/41016 PC justice

Resources Aimed at the Prevention of Child Abuse and Neglect

IMPLEMENTATION BRIEF ON THE MANAGEMENT OF CHILD SEXUAL OFFENCES IN COURTS: Failing systems, broken promises

Authors
Samantha Waterhouse
Blanche Rezant
Loraine Townsend
Christina Nomdo

April 2014

Table of Contents

1. Introduction

Rates of sexual violence against children in South Africa remain alarmingly high and do not seem to be dropping significantly. The past 15 years have seen concerted effort to improve the legal and policy framework to respond to these matters, however, the question at this stage is if those developments are resulting in changes in practice and improved protection of children's rights within the system.

Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) provided court preparation and support services in six[1] regional magistrate's courts in the Western Cape between 2002 and 2013. Through this work the organisation has developed a deep understanding of the significant implementation challenges faced by stakeholders in the system, by children and their families.

RAPCAN is particularly concerned that although there have been significant legislative and policy developments in this regard, and noting the constitutional standard that the best interests of the child are of *paramount importance in all matters affecting children;*[2] in practice, children's interests are often considered secondary to the interests of the system and of the adults who work in that system. Further children's views on and experiences of the system receive little attention in the discourse.

In an effort to draw further attention to the perspectives and experiences of children, RAPCAN undertook a research project to engage directly with children, their care-givers and the court support workers (CSW) who provide support to children going to court through the RAPCAN programme. This brief is based on an analysis of interviews and of written reports from CSW emanating from a workshop held for the purpose of obtaining their experiences and views. Throughout we include direct quotes from these sources to illustrate the points raised. In addition, we have undertaken an analysis of various law, policy and programmes relating to sexual offences against children as well as referring to available research and reports on the implementation of these.

The nature of the experiences that these children have had and the associated trauma, affect a project of this nature significantly. A research project relating to the traumatic experience of the sexual offence as well as the further trauma experienced by many during the trial process, holds the danger of re-opening feelings of distress and possibly creating yet more trauma. For this reason, in spite of a large number of children and their families being contacted to participate in the process, only a small number of children wanted to or were suitable to be interviewed. The information provided by the children has been augmented by information from their caregivers as well as the CSW who work closely with the children and thus have a more direct sense of the impact of the trial process on the child.

Managing criminal sexual offence matters requires the intervention and coordination of a number of government departments and agencies, ranging from the Department of Social Development, the Department of Health, the South African Police Service and the Department of Justice and Constitutional Development (including the National Prosecuting Authority). However, the scope of this implementation brief will focus only on the Department of Justice and Constitutional Development (DoJCD) and National Prosecuting Authority (NPA) as the most significant actors in the court system.

Throughout this brief we include comment on the implications for implementation and practice at the end of each section.

---

[1] This number was subsequently reduced to 5, before Childline South Africa took over these services under RAPCANs guidance in 2012

[2] The Constitution of the Republic of South Africa. Act 108 of 1996. S 28(2)

1.1. Developments in law and policy

The South African legal and policy framework for child protection and to promote access to justice in sexual offences matters is relatively strong. Principle among the legislation addressing the issue of sexual offences is the Criminal Law [Sexual Offences and Related Matters] Amendment Act of 2007 (SOA) and the National Policy Framework for the Management of Sexual Offences (NPF) that was developed in response to the requirements of the Act. The SOA, includes important provisions for the development of policy directives for different stakeholders in the criminal justice system, including the NPA (which falls under the DoJCD). These directives establish duties on prosecutors regarding the manner in which preparation and prosecutions should be undertaken. Notwithstanding this, a major criticism of the Act has been its failure to adequately improve the implementation of certain protective measures for child witnesses and complainants.[3] As a result of this, many consider the Act to fail in its objective to *'afford complainants of sexual offences the maximum and least traumatising protection that the law can provide'*.[4]

The Constitutional Court considered the question of if the measures that protect the rights of children during trial, contained in the SOA, meet constitutional muster in *Director of Public Prosecutions v Minister for Justice and Constitutional Development and Others 9[2009] ZACC 8*). In its judgement the Constitutional Court found that the problem does not lie with the provisions of the Act but rather with the interpretation and implementation of the Act by presiding officers and other court staff. The Court stressed that the constitutional provision that *'the best interests of the child are of paramount importance'* must be considered when making any decisions relating to the use of the protective measures in the SOA. Further, the court directed that the legislation must be interpreted to give effect to the constitutional values of human dignity, equality and freedom.[5] The implications of the judgement affect criminal justice practitioners particularly presiding officers but also prosecutors, intermediaries, interpreters and defence lawyers.[6] Its main impact is to provide guidance to these practitioners regarding the correct interpretation of the provisions in the SOA, in accordance with the rights contained within the Constitution to ensure that the consideration for the best interests of the child remain paramount. It indicates that when using discretion to decide on the use of these measures, that the constitutional principles and rights should be a primary consideration.

Importantly, a recent law signed in January 2014 has provided the legal framework for the establishment of Sexual Offences Courts (SOCs).[7] 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, nor regarding the standards and functioning of these courts. The detail required may be contained in regulations. However, the Act does not mandate the Minister to develop these regulations and as such it is currently unknown if and when these will be developed.[8]

Prior to the development of the legislation for the SOCs, the Minister of Justice and Constitutional Development established a Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (MATTSO). The MATTSO comprised a range of stakeholders from government and academic institutions which undertook a detailed investigation into the question of the re-establishment of sexual offence courts. This included examining international frameworks and practice, auditing existing court services for sexual offences in South Africa and analysing a wealth of research into the effectiveness and weaknesses of court services for sexual offences. In their report, issued in August 2013, the MATTSO strongly recommend the re-

---

[3] Applicants and Amicus arguments made in *Director of Public Prosecutions v Minister for Justice and Constitutional Development and Others 9[2009] ZACC 8*

[4] Section 2 Criminal Law Sexual Offences and Related Matters Amendment Act. No32 of 2007

[5] Summary of the Constitutional Court Judgment in *Director of Public Prosecutions v Minister for Justice and Constitutional Development and Others ([2009] ZACC 8).* Centre for Child Law, University of Pretoria referring to paragraph 83 of the judgment.

[6] *Ibid*

[7] Judicial Matters Second Amendment Act of 2013 no. 43 of 2013 which Amends section 67 of the SOA

[8] *ibid*. Section 4

establishment of sexual offence courts in South Africa.[9] In addition the MATTSO report is consistent with many of the recommendations made in a submission to parliament in April 2013 by the *Shukumisa Campaign,* a group of civil society organisations working with sexual offence survivors and the criminal justice system to promote improved justice in sexual offences.[10] The MATTSO report makes a range of recommendations to improve the implementation of the existing policy on the management of sexual offences cases at court, many of those are consistent with the recommendations contained in this implementation brief. The extent to which the MATTSO report engages with these issues is far greater than what is possible within the scope of this implementation brief. To this end we recommend its reading.[11]

Although the MATTSO report does not have policy status, it is important, as it indicates that Government, and in particular the DoJCD have a strong sense of what the issues are and what is required to address the many challenges in the system. In addition it provides an important tool with which to advocate for advances in the implementation of the existing framework to promote increased protection for child victims of sexual offences.

1.2. Performance of the Criminal Justice System

In spite of these policy developments, their implementation remains challenging. The protection of the rights of child victims and witnesses in criminal matters remains uneven. For too many children, these changes in policy have not translated into changes in practice. The result is that alarming numbers of children who've experienced sexual violence, continue to be exposed to high levels of avoidable distress and trauma while negotiating the course of the criminal justice process. A wealth of research from South Africa and globally indicates the range of challenges and additional trauma experienced by children who've experienced sexual offences as a result of their engagement with the criminal justice system.[12]

A trajectory of interventions to improve access to justice for children, such as the establishment of SOCs, led to some improvements in the management of these matters and greater protection of children's rights, however the lack of political commitment to ongoing investment in these has resulted in reversal. This has led to the loss of many gains in the struggle to achieve justice in these cases and a reversal in standards applied in these cases. Recent decisions to reintroduce these have not yet been implemented.

An analysis of recent annual reports from the NPA and the South African Police Service (SAPS) indicates that the conviction rates in terms of cases reported to the police is approximately 6.9%. This is based on recent annual reporting rates of all sexual offences to SAPS which fluctuate at around 65 000 and the NPA number of 6 913 sexual offences cases finalized in 2011/12 at a conviction rate of 65.1% of these finalized cases (which amounts to 4 500 convictions).[13] Thus if only 4 500 out of 65 000 cases reported to the police resulted in conviction the rate would be 6.9%. This manner of calculating conviction rates is not accurate, however it does provide a fair estimation of what the actual rate might be. Further large scale-research to track actual cases would provide a more accurate picture.

Where case-tracking research on conviction rates has been conducted in smaller jurisdictions the rates that emerge are chillingly low. A study on rates in Gauteng in 2003 found the conviction rate for rape to be 4% of

---

[9] Report on the Re-establishment of sexual offences courts; Ministerial advisory task team on the adjudication of sexual offence matters August 2013. (MATTSO 2013)

[10] Shukumisa Campaign. *Submission to the Portfolio Committee on Justice and Constitutional Development on the Strategic Plans and Budget of the Department of Justice and Constitutional Development and the National Prosecuting Authority.* 13 April 2013

[11] The Report can be accessed at http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf

[12] Müller, K. and Van der Merwe, A. 2005. Judicial management in child abuse cases. SACJ (1) 42-43

[13] National Prosecuting Authority. 2013. *National Prosecuting Authority 2011/12 Annual Report*. P40

cases reported.[14] Another study tracking cases from a single police station found the conviction rate in rape cases against children to be 4.1% (and 0.8% for rape of adult women).[15] When compared to a study published in 2000 on conviction rates which tracked actual cases through the system, the overall conviction rate for *rape* matters was 7%. In rape cases involving children, it was 9%.[16]

Another important factor is the category of offences being counted. Previously it was possible to establish the conviction rates for rape specifically. More recently government reports on all 59 sexual offences in a single category. Vetten et al's 2008 study shows that the conviction rate for rape tends to be lower than that for other sexual offences.[17]

The fact that there is no difference in the conviction rates over the past 14 years raises the serious question of what value the law reform and programme developments relating to the prosecution of sexual offences over the past two decades has actually had.

1.3. The Sexual Offences Court Model

Based on analysis of the blueprints that were developed for SOCs in 2002 and 2005 and informed by the research undertaken, the MATTSO Report has developed a Sexual Offences Court Model that goes further than these original blueprints. This model includes a range of elements and the report provides significant detail regarding the optimum implementation of these.[18]

Infrastructure
The Model requires a courtroom, a separate room for testimony through CCTV and intermediary systems, CCTV equipment, separate waiting rooms for adult and for child witnesses and anatomically detailed dolls.[19]

Staff
The Model provides for a presiding officer, interpreter, intermediary, designated clerk, designates social worker, legal aid practitioner and court preparation or victim support officers. Importantly the Model requires that two prosecutors be assigned to each court.[20]

Minimum Training
The Model recognises the importance of quality training programmes for all personnel working in these courts. It sets out the range of issues on which staff must be trained these include training on the SOA and the Victim's Charter, the trauma related to sexual violence, the effect of testifying in court on victims, communication with children, child development, and working with people with mental disabilities amongst others.[21]

Victim Support
The requirements for victim support contained in the Model include the provision of court preparation programmes for witnesses, information, victim support and a feeding scheme for child witnesses.[22]

---

[14] Vetten L, Jewkes R, Sigsworth R, Christofides N, Loots L and Dunseith O. (2008) *Tracking Justice: The attrition of rape cases through the criminal justice system in Gauteng.* Johannesburg: Tshwaranang Legal Advocacy Centre, South African Medical Research Council and the Centre for the Study of Violence and Reconciliation.
[15] Vetten, L, van Jaarsveld F and Riba, P. (2012). *A Criminal Injustice System? The attrition of rape cases in one rural locality, Mpumalanga.* Research Brief 5, Tshwaranang Legal Advocacy Centre.
[16] Paschke, R. and Sherwin, H. 2000. *Quantitative research report on sentencing.* Institute of Criminology, University of Cape Town.
[17] Vetten L et al 2008 *Ibid*
[18] MATTSO 2013 *Ibid* Pp76-79
[19] MATTSO 2013 *Ibid* Pp76-77
[20] MATTSO 2013 *Ibid*. Pp79
[21] MATTSO 2013 *Ibid*. Pp79
[22] MATTSO 2013 *Ibid*. Pp79

Data Collection
Finally the model requires a data collection system to enable proper tracking of cases and trends in each court.[23]

This Model improves on the previous standards set by the blueprints. Primarily in its recognition of the need to improve court responses in matters where the complainant has an intellectual disability; the requirements for anatomically correct dolls and the requirements for effective data collection systems.

2. Fear and protection from harm

There are a number of aspects of the process of going to court in a sexual offence matter that expose children to further emotional and social harm, distress and indignity. These have profound impact on many children's emotional well-being and on their ability to testify adequately in the trial. Too often these impacts are not considered seriously, nor steps taken to prevent them, by the adult stakeholders who make decisions regarding the case.

At the outset we note that the experience of going to court to testify about the traumatic experience is inherently frightening. High levels of stress and anxiety associated with going to court are to be expected and it is unlikely that they can be completely addressed in most children (not to mention adults). As one court support worker who participated in the research stated:

> "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." (CSW 2)

However the stress and fear inherent in the process is exacerbated by a number of factors, these are discussed below.

3. Delays and postponements

One aspect of the distress experienced by children is the delay between the offence and the trial, and the repeated trips to the court for the trial and associated processes. This interrupts the child's recovery process in order that they may move forward in their lives. They are forced to repeatedly go back to the memory of the experience and then relive it while being interviewed by the prosecutor and when testifying and being cross-examined. The anxiety of attending court is not only present on the day that the child must attend court, but is in fact prolonged for a number of days and in some cases, weeks, preceding this.

Postponements are common and there are a range of reasons for multiple postponements of cases including the child's readiness to testify, the availability of evidence and the preparedness of the defence. Commonly, the child is required to attend the court on a number of occasions before they are able to testify.

> *"there were times when we now went to court and then we must hear, no, he's ill... [the child witness] must stay out of school, and it was no two occasions that we had to go through for nothing." "... feels like it's going on and on, and you are not getting closure*" (Caregiver 1)

> *"Sometimes they come here three times, and they just sit here the whole morning...."* (CSW 4)

[23] MATTSO 2013 *Ibid*. Pp79

"I tell them the law takes long... the arm of the law is lengthy...: (CSW 5)

Research on the benefits of sexual offences courts indicates that prosecutor involvement from an early stage of investigation, and effective case-flow management can shorten the period that it takes to finalise a case and minimise the number of postponements.[24]

Skilled and experienced prosecutors and presiding officers are also in a better position to challenge vexatious requests by the defence for postponements. While some do raise these objections, many don't.

Implications for implementation and practice

The problems regarding case-flow management and the fact that some sexual offences courts sit idle due to not having enough cases is well recognised by the state. The other side of the coin: that of children waiting and their cases repeatedly being postponed is not however addressed in the MATTSO report or the NPF. Ensuring prosecutor involvement as early as possible in the investigation process should assist to ensure that case dockets are ready for court before the child comes for the first date.

Prosecutors and presiding officers should take a stronger stand in cases where excessive postponements are one of the tactics of the defence.

4. The court environment and exposure to the accused outside court

The National Policy Directives for the Prosecution of Sexual Offences issued by the NPA in compliance with the SOA require that the DoJCD should take efforts 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."* This is emphasised in the Model developed by the MATTSO, which requires separate waiting rooms for children and for adults.

Few court buildings have been built with the needs of witnesses, and in particular child witnesses in mind. Many buildings are extremely old with only a few newer courts being built over the past 15 years. In addition to building new courts, the DoJCD in conjunction with the Department of Public Works have upgraded some courts to improve the environment into which children are brought for these cases. Further to the efforts of government, a number of courts have been rendered more 'child-friendly' through efforts of non-governmental organisations and private sector to improve the look and feel of designated child or victim waiting areas associated with the SOCs. This is important, and these do minimise the stress associated with going to court. However, in spite of these efforts, it remains true that the design and decoration of the majority of court buildings, even those with designated areas do not adequately protect children from additional anxiety and trauma.

Adults who work daily in the environment often fail to appreciate the negative impact it can have on children. In many cases children are distressed by the appearance of the rest of the building through which they are required to pass in order to get to these waiting areas or to the court rooms and, more importantly, these measures regularly fail to prevent the child from coming into contact with the accused and the supporters of the accused. One child interviewed explains:

> *"I heard many bad stories about the court and it was my first experience there... It's a neat place, but the gates ... it sommer shows it's for prisoners... it looks a bit scary inside... I don't know there would*

[24] MATTSO 2013 *Ibid*. P48

be a camera room, because I didn't want to see the man that did it... I actually felt safe (in the waiting room) ... I was watching the TV and I was keeping myself busy" (child 2)

"*There was weird people standing around, I mean they come in to appear and I didn't like that for [child's name] to see*" (Caregiver 6)

A court support worker, working in a SOC describes the inadequacy of the measures in place:

"I *don't think the court can be child friendly! It's too cold there... it's just those benches there... we have to walk past the perpetrator in the passage.*"(CSW 4)

Court buildings are designed for processing the cases of people accused of crimes. Yet the process of justice requires not only the court officials and the alleged perpetrators' presence, but also that of the people who've been victimised in the crimes. Through the eyes of a child, the court environment can be strongly associated with prison; this can increase their anxiety.

"*...we had to use the loo. They had to give you a key and then you had to go downstairs, open the gates and doors, it's like you were in jail. That's the only part I didn't like*" (Child 2)

"*... perhaps a few policemen there to protect the people... you see people walking around with chains. She [the child] didn't like that.*" (Caregiver 4)

Children and their caregivers reported the positive impact of the separate waiting room facilities in creating a safe and contained environment.

"*The waiting room... was totally cut off from the other people. The entrance were we went in, it's separate from the perpetrators and the witnesses...*" (Caregiver 1)

While measures to separate children and witnesses from accused in waiting areas are effective to some extent, the court case takes place within the context of days at court and within a broader court environment. Children are still exposed to stressors relating to the environment and many children are still exposed to the accused and supporters outside of the courtroom as they make their way to and from the waiting rooms.

"*...when it's lunchtime and we had to go outside, then she will always hide behind me and say: mommy, there is his mommy sitting. Then she will now stand so they can't see her. So I don't think that is very good, because she was very nervous whenever she saw him or his parents, and even his witness.*" (Caregiver 1).

"*We went up to the fifth floor and we came past the area where the mother and the perpetrator was sitting. I also didn't like that...*" (Caregiver 6)

"*I saw his family, of that man [crying], and I saw him, he was very happy and I was not happy with that.*" (Caregiver 7)

Designing courts to prevent all contact with the accused prior to the trial and their supporters at all time is a major challenge, but essential. Further, this investment must include efforts to ensure that child witnesses are not exposed to an environment that increases their anxiety.

"*I think when they built the court they could have made another pathway so that the victim doesn't see...*" *(Child 2)*

"...we could have a gate for the perpetrators and one for the people who have reported crime, I think it would be fine" (CSW 5)

The requirements of and investment into child-friendly waiting areas over the past 15 years is important, however, redesigned waiting rooms alone are insufficient to achieve their purpose of protecting children and of ensuring that their best interests are treated with *paramount importance*. The protection provided to a child separated from the building and the perpetrator in the waiting room is undermined when that child must pass the perpetrator and supporters to get to that room or to go to the toilet. Children are not adults, the necessary measures in place to ensure that prisoners do not escape, heighten the anxiety and distress of many children. Creating a 'child-friendly' environment must extend to ensuring that exposure of child witnesses to the alienating court building is minimised.

The MATTSO report states that *'the issue of lack of adequate space to accommodate the basic features of this court model has in fact grown into an insurmountable barrier in many courts.'*[25] Recognising this, a programme for redesigning and renovating courts to ensure that the infrastructure provides greater protection to children, will require understanding that this investment, as with the investment into creating the 'child friendly' waiting rooms in the past, can minimise the high levels of avoidable stress and anxiety experienced by children before and while they testify in the trial. This anxiety is not only inherently harmful to the child, it impacts on their ability to testify with the minimal levels of stress which has a result on the quality of their testimony.

Implications for implementation and practice

The Department of Justice and Constitutional Development, along with the Department of Public Works must prioritise the creation of separate entrances or routes through the court building that will prevent the exposure of children to the accused. To this end it's necessary that they prioritise plans and attach dedicated budgets. We note that this is not an easy task, however the negative impact on children's levels of stress and anxiety as well as the associated negative effects on the quality of their testimony warrant the prioritisation of this process.

The effectiveness of measures to avoid contact between children and the accused will depend on clear signage outside the court.

Court staff and police officials who bring children to court must take necessary measures, particularly where there are no separate entrances, to ensure that this contact with the accused is minimised. In cases where exposure to the accused is unavoidable, they must ensure that someone with authority is present as the child walks through the building so that the child has a greater sense of security and the accused and family are aware that they are under scrutiny.

5. Privacy and exposure to the public while testifying

The Criminal Procedure Act provides that in sexual offence matters the testimony of the complainant can be held behind closed doors, or *in camera* as it is officially referred to, meaning 'in secret'. This means that all members of the public or persons not required in court for the case may be asked to leave the courtroom. In many courts it has become established practice to apply this provision while complainants in sexual offence cases testify. The section can be applied even if the child is testifying via closed circuit television (CCTV) from a separate room to the courtroom. It is accepted that this limitation on the accused's right to a public trial is

[25] MATTSO 2013 *Ibid*. P10

justifiable and is in the interests of justice. The purpose of this provision is to provide greater protection to the child's right to dignity and privacy and to minimise the stress and anxiety of speaking about an experience of this nature in a public forum.

However, there are cases in which the provision is not applied and cases in which it is applied but not monitored. In those cases the public are formally ordered to leave the courtroom during the child complainant's testimony but then enter during the course of the child testifying and are not asked to leave again.

> *"What I don't like is that when people are waiting for their cases, everybody comes and sits inside and everybody comes to hear your story. And then outside, when you get the people that were in there... and they look at you with that intention... I think they have to leave those people outside, and it's only the lawyers and the policemen that have to be there and that man and whoever, and the people who are supporting you, but not someone from outside... like private, private... no one else should have access to hearing your story and to be in the court room, except those who were involved."* (child 2)

It is clear from the quote above, made by a child who testified in a court that was previously designated as a Sexual Offences Court, that the provision for closing the court to the public was not implemented in this matter. The unnecessary, negative impact on the child's dignity and privacy is clear. It highlights and instance in which the constitutional rights of the child, including the best interest of the child principle, were not applied by the court. Because this provision does not have any impacts on the adults in the room, they are often blind to the serious, yet entirely avoidable consequences for children.

Implications for implementation and practice

Improved training for presiding officers and prosecutors regarding the implications of the decisions of the Constitutional Court as well as improved monitoring of cases by the National Prosecuting Authority and civil society organisations should assist to improve on the implementation of this measure.
Prosecutors must, as standard practice, apply for all proceedings involving child complainants, including where the child gives evidence via the CCTV system, to be heard in a closed court.

Once a decision is made to hear the evidence of the child in a closed court, prosecutors, magistrates and court orderlies must enforce this for the duration of the child's testimony.

6. Exposure to perpetrator while testifying

In sexual offences cases the Criminal Procedure Act and the SOA provide for circumstances in which children can testify outside of the courtroom in a separate room making use of CCTV.[26] In addition to the use of the CCTV system, an *'intermediary'* can be used, in these cases it is their role to listen to the questions posed in court and convey these to the child in age-appropriate language and tone.[27] However, they may not change the nature of the question. The child's responses are viewed on a television screen directly by the role-players in the courtroom. These provisions recognise the particular vulnerability of child witnesses to further trauma as a result of testifying in the formal court environment. Importantly they ameliorate the trauma

[26] Section 158 of the Criminal Procedure Act no. 51 of 1977 as amended by the Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007.
[27] Section 170A of the Criminal Procedure Act no. 51 of 1977 as amended by the Criminal Law [Sexual Offences and Related matters] Amendment Act 32 of 2007

associated with being confronted with the perpetrator and of having to testify about the sexual offence in the presence of the accused.

The SOA provides that where the prosecutor makes an application for the use of either of these two measures for a child under 14, and the court refuses this application, the reasons for this refusal must be entered into the record of the proceedings.[28] This implies, that first it is up to the prosecutor to make an application for the use of these measures and secondly that there is discretion for the presiding officer to grant the application. The Constitutional Court found that the underutilisation of these measures by courts and the consequent violation of children's rights is linked to the failure of presiding officers to interpret the law in context of the constitutional provisions that the best interest of the child are of paramount importance and in consideration of the child's rights to dignity.[29]

These measures, and in particular the use of the intermediary system, has seen greater implementation over the past ten years, particularly for children under 14. However there are still a large number of cases in which children of all ages are required to testify in the courtroom. The discretion of courts in this regard is important, in some circumstances, testifying in the presence of the accused can assist the child to gain a sense of control back over their lives.

> *"it makes you feel like you are a normal person. It almost eases the pain as well, ... you don't look at a person and like, oh, I hate you. It makes you get over the feeling as well ... you know, I felt better. It made me just overcome my fears and everything"* (child 1)

However, it is well established in research that for most children, the anxiety related to being in the courtroom and in the presence of the accused is extremely difficult. Research indicates that the direct presence of the accused in the courtroom with child witnesses not only exacerbates the traumatic nature of the experience, it also negatively affects the quality of the child's evidence.[30] Thus in addition to protecting the child, the provisions promote the interest of justice by improving the quality of evidence placed before the court.

> *Interviewer: So how did you feel when you were inside the court?*
> *Child: it was painful*
> *Interviewer: was it painful?*
> *Child: Yes, because I did not want to see him again because he said to me if I did speak he would kill me (child 4)*

In some cases, children may refuse to testify or retract their original allegations not because the case is unfounded, but purely in order to avoid this confrontation with the accused.

> *'When you see the person that did something to you, you change your mind and then don't want to go further with what you did. Not that you are lying, but just because you are scared of what can happen outside. ... my granny always tried to calm me, but I would always get myself worked up because I know I had to go there and I was going to see the man."* (Child 2)

Too often prosecutors don't make an application for the use of these measures.

---

[28] Criminal Law [Sexual Offences and Related Matters] Amendment Act no. 32 of 2007. Schedule one, amending sections 158 and 170A of the Criminal Procedure Act no 51 of 1977.

[29] Summary of the Constitutional Court Judgment in *Director of Public Prosecutions v Minister for Justice and Constitutional Development and Others ([2009] ZACC 8)*. Centre for Child Law, University of Pretoria referring to paragraph 83 of the judgment.

[30] Müller, K. and Hollely, K.A. 2009. Introducing the Child Witness. Printrite. Port Elizabeth p61

"They didn't actually ask me if I was okay actually speaking in the court, but they just asked me if I was okay to speak today." (Child 2)

As noted above, the number of children who access this protection has increased over time. However, the application is uneven. In addition to not making applications, the failure to use the measure is at times linked to the unavailability of social workers to undertake the necessary assessment of the child's ability to testify in the courtroom. Further, the positions of presiding officers on the desirability of utilising these measures differ.

Implications for implementation and practice

To ensure better implementation it's necessary to improve the monitoring on the use of these measures, including monitoring when prosecutors fail to make the application and the reasons for this.

Monitoring the reasons cited by the court for refusing applications is also important to inform education and training programmes for presiding officers in this regard.

Further, equipment failure or lack of staff with skills to operate the equipment undermines the utilisation of these measures, as such the DoJCD should incorporate budget for systematic monitoring and maintenance of the upkeep of the equipment and facilities. More than one person at each court should be trained to operate the equipment.

7. Cross Examination

The criminal justice system has, as a starting point the presumption of innocence of the accused, it requires a high level of veracity to establish if a person accused, can be convicted beyond reasonable doubt of an offence. As a result the system is considered to be adversarial in nature. The evidence of witnesses is thus subjected to close scrutiny by the court. The process of cross-examination by defence attorneys is one of the primary tools used by the defence to establish reasonable doubt. In sexual offence matters this process is notoriously gruelling and challenging of the witnesses. Very often, the cross examination is associated with aggressive or belittling questioning, repeated assertions that the witness is being untruthful or that the witness is confused. Adversarial cross-examination is distressing for adults, but even more so for children. While many adults wither in the face of a torrent of questions, statements, and insinuations aimed at discrediting their testimony, the anxiety this causes a child who lacks the cognitive and emotional resources to buffer such a verbal onslaught is extreme. For many children, the experience of cross-examination in particular reflects the experience of the original offence in that it is perceived by the child as being designed to harm them.

"...sometimes they are afraid of the defence lawyer, ... they want to catch the kid out. They want the perpetrator to win, ..." (CSW3)

"he also twisted a lot of my answers... how would he have liked somebody must say that to his daughter or his son..." (Caregiver 1)

The development, home language and linguistic capacity of the child witness must be kept in mind when engaging in cross-examination. The linguistic capacity of a child is often not fully developed to understand the manner in which defence attorneys construct questions. This practice of confusing the child with language, and building their sense of responsibility for the offence that was committed against them through cross examination can result in negative consequences for the child. This includes affecting their

self-confidence and questioning areas of guilt within themselves. Even when children are considered competent to give evidence in court or through an intermediary, they should not be treated as adults in court.

In addition, many court personnel ranging from defence lawyers, presiding officers and prosecutors prefer for the child to be as unemotional as possible while testifying and under cross-examination. This is often conveyed to the child and places the additional burden on the child to try to manage their natural emotions during the process. One child in the study refers to this:

> *"... the lawyer told me that if I started crying, they are going to think that I'm lying."* (Child 2)

Given the extremely negative impact of the cross-examination on children, it raises the question, where there is strong evidence to support the child's version, is it in the best interests of the child to expose them to the emotional harm experienced under cross examination? As one court support worker stated in the study:

> *"if there is evidence, why doubt the child"* (CSW 2)

However, in sexual offences matters, the evidence of the child is frequently the only evidence available to support the child's claims. There are seldom other witnesses to the sexual offence and often, medical evidence is lacking. Thus the weight of the possible conviction falls on the shoulders of the child. This places immense responsibility on the child witness to recall and revisit the traumatic experience and then to defend themselves and their version of events in this adversarial system.

Of concern to court support workers who observe many cases, is the fact that there is often no intervention by the prosecutors and presiding officers when the cross examination is excessive or badgering. This failure to protect the dignity of the child as well as the failure to promote and protect the best interests of the child is extremely problematic.

It is possible to undertake stringent cross-examination with minimal negative impact on the child. As a coordinator of court support services in a number of courts states:

> *"there is a defence attorney who used to be a teacher, and when I know he is going to be on a case I can breathe, I know the child will be okay. He does his job and asks the hard questions to defend the accused, but he does it with respect for the child and understanding of the child's level of development. He doesn't do more harm."*[31]

Where the questioning is excessive and potentially harmful to the child or the case, the prosecutor is empowered to object, however too many fail to do so. Further, although it is preferable that the presiding officer remain neutral, they are empowered to intervene in instances where the questioning goes too far and where upon weighing up the interests of justice and the accused's rights against the best interests of the child and the child's right to dignity, it may be necessary to intervene.

Furthermore, the use of intermediaries is helpful in mitigating against the negative impact of harsh cross examination of children. Although this system requires that the intermediary relate every question to the child and that they may not change the meaning of the questions, the fact that the tone of aggressive, bullying or belittling questions from the defence attorney is changed and that the questions are rephrased in developmentally appropriate language helps. Further, the fact that the child is not directly exposed to the aggressive presence of the defence attorney is positive.

---

[31] B Rezant, personal communication 17 March 2014

Implications for implementation and practice

Cross-examination must take the ability of children to comprehend language into account. The process of cross-examination should require developmentally appropriate questioning to ensure the protection of child witnesses.

To achieve a changes in the tactics used by defence lawyers, many of whom are not trained in child development, will be difficult. However, raining for prosecutors to understand when to intervene on behalf of the witness and the case, must be incorporated into training programmes. Similarly presiding officers in sexual offences matters must receive training regarding the acceptable limits to cross-examination and when to intervene to protect children's rights.

Recognition of the benefits of the intermediary system on the experience of the child during cross-examination is critical, our recommendation regarding the need for prosecutors to apply for the use of these systems in all matters involving children is thus essential.

8. Support and information

Few people are familiar with court processes or the environment. In a situation as charged with stress as a trial relating to a sexual offence, the necessity for providing information and support services is heightened. Children who've experienced sexual offences often require further reassurance that they are safe and supported throughout the process. The prosecutor, court preparation and most importantly psycho-social support providers form a necessary network to address the support and information needs of children.

A number of respondents in the RAPCAN study indicated the benefits of court preparation services to provide information and reassurance.

> *"They introduced themselves... and told her they are there to help her if she's got questions... they made her feel comfortable... they were like real mothers... they didn't keep themselves up there... they were always cheerful and [supportive]" (Caregiver 1)*
>
> *'[support workers] showed us how they love their job and they assist us with our children a lot... from the first day I saw a miracle that they assisted us so much with our children and that means it was not only us who were assisted in this manner, which means that every child that has a problem is assisted kindly." (Caregiver 8).*
>
> *".... I thought maybe the family was going to ... [call] us names, but [the court support worker] said they can't do anything to us and they can't harm me, and if they do they can go to jail". (Child 2)*
>
> *"...they actually had a big chart of the court layout... they said I was going to feel nervous... they said I should stay calm about everything." (Child 1)*

However, there are concerns regarding the extent to which court support workers overstep the professional boundaries in their efforts to support children and their families.

Providing information on the process is central to court preparation programmes, the NPF recognises this, indicating that information is important to reduce anxiety and *'empower victims to become informed*

participants in the process'.[32] This information must include general information about the trial process as well as specific information regarding the child witness', the role in the trial and the progress of the case. Both prosecutors and police officials tend to be extremely busy, carrying large case-loads, this and a failure to grasp the importance of information to the child contribute to failures to provide this information.

> *"... [the] prosecutor doesn't come up and say, listen here, this is what is happening, the case is going to be postponed."* (CSW 4)

> "... he [the prosecutor] was always there to help us answer questions. If we now asked him what was going to happen today, then he would tell us the whole layout of the court case." (Caregiver 1)

Caregivers may play two roles, firstly in support of their child and secondly they are often witnesses in the trial. Both of these necessitate that parents also receive good information about the processes at court, the role that they play and the progress of the case.

> *"everything is one-sided. It's almost like I'm not involved, I'm not her mother.... I didn't know that I was also going to be called up to testify.. I didn't know I could be included... "* (Caregiver 1)

> *"We are still waiting... it's almost like we are not part of this whole process that's going on." (*Caregiver 1*)*

The responsibility for providing this information lies with a range of people, including court support workers, prosecutors and investigating officers. The volume of information with which a child victim must become familiar about the process, means that in one court preparation session the child may not grasp or remember all of the information. These quotes demonstrate the positive effect of providing support and information to children and their families.

> *"yes, we do get summons when we are in court but the police will always remind me of the court date or SMS me to remind me of the date in court and my grandchild has also trusted me because of them. ... The police I would give them 10 out of 10 because of the way they encouraged us."* (Caregiver 7)

> *"...detective [name] was also supportive. He gave me the same advice as the aunty gave me, not to look at the accused, but only to concentrate on the prosecutor and the magistrate. .. I had no money to go to court, he would go and fetch me from home"* (Child 3)

> *"the person that is dear to me is the lady that handles this case and she is not a lawyer and she is a magistrate officer. She gave us support and supported our children even in court." (*Caregiver 8)

Implications for implementation and practice

Court preparation services, whether provided by the NPA or by civil society organisations, must be available across courts. Most importantly, it is essential that the people delivering the services have specialised training as well as the personal attributes to work with traumatised children. Robust management processes to ensure accountability must accompany these.

---

[32] *National Policy Framework on the Management of Sexual Offences.* Government Gazette no. 36804 (2013) Interministerial Task Team on Sexual Offences. P19 (NPF 2013)

Written information must be available in all courts, in the prevalent local languages to describe the court environment, process and the role of a witness. This information must be presented in a manner that is understandable to a child.

Caregivers must also receive information regarding the courts, and processes as well as timeous information regarding the progress of the case.

Training programmes for prosecutors must include the issue of the importance of information to assist a person who has experienced trauma to gain a sense of control over their life. The establishment of basic performance standards in this regard and management of these must accompany this training.

9. Inconsistencies

It is evident that the standards and quality of protecting children's rights in court are inconsistent. Depending on which court, which prosecutor and which presiding officer is involved, different standards are applied. While it will be impossible to ensure that every case is handled in the same manner, organisations working with children in the system relate that the level of inconsistency is serious. Indicating that while there are matters in which children's rights are protected throughout or at least at some stages of the process, that this is a lottery and for the majority of children poor service and low levels of protection remains the norm.[33] RAPCAN court support workers reflected on this:

> "... 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." (CSW 2)

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

There are a range of factors to which these inconsistencies in standards can be attributed, these are discussed in the sections below.

9.1. Specialised services, specialised staff: Aptitude, qualities and training

Closely linked to the issue of support and communication are the attitudes and capacity of court staff to work with child witnesses. Court practice must be centred on the constitutional rights to dignity,[34] privacy,[35] and freedom and security of the person.[36] A specialised approach to prosecution and case management that does this, stands a stronger chance of minimizing secondary victimization and addressing prevalent fears about the criminal justice system.

Importantly section 7(2) of the Constitution specifically imposes a duty on the state to respect, protect, promote and fulfil these rights. This duty extends to all court personnel including presiding officers.

---

[33] Shukumisa Campaign members' teleconferences on 07 and 15 March 2013. Involving 8 organisations interfacing directly with sexual offence survivors and the criminal justice system. Minutes available from Author.
[34] The Constitution of the Republic of South Africa. 1996. section 10
[35] *ibid.* section 14
[36] *ibid.* section 12 - with particular emphasis on sub-section 12(1)(e)

Realising victim-centred services to child victims as set out in the principles of the NPF, requires people working at all levels of the court system who have particular attributes.[37] At all times, the very nature of a childhood and a child's developmental capacities needs to remain on the foreground of court processes. Too often the child is expected to adapt to the court environment instead of the environment adapting to the child.

When interviewed, child victims and their caregivers sketched a varied picture of their experiences. A large contributing factor was the attitude, demeanour and expertise of the court staff. Some clients experienced friendly, approachable and supportive prosecutors.

> *"...And yes, there was never a time when he [the prosecutor] said he's busy, can't we do this later? ... there was also a time when the court went out so late so we couldn't get the witness fees. So he took out of his own pocket... it was a very good gesture he made too because we told him we were dependent on the money."* (Caregiver 1)

Others were exposed to harsh, unhelpful and abrupt prosecutors.

> *"I felt that she was rude... she would complain to my mommy that I'm getting an attitude, but it's because I got upset about it. It was almost like they were shouting, man, and convincing me that I'm lying, and I know I am not lying. It feels like she's not even on my side here... I think they can be more polite"* (child 2)

> *"The prosecutor is harsh to my child, even if they must be like that, then I will ask why is she talking like this to my child and I feel she is unfair sometimes to them."* (Caregiver 8)

Reports from RAPCAN court support workers reflect that some magistrates are not aware of the mental stress that testifying places on children and their families, and that some are impervious to the difficulties experienced by children. RAPCAN's experience has shown that child victims of sexual offences often respond well when they are assisted by 'friendly' adults to navigate the cold, alien and hostile environment and process of the criminal justice system.

Not everyone has the temperament to work with sexual offences. Secondary victimisation is caused because the people managing these cases are unsuited to the task. It is also a result of poor knowledge of the law and procedures and a failure to grasp the emotionally traumatic impact of sexual offences. Sexual offences involving children are complex, yet too often, inexperienced and untrained court preparation officers, intermediaries, interpreters, prosecutors and presiding officers are managing them. This contributes to widespread violations of children's rights and often to miscarriages of justice.

> *"... we found that the magistrate has never worked with kids ... that have been raped or that have been abused."* (CSW 4)

The MATTSO report recognises the qualities required for prosecution in these matters requires *'time, skill and patience';* and prosecutors who are committed to these emotionally difficult to manage cases. It also recognises that prosecutors working in this field should have the skill to work with traumatised child victims and have the ability to *'develop a relationship of trust with the victim to ensure the best quality of evidence is presented to the court'.*[38]

High turnover of prosecutors has had negative impacts on children's rights. The MATTSO report indicates that in courts with the specified two prosecutors per court, not all of these were dedicated to SOCs and that

---

[37] NPF 2013 *ibid.*
[38] MATTSO 2013 *Ibid.* P25

they are not necessarily specialized.[39] This is consistent with experiences of a number of NGOs providing services to victims in courts operating with two prosecutors. In their submission to the Portfolio Committee on Justice and Constitutional Development, the *Shukumisa Campaign* explain that the high rate of rotation of unspecialized prosecutors results in child victims dealing with two or three prosecutors for the duration of the case; experiencing high levels of secondary victimization; and affecting the relationship of trust between the child and the prosecutor, thus impacting on the quality of the child's evidence.[40] They reflect that in some courts the practice that has developed is that the less experienced prosecutor undertakes the consultations with the witness prior to trial and the more experienced prosecutor appears in court. This attempt at court level to address the problem is in itself highly problematic and in all likelihood contributing to the persistently low prosecution and conviction rates. The solution lies in a specialized prosecutor undertaking all engagements with the child in preparing for trial and that same prosecutor prosecuting the matter.

Implications for implementation and practice:

These cases are emotionally and technically complex, appointment criteria for court staff working with sexual offences must include of competencies that include and extend beyond legal competency. They should include a demonstrable aptitude to deal with these matters and to communicate with traumatised children.

In addition the minimum years experience in prosecuting or presiding over criminal matters should be clearly defined.

The standard of two prosecutors per SOC must be applied, these must both be specialised prosecutors and practice must ensure that the same prosecutor undertakes preparation and prosecution in the trial. Further every effort must be made to ensure the stability of these posts to minimise turnover of prosecutors.

9.2. Training and experience

The MATTSO report specifies that prosecutors and magistrates require '*experience, should have specific training that equips them to work with children, people with mental disabilities and to understand the dynamics of sexual abuse*'.[41] The earlier blueprint that was upgraded in 2005 specified that Magistrates should be 'dedicated, sensitised, empathic and have at least six months experience'. This detail regarding qualities and length of experience is no longer included in the Model recommended by the MATTSO. The earlier "blueprint" for sexual offences courts specified that prosecutors have a minimum of three years experience, this detail too is not contained in the MATTSO Model.

In 2004, research to establish the levels of specialization amongst prosecutors in the SOCs, half of the prosecutors interviewed had not received any specialized training.[42] This scenario should have shifted as the NPA has undertaken training programmes with prosecutors on the content of the Act since it was promulgated in 2007, however it is unclear the extent to which the nature of the training includes 'social context' training as mandated by the Act.[43] (66(2)(b)(ii). The length of time spent in training is also unclear as is the training methods used and the skills of the people who conduct the training.

---

[39] MATTSO 2013 *Ibid*.. P90

[40] Shukumisa Campaign. *Submission to the Portfolio Committee on Justice and Constitutional Development on the Strategic Plans and Budget of the Department of Justice and Constitutional Development and the National Prosecuting Authority*. 13 April 2013 p22-23

[41] MATTSO 2013 *Ibid*. P52

[42] Műller, K.D. and Van der Merwe, I.A. 2004. The sexual offences prosecutor: a new specialisation. Journal for Juridical Science. 29(1):135 – 151 in MATTSO p20

[43] Criminal Law [Sexual Offences and Related Matters Amendment Act No. 32 of 2007 s 66(2)(b)(ii)

Attendance at a training session is not a sufficient indicator of that person's ability to work on these matters. There is no evidence to suggest that court staff who attend training are being assessed against learning outcomes. This makes it impossible to assess the standard of the training.

It's well established in most disciplines, including law, that practical training, to augment 'classroom' training, is an essential aspect developing capacity.[44] However there is no formal system to facilitate this for specialised prosecutors in sexual offences. This is especially problematic with less experienced prosecutors, who often struggle to protect the rights of victims effectively. This specifically within the context of defence lawyers who are often more experienced and generally have more time to prepare or in matters where presiding officers have not been trained or are inexperienced.

Implications for implementation and practice

We support the implementation of the training requirements set out in the MATTSO report. However there are a number of additional elements that we believe should be added.

To develop understanding of child victims' needs; of how they are likely to respond emotionally; and the responses to child victims in their social context it is important that training makes use of methodologies that are interactive and experiential.

Trainers in the psycho-social aspects should have expertise to manage training on these complex issues, without this the training may entrench certain negative attitudes.

Evaluation processes to establish the training outcomes for trainees must be mandatory.

Including a practical component to training programmes for prosecutors will enhance their ability to effectively promote the rights of the complainant in court. These practical programmes may include 'shadowing' more experienced prosecutors in sexual offences matters or relying on moot court exercises designed to create some of the more difficult scenarios that occur in these cases.

Clearly, to adequately train court staff to work with child victims, even those staff who do have the basic aptitude, requires an investment in time, time that may be hard to find in the busy court context. However the investment by the state in the time and costs associated with quality training programmes at this stage is essential.

Training on its own may not have the widespread impact if strong performance management and accountability processes at court level do not back it up. Senior court staff, must undertake regular monitoring of performance against an agreed set of standards and provide support and where necessary discipline in instances where it's required.

9.3. Support to court staff

Prosecutors are exposed to the merits of the case and often have to read, review and hear horrific accounts of child sexual abuse. The negative effects of working with cases of this nature are, at this stage, well known. A number of prosecutors, in conversation with RAPCAN court support workers, have described symptoms of vicarious trauma. They express frustration, feelings of becoming overly protective of children and an overall scepticism of people in general. They describe their negative reactions to seeing everyday occurrences such as a father playing with his daughter in the park, an uncle offering to fetch the child at school, the driver transporting children. These reactions are based on their exposure to many cases in which

[44] This refers specifically to norms relating to articleship/clerkship under the Attorney's Act (53 of 1979).

these were the circumstances of abuse. This effect is common and can be observed in most people who are exposed to cases like this over a long period of time such as magistrates, councillors and police officials.

In some professions, regular support and debriefing is accepted as the norm and incorporated into the functioning of a professional service. These interventions assist in two ways. They support the coping mechanisms of people to manage the adverse effects and they can prevent the development of 'compassion fatigue' whereby professional staff become less sensitive to the impacts on the child victims over time.

The MATTSO report refers to this as one of the 'systemic challenges that led to the demise of Sexual Offences Courts', noting that the lack of debriefing programmes for court official resulted in many experiencing vicarious trauma.[45] In recognition of this, the recently tabled NPF requires that '*Debriefing sessions must be periodically offered to all personnel exposed to victims of sexual offences.*'[46]

Implications for implementation and practice

The implementation of the NPF requirement for the provision of support services to staff in this regard is important. Furthermore, this support should be provided regularly and the frequency of such support must be carefully considered. It would be problematic if the *periodic* nature of these sessions resulted in only one a year for example. Importantly, participation in these processes should be established as part of the culture of Department of Justice and Constitutional Development. While staff cannot be forced to participate, failure to do so should result in performance management action by senior staff.

9.4. Intersectoral collaboration and coordination

To render services that address the needs of child victims from their point of entry into the system through to the finalisation of the court case, coordination and collaboration is needed from the range of departments, institutions and other service providers that fulfil various functions. This goal is strongly emphasised in the Act, which establishes the Inter-sectoral Committee for the Management of Sexual Offences at national level; the NPF which includes this as one of three objectives and refers to national and provincial co-ordination structures of this nature;[47] and in the MATTSO report, which refers to these at national, provincial and local levels, but only in respect of the re-establishment of the sexual offences courts. It does not specify if these would be ongoing.[48]

The NPF requirements are positive, however, it is concerning that the establishment of co-ordination structures is not extended in this policy to the local level. It is unclear why this is the case. Previously committees were established at some sexual offences courts at which the range of stakeholders including civil society organisations would regularly meet (often monthly) in order to discuss and develop solutions to challenges with implementation at that court. Later many of these committees were discontinued, however, the same objectives were achieved through opening parts of the case-flow management meetings to the attendance of the relevant stakeholders for this purpose. This is still the practice in a few courts.

There have been no formal studies to assess the impact and challenges of these forums, thus our opinions regarding them are anecdotal, based on the 11 years of RAPCAN working across six courts in the Western Cape. According to RAPCAN court support staff, depending on factors such as leadership and the regularity of these meetings, they provided an important forum in which to resolve problems that were systemic in those specific courts and improve the standards generally. As a result of the problem-solving nature of these

[45] MATTSO 2013 *Ibid*.. P13
[46] NPF 2013 *Ibid*.p36
[47] MATTSO 2013 *Ibid*. Pp34-35
[48] MATTSO 2013 *Ibid*. P99

meetings, the RAPCAN staff is of the opinion that they improved the standards for protection of victims rights in those courts. Essentially, at courts where these forums function with good leadership, children receive more uniform positive treatment.

Thus, recognizing the challenges regarding the time and the of the range of stakeholders that must be committed to attending these meetings, we believe that the benefits in terms of addressing violations of children's rights warrant this investment. Once again, the fact that the best interests of the child are of *paramount* importance in terms of the Constitution, this question should be considered first in the decision not to promote these forums at local level.

Implications for implementation and practice

Recognising that it is in the best interest of children, national, provincial and local co-ordination structures that include the range of stakeholders must be instituted and meet on a regular basis. Particular focus should be placed on the establishment of these at all SOCs at local level.

10. Resourcing and budgets

Civil society organisations have maintained, that in order to give meaning to the legal and policy framework, sufficient resources, based on costing and responding to the scale of the problem, must be allocated to these matters. They have argued that without this, the priority afforded to sexual offences in government documents, does not translate to the changes in practice that are critical.[49]

The NPF recognises this and requires that '*interventions must be appropriately costed and resourced*' and that budget allocation and expenditure on sexual offences must be tracked in various department budgets.[50] However, the NPF refers to the '*progressive realisation*' of all measures required throughout the document. At the same time, it does not stipulate any timeframes in which this progressive realization should be achieved. This dilutes the strength of this provision. The MATTSO recommendations are also weak in terms of resourcing. Although they do a detailed costing of the SOC model, the MATTSO report sets a target number of courts to be prioritized at 57 in the short term '*within available resources*'.[51] This is based on Regional Courts that already have the necessary infrastructure or where most of the infrastructure and resourcing is already in place. It then specifies that the "*rest of the identified SOCs*" must be progressively realized within ten years by 2015.[52] It is unclear what the exact number of identified courts are, whether it is the further 106 courts that have waiting rooms available or the full 567 Regional Courts across the country.[53] It remains to be seen if the NPF provisions will result in the establishment of these courts over the next ten years. Assuming they are referring to the 106 courts, and assuming that the Department implements the recommendation; it remains to be seen whether the provisions in the Judicial Matters Second Amendment Act of 2013 will result in sufficient coverage in court jurisdiction to ensure that all sexual offences matters are heard at SOCs.

As it stands, we don't believe that the provisions of the NPF are sufficient to frame government's plan to ensure the improvement of services for sexual offences nationally, in particular in areas that are poorly resourced.

---

[49] Shukumisa Campaign. *Submission to the Portfolio Committee on Justice and Constitutional Development on the Strategic Plans and Budget of the Department of Justice and Constitutional Development and the National Prosecuting Authority.* 13 April 2013 p14.
[50] NPF 2013 *Ibid.* p26-28
[51] MATTSO 2013 *Ibid.*. P98
[52] MATTSO 2013 *Ibid.* P15
[53] MATTSO 2013 *Ibid.* P14

Another key concern regarding the resourcing of these courts, relates to the capacity of the NPA to ensure that there are two specialized prosecutors employed in each of these courts. The MATTSO report indicates that there are currently 148 courts with access to two prosecutors (not necessarily specialized).[54] The NPA's Strategic Plan 2013 to 2018 frankly notes that there is *'severe stress'* on their compensation budget and that they do not believe that this will improve over the MTEF period.[55] Without additional resources to pay salaries, how will the NPA manage to ensure that there are sufficient specialized prosecutors to work in these courts? The NPA refer to the development of A Human Resources Plan[56] as well as to a 'reprioritisation process' regarding the compensation budgets.[57] It remains to be seen how the Human Resources Plan will address specialised prosecutors in SOCs.

The MATTSO recognise that without *'political support'*, the necessary budget allocations will not manifest.[58] We agree, without political will, the investments required to address the needs of child victims in the system will not take place. Responding to sexual offences will remain a well-intended aspiration rather than a reflection of a government priority.

Implications for implementation

The Department of Justice and Constitutional Development must commit to a clear plan, including timeframes and dedicated resourcing for the establishment of SOCs that meet the standards outlined in the MATTSO report.

11. Conclusion

In spite of years of attention to addressing sexual offences, and investment into developing the legislative and policy frameworks, the gains in reducing further truamatisation of children who go through the system are difficult to ascertain. It is clear the numbers of children who experience avoidable trauma remain higher than would be expected at this stage. The consequences on the lives of those children and their families are profound. The failure over the past 14 years to improve conviction rates in these matters is a serious indictment on the system's failure to effectively address the issues that undermine access to justice, in spite of the framework.

The failures to effect real change at case level indicate a strong necessity to implement new systems at courts, many of those systems requiring investment of additional resources and time in a stretched environment. Without this shift, it is conceivable that high levels of violation of victim's rights will persist in spite of recent policy developments that attempt to address the problems at a broad scale.

As the MATTSO report indicates, the range of factors that undermine justice in these matters persist. It names failures regarding physical space, procurement and maintenance of equipment, lack of specialization, poor case flow management, lack of debriefing, limited training programmes, poor coordination, and failure to implement measures to support access to justice for marginalized victims such as children with disabilities.[59]

---

[54] MATTSO 2013 *Ibid*. P90
[55] National Prosecuting Authority. 2013. *NPA Strategic Plan 2013 -2018*. P24
[56] National Prosecuting Authority. *Ibid.* p20
[57] National Prosecuting Authority. *Ibid.* p24.
[58] MATTSO 2013 *Ibid*. P99
[59] MATTSO 2013 *Ibid*. P13-14

The national legal and policy framework and the further guidance provided by the Constitutional Court, provide a relatively sound basis on which to reform the system regarding these cases. However, change remains lethargic at the point of implementation – Magistrates Courts. We believe that the devil is in the detail and how this is incorporated at the level of service to children. In addition to addressing the points raised in the MATTSO report, emphasis must be placed on ensuring that suitable staff are appointed to these courts and the weakness in quality of training programmes (not only the numbers of people trained) must be addressed.

To ensure implementation at courts, the important values, objectives and principles contained in the framework must be reflected at that level. Attention must be turned to local monitoring, oversight and management of services. This implies emphasis on strong leadership at courts to drive these into daily practice. In our view this aspect has received far too little attention in the frameworks and implementation strategies yet, based on strong anecdotal evidence, is often the deciding factor as to whether children's rights are protected in practice.

The other major gap has been the consistent failure to allocate adequate resources to these matters. We note that government resources are stretched but also note that government policy priorities must be reflected in resourcing if they are to be more than empty promises.