court support workers prepare children for court proceedings, debrief children and families after testimony in court, and follow up with children after the completion of the case. The CWP also works hard to ensure that the environment in court is conducive to children's comfort and safety by providing child-friendly physical spaces such as separate waiting rooms and playrooms at each court. All CWP court support workers have the necessary aptitude as well as previous experience working with children, and have completed a three-week training course provided by RAPCAN.

## Research methodology

This article draws on two studies that sought the perspectives of the CWP's court support workers to examine whether a child rights-based approach is followed in the CJS for child victims of sexual abuse.

Both studies were cross-sectional and employed a qualitative approach for data collection.<sup>60</sup> This method was deemed appropriate because the CWP court support workers interact not only with child victims and caregivers but with all role players in the CJS with whom child victims and caregivers come into contact. Their experiences and insights position them to understand the processes to which child witnesses and their caregivers are subjected while interacting with the CJS.

In the first study, conducted in mid-2011, the perspectives of the CWP court support workers were sought through their own written reports of cases that had particular salience for them. In the second

study, in mid-2012, face-to-face interviews were conducted with the CWP court support workers. These interviews used a storytelling, oral history format rather than a structured interview format. Interviewers asked questions that accessed narrative detail that could not be answered with a simple 'yes/no' response. Such questions were designed to elicit cognitive, behavioural and emotional content (often simultaneously), and to give rise to autobiographical accounts of experiences, good and bad, rather than bland generalisations.<sup>61</sup>

In the first study referred to above, 16 court support workers attended a two-day getaway where they were asked to record their most significant case while working in the CWP. These reports were written and shared among participants. Information was shared voluntarily, and the court support workers gave their permission to use extracts from the written reports. As this was an internal team building exercise, ethics approval was not sought.

In the second study referred to above, researchers randomly and independently selected one court support worker from each of the five courts out of the approximately 20 who worked in the CWP. All of the five court support workers approached were willing to be interviewed. After written, informed consent was obtained, court support workers were interviewed by an experienced researcher. Interview guides were used to lead the conversations, with questions designed to encourage participants to think about their behaviours and emotions in relation to their experiences of the CJS, as well as how they related to the people they encountered and the physical spaces in which the interactions occurred. All interviews were conducted in participants' own language and were audio-recorded, transcribed and translated where applicable. Original recordings were checked against the transcripts to ensure the accuracy of the data capture. This study was approved by the research ethics committee in the Department of Psychology at the University of Cape Town.

A thematic content analysis was used for the written case reports and the interviews. The case reports and transcripts were read repeatedly by both team members independently, and initial broad themes

were identified. The team members discussed and decided upon the themes in consultation and by mutual agreement.

## Findings

### Support workers

There are many role players children engage with from the moment of disclosure to their engagement in court, as described in this interview:

... report first time to the police ... tell the story to the doctor ... tell it to somebody that's maybe a counsellor ... they have told it to their parents or whoever they told first ... So that's already four people ... come to court ... telling the prosecutor, so they get tired ... girls are not comfortable telling their story to somebody that is a male ... (Interview: CSW 5)

Court support workers provide a safety net for the children during (and sometimes after) their engagement with the CJS. They work with child victims as young as five and up to 18 years of age. Their strong commitment to their charges and their work was seen consistently across the interviews and in the written reports.

Court support workers ensure that children are well-prepared for court appearances. The CWP court support workers are trained, guided and supervised to only fulfil this specific role. They are trained not to elicit the story of the incident, as it may affect the merits of the case; nor give advice outside the scope of their knowledge of the court process; nor should they impose any religiosity or make contact with the family outside of the court spaces. Despite this training, court support workers reported that they overstepped these roles in some cases, for example providing advice to children and visiting the family of abuse victims.

In many cases it was clear that court support workers felt a great deal of empathy for the children. There were also accounts of having bonded closely with the children, and internalising the trauma experienced by the children. While these behaviours would be considered as crossing professional boundaries and could be the result of insufficient training, supervision and debriefing, they could also signify

a compassionate and empathetic response by the court support workers to a system they consider to be dispassionate. Some court support workers expressed anger, despair and helplessness (at the perpetrator, the court system, the children's caregivers), suggesting that they were experiencing vicarious trauma.<sup>62</sup>

### Confronting the perpetrator

Ideally, victims (especially children) should not need to fear contact or confrontation with perpetrators, thereby deepening the trauma inflicted by the initial sexual offence. However, due to a failure of personnel diligence or, in certain instances, a lack of resources, children are sometimes obliged to confront their perpetrators.<sup>63</sup>

Court support workers talked about their particular frustrations with investigating officers who seem to have no awareness of how being in close proximity to the perpetrator would affect a child, and who even transport victims to court with the alleged perpetrators:

Say they come from the farms, that long distance from [place name] or wherever they come from, sitting with the perpetrator in the car. I can imagine myself, sitting with somebody in a car that wanted to murder me, or did rape me or whatever. So when the child comes here, you don't know what to say. You don't know where to start, what to talk or where to begin with the child, because the child is so traumatised sitting with that person for an hour or hour-and-a-half in the car. (Interview: CSW 4)

Even though transporting children and perpetrators together may seem efficient or justifiable due to limited resources, such practices are in direct opposition to the principle of the best interests of the child, and are completely unacceptable.

Children may also come into contact with alleged perpetrators in the court building. As described earlier, the Criminal Procedures Act does provide for children below the age of 18 to testify in a separate room linked to the court via closed-circuit television and/or with the assistance of an intermediary. These measures are intended to protect child witnesses from psychological stress caused by testifying

in open court, and to alleviate some of the harm associated with cross-examination. These measures do not, however, take into account the exposure of children to perpetrators outside the courtroom. Court support workers described how, in some cases, children met the perpetrator (or their family) in the passages, the public toilets or even in the court. These experiences make children anxious, while they need to be calm and confident if they are to testify against the perpetrator. Contact with the perpetrator negatively affects the quality of many children's testimony, unnecessarily traumatises the child, and also has the potential to impact adversely on the outcome of a case. One court support worker wrote about this exact experience for a 10-year-old rape victim:

Die kind was deur die familie van die beskuldige voorgekeer en daarna wou sy nie verder praat in die hof nie. Met die gevolg dat die man vrygespreek is en die saak van die rol is. (The child was accosted by the family of the accused and after that she did not want to speak in the court. With the result that the man was acquitted and the case was taken off the court roll.)

In many instances the layout of court buildings makes it impossible for the two parties to avoid each other. This is exacerbated by the failure of court staff to recognise the negative impact of this contact and take the necessary measures to prevent it.

### **The cold reality of court**

Court buildings have not been designed to accommodate children who enter as victims or witnesses. The starkness of the court buildings and rooms intimidate first-time visitors, and often invoke fear and uncertainty for the children and their caregivers.

The minute they have stepped into that door, there is that fear. They are on their nerves. It's like some of them withdraw into themselves. (Interview: CSW 2)

To soften the negative impact of the stark court environment on children, a number of courts have established 'child-friendly' waiting rooms and interview rooms to prevent a situation where the child waiting for the trial to start has to be in the

same waiting area as the accused. According to the experience of the court support workers interviewed in this study, measures to create separate waiting areas and testifying rooms for children are not sufficient protection for traumatised children.

I don't think the court can be child friendly! It's too cold there ... it's just those benches there ... (Interview: CSW 4)

With repeated delays and postponements of the trial date, it is a reality that children experience the cold court environment, and risk the potential to confront their perpetrators, on multiple occasions.

### **Delays and postponements**

Court proceedings are often protracted. Many of the court support workers spoke about how these processes were difficult for children to endure. One court support worker wrote that '[o]ver the next 18 months the case [got] postponed six times'; another spoke about how '[the children] get tired sitting in one place'. Support workers interviewed in our study expressed their frustrations about postponements and delays, and the inability of the court to provide timely information to victims that would shorten their stay at court:

Sometimes they come here three times, and they just sit here the whole morning. ... (the) prosecutor doesn't come up and say, listen here, this is what is happening, the case is going to be postponed. (Interview: CSW 4)

The main role players in the court process should ensure that victims are protected from secondary traumatisation, but their insensitivity or carelessness can turn the court process into a painful experience, filled with anxiety and fear. The opportunity for children to connect meaningfully with adults who care can be tainted by their engagement with insensitive defence lawyers, prosecutors and even magistrates.

### **Going the extra mile – or inefficiency**

The investigating officers are important role players in the CJS and are instrumental in ensuring the child's case is built. The docket with all the statements and evidence that supports the child's case becomes the sole representation of the child's experience of being abused. It is important that this be as complete



a record of the crime as possible. When there are gaps in this record of the crime, the child's case is weakened, as these support workers noted:

It [pertinent evidence] had to be in the docket, but was not there, and that is why the perpetrator was being released. (Interview: CSW 4)

Sometimes it is not even the child's fault that the evidence is incomplete or sometimes the docket gets lost. (Interview: CSW 3)

The investigating officers are also required to ensure that the child is advised of court dates and when he or she must appear in court. Court support workers in our study spoke of cases in which a child was required in court, but the investigating officer had forgotten to collect them. However, one support worker's experience with the police and their handling of cases was positive:

There's great assistance [from the detectives] because there is support: the police will come to them and the police will assist them. The police will take them here and take them there, so I don't want to put the police down. (Interview: CSW 1)

### **Sensitivity – or jaded callousness**

Court support workers work with prosecutors, and jointly they act as the advocates in the court process for children who have witnessed or experienced sexual offences. For the children, these 'friendly' adults will be symbolic of the humanity of the CJS and assist in rebuilding trust after the violation associated with the sexual offence, which is often committed by a trusted adult. They will remember if these adults talked to them respectfully, gave credence to their experiences, and did the best they could to see that those responsible would be held to account.

The court support workers' written reports made reference to how prosecutors and magistrates operate. For instance, one court support worker felt that a certain prosecutor did not do enough to bring a case to justice. A certain magistrate was seen as insensitive to the difficulties a child witness had with testifying, while the child support worker recognised that this had more to do with the child's mental state

as a consequence of long-term abuse than with any fault in her actual testimony.

In some cases prosecutors were perceived as intimidating, reportedly acting in a very harsh manner towards the children whose rights they were supposed to uphold and protect. Child support workers felt that prosecutors were re-traumatising children by questioning them in a manner that made them emotional and undermined their ability to reliably testify in court. One of the support workers had this to say:

The prosecutor, she is very helpful to the kids, but sometimes she can also be unhelpful. They speak to kids, and sometimes they push them and say, no, you are not telling the truth ... because of the treatment they [the children] get, they end up getting emotional so that they can't handle it any further. (Interview: CSW 2)

Support workers believed that empathy with child victims was a missing ingredient in the system:

Maybe the lawyers or even the magistrate can feel for the child ... If we feel what the child is feeling, we will change our mindsets. (Interview: CSW 2)

Court support workers in our study appreciated the role of sensitive prosecutors:

The court is a very cold place ... it depends on the prosecutor, the one defending that child ... that prosecutor will tell the child, okay, you don't need to worry. Don't worry; everything is going to be fine. You don't have to fear. Don't even look at the perpetrator ... you look at me. (Interview: CSW 2)

## **Discussion**

### **Lack of uniformity in services to children**

Findings from this study suggest varying degrees of protection, assistance and support for child victims of sexual abuse during participation in the CJS. There were mixed reports from participants on the support received from investigating officers: some were clearly supportive, providing assistance that likely arose from sensitivity to the children and their ongoing ordeal/s, while others seemed to have little regard for them, or lacked sensitivity. Similarly, while some prosecutors did understand the needs of children, others were

demeaning and insensitive to the children. There could be various reasons for this: not knowing the extent of the impact testifying has on a child, a poor understanding of the 'best interests of the child' principle, and the low value placed on children in the CJS. These findings certainly denote unevenness in the standards applied across state stakeholders in the criminal justice system.

Gaps in the policy framework that should be setting these standards, and failures in management practices to enforce the standards that are set, exacerbate this inconsistency. The on-again, off-again approach to specialised policing units and SOCs has further undermined the standardisation of measures to better protect the rights of children in the system.

### **Protecting the rights of the child**

The findings revealed that the rights of children who attend court to equality, dignity and not to be treated or punished in a cruel, inhuman or degrading way, are regularly undermined. Assistance and support for these children most consistently come from court support workers. Yet, in the view of the child support workers, there is a systematic failure to protect children from the trauma of having to face the perpetrators and their families and the real or imagined threats directed at them in these encounters.

Defence lawyers' strategies and efforts to represent the constitutional rights of accused persons are necessary for the pursuit of justice. However, while there are provisions in law (such as the use of an intermediary to relate the questions posed in court to the child) to mitigate the negative impact of this on children, these provisions are not uniformly applied. The Constitutional Court found that the discretion of the court to apply these provisions is constitutional, but that their application by courts in many cases was unconstitutional, due to a failure to apply the best interests standard.<sup>64</sup> The Constitutional Court also underlined the importance of giving effect to the constitutional values of human dignity, equality and freedom in these matters. The failure of prosecutors and presiding officers to intervene when the cross-examination by defence lawyers becomes unnecessarily badgering, or undermines the child's dignity, is concerning and represents a

failure to promote the best interests standard. In addition, some prosecutors appear to have a poor understanding of how a child's testimony is affected when testifying in the presence of the accused, and when exposed to direct cross-examination.

Repeatedly having children and their caregivers wait endlessly at the courts, only to be told to return on another day, shows great disregard and a certain callousness to the victims of abuse. The findings from this study suggest that the legal and administrative proceedings involving children were not kept to a minimum. The participants spoke about delays in court proceedings, and continual postponements. All spoke about disregard for victims and their families, and having to wait many hours before being advised of a postponement.

### **Measuring performance in the management of sexual offences**

The findings of this study suggest that there are some instances in which the approach of staff in the criminal justice system, and the application of protective measures during the trial, may lessen the secondary trauma experienced by children. However, the absence of baseline or current research on this question means that it is not possible to assess if the rates of secondary trauma experienced by child victims have dropped in South Africa in response to developments over the past 20 years.

In spite of the difficulty posed by the reporting and performance statistics currently available, the available information on the performance of the CJS in terms of prosecution and conviction rates clearly shows that there has been little change in the case outcomes. The data available indicate that prosecution and conviction rates remain as alarmingly poor as was the case when they were studied 14 years ago.<sup>65</sup>

The failure to disaggregate police and prosecution data into age categories and types of offences obfuscates the ability to assess the actual performance of the CJS. Further, the unavailability of information on the attrition of cases from the reporting and prosecution stages means that strategies to address problems in this regard cannot be devised.

Information regarding how the relationship between the accused and the victim is linked to the case outcomes (i.e. is there a correlation between the relationship between the accused and the child and detection, prosecution and conviction rates?) may also assist in the planning of prevention strategies and responses, such as training interventions to improve the management of cases at all stages. At this stage, no such information is routinely collected.

### **Budget allocation to sexual offences**

It is currently not possible to assess how resources in the SAPS, the NPA or the DoJCD are allocated with the intent to improve the investigation and prosecution of sexual offences. An assessment of the information available in the NPA performance plans shows that the intention to improve SOCs is not likely to be realised, given the budgets available. For example, SOCs should be staffed by two prosecutors, however, the NPA reports that it does not have sufficient funds to pay the current number of prosecutor posts and that the compensation budget is under 'severe stress'.<sup>66</sup> In addition, while the MATTSO report calls for the establishment of SOCs, it goes on to suggest that the SOCs that will be developed are all already resourced to the standards set and there is no indication of a plan to increase resources for the further establishment of these courts.<sup>67</sup> The failure to commit funds to the further roll-out of SOCs will perpetuate the unevenness of services to child victims in different parts of the country.

### **Conclusion**

The law reform and policy developments undertaken to date clearly have not had the desired impact on case outcomes, and too many children continue to experience avoidable secondary victimisation when traversing the CJS. The impact of the NPF and the extent to which recommendations in the MATTSO report are implemented may be critical factors in changing the experiences that children have in what has remained to date a stubbornly negative environment for child victims.

The participants in our study reported children's discomfort, fear and trauma when confronting the perpetrator either in court, in the court buildings

and/or outside of court. The court support workers spoke about children becoming confused, recanting testimony and/or appearing untrustworthy when harangued by defence attorneys. While the justice system is adversarial, ways to mitigate the harsh effects that adversarial court systems have on children's rights to dignity, privacy and freedom from harm must be given serious consideration. We offer the following recommendations:

- SAPS statistics should include age-disaggregated data to allow for year-on-year monitoring of reported sexual offences against children.<sup>68</sup> In addition, the different types of sexual offences, and in particular rape and sexual assault, should be reported separately.
- NPA performance data must include information on the numbers of cases referred for prosecution against the numbers of cases prosecuted. Similar to the above recommendation, these figures should be age-disaggregated and various sexual offences should be separately reported.
- The allocation of budget to sexual offences matters by the SAPS, the NPA and the DoJCD must be delineated in annual performance plans. Spending must be reported in the annual reports.
- To promote uniformity in protecting children's rights, and to guard against regression where good standards are developed, standards for infrastructure and staffing in SOCs, in line with the recommendations of the MATTSO report, must be incorporated into a formal policy framework or law. This can be achieved by including these standards in regulations to the Judicial Matters Second Amendment Act of 2013. Although this Act makes the development of regulations discretionary and consequently sets no time frames for their development, the DoJCD must be urged to finalise these urgently.
- Court support workers should have ongoing, expert professional psycho-social training and supervision. This would provide them with the skills necessary to avoid crossing professional boundaries, vicarious trauma and 'compassion fatigue'.<sup>69</sup>

- A greater investment should be made to improve the quality of investigations and forensic evidence collection.
- The robust implementation of existing instructions for police officials when dealing with sexual offences is needed. This includes systematic monitoring of their implementation. The National Instructions for police officers when dealing with child victims of sexual abuse should be extended to include measures to ensure the child's rights to privacy, dignity, and safety once s/he enters the court system.<sup>70</sup> Specifically, rules regarding transporting child witnesses and perpetrators to court need to be clearly spelled out.
- Police officers should have training in the particular psychological vulnerability of child victims of sexual abuse and their caregivers, and in how to question and take statements from children in a sensitive manner.
- The quality of prosecution of sexual offences against children should be strengthened. This could be done through improving the skills and knowledge of prosecutors in the technical as well as the emotional aspects of prosecution and working with child victims of trauma.<sup>71</sup> Not only training, but improved recruitment and selection processes for prosecutors would go a long way to strengthen the quality of prosecution of sexual offences against children. To this end the recommendation contained in the Directives for Prosecutors – that dedicated prosecutors who are experienced, skilled and sensitised – are selected, should be adhered to, without exception.<sup>72</sup>
- The CJS is essentially 'adversarial' in nature; this means that the victim's needs and rights carry the least weight in relation to those of the accused and the state. To undertake reforms that would increase the 'inquisitorial' nature of the system would allow for an increased focus on the victim's needs. At its simplest level, this means that the magistrate can play a greater role in protecting the rights of the victim, within the constitutional framework, yet sometimes at the expense of entrenched rules of procedure, for the purpose of uncovering the truth. Even without reform to the nature of the system, there is sufficient precedent for presiding

officers to play a stronger role to promote the rights of child victims. Careful selection and quality training of presiding officers prior to their hearing sexual offences matters can improve the level of protection provided to children within the current constitutional framework.

- The use of video testimony of child victims, either within evidence-based prosecutions or within the current system, should be further investigated or considered. The child's entire testimony could be video recorded and replayed during trial without necessitating the child's presence in court.
- The NPF and the recommendations made in the MATTSO report must be implemented as a matter of urgency.

This study has alerted us to the sometimes callous attitudes of adult role players towards child victims. The training of court role players needs to be placed within a psycho-social context to promote increased levels of sensitivity. This would go a long way to ensuring consistently good and empathetic service delivery, including regular supervision of adherence to the objective of limiting the secondary traumatisation of child victims.

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## Notes

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