

## THE ROLE OF THE INTERMEDIARY IN SOUTH AFRICA

Submitted by the Child Witness Institute

KEY CONCEPTS	
Intermediary	Court accommodations
CCTV	Witness assistance
Function of intermediary	Undue mental stress or suffering

### Introduction

Internationally this term has come to refer to someone who assists a witness in court to communicate more effectively by helping them to understand the questions being posed. Intermediaries are used in many countries around the world and their roles and responsibilities vary from country to country. They are used in South Africa, Ethiopia, United Kingdom, Myanmar and are in the process of being introduced in even more countries, because they have been shown to be extremely successful in enabling witnesses to understand the questions posed and thereby ensuring the witness is able to take part effectively in the court proceedings.

In South Africa, the intermediary is a creature of statute and was introduced by s170A of the Criminal Procedure Act 51 of 1977, which sets out what the role and function of the intermediary is and other applicable procedural issues.

### Who can be an intermediary?

Although the Criminal Procedure Act itself does not set out who can be an intermediary, it does provide in s170A(4) that the Minister may by notice in the Gazette determine the persons or the class of persons who are competent to be appointed as intermediaries. The list of people who can be appointed was set out in the Government Gazette no. 15024, 30 July 1993, as amended by Government Gazette no. 17822, 28 February 1997. The following is a summary of the people who qualify:

- Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Services Professional Act, 1974 (Act No. 56 of 1974), and against whose names the specialty of paediatrics is also registered;
- Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Services Professional Act, 1974 (Act No. 56 of 1974), and against whose names the specialty of psychiatry is also registered;
- Family counsellors who are appointed as such under Section 3 of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), and who are or were registered as social workers under Section 17 of the Social Services Professions Act, 1978 (Act No.110 of 1978), or who are or were educators as contemplated in paragraph 2.2.6 hereunder, or who

are or were registered as clinical, educational or counselling psychologists under the Medical, Dental and Supplementary Health Services Professional Act, 1974 (Act No. 56 of 1974)

- Child care workers who have successfully completed a two year course in child and youth care approved by the National Association of Child Care workers and who have two years' experience in child care;
- Social workers who are registered as such under Section 17 of the Social Service Professions Act, 1978, and who have two year experience in social work, and persons who have obtained a Master's degree in social work and have two years' experience in social work;
- Persons who have four years' experience as educators and who have not at any stage, as a result of misconduct, been dismissed from service as educator. For the purpose of this paragraph 'educator' means a person who teaches, educates or trains other persons, or who provides professional education services, including professional therapy and educational psychological services at a public, independent or private school as contemplated in the South African Schools Act , 1996 (Act No 84 of 1996), including former and retired educators;
- Psychologists who are registered as clinical, educational or counselling psychologists Medical, Dental and Supplementary Health Services Professional Act, 1974 (Act No. 56 of 1974).

There is quite a long list of people who qualify to act as intermediaries, but in practice intermediaries tend to be social workers, educators or child care workers.

### **When can an intermediary be used?**

Intermediaries are not automatically available to witnesses, and an application must be made for their appointment. Section 170A of the Criminal Procedure Act has been amended by the Criminal and Related Matters Amendment Act 2020. It is now available to the following witnesses:

- those under the biological or mental age of 18 years
- those who suffer from a physical, psychological, mental or emotional condition
- those who are older persons (65 years old and older in the case of a male and 60 years and older in the case of a female).

The criteria for availability is that the above witnesses must be exposed to undue psychological, mental or emotional stress, trauma or suffering if they should testify at these proceedings. If the court finds this to be so, then they may appoint a competent person as an intermediary. In criminal matters this is governed by s170A(1) of the Criminal Procedure Act 1977 and in civil matters it is governed by s51A of the Magistrates' Court Act 1944 and s37A(1) of the Superior Courts Act 2013. Intermediaries can, therefore, be used in both civil and criminal matters.

Section 170A applies to "any witness" and is not restricted to charges of sexual abuse or physical abuse. Neither is it limited to witnesses who are complainants. In theory, it could, for instance, apply to a child who has witnessed an attack on a parent, and is not herself a

direct victim of the crime. A child, who has viewed the murder of a family member, although not a complainant in a case, will also experience trauma when having to testify in an adversarial environment. This has dramatically increased the role of the intermediary

### **The discretion of the court**

Section 170A(1) supra uses the phrase “the court may” which implies that the court has a discretion to allow the appointment of an intermediary, and that the appointment is not automatic. In practice this means that the prosecution will have to make an application to the court that an intermediary be appointed. Although the court does have a discretion to grant or refuse the appointment of an intermediary, this discretion has been limited by subsection (7), which requires the court to provide reasons for refusing any application.

(7) (a) The court must provide reasons for refusing any application or request by the public prosecutor or a witness referred to in subsection (1), for the appointment of an intermediary, immediately upon refusal, which reasons must be entered into the record of the proceedings.

These reasons must be provided immediately upon the refusal and must be entered into the record of the proceedings. This provision thus places a much stronger duty on the presiding officer to evaluate the presence of undue stress, as they will now have to provide reasons why an application for an intermediary has been refused. This further entrenches an approach of making greater use of intermediaries, especially for young children.

### **Undue mental stress or suffering**

The test for the appointment of an intermediary used to be that the witness would be exposed to undue mental stress or suffering if they testified in court. This has now been extended by the amendment and requires the witness to be exposed to undue psychological, mental or emotional stress, trauma or suffering should they testify at the proceedings. The latest amendment is much wider.

However, the psychological, mental or emotional stress, trauma or suffering is qualified by the word ‘undue.’ The term ‘undue’ implies that it refers to something more than simply stress, trauma or suffering. This interpretation was accepted by the court in *S v Stefaans* 1999(1) SACR 182 at 187B:

“In the first instance the use of the word ‘onredelik’ (undue) connotes a degree of stress greater than the ordinary stress to which witnesses, including witnesses in complaints of offences of a sexual nature, are subject.”

The question to be asked then is how acute must the stress, trauma or suffering be before it can be classified as ‘undue’? It would seem from the wording that the stress, trauma or suffering experienced by the witness will have to be more than the ordinary stress experienced. In *S v Stefaans* supra the court accepted that the “giving of evidence in court is inevitably a stressful experience” (188C), and that in order for a court to be satisfied that stress was undue, it would have to be something in excess of the ordinary stress. The

younger the child, the more likely it will be assumed that the child will be exposed to stress or suffering by testifying in an open court in the presence of the accused.

In *S v Mokoena*; *S v Phaswane* case no. CC7/07 and CC19/07 (TPD) the High Court held that the requirement of undue stress or suffering in section 170A(1) demands “an extraordinary measure of stress or anguish before the assistance of an intermediary can be called upon”. The Constitutional Court in *DPP, Transvaal v Minister for Justice and Constitutional Development and Others* CCT 36/08 [2009] ZACC 8 found that although the Act does not define the phrase ‘undue mental stress or suffering’, the meaning must be understood in the context of the objectives of the section as a whole, as informed by section 28(2) of the Constitution and the atmosphere in which a child testifies in court. The objective is to protect children from undue mental stress or suffering that may be caused by testifying in court.

“A court operates in an atmosphere which is intended to be imposing. It is an atmosphere which is foreign to a child. The child sits alone in the witness stand, away from supportive relatives such as a parent. The child has to testify in the presence of the alleged abuser and other strangers including the presiding judicial officer, the accused’s legal representative, the court orderly, the prosecutor and other court officials. While the child may have met the prosecutor before – at least one assumes that the prosecutor would have interviewed the child in preparing for trial – the conversation now takes place in a context that is probably bewildering and frightening to the child. Unless appropriately adapted to a child, the effect of the courtroom atmosphere on the child may be to reduce the child to a state of terrified silence. Instances of children who have been so frightened by being introduced into the alien atmosphere of the courtroom that they refuse to say anything are not unknown.” [per Ngcobo J para 101]

The judge found at para 108 that a child complainant who relates in open court the graphic details of the abusive acts perpetrated upon him or her and in the presence of the alleged perpetrator will in most cases experience undue mental stress or suffering. This experience will be exacerbated when the child is subjected to intensive and at times protracted and aggressive cross-examination by the alleged perpetrator or legal representative. Cumulatively, these experiences will often be as traumatic and as damaging to the psychological well-being of the child as the original abusive act was.

In terms of paragraph 114 of the judgment, the Constitutional Court found that section 170A contemplates that in every trial in which a child is to testify, the court will enquire into the desirability of appointing an intermediary. This becomes even more important in the case of child complainants since they are not parties to the proceedings but have constitutional rights which must be protected by the court.

In determining undue stress, trauma or suffering, the court have in the past, where children are concerned, taken into account the following: the age and maturity of the child; the nature of the alleged offence; the nature of the evidence which the child may have to give; and the relationship between the accused and the child. These factors would by implication also apply to other witnesses who are now also entitled to an intermediary.

### **Where does the witness testify?**

Where an intermediary has been appointed, the court can, in terms of the above legislation, direct that the witness testify in a place that is informally arranged to make the witness feel comfortable and in a place where they do not have to see or hear anyone that may upset them. The only requirement is that the court and those present in the court are able to see and hear the witness and the intermediary, either directly or through the medium of an electronic device. This would in most cases be the special courtroom in the Sexual Offences Courts.

### **What is the primary function of the intermediary?**

The primary function of the intermediary is contained in the Criminal Procedure Act 1977 and the same section is repeated in the Magistrates' Court Act 1944 and The Superior Courts Act 2013. The section provides as follows:

- (2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.
- (b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

The main function of the intermediary is to act as a conduit between the court and the witness. Subsection 2(a) above clearly states that all questions that form part of examination, cross-examination and re-examination must go through the intermediary. The function of the intermediary then is to convey the question of the prosecution or the defence to the witness in a manner which is understandable to that witness. The section is worded relatively widely. The intermediary is mandated to convey "the general purport of any question to the relevant witness" and is, therefore, not required to repeat the exact words that the question was framed in originally. It is sufficient that the intermediary convey the meaning or substance of the question.

### **What other functions do intermediaries perform?**

In addition to their main legislative function, intermediaries are also required to perform numerous other functions. These include the following:

#### *Meeting the witness*

Intermediaries are required to meet the witness on the day of the trial and escort them to the prosecutor, show them where the waiting room and toilet is, and generally make the witness's arrival at the court as pleasant as possible.

#### *Familiarising the witness with the courtroom*

Many people find the set-up of the court unfamiliar and intimidating. Vulnerable witnesses, particularly children, will require some familiarization with facilities and equipment in the

separate room. In preparation for the trial, the intermediary should familiarize the witness with the court, the separate room and the equipment that is used for testimony. The intermediary can show where they will sit and introduce them to the equipment, giving the witness, especially the child witness, an opportunity to try the microphone and earphones, and explaining how the CCTV will work. Older witnesses may want to know where the accused will sit, and this should be pointed out to them.

#### *Court orientation*

The intermediary must explain the court processes to the witnesses, parents and or care givers. This is crucial as it prepares the parties for what to expect and how much time they might need to spend at court. Depending on the age of the witness and the time available, it is essential that they understand the process that is to take place i.e. examination-in-chief and cross-examination. Also in some districts, there are no court preparation officers and then intermediaries will be required to fulfil this role.

#### *General care of witness on the day*

This would include liaising with the prosecutor regarding the needs of the witness, especially where the witness is a child. In this case the intermediary would need to keep the child entertained and ensure that they have something to eat and wait in a safe place where they will not come into contact with the accused.

#### *Emotional containment*

Because testifying can be frightening and often requires the witness to relate a traumatic episode, many witnesses break down in the courtroom or special courtroom and start crying. As the intermediary will be alone with the witness in the special room, they are required to provide emotionally support and assist the witness. They can ask the court for an adjournment so that the witness can have a short break in which they can provide comfort. They can get the witness some water to drink and calm them down. They can then inform the court when the witness is ready.

#### *Basic first aid*

The intermediary may also be required to provide basic first aid assistance should this be required. For instance, a witness may faint or vomit, and the intermediary will have to respond immediately and assist the witness. A section on basic first aid assistance has been included at the end of the manual.

#### *Provide debriefing*

After the witness has testified, the intermediary must update the witness and parents, where applicable, about the procedures that will follow and answer any questions they may have. Depending on the emotional state of the witness they may need time in the special room to regain their composure. The intermediary may also provide them with some refreshments and basic debriefing.

#### *Assist parents with referrals*

It may be necessary to assist witnesses or parents of child witnesses with relevant NGOs and Social Services for counselling or further assistance.

#### *Responsibility for CCTV equipment*

Intermediaries are required to check that the CCTV equipment is fully operational before the witness enters the room and that the sound quality is good. Complaints should be logged if the equipment is faulty. Intermediaries must ensure that camera angles are adjusted to get the best view of the witness. They should also ensure that the special courtroom and waiting room, if there is one, are clean.

#### *Other administrative duties*

Intermediaries are required to perform a number of additional administrative duties, which could include:

- Keeping and updating calendars/ diaries for court cases
- Assisting with the administration related to the National Sex Offender Register
- Compiling and submitting monthly reports electronically
- Compiling and maintaining monthly statistics.