

**CHAPTER NINE**  
**PROTECTIVE MEASURES:**  
**In Camera Hearings, Closed Circuit Television, Support Persons**  
**And Vulnerable Witnesses**

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**1. CURRENT SOUTH AFRICAN POSITION:**

The effectiveness of existing protective legislative measures has been severely hampered by the lack of knowledge on the part of witnesses of their rights and the failure of presiding officers to interpret the law in a manner congruent with providing adequate protection to witnesses in sexual offence proceedings. In fact, the courts have displayed a general reluctance to afford such witnesses protection as to do so has been said to negatively affect the rights of the accused to challenge incriminating evidence.

**2. PROPOSAL BY LAW COMMISSION:**

The proposed legislative enactment is set out in Clause 11 of the Bill.

**3. DISCUSSION:**

We commend the Commission for recognising the need to enact legislation dealing with the notification of witnesses in sexual offence proceedings with regard to the availability of protective measures and the importance of placing a positive duty on both the prosecution and the presiding officer in this regard.

Notwithstanding the above, we draw the Commission's attention to our proposals with regard to allowing for limited legal representation of complainants in sexual offence proceedings [see Chapter 7 of this document] automatically declaring all witnesses, other than the accused, in such proceedings vulnerable witnesses. If our proposals in this regard are accepted, we recommend that draft Section 11 of the Bill be deleted in its entirety as its inclusion in the final act would be redundant.

Alternatively, If our recommendations are not accepted or if it is deemed prudent to retain Clause 11 of the Bill as a precautionary measure aimed at ensuring that witnesses are informed of their rights, we recommend that witness notification be linked to the time when such witness is to testify rather than the commencement of the criminal proceedings. Accordingly we recommend that subsection (1) read as follows:

**“The prosecution shall inform a witness who is to give evidence in criminal proceedings in which a person is charged with the alleged commission of a sexual offence, or if such witness is below the age of eighteen years, such witness, his or her parent, guardian or a person in loco parentis, of the possibility that he or she may be declared a vulnerable witness in terms of section 13 and of the protective measures listed in paragraphs (a) to (g) of section 13(4) prior to such witness commencing with his or her testimony at any stage of the proceedings.”**

Similarly, if Clause 11 is retained and our recommendation regarding blanket declaration of vulnerability is not followed, we suggest in relation to subsection (2) that the court must have a duty to enquire where a witness has been informed of the possibility of being declared a vulnerable witness and of the protective measures associated therewith, the court must ensure that the witness is so informed but shall also apply its mind, prior to the commencement of the witness's testimony, to whether or not such witness should be declared a vulnerable witness in terms of the provisions of Section 13, and, if so, what protective measures should be applied.

As regards the non-legislative recommendations set out in chapter 21 of the Discussion Paper to the Draft Sexual Offences Act, and to the extent that it remains necessary in the light of our proposals above, we support the development and establishment of a training programme for prosecutors and presiding officers in relation to witness notification. Furthermore, and in respect of the launching of a victim empowerment program to inform witnesses in sexual offence proceedings of the protective measures that may be requested, we suggest that the proposed pamphlets be distributed to witnesses either at the time when the offence is reported or at the time when the witness is first notified that he or she is to testify in sexual offence proceedings.

## **IN CAMERA HEARINGS**

### **4. THE CURRENT SOUTH AFRICAN POSITION**

Both public policy and section 35(3)(c) of the Constitution grant an accused the right to a public trial. In *Nel v Le Roux NO*<sup>1</sup> the Constitutional Court however recognised that the right of an accused to a public trial is not absolute and that there are well-recognised exceptions to the rule, which exceptions may be justified<sup>1</sup> in terms of the limitations clause contained in the Bill of Rights.

While the present formulation of Section 153 of the CPA is sufficient to protect complainants in sexual offence proceedings, its effectiveness has been severely curtailed by the failure on the part of the prosecution and presiding officers to invoke the protections provided for therein and, indeed, to inform those eligible for protection of their rights in this regard.

### **5. PROPOSAL BY THE LAW COMMISSION:**

The proposed legislative enactment is set out in Clause 14 of the Bill.

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<sup>1</sup> *Nel v Le Roux NO* 1996 (3) SA 562 (CC)

## **6. DISCUSSION:**

### **Amendment of section 153(3a) of the CPA**

We support the proposed amendment of Section 153(3A) of the CPA to specifically provide for the presence of a support person appointed as such by the court during in camera proceedings.

### **Training of prosecutors and court officials**

As regards training for prosecutors and presiding officers in respect of witness notification, this is dealt with in terms of chapter 21 of the Discussion Paper to the draft Sexual Offences Bill and we refer the reader to our detailed submissions in relation thereto.

### **Movement of persons in and out of court during an in camera hearing**

We are of the opinion that the Bill should impose a positive duty on presiding officers to ensure the limitation of movement of court officials and private persons whilst a vulnerable witness is testifying. Accordingly, we recommend that presiding officers be directed to issue an order declaring the court closed for the duration of the testimony delivered by a vulnerable witness, which order must be enforced by the court orderly or similar official.

## **CLOSED CIRCUIT TELEVISION**

### **7. CURRENT SOUTH AFRICAN POSITION**

Section 158 of the CPA provides for the use of closed circuit television in certain circumstances. The section has however been subject to narrow interpretation by the courts and its intention repeatedly frustrated as a result.<sup>2</sup>

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<sup>2</sup> . See in this regard **S v F** 1999 (1) SACR 571 (C).

## **8. PROPOSALS BY THE LAW COMMISSION**

The Commission proposes the amendment of section 158 by the insertion after subsection (3) of two new subsections.

## **9. DISCUSSION:**

In relation to the draft Section 158(3A), we recommend that the words "*it is imperative that*" be deleted from line 2 as, while it may not be "imperative" that a witness give evidence by means of closed circuit television, it may nevertheless be the case that such protection should be afforded the witness concerned upon consideration of all the relevant provisions in the Bill.

Furthermore, we are concerned about the appropriateness of certain factors which a court is required by draft Section 158(3B) to take into account when considering whether to transfer criminal proceedings in terms of subsection (3A), and particularly the weight which may be attributed to such factors, whether individually or cumulatively. In this regard, we submit that that subparagraphs (d) and (f) of subsection (3B) be deleted as it is always likely to be costly to have the proceedings transferred and that such transfer will bring about an "unreasonable delay" given the current backlog experienced by the South African courts. Alternatively, presiding officers should be given specific direction as to what constitutes an "unreasonable delay".

### **Plan for the training and use of closed circuit television in sexual offence courts:**

We recommend that a positive duty should be placed upon the National Directorate of Public Prosecutions regarding the development and implementation of a plan for the training and use of closed circuit television in sexual offence matters. Furthermore, the Directorate should be given a specific time frame within which to develop and implement this plan.

## **10. RECOMMENDATION:**

We accordingly recommend that Sections 158(3A) and 158(3B) of the CPA be amended to read as follows:

**“(3A) If in criminal proceedings involving the alleged commission of a sexual offence the court is of the opinion that a witness or an accused should give evidence by means of closed circuit television or similar electronic media and such facilities are not readily available or obtainable, the court may order that the criminal proceedings should be transferred to another court which has such facilities after the approval of such other court has been obtained.**

**“(3B) When considering whether a transfer as referred to in subsection (3A) should be effected, the court shall take into account-**

- a) the need to protect the person who is to give evidence by means of closed circuit television or similar electronic media from traumatisation;**
- b) The wishes of the person who is to give evidence by means of closed circuit television or similar electronic media;**
- c) The wishes of other persons who are to give evidence in the proceedings; and**
- d) Inconvenience to the complainant;”**

## **SUPPORT PERSONS**

### **11. CURRENT SOUTH AFRICAN POSITION:**

At present, no statutory provision is made for the appointment of a designated support person to accompany and thereby provide emotional support to a witness in sexual offence proceedings.

### **12. PROPOSALS BY LAW COMMISSION:**

The proposed legislative enactment is set out in Clause 14 of the Bill.

### **13. DISCUSSION:**

#### **Limitation of entitlement to support person**

Subsection (1) as currently formulated clearly limits a witness's entitlement to a support person of their choice by -

- making such entitlement a matter to be determined by judicial discretion; and
- failing to place a positive duty on the prosecution and the court to inform a witness of his or her right to have a support person present at all times.

#### **Parents or guardians as support persons**

Furthermore, although subsection (1) currently provides for a witness to be accompanied by a support person of his or her choice, cognisance must be taken of a minor's wishes in relation to his or her parent or guardian or a person *in loco parentis* being the designated support person. The importance of taking the minor's wishes into account is illustrated by the common reluctance on the part of minors to narrate the intimate details of a sexual offence in the presence of his or her caregiver. Accordingly, we recommend that the court enquire from the minor him or herself as to his or her choice of a support person.

#### **Appointment of support person not in the interests of justice**

We recommend that where the court makes a finding that the appointment of a requested support person will not be in the interests of justice, the presiding officer must be required to record the reasons for such finding.

#### **Revoking appointment of support persons**

In relation to subsection (4), we submit that the words “*after having consulted with the said witness in private*” be inserted after the comma and before the words “*at any time*” in the second line of the subsection. Furthermore, we submit that the words “*of the witnesses choice*” be inserted after the word “*person*” and before the words “*in his or her place*” in the last line of the subsection.

### **Affirmation by support person**

Subsection (5) requires the designated support person to affirm to the court that he or she will assist the court to the best of his or her ability and not in any manner interfere with the witness or the evidence being given. We submit that the proposed affirmation is inappropriate in the circumstances and that it would be sufficient merely to inform the said person that he or she may not interfere with the witness or the evidence being given. Accordingly, we recommend that subsection (5) be deleted in its entirety.

### **Transport allowance**

We support the inclusion of subsection (6) regarding the transport allowance as currently formulated.

### **Support person where witness testifies outside the presence of the accused**

Where a witness is giving evidence outside of court, for example in circumstances contemplated in Sections 158(3) and 170A of the CPA, it should be clearly stated that such person is entitled to the presence of a support person of their choice. In this regard, we support the inclusion of draft Section 158 (3A) in the CPA and recommend that a provision consistent therewith be inserted in Section 170A of the CPA. Accordingly, we recommend that Section 170A be amended by insertion after subsection (6) of the following subsection:

**“170A(7) If a court has directed that a vulnerable witness as referred to in subsection (5) be accompanied by a support person as referred to in section 14 of the Sexual Offences Act, 20... (Act No. xx of 20...) no examination, cross-**



examination or re-examination of such witness shall take place other than in the presence of his or her support person unless such witness agrees otherwise.”

## **VULNERABLE WITNESSES**

### **14. CURRENT SOUTH AFRICAN POSITION**

At present, witnesses in sexual offence proceedings are not automatically afforded protection in order to ensure their ability to give evidence and to preserve the integrity of such evidence. This is due to a lack of recognition of the vulnerability of complainants in sexual offence proceedings and the secondary victimisation they commonly experience in the criminal justice system.

While provision is made in the Criminal Procedure Act [CPA] for certain protective measures,<sup>3</sup> the courts apply these measures inconsistently, if at all, and witnesses are frequently unaware of their rights.

In the light of the above, we commend the Commission for aligning itself with the international move towards making special protective measures automatically available to all victims of sexual offences who are required to give evidence in criminal proceedings and for further recognising the need to extend such protection, in certain circumstances, to all witnesses to a sexual offence due to the traumatising and intimate nature of such offences.

### **15. PROPOSAL BY THE LAW COMMISSION:**

The proposed legislative enactment is set out in Clause 13 of the Bill.

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<sup>3</sup>. See ss 158(3) and 170A of the CPA.

## **16. DISCUSSION AND RECOMMENDATIONS:**

### **'Blanket' declaration of witnesses as vulnerable**

We support the Commission's proposal that complainants in sexual offence proceedings automatically be declared "vulnerable witness" and that at least one of the protective measures provided for in subsection (4) should apply.

However, we are of the opinion that the automatic declaration as a 'vulnerable witness' (and concomitant use of protective measures) should not be limited to the witnesses listed in subsection (1).

We argue for a recognition that witnesses other than complainants in sexual offence proceedings who have not 'witnessed the offence being tried' may also require protection regardless of their age. Especially where the offence was committed in an intra-familial context, or in a relatively closed community, other witnesses may be equally in need of protective measures in order to assist them to testify. Examples may include the person to whom the offence is first reported or family members where the accused forms part of the victim's family.<sup>4</sup> Where the witness indicates that she or he does not wish to be declared a vulnerable witness, this measure may be dispensed with. Accordingly, we suggest that subsection (1) read as follows:

#### **Recommendation No 1:**

**"A court, in criminal proceedings involving the alleged commission of a sexual offence, must declare a witness, other than the accused, who is to give evidence in that proceeding a vulnerable witness."**

Alternatively:

If Recommendation No 1 is not accepted, we recommended that the words "*below the age of 18 years and*" be deleted from section 13(1)(b) so that subsection (1) reads as follows:

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<sup>4</sup> . A further example would be the forensic nurses referred to in the Discussion Paper.

### **Recommendation 1a:**

**“A court, in criminal proceedings involving the alleged commission of a sexual offence, must declare a witness, other than the accused, who is to give evidence in that proceedings a vulnerable witness if such witness is-**

- a) the complainant in the proceedings pending before the court; or**
- b) has witnessed the offence being tried.”**

### **Discretion to declare witnesses as ‘vulnerable’**

In addition to subsection (1), which provides that prescribed witnesses *must* be declared a "vulnerable witness", subsection (2) grants the court the discretion to afford certain witnesses such status upon consideration of certain listed factors. If Recommendation No 1 above is accepted, we recommend that subsection (2) be deleted in its entirety.

Alternatively:

If Recommendation No 1 is not accepted, we suggest the insertion in subsection (2) of two further factors for consideration by the court in exercising its discretion.

Witnesses may be reluctant to testify in front of others to whom they are connected by virtue of a specific relationship. For example, witnesses in sexual offence proceedings have expressed their reluctance to testify in front of community elders and/ or family members whom they fear or respect, be they the accused or simply someone present at the trial. The graphic or incriminating nature of the evidence may also render a witness vulnerable, particularly in the context of sexual offence proceedings where evidence of a particularly private or intimate nature may be led. The witness may also have kept the information secret for an extended period of time or may consider it shameful, and may accordingly be reluctant to testify in detail.

### **Recommendation 2:**

We accordingly suggest the addition of the following two subsections:

- (f) the relationship of the witness to any party to the proceeding, 1 and / or**
- (g) the nature of the subject matter of the evidence.**

### **Clarification of 'trauma'**

Subsection 2(c) lists "trauma" as a factor that may result in a witness being vulnerable. In this regard, we recommend that the subsection be re-phrased to reflect that this trauma may result from recounting the evidence and / or testifying in front of the accused or others. Accordingly, we suggest that subsection 2(c) be re-worded as follows:

### **Recommendation 3:**

**"trauma associated with giving evidence in relation to the alleged commission of a sexual offence and / or testifying in the presence of the accused or in open court in sexual offence proceedings;"**

## Evidence by 'knowledgeable' persons

Subsection (3) provides the court with the discretion to summon any "knowledgeable" person to appear before and advise the court on the vulnerability of a witness. In the event that our Recommendation No 1 is accepted, then the need for the opinion of a "knowledgeable person" would be obviated and it is recommended that subsection (3) be deleted in its entirety.

Alternatively:

If the aforesaid recommendation is not accepted, we suggest that the summoning of a "knowledgeable person" should be mandatory where doubt exists and should not be a matter for judicial discretion. Furthermore, guidelines as to who would qualify as a "knowledgeable person" should be included in sub paragraph (3).

## Appointment of intermediary

While we support the recommendation that an intermediary be appointed in respect of a minor who has been afforded "vulnerable witness" status, we are concerned about the fact that this protection is made subject to "exceptional circumstances justifying the non-appointment of an intermediary".

The phrase "exceptional circumstances" as employed in section 60(11)(a) of the Criminal Procedure Act 60 has been subjected to varied and inconsistent interpretation by the courts.<sup>5</sup> Accordingly, our concern is that such a broad discretion will result in the denial of protection in circumstances where the granting thereof would be appropriate. Furthermore, although the court is directed to record its reasons for the non-appointment of an intermediary, in practise presiding officers often fail to provide reasons and even where reasons are provided, witnesses are forced to testify without being afforded an opportunity to contest the non-appointment

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<sup>5</sup> . See in this regard e.g. **S v Jonas** 1998 (2) SACR 677 (SE); **S v C** 1998 (2) SACR 721 (C); **S v H** 1999 (1) SACR 72 (W); **S v Mokgoje** 1999 (1) SACR 233 (NC); **S v Mauk** 1999 (2) SACR 479 (W); **S v Mohammed** 1999 (2) SACR 507 (C); **S v Siwela** 1999 (2) SACR 685 (W); **S v Yanta** 2000 (1) SACR 237 (Tk); **S v Vanqua** 2000 (2) SACR 371 (Tk);

of an intermediary prior thereto. We therefore recommend that a provision be inserted in the Act that provides witnesses in sexual offence proceedings the right to challenge the non-appointment of an intermediary prior to testifying. In this regard, we recommend that subsection (5) be re-worded as follows:

**“(5) If the court has declared a person below the age of 18 years a vulnerable witness, the court must, subject to the provisions of subsection (8), direct that an intermediary as referred to in subsection (4)(c) be appointed in respect of such witness unless there are exceptional circumstances justifying the non-appointment of an intermediary, in which case the court must record the reasons for not appointing an intermediary, which reasons may be challenged by such witness, or by another person on his or her behalf, and the determined by the Court prior to such witness being required to commence with his or her testimony.”**

### **Qualifying criteria**

In terms of subsection (6), the court *may* direct that the protective measures referred to in paragraphs (b) to (e) of subsection (4) be applied in respect of a vulnerable witness, irrespective of any other qualifying criteria that may be prescribed by the relevant provisions of the CPA. The discretion granted to the court in terms of subsection (6) is in direct conflict with the express direction to the court in terms of subsection (4) that it *must* direct that a vulnerable witness be protected by one or more of the listed protective measures. Accordingly, we recommend that subsection (6) be deleted in its entirety in order to avoid the confusion that may be occasioned by its inclusion in the Act and that the relevant sections of the CPA referred to in subsection (4) be amended where necessary.

### **Determining which protective measures should apply**

In respect of subsection (7), we are concerned that in determining which of the protective measures in subsection (4) should apply, the court *must* first be satisfied, presumably on a balance of probabilities, that such measure(s) *“is likely to improve*

*the quality of evidence to be given by that witness*". The application of protective measures is thus made subject to the satisfaction of this initial requirement, failing which protective measures cannot be granted. Our concern is that presiding officers will disregard the intention of the Act and, claiming that they have not been satisfied as required by the express wording of subsection (7), continue to deny protection to vulnerable witnesses. Accordingly, we submit that it should be accepted that any or all of the protective measures afforded to a vulnerable witness are likely to improve the quality of their evidence and that such acceptance is in line with the intention of the Act. We therefore recommend that the introductory paragraph to subsection (7) be amended to read as follows:

**"In determining which protective measure or protective measures as referred to in subsection (4) should be applied to a witness the court must have regard to all the circumstances of the case, including-**

In terms of subsection (7)(c), the court must consider whether there is a need to protect the witness's dignity and sense of safety and to protect the witness from *"further traumatisation"*. We submit that it should be accepted that the aforementioned needs exist in respect of *all* vulnerable witnesses and, accordingly, they should not be included as factors for consideration when determining which of the protective measures should be applied to a vulnerable witness. The danger of allowing judicial discretion in this regard is clearly illustrated by the case of *S v F*.<sup>6</sup> *In casu* court denied the witness in question protection as it had not been specifically alleged that giving evidence in the presence of the accused would subject the witness to further trauma than it had been alleged would result from having to narrate the details of the offence.

Subsection (7)(d) further requires courts to consider whether the protective measure(s) requested is likely to prevent the evidence given by a witness from being effectively tested by a party to the proceedings. Again, we are of the opinion that it should be accepted *as a matter of course* that the protective measures applied to vulnerable witnesses are reasonable and justifiable and not preventative of the

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<sup>6</sup>. **S v F** 1999 (1) SACR 571 (C).

evidence being tested effectively. In support of this submission we point out that the rights enjoyed by an accused are not unlimited<sup>7</sup> and need to be balanced with those of a witness in criminal proceedings, and particularly a vulnerable witness in sexual offence proceedings.

Accordingly, we recommend that subparagraphs (c) and (d) of subsection (7) be deleted in their entirety in an effort to ensure that the rights of the accused are not placed above the rights of witnesses not to have their dignity or sense of safety infringed and, most importantly, not to be subject to secondary trauma in their pursuance of justice.

### **Revoking direction**

We are concerned about the proposal that the court may at any time revoke or vary a direction given in terms of subsection (4) in relation to a vulnerable witness upon the request of the prosecution. We suggest that the prosecution would need to make out a convincing case for the revocation or variation of such direction and that guidelines should be included as to what circumstances may justify the prosecution making such request. Furthermore, we submit that the court must be satisfied that it would be in the interests of justice to vary its initial direction and that such variation or revocation is likely to improve the quality of evidence to be given by that witness, having regard to all the circumstances of the case, including the factors listed for consideration in subparagraphs (a) and (b) of subsection (7).

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<sup>7</sup>. In *R v Rall* 1982 (1) SA 828 (A) the Appellate Division recognised in principle that the rights of an accused are not absolute and in so doing acknowledged that the interests of a witness require protection as well.