

THE USE OF SPECIALISED INTERVIEWERS (INTERMEDIARIES) IN CASES INVOLVING CHILD WITNESSES

Submitted by the Child Witness Institute

KEY CONCEPTS	
Child language	Questioning children
Cross-examination of child witnesses	Intermediaries
Leading questions	Developmentally inappropriate vocabulary
Judicial training	

1. INTRODUCTION

Research has shown that children experience great difficulty with the questioning processes adopted in the legal environment due to cognitive and linguistic limitations, that result in inaccurate evidence and further trauma for the child witness. In order to address these difficulties, various international jurisdictions have introduced accommodations to assist the child, as well as other vulnerable witnesses, to communicate more effectively in judicial proceedings. The purpose of this discussion document is to examine these accommodations and investigate issues that have arisen with their implementation.

2. THE TRADITIONAL APPROACH TO THE EVIDENCE OF CHILDREN

Traditionally, when testifying, children have been treated like adults in the criminal justice system and no accommodations have been made for their cognitive and language limitations. Research has highlighted a number of difficulties experienced by children who have to testify in court. These include, amongst others, having to testify in the presence of the accused, finding the questions posed in court difficult to understand, being treated with hostility and being ignorant of the procedures that are followed. In response to the difficulties experienced by children, most jurisdictions internationally have adopted various accommodations to reduce the likelihood of further trauma to the child as a result of the processes. Accommodations have included the use of screens to separate the child from the accused, one- or two-way mirrors behind which the child can testify, and closed-circuit television, which allows the child to testify from another room. These accommodations have focused primarily on protecting the child from confronting the accused. Some countries have also introduced court preparation programmes for children to improve their understanding of the court process and thereby increase their confidence and make them more effective witnesses.

Up until approximately a decade ago, very little attention was focused on the cognitive and language impediments children experience with the court process, and their limited ability to deal with the hostility of the questioning processes in a trial. Within the psychological arena, the child witness became an area of interest and subsequent research in many countries. The findings from the large

body of research conducted on this topic indicated that children were unable to communicate effectively within the court environment as a result of certain cognitive and language limitations. However, because of the adversarial nature of proceedings, presiding officers have been wary of interfering with the questioning of child witnesses, especially during cross-examination, to avoid any suspicion that they are not being impartial. This is exacerbated by the fact that judicial officers have not been trained in cognitive and language development and are, therefore, mostly unaware when the child is experiencing difficulty with a question or is confused.

The medium of exchange in the courtroom is a particular form of language so steeped in legal tradition that it falls outside the normal language repertoire of adults and, even more so, of children (Brennan and Brennan 1988:31). This, together with the hostile manner in which questions are framed, has contributed to increased trauma for the children and reduced accuracy in their evidence. The overwhelming finding of the research was that the questioning of a child witness is a very specialised task, and presiding officers, prosecutors and defence counsel are not trained to perform these functions.

3. COMMUNICATING IN THE COURTROOM ENVIRONMENT

In the courtroom, communication takes place within a prescribed framework of examination, cross-examination and re-examination. In addition, the communication must take place within the question-answer format, which leaves children little room to negotiate when they do not understand the language employed. Children have limited cognitive capacity, and this has implications for their ability to cope effectively with the language employed in court, which has been described as being developmentally inappropriate. Developmentally inappropriate questions refer to questions which employ language and structures that are incompatible with a child's cognitive and linguistic capability and thus decrease the likelihood that the child will be able to give an accurate response.

Although cognitive- and language-related difficulties are experienced throughout the testifying process by children, cross-examination has proved to be the most difficult for children and to cause the most secondary trauma. Cross-examination is stressful for witnesses, and even more so for children. The stress is induced not only by having to give evidence in court but also, in cases of sexual abuse, by the fact that the child will be called upon to reveal very intimate details. The adversarial nature of the trial places the child in a position where they find themselves under attack. The defence is obliged to attack the child's credibility in an attempt to highlight inconsistencies and discredit the child's evidence.

A number of techniques employed in cross-examination give rise to serious difficulties with comprehension for the child witness (Müller and Tait 1997:521). These would include the use of leading questions, hypothetical questions, age-inappropriate vocabulary, complex syntax, general ambiguity and a focus on peripheral detail. Many children, therefore, experience difficulties with communication, either because their language is not understood or because they cannot be heard. At present it suffices to say that the use of these techniques makes it impossible for child witnesses to communicate truthfully and effectively. This was accepted by Melunsky J in *Klink v Regional Court Magistrate NO and Others* 1996(3) BCLR 402 (SE) at 411E:

"It is sufficient to say that I am quite convinced that a child witness may often find it traumatic and

stressful to give evidence in the adversarial atmosphere of the courtroom and that the forceful cross-examination of a young person by skilled counsel may be more likely to obfuscate than to reveal the truth.”

In order to highlight the great divide between the cognitive and language capacity of the child and the language techniques used in court, attention is drawn to certain problematic techniques employed within the courtroom.

3.1 Leading questions

A leading question is one which encourages a particular response, and research has shown that these questions are the most unreliable method of eliciting information from children (Cossins 2009: 80). In court, questions are posed in such a way that they require a yes or no response in order to give the questioner full control of the questioning process. However, this technique prevents the child from elaborating or explaining and often results in inaccurate information. This is exacerbated by the fact that children, because they are submissive to adults, tend to offer the response signaled as appropriate irrespective of whether it is the correct response or not.

3.2 Developmentally inappropriate vocabulary

Language used in court is extremely specialised and so steeped in legal tradition that it is understood with difficulty even by adults. Law is a profession which uses vocabulary and technical terms that are specific to it. Children, who are relatively inexperienced language users, have great difficulty comprehending the specificity of legal language. Children have the tendency to interpret words in terms of their own personal experiences, and these can differ from the meanings traditionally assigned to the words, which can lead to errors in communication. Children communicate vaguely and inaccurately.

3.3 Embeddings

Language used in court is very compact and compressed, since a lot of information needs to be inserted into a single question. This is achieved by the use of complex syntactical structures which make comprehension very difficult. The technique used to compress information into a sentence is referred to as embedding, e.g. “Did you see the child sitting in the park with a doll on her lap, watching the other children play?” If children are confronted with questions that contain a lot of embedded information, their understanding of the content will be severely compromised.

3.4 Use of the negative

Legal language is inundated with the use of the negative. Negatives are frequently placed in unusual positions and function to break up the content of the questions. The use of the negative contributes to confusion and miscommunication, as can be seen in the following example: “Now you had a bruise, did you not, near one of your breasts, do you remember that?” (12 year old). Children do not have the cognitive strategies necessary to process and respond to negatives until they are at least 9 years old. This difficulty is further compounded when double negatives are used. Negatives should be avoided wherever possible with questions always being framed in the positive (Righarts 2007: 42).

3.5 Tag questions

A tag question is one that transforms a statement into a question by adding on a request for confirmation, and encourages agreement e.g. “You were unhappy then, weren’t you?” Although even young children appear to make use of tag questions, studies have found that many 12 and 14 year olds have difficulties understanding tag questions. This is because tag questions require a process of unravelling and children, because of their incomplete linguistic development, have great difficulty with this unravelling task. These questions are regarded as very suggestive, because children may agree with the questioner even though they may not agree with the content of the statement. It may simply be that the child does not have the cognitive ability required to “dissect” the question and disagree with it. The child, therefore, may agree simply to be co-operative (Plotnikoff and Woolfson 2010: 7).

3.6 Multiple questions

Multiple questions involve the use of several questions at once e.g. “You don’t remember? Did anyone ever wake and see this happening?” In order to avoid multiple questions, children should be asked to provide one piece of information at any given time. It is essential that questions to children be formulated as carefully as possible.

3.7 Use of pronouns

Pronouns have no meaning apart from the specific context in which they occur. The sentence “Did she go to the shop?” will have no meaning unless the listener knows to whom ‘she’ refers. The ability to link pronouns with prior or subsequent nouns is not fully developed until the age of 10. It is suggested that interviewers repeat critical information instead of using pronouns.

3.8 Cognitive limitations

A why-question is generally not understood before the age of eight or ten (Brennan and Brennan 1988:56). This is related to a child’s difficulty in understanding evaluative questions. An evaluative question is one that requires the child to think about and interpret facts. According to Perry and Wrightsman (1991:60), as a child’s brain develops a fatty substance (myelin) begins to coat and protect the neural fibres which have the function of reducing the random spread of impulses from one fibre to another. The last structure to myelinate is the *corpus callosum*, which is the band of fibres connecting the right and left hemispheres of the brain. One of the major functions of the *corpus callosum* is to transfer information from one hemisphere of the brain to the other, which would enable children to evaluate and make inferences. Myelination of the *corpus callosum* is not complete until after a child is ten years old.

3.9 Misunderstanding and compliance

Because of the difficulties children experience with communication in the court environment, inaccurate responses tend to stem from misunderstanding. The child’s inability to understand, coupled with the fact that they are unaware that they do not understand, means that it is highly unlikely that the child will seek clarification or say that they do not understand. In addition to the misunderstandings, accuracy is further compromised by the compliance of the child. Compliance refers to the child complying with the questioner’s request for a response, and results in the child providing an answer, irrespective of whether the child understood the question or not (Zajac, Gross and Hayne: 2003: 22).

3.10 Conclusion

Research over the previous twenty-five years has highlighted the cognitive and language limitations children have when trying to communicate in the court environment, and have emphasised that *traditional procedures create secondary trauma for children and result in inaccurate evidence.*

4. ATTEMPTS TO REGULATE CROSS-EXAMINATION

A lot of attention has been placed on the destructive effect that cross-examination has on children, with evidence of children experiencing secondary trauma. Cross-examination is by implication aggressive since one of the aims of cross-examination is to attack the credibility of the witness. Children are unable to deal with this hostility and research has emphasised the negative impact which this has on the mental health of child witnesses. As a result, many international jurisdictions have attempted to regulate cross-examination in order to protect child witnesses.

In South Africa a section on cross-examination was introduced in s166 of the Criminal Procedure Act 1977, which reads as follows:

(a) If it appears to a court that any cross-examination contemplated in this section is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, the court may request the cross-examiner to disclose the relevancy of any particular line of examination and may impose reasonable limits on the examination regarding the length thereof or regarding any particular line of examination.

(b) The court may order that any submission regarding the relevancy of the cross-examination be heard in the absence of the witness.

In New Zealand the legislature made an attempt to regulate questions in cross-examination with the introduction of section 85(1) of the Evidence Act 2006, which provides that a judge may disallow any question that they consider to be “improper, unfair, misleading, needlessly repetitive, or expressed in language too complicated for the witness to understand.”

Queensland Parliament has provisions relating to cross-examination in the Evidence Act 1977. Provision 9E contains the principles that are applicable to child witnesses, and provides for the use of special measures when children give evidence. 9E(2)(a) provides specifically that “the child should not be intimidated in cross-examination.” Section 21 deals with improper questions and provides:

- (1) The court may disallow a question put to a witness in cross-examination or inform a witness a question need not be answered, if the court considers the question is an improper question.
- (2) In deciding whether a question is an improper question, the court must take into account –
 - a. any mental, intellectual or physical impairment the witness has or appears to have; and
 - b. any other matter about the witness the court considers relevant, including, for example, age, education, level of understanding, cultural background or relationship to any party to the proceeding.

In Australia, the issue of cross-examination was dealt with in the context of family violence, and is pertinent to other criminal procedures as well since child witnesses very often have to testify against family members. The Family Act 1975 was amended by the Family Law Amendment (Family Violence and Cross-examination of Parties) Act 159 of 2018 and deals with the cross-examination of parties where there are allegations of family violence. It provides that, in such a case, the examining party is

not allowed to cross-examine the witness personally, but has to do this through their legal representative (102NA (2)).

This provision is also reflected in the Tasmanian Evidence (Children & Special Witnesses) Act 2001, although the Tasmanian version refers to any criminal proceedings and not only those involving family violence. Section 8A(1) provides that a defendant is not permitted to cross-examine a witness who is the alleged victim of the offence unless the cross-examination is undertaken by the legal representative. The United Kingdom has a similar provision in sections 36 and 37 of the Youth Justice and Criminal Evidence Act 1999 which gives courts the power to prohibit unrepresented defendants from cross-examining witnesses.

There are many legislative provisions dealing with cross-examination in the United States of America. As an example, Article VI Rule 611 of the Federal Rules of Evidence deals with the examination of witnesses. It provides that the court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to make the procedures effective for determining the truth, to avoid wasting time and to protect witnesses from harassment or undue embarrassment. The Federal Rules also include provisions on the scope of cross-examination and leading questions:

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony.

Although many jurisdictions have introduced provisions in an attempt to regulate cross-examination, these innovations have not proved to be successful. Research conducted by Hanna et al (2010: 39) to examine the extent of judicial intervention found that, although judicial curbing of inappropriate questioning increased, there were very many instances where complex questions were not disallowed.

These findings provide a basis for suggesting that the power to disallow certain questions does not provide a 'fail safe' method of ensuring that cross-examination is developmentally appropriate. It would appear that the efficacy of these legislative provisions are limited by the fact that judges do not possess the level of specialised knowledge required to appreciate when a question is developmentally inappropriate and/or likely to produce inaccurate evidence. It follows, therefore, that specialised knowledge on cognitive development, language development and communication is required to recognise questions that are misleading, developmentally inappropriate or too complicated for the child witness to understand. Evidence, however, has shown that judges do not possess the requisite specialised knowledge to perform these tasks (Cashmore and Trimboli 2005: 81).

It is clear from the research that the statutory innovations aimed at controlling the cross-examination of witnesses have not been successful for a number of reasons. Firstly, the fact that the legal provisions refer to cross-examination implies that cognizance is not taken of the fact that it is the child's limited cognitive and linguistic abilities that are the core issue and which give rise to the inaccuracies. It follows, by implication, that it is not only cross-examination that is difficult for children, but also examination and re-examination. In fact, it is communicating in the court environment, which does not take cognizance of their limited cognitive and linguistic abilities, that is the core of the problem for child witnesses. Secondly, most judges are not adequately sensitized or trained to communicate with children in a developmentally appropriate manner and are, therefore, unable to intervene even when they have enabling legislation to assist them.

5. THE INTRODUCTION OF SPECIALISED CHILD INTERVIEWERS

Children are unable to communicate effectively in the court environment and this causes secondary traumatization of child witnesses and leads to inaccurate evidence. Accommodations to the court processes that have been introduced to assist child witnesses have not addressed the difficulties relating to child communication and attempts to curb cross-examination by legislative means have not been successful. As a result, various countries began to explore introducing initiatives that would minimize the difficulties children experience with communicating in court and reducing the distortion of their evidence caused by misunderstandings.

Generally, an intermediary is a person with specialist knowledge and skill who assists a child to communicate in court. The exact scope of the role of the intermediary varies in accordance with the legislation mandating their appointment. Intermediaries can be classified into two broad types: the narrower interpretation refers to the situation where the intermediary acts only as an interpreter or translator while the broader interpretation allows for the intermediary to rephrase communications between the child and the court (Tillet 2011: 34).

5.1 South Africa

In response to the above, the concept of an intermediary or specialised child interviewer was first introduced in South Africa in 1989 as a result of an investigation into improving the experience of the child witness in the court process. Consequent to the recommendations of the South African Law Commission, the Criminal Law Amendment Act 135 of 1991 was passed, which introduced the persona of the intermediary. Although the Commission originally referred to this person as the child investigator, the term 'intermediary' was used in the section as it was thought that the term 'child investigator' was misleading as it implied an investigator. The role of the intermediary would be to facilitate communication between the child and the court and thus the 'term' intermediary was preferred.

Section 170A of the Criminal Procedure Act 51 of 1977¹ provides that, if in criminal proceedings it appears to a court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if they testify, the court may appoint a competent person to act as an intermediary in order to enable the witness to give their evidence through the intermediary. If such an appointment is made, then all communication must take place through the intermediary, although the presiding officer does have the discretion to communicate directly with the child. This section has been framed very widely since it refers to any witness under the biological or mental age of 18. It is not limited to complainants only or to specific crimes.

The function of the intermediary is to convey the general purport of any question to the relevant witness, which has been interpreted to mean that the intermediary is required to convey the questions of the prosecution or the defence to the child in a manner which is understandable to the child. The intermediary is mandated to convey the general meaning of the questions and is, therefore, not forced to repeat the exact words that the question was framed in originally. It is sufficient that the intermediary convey the meaning.

The intermediary must, therefore, convey the content and meaning of the question to the child in a manner that the child understands. In carrying out this duty, the intermediary has two very distinct functions. Firstly, they are able to remove all hostility and aggression from the questions, as was recognised by the Law Commission in their report. In repeating or rephrasing the question, the

¹ The full section is quoted in Annexure A.

intermediary will be able to remove any aggressive nuances that may be inherent in the original question. This is especially important when conveying the questions of defence counsel, as these questions are often phrased in a manner which aims to intimidate and confuse the witness (Müller and Tait 1997:526). The intermediary, therefore, can and does act as a form of protection for the child against any hostility implicit in certain questions. This has been accepted by the courts in the *Klink* case *supra* at 411 I-J:

“It is true that it is not only the contents of the questions that forms part of the armoury of the cross-examiner. The successful cross-examiner may employ intonations of voice and nuances of expression to drive his point home and, perhaps to cause discomfort to the witness. It is therefore possible that the forcefulness and effect of cross-examination may, to some extent, be blunted when an intermediary is interposed between the questioner and the witness.”

Secondly, the intermediary has, in terms of 170A(1)(b), the power to change the question in such a way that the child understands what is being asked. This interpretation was accepted by the Supreme Court in *Klink's* case *supra* where it was argued that it was in the interests of justice that the child comprehends the question that was being put to them, so that they could answer it properly:

“There are sound reasons why the conveyance of the general purport of the question might enable a child witness to participate properly in the system. Questions should always be put in a form understandable to the witness so that he or she may answer them properly. Where the witness is a child, there is the possibility that he may not fully comprehend or appreciate the content of a question formulated by counsel. The danger of this happening is more real in the case of a very young child. By conveying ‘the general purport’ of the question, the intermediary is not permitted to alter the question. He must convey the content and meaning of what was asked in a language and form understandable to the witness.”

The intermediary, as mentioned by the court in the above excerpt, may only convey the question in a way that the child understands. The meaning of the question may not be changed as the parties will have the right to object that their question was not asked, and may put it to the witness again. This was accepted by the Court in *S v Stefaans* 1999(1) SACR 182:

“If the section is invoked the presiding judicial officer should be aware of the risk that the efficacy of cross-examination may be reduced by the intervention of the intermediary. The judicial officer should be alert to this and should be prepared to intervene to insist that the exact question rather than the import thereof, be conveyed to the witness.”

The intermediary has no power other than to convey the meaning of a question, and has been described as a special kind of interpreter. This was accepted by the court in *Klink supra* where the court at 411 I said: “The intermediary acts, in a sense, as an interpreter.” And this was reiterated in *S v Motaung*, case no. CC79/05 High Court (SECLD), where the court found that “[an] intermediary performs a similar function to that of an interpreter.”

The list of persons who can act as an intermediary are published by notice in the Government Gazette², and these have been updated on numerous occasions. The list covers a broad range of individuals and this spectrum was included to cover every eventuality initially as the position of intermediary was not permanent and the courts were required to use *ad hoc* persons to act as intermediaries. The list includes paediatricians, psychiatrists, family counsellors, child care workers, social workers, community trauma counsellors, educators, and psychologists. In order to be competent to be an intermediary, these professionals have to comply with certain requirements. For

² The applicable notice is included as Annexure 2.

instance, a social worker has to be registered as such under the applicable act and must have at least two years' experience as social worker. Although the Government Gazette sets out who may act as an intermediary, it does not require any additional qualification nor does it require that an intermediary undergo any minimum training before being appointed as such. However, in practice, intermediaries do undergo in-house training but this training is not standardized nor is it accredited.

5.2 United Kingdom

Intermediaries have been used for witnesses in England and Wales since 2004, and in Northern Ireland since 2013. The concept of a specialist interviewer was first recommended in 1989 in the Pigot Report (Home Office 1989) where it was suggested that questions posed by counsel be relayed through a person approved by the court, referred to as an interlocutor, who enjoyed the confidence of the child.

This recommendation was not implemented, but in 1998 the Home Office revisited the issue and recommended the use of a communicator or intermediary to assist vulnerable adults as well as children, as well as a scheme for the accreditation of such communicator or intermediary. As a result of these recommendations special measures were introduced for vulnerable witnesses in the Youth Justice and Criminal Evidence Act 1999 and in the Criminal Evidence (Northern Ireland) Order 1999 (CE(NI)O 1999) in Northern Ireland. These special measures are, in terms of section 16 of the Youth Justice and Criminal Evidence Act, available for witnesses who:

- are under 18 at the time of the hearing or
- suffer from a mental disorder or a significant impairment of their intelligence and social functioning which is likely to diminish the quality of their evidence or
- have a physical disability or disorder.

The special measures are also extended to grounds of fear or distress in terms of section 17.

The use of intermediaries is included as one of the special measures available for vulnerable witnesses. Section 29(2) of the Youth Justice and Criminal Evidence Act 1999 sets out the function of the intermediary as follows:

- (2) The function of an intermediary is to communicate—
- a. to the witness, questions put to the witness, and
 - b. to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

Section 29(3) of the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) describes the manner in which the intermediary is required to perform this task:

- (3) Any examination of the witness in pursuance of subsection (1) must take place in the presence of such persons as rules of court or the direction may provide, but in circumstances in which—
- a. the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the intermediary, and
 - b. (except in the case of a video recorded examination) the jury (if there is one) are able to see and hear the examination of the witness.

The role of the intermediary in England and Wales is to assist the police and the court to communicate with the witness in order to obtain the “best-quality” evidence from a vulnerable witness (Mattison and Cooper 2017: 353). The intermediary performs an individual assessment of the witness's communication needs before the trial. It is usually conducted before the witness is interviewed by the police, although the assessment can take place later in the proceedings i.e. after

the witness has been interviewed but before the trial. The findings of the communication assessment will be used to advise police and court role-players how best to communicate with the witness. Since the assessment is done on an individual basis, it can contain specific recommendations on how to communicate with that particular witness both prior to and during the questioning; how to communicate with the witness when preparing them for the criminal process; how to monitor and manage anxiety associated with giving evidence where it impacts on communication; and how to use communication aids or devices to assist with communication (Mattison and Cooper 2017:355).

Intermediaries come from a wide variety of professional backgrounds, including speech and language therapy, psychology and social work , and are then required to undergo training before they can be registered as intermediaries. The training aims to provide them with the knowledge and skills for assessing the communication needs and abilities of the witness; advising the police on how best to communicate with the witness at an interview; writing a report for the lawyers and judges about how to adapt their communication in court; and taking part in a pre-trial case management hearing (Mattison and Cooper 2017: 355).

The Ministry of Justice makes use of a referral service which matches witnesses with intermediaries, depending on the particular needs of the witness and the geographical location. Once the intermediary accepts the appointment, they begin to gather information about the witness and the nature of the allegation. Where possible, they will also gather information from third parties about the witness's communication needs and abilities. This could include conversations with parents, carers and teachers as well as reading relevant school or psychological reports. Provisional dates will be organised for the assessment of the witness and the police interview. This requires some preparation as the intermediary will have to plan the interview with the police, both logistically and in terms of the areas of communication that need to be explored (Mattison and Cooper 2017: 357).

A rule of practice that has developed requires that intermediaries never be left alone with the witness they are assessing to avoid the perception that they may have coached or otherwise influenced the evidence of the witness. It is also to avoid the situation where the witness may make a disclosure to the intermediary and the latter becomes a witness in the case. It is the practice that the interviewing officer is usually the person who is present throughout the assessment as it has the additional benefit that they are able to gain further information about the witness's needs and abilities (Mattison and Cooper 2017: 358).

There is no formal or standard protocol for the structure of the intermediary's assessment, but the assessment may not include any discussion about the case or evidence. The assessment involves a range of tasks that are aimed to assess the witness's communicative capacity to give evidence, and includes issues like the witness's ability to understand questions, to express themselves, their ability to concentrate and the necessity for using external aids to assist communication. The findings from this assessment will inform the basis of the recommendations that are made to the police and court (Mattison and Cooper 2017: 358).

The intermediary is present during the police interview and facilitates communication by listening carefully to the questions the police interviewer asks and monitoring whether the questions are appropriate to the witness's communicative ability. If any communication problems arise, the intermediary can intervene and suggest a way to resolve the problem. The intermediary also manages the witness's anxiety levels to ensure that they can communicate effectively. If necessary, the intermediary will also provide and facilitate the use of communication aids (Mattison and Cooper 2017: 358).

The intermediary is also responsible for producing a report for the court, which will provide full

details of the assessment conducted and the findings . Recommendations are also included for ground rules for the trial as well as for any other special measures that would assist the witness. These recommendations deal with a range of topics such as the structure and format of questions, the pace of questions, the use of communication aids and how to deal with distress or confusion (Mattison and Cooper 2017: 358).

Before the trial, the intermediary is also responsible for organizing the pre-trial court visit, the purpose of which is to familiarize the witness with the court environment and to provide an opportunity for the court staff to provide information about going to court. The intermediary will facilitate communication here to ensure the witness understands the information provided. A scheduled discussion with judges and counsel, known as a ground rules hearing, also takes place before the trial. The purpose of this hearing is to provide the intermediary with an opportunity to highlight the recommendations in the report about the structure of the questions, the frequency of breaks and the use of communication aids, and to agree on how and when the intermediary will intervene if there is a breakdown in communication. The judge may also at this hearing make directions for the intermediary to review the cross-examination questions of the advocates before the witness has to give evidence in court (Mattison and Cooper 2017: 359).

At the trial, the intermediary has to sit next to the witness and their role is to assist with the management of the witness's emotional state when needed and to monitor carefully the structure and phrasing of questions. Sometimes the intermediary may be required to relay the answers of a witness where, for instance, the witness is only able to write down answers. The intermediary will also be required to facilitate the use of communication aids, where these are used, and intervene where communication difficulties arise (Mattison and Cooper 2017: 359).

It would appear from the available research that the intermediary scheme in England and Wales has been found to be highly successful and has obtained the support of court role-players, including police. In fact, the study conducted by Plotnikoff and Woolfson (2015).

5.3 New Zealand

Initially New Zealand opted for the narrow 'translator' version of the intermediary when the Evidence Act 1908 was amended to allow for the appointment of an intermediary. In terms of section 23E(4), where a child complainant was to give evidence from out of court or from behind a screen, the judge could direct that questions be put to the witness through an approved person. This section could only be used when evidence was being given via an alternative method, like from behind a screen, and only where the alleged offence was of a sexual nature.

Tillet (2011: 34) describes the role of the intermediary as that of a "megaphone" since the purpose of such an appointment was restricted to removing practical complications that could arise where evidence was given outside of the court's hearing or sight. This role of the intermediary was accepted in *R v Accused HC Wellington T91/92*, 5 March 1993 where Neazor, J. said that the intermediary was responsible for responsibly and fairly putting the questions as asked. If it appeared to the court that the child did not understand the question, then it was the responsible of counsel to rephrase the question.

However, in 1996 the Law Commission recommended that the role of the intermediary be extended to rephrasing questions "to assist witness comprehension," but this recommendation was not included in the later draft legislation and the previous provision relating to intermediaries was abolished as well (Tillet 2011: 35). The discussion around the concept of the intermediary was revived in 2011 when the Ministry of Justice published a discussion document on proposed possible solutions to problems associated with child witnesses testifying. Included in these proposals was the reintroduction of the intermediary concept. Cabinet approved a package of child witness law

reforms in 2011, one of which was the use of intermediaries to assist child complainants while being questioned in court. The New Zealand government agreed in principle to provide for the use of intermediaries for children under 18 and allowed for the procedures to be prescribed in regulations. However, this proposal was not supported by the Minister of Justice, who argued that intermediaries are more suited to inquisitorial systems of procedure and that the defendant's right to cross-examine a witness would be adversely affected by the use of an intermediary. It was also argued that it would be difficult to find people with the requisite skills to act as an intermediary (Tasmania Law Reform 2016: 42-43). In consequence, section 80 of the Evidence Act no.69 of 2006 allowed for the appointment of a communication assistant. Section 80 provides as follows:

80 Communication assistance

- (1) A defendant in a criminal proceeding is entitled to communication assistance, in accordance with this section and any regulations made under this Act, to—
 - (a) enable the defendant to understand the proceeding; and
 - (b) give evidence if the defendant elects to do so.
- (2) Communication assistance may be provided to a defendant in a criminal proceeding on the application of the defendant in the proceeding or on the initiative of the Judge.
- (3) A witness in a civil or criminal proceeding is entitled to communication assistance in accordance with this section and any regulations made under this Act to enable that witness to give evidence.
- (4) Communication assistance may be provided to a witness on the application of the witness or any party to the proceeding or on the initiative of the Judge.
- (5) Any statement made in court to a Judge or a witness by a person providing communication assistance must, if known by the person making that statement to be false and intended by that person to be misleading, be treated as perjury for the purposes of sections 108 and 109 of the Crimes Act 1961.

Section 80 allows the court to make an order to provide assistance to a witness or defendant with a "communication disability" or who lacks "sufficient proficiency" in English to understand proceedings or give evidence (Henderson 2016). This assistance does not have to be provided if the judge considers the witness is able to understand the question and respond. This is provided for in section 81:

81 Communication assistance need not be provided in certain circumstances

- (1) Communication assistance need not be provided to a defendant in a criminal proceeding if the Judge considers that the defendant—
 - (a) can sufficiently understand the proceeding; and
 - (b) if the defendant elects to give evidence, can sufficiently understand questions put orally and can adequately respond to them.
- (2) Communication assistance need not be provided to a witness in a civil or a criminal proceeding if the Judge considers that the witness can sufficiently understand questions put orally and can adequately respond to them.
- (3) The Judge may direct what kind of communication assistance is to be provided to a defendant or a witness.

Court-appointed communication assistants are communication specialists who are neutral, impartial officers of the court for vulnerable witnesses or defendants, whether children, youth or adults. The role of the communication assistant is to assist all involved in legal proceedings to communicate with the person involved. This role is seen to be akin to that of an interpreter, and they are in fact funded as interpreters by the Ministry.

According to Henderson (2016) communication assistants have been appointed in New Zealand in cases involving defendants and witnesses with head injuries, dementia and stroke-related conditions, foetal alcohol syndrome and significant learning disabilities as well as for developmentally normal

young children. Although the section has been employed mostly in cases of people with mental disabilities, it has, nevertheless, also been used for trying to communicate with children who do not have mental disabilities. Its use of a communication assistant was approved by the Court of Appeal in *R v Hetherington* [2015] NZCA 248 where the trial related to a sexual offence against a teenage complainant with Down's Syndrome and considerable language delays.

"The accused's right to a fair trial is a keystone of our criminal justice system. It is not the only keystone. People with intellectual difficulties and challenges should be able to come to our Courts and present their evidence in a way that is tailored to their needs to ensure that the trier of fact ... can be as confident as possible that the answers are true answers, that is as to what occurred, rather than the witness being confused and challenged by the questions being asked."

Experience has shown that communication assistants can be invaluable when facilitating communication with an impaired person as they provide an effective and practical way of overcoming the barriers to achieving justice by improving the quality of witnesses' evidence and increasing defendants' ability to understand and participate in their own trials (Henderson 2016). The question, however, is whether sufficient use of this service is made for children who not have any developmental delays, but due to normal developmental limitations have difficulty communicating in the legal environment.

This task is generally performed by expert speech-language therapist who is appointed by the court to conduct a specialised assessment of the speech, language and communication skills of the identified person to determine whether they will be able to communicate within the court context. The assessment explores what strategies can be used to modify language and what visual supports can be used to assist communication. A report with necessary recommendations is provided to the court. The court may then appoint the therapist as the communication assistant to assist the role-players in the court to communicate with the person.

5.4 Philippines

The Philippines have issued rules and regulations for the implementation of the Special Protection of Children against Abuse and Exploitation and Discrimination Act {Republic Act No. 7610} 1992. Of particular relevance to this discussion is the Rule on Examination of a Child Witness, which governs the examination of child witnesses who are victims of crime, accused of a crime and witnesses of crime. The objectives of the Rule (section 2) are to create and maintain an environment that will allow children to give reliable and complete evidence, minimize trauma to children, encourage children to testify in legal proceedings and facilitate the ascertainment of the truth.

The procedures provided in this Rule are for any person who is under the age of 18, although this limit has been increased to over 18 where the court finds the person is unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition (section 4(a)).

In the Philippines, use is made of a facilitator to assist with the questioning of the child and a facilitator is defined in the Rules as "a person appointed by the court to pose questions to a child." In terms of section 10, the court may appoint a facilitator if it finds that the child is unable to understand or respond to the questions asked. If the court appoints a facilitator, then all questions have to be posed through the facilitator. The facilitator is also not limited to use the specific words of counsel but can convey the meaning of the question in words that the child will understand. The section reads as follows:

Sec. 10. Facilitator to pose questions to child.—

(a) The court may, *motu proprio* or upon motion, appoint a facilitator if it determines that the child is unable to understand or respond to questions asked. The facilitator may be a child psychologist, psychiatrist, social worker, guidance counselor, teacher, religious leader, parent, or relative.

(b) If the court appoints a facilitator, the respective counsels for the parties shall pose questions to the child only through the facilitator. The questions shall either be in the words used by counsel or, if the child is not likely to understand the same, in words that are comprehensible to the child and which convey the meaning intended by counsel.

Section 10 also provides a list of the people who can act as intermediaries, and these include but are not limited to child psychologists, psychiatrists, social workers, guidance counsellors, teachers, religious leaders, relatives and even parents. In terms of subsection (c), the person appointed as a facilitator must take an oath or affirmation to pose questions to the child according to the meaning intended by counsel.

Section 19 of the Rule regulates the mode of questioning of children and requires that the court exercise control over the questioning of children in order to facilitate the ascertainment of truth; ensure that questions are stated in a form appropriate to the developmental level of the child; protect children from harassment or undue embarrassment; and avoid wasting time. As can be seen, the legislature has taken cognizance of the developmental difficulties children may have with questions, and the term “developmental level” is defined in section 4(h) as the “specific growth phase in which most individuals are expected to behave and function in relation to the advancement of their physical, socio-emotional, cognitive, and moral abilities.” The section also states that the “court may allow the child witness to testify in a narrative form,” acknowledging the difficulty children have with the traditional questioning process in court.

5.5 Zimbabwe

The Criminal Procedure and Evidence Amendment Act 2004 s319A to G deals with the appointment and regulation of intermediaries in the Zimbabwean courts. Section 319B reads as follows:

If it appears to a court in any criminal proceedings that a person who is giving or will give evidence in the proceedings is likely –

(a) to suffer substantial emotional stress from giving evidence: or

(b) to be intimidated, whether by the accused or any other person or by the nature of the proceedings or by the place where they are being conducted, so as not to be able to give evidence fully and truthfully;

The court may, subject to this Part, do any one or more of the following, either *mero motu* or on the application of a party to the proceedings: –

(i) appoint an intermediary for the person;

(ii) appoint a support person for the person;

(iii) direct that the person shall give evidence in a position or place whether in or out of accused's presence, that the court considers will reduce the likelihood of the person suffering stress or being intimidated: Provided that, where the person is to give evidence out of the accused's presence, the court shall ensure that the accused and his legal representative are able to see and hear the person giving evidence, whether through a screen or by means of closed circuit television or by some other appropriate means;

(iv) adjourn the proceedings to some other place, where the court considers the person will be less likely to be subjected to stress and intimidation;

(v) subject to section 18 of the Constitution, make an order in terms of the Courts and Adjudicating Authorities (Publicity Restriction) Act [Chapter 7:04] excluding all persons or any class of persons from the proceedings while the person is giving evidence.

The court is guided by s319C in determining whether any of the above measures should be used.

The court has to take into consideration the age, mental and physical condition and cultural background of the witness as well as the relationship, if any, between the vulnerable witness and any other party to the proceedings. The court should also consider the nature of the proceedings, the feasibility of taking the measures concerned, the views expressed by the parties and, finally, the interests of justice. The court is also allowed to interview the witness concerned out of sight and hearing of the parties to the proceedings, provided, of course, that the merits of the case are not discussed.

Section 319E gives the court the power to rescind any measure taken by it in this regard where it believes it would be in the interests of justice to do so. This means that the court could withdraw the services of an intermediary in the middle of a trial where, for instance, the use of the intermediary is seen to be interfering unduly with the accused's right to examine a witness since the accused is, in terms of s13(3)(e) of the Zimbabwean Constitution, afforded the right to examine a witness called by the prosecution.

Except in special circumstances, the court can only appoint a person as an intermediary who is or has been employed by the State as an interpreter in criminal cases and who has undergone training in the functions of the intermediary (319F). The functions of the intermediary are contained in s319G, and the section provides that an intermediary must "convey to the vulnerable witness concerned only the substance and effect of any question put to the witness" and "may relay to the court the vulnerable witness's answer to any questions put to the witness". When relaying the child's response to the court, the intermediary must "so far as possible, repeat to the court the witness's precise words". This system differs from the South African version in that the intermediary is required to relay the child's response back to the court, whereas in South Africa the intermediary only conveys the question to the child and the child's response is heard by the court.

In terms of s319B, the court must be convinced that a person who is testifying or about to testify is likely to experience emotional stress in order for the court to grant the appointment of an intermediary. The inclusion of the phrase "mero motu" allows the court to act on its own initiative in appointing an intermediary, in the absence of an application by the State. In practice, this authority has been used by the courts to justify an automatic appointment of intermediaries, except in cases where a child witness prefers to confront the accused in the main courtroom. Section 319B does not stipulate any age limit for witnesses who may receive intermediary assistance, and permission to use intermediaries is not limited to sexual offence trials only. In separate group interviews with presiding officers and prosecutors, both groups unanimously agreed that in practice the courts have opted for the wider interpretation of the legislation. This means that in sexual abuse cases intermediaries are automatically granted to child witnesses and any other witnesses who are deemed to be vulnerable in terms of the Act, unless, of course, they choose to forego the assistance of an intermediary (Müller and Marowa-Wilkerson 2011: 15). An innovative aspect of the legislation is the use of interpreters to act as intermediaries. Section 319F requires that for a person to be appointed as an intermediary, that person must be a current or former state interpreter and must have undergone training to be an intermediary. Only in exceptional circumstances may a person, who is neither a current nor a former state court interpreter and has not received intermediary training, be appointed as an intermediary. The section does not give any indication as to what would amount to exceptional circumstances. In practice the combined function of interpreter and intermediary is known and accepted in most regional courts in the country, where the interpreter simply becomes the intermediary when the witness is a child (Müller and Marowa-Wilkerson 2011: 16).

Intermediaries in Zimbabwe are generally expected to possess the following attributes:

- sound interpretation skills;

- proficiency in local languages and language skills;
- demonstrated interest in children of all ages;
- patience and emotional stability;
- no previous convictions of abuse;
- no record of having been a victim of abuse;
- knowledge of the legal framework especially court proceedings;
- knowledge of use of exhibits especially anatomically correct dolls;
- ability to establish rapport with young children within a short time; and
- demonstrated understanding of child psychology and child communication skills (Müller and Marowa-Wilkerson 2011: 16).

Once an intermediary has been appointed, all questions must be put to the witness through the intermediary unless the court directs otherwise. The functions of the intermediary are governed by s319G, which provides that the intermediary must convey to the vulnerable witness “only the substance and effect of any question put to the witness” and “may relay to the court the vulnerable witness’s answer”. In terms of this section the intermediary does not have to convey questions using the same wording. In practice, the words “the substance and effect” mean that the intermediary may tone down questions which would have otherwise been aggressive and threatening if put directly to the witness. The intermediary communicates questions to the witness in a language that is familiar to the witness, meaning that the intermediary is permitted to use any slang, jargon, vernacular or colloquial speech that is peculiar to any witness because of his or her age or societal background. This is meant to ensure that the witness understands the content of the questions posed and is protected from the aggression inherent in the adversarial approach. During the course of the trial, the intermediary is permitted not only to rephrase questions, but to comment on a question and offer an opinion on whether the child understands it or not. They can make comments regarding the child witness’s performance and call for adjournment if the child appears tired (Müller and Marowa-Wilkerson 2011: 17).

In Zimbabwe, practice has shown that outside of the parameters set out in the legislation, the intermediary acts as the frontline person and welcomes the child and their caregivers and provides emotional assistance and support. Before the trial commences, the public prosecutor meets with the intermediary in order to provide the latter with essential background information, such as a witness’s age, family background, who the perpetrator is and when the incident occurred. The prosecutor then introduces the intermediary to the child witness. The intermediary is expected to spend some time alone with the child in order to establish some rapport. The intermediary also makes use of this time to explain his or her role to the child. Before trial, the intermediary is expected to make notes on the child’s developmental abilities. The intermediary informally interviews the child in order to assess the witness’s developmental stage, intellectual abilities, and vocabulary and language skills as well as identify any physical or mental disabilities the child may have. This information is then conveyed to the prosecutor (Müller and Marowa-Wilkerson 2011: 17-18).

5.6 Norway

Norway has a semi-adversarial process of law and contains both inquisitorial and accusatorial elements with relaxed rules regulating the admission of evidence, so they have adopted a more inquisitorial approach to assisting children to communicate in court. Special measures for children in Norway were introduced as far back as 1926 but these have been reformed and readjusted on a number of occasions subsequently.

In cases where a child or person with a mental disability has experienced violence either as a witness or complainant, specialised interviews are conducted at a type of a one-stop centre, referred to as the Barnehus or Children’s House (Tasmania Law Reform 2016). In these instances, the child or

person with a mental disability are taken to the Barnehus where medical examinations and forensic interviews are conducted. Child witnesses are questioned in early pre-trial hearings by trained police officers who have been instructed by the prosecutor and the defence counsel as to what issues need to be covered in the interview. The interview is observed by the judge, prosecution and defence lawyers, either from behind one-way glass or via closed-circuit television (Hannaa et al 2013: 4). When the interviewer believes that they have covered the topic sufficiently, they will then consult with the judge and counsel to find out whether there are any further questions that need to be asked, subjects to be covered or contradictions to be clarified. The interviewer will then return to the room and continue the interview to cover the new instructions received. This process will continue until the judge rules that the interview is complete. Other than the interviewer, none of the other parties are allowed to put questions directly to the child. A psychologist also observes the interview and will assess the witness's psychological health as the interview progresses.

The interview is recorded and this recording is later played at the trial. Where the child is over the age of 15, the interview is conducted at the courtroom, although the specialist interviewers still have the sole responsibility for conducting the interview. These specialist interviewers are trained in best practice procedures for eliciting complete and accurate evidence from children and people with mental disabilities. The purpose is to ensure that interviews are conducted by appropriately qualified people in a way that is developmentally appropriate and emotionally respectful (Tasmania Law Reform 2016).

6. METHODS OF OVERCOMING COMMUNICATION DIFFICULTIES WITH CHILDREN

As highlighted previously, children are unable to communicate effectively in a court environment due to limitations in terms of their cognitive and language capacity. Forcing children to testify within the traditional examination and cross-examination framework creates secondary trauma for children and leads to inaccurate evidence.

There are three possibilities that could be used to overcome these issues, and these include:

- the training of judicial officers, defence and prosecution to communicate more effectively with children;
- the questioning of the child by the judicial officer; and
- the use of a specialist interviewer.

6.1 Training of court role-players

One method of reducing the use of developmentally inappropriate questioning in court would be to train the prosecutors, defence and judiciary on how to communicate effectively with children in order to elicit accurate evidence and reduce trauma for the child. In an ideal world, this would probably be the best option. However, communicating with children, especially young children, is a specialist area that would involve the acquisition of skills and knowledge of various topics related to communication. For instance, topics would include cognitive development, language development, cognitive delays, communication skills and other related topics. From a practical point of view, it would not make sense to turn legal specialists into child communication experts. These are two very distinct professions, and the topic of child language is too specialised to be dealt with in a single training course.

Although the specialization of these role-players does not appear to be a practical solution, training may nevertheless assist judicial officers to recognise questions that are confusing or developmentally appropriate and raise awareness of the impact of certain questioning techniques on the evidence of a child. Short-term training will not create specialists, but rather only contribute to recognition of difficulties. Being able to change these complicated questions into ones which are developmentally appropriate would require a specialisation that goes beyond short-term training. Added to this,

research has shown that judicial officers do not intervene as often as they could when children testify. This could be attributed to the fact that they are wary of being seen to favour a particular party, thereby creating grounds for appeal, or simply that the task is a very complicated one and they are required to be analyzing the evidence of the witness at the same time.

A further practical issue relates to the implementation of such training. The feasibility of training all legal practitioners who would at some point need to interview a child witness is overwhelming, without even having to examine questions like who would be responsible for the cost of such an intensive training programme. In addition, it creates certain conflicts for the defence, who see cross-examination as an opportunity to scrutinize, challenge and test the reliability of the witness' evidence, a process which by its very nature is confrontational.

6.2 Questioning by the judicial officer

Some jurisdictions allow all questioning of the child witness to be conducted by the judicial officer. The presiding officer is responsible for all the questioning of the child, and counsel have an opportunity to raise any outstanding issues or questions that have not been covered. Namibia has included such a provision in their Criminal Procedure Act 51 of 1977:

166(4)"...the cross-examination of any witness under the age of thirteen years shall take place only through the presiding judge or judicial officer, who shall either restate the questions put to such witness or, in his or her discretion, simplify or rephrase such questions."

The advantage of such a procedure is that the judge would be impartial, since they do not represent any party and their focus is to discover what has happened. The prosecution and the defence, on the other hand, are focused on eliciting evidence that supports their own cause.

However, there are a number of disadvantages that have been raised with respect to this procedure. There is concern about this role of the judge in the adversarial system of law, since the judge in an adversarial system is required to be impartial and act as a referee or umpire, and ensure that the trial is conducted fairly. This is in contradistinction to inquisitorial systems, where the judge assumes the responsibility for most of the examination of witnesses. In order for judges to conduct the examination effectively, they would have to have prior knowledge of the child's evidence, which is why judges in inquisitorial systems have access to the docket or dossier. For instance, the judge would have to know the basis of the prosecution case to be able to ask the child the relevant questions. If the prosecution has evidence of a long process of grooming before the offence is committed, the judge would not know about this and, therefore, would not include questions of this aspect. Admittedly, the prosecution could raise this issue afterwards, but the impact of this evidence would be lost. It is, therefore, a concern that having judges question witnesses may affect their impartiality and impact on their ability to referee the court process.

Another question that has been raised relates to the absence of control over a trial where judges, particularly where they sit alone, are responsible for the questioning of a child witness. There would be no one to control any inappropriate questions asked by the judges themselves.

A further concern is the capacity of the judge to perform the task of questioning the child effectively. As discussed *supra*, communicating with children, especially young children, is complex and requires specialised knowledge and skills. Although the judge may be able to ameliorate the hostility and aggression usually inherent in the questions of the defence, there is no guarantee that the judge will be able to communicate effectively with the child. Even if judges are provided with training, this will not result in specialisation and will not necessarily provide them with the skills to simplify questions in a developmentally appropriate way.

6.3 The use of specialised interviewers

The third method of addressing the cognitive and language limitations of children in the courtroom is the use of a specialist interviewer to assist with the questioning process. Specialist interviewers, referred to by many different terms such as communication assistant, facilitator or intermediary, are used in many different jurisdictions. Their roles vary from simply being a translator who is required to

repeat the exact questions of court role-players to being able to conduct the questioning in its entirety. Some of these interviewers are involved throughout the criminal justice process while others only appear at the questioning stage of the court process.

The advantage of using a specialised interviewer to question a child is that it enables the child to understand the questions posed and, therefore, to communicate more effectively in the courtroom environment. The specialised interviewer has both the knowledge and the skills to communicate with the child in a manner that is developmentally appropriate. This improves the accuracy of the evidence and also reduces the secondary traumatization experienced by children, since the specialised interviewer is neutral and does not approach the questioning process in a hostile manner. In addition, the availability of a specialised interviewer has been used in some jurisdictions to ensure that the child is provided with further services, like court preparation and victim support.

7. THE CONSTITUTIONAL IMPLICATIONS OF USING AN INTERMEDIARY

The constitutionality of the section enabling the appointment of an intermediary (s170A) in South Africa came before the court for decision in the *Klink* case *supra* where the applicant alleged that this section limited his right to a fair trial. He alleged that s170A went too far in protecting child witnesses and resulted in an unreasonable and unnecessary limitation of the fundamental rights of an accused person to a fair trial. His main concern related to the appointment of an intermediary and he argued that this appointment limited, or even excluded a proper cross-examination of the complainant and thus amounted to a violation of his right to a fair trial (408E-F).

Although s25(3)(d) of the Interim Constitution, in terms of which the *Klink* case had to be decided, and s35(3) of the final Constitution do not mention the right to cross-examination, the right to challenge evidence includes the right to cross-examine. At common law the right to cross-examine is regarded as a fundamental right, the denial of which will amount to an irregularity. This right is also enshrined in s166 of the Criminal Procedure Act of 1977.

The issue that had to be decided in *Klink* therefore was whether cross-examination by means of an intermediary was inconsistent with the right to a fair trial because it violated the right of an accused person to challenge or cross-examine a child witness. Section 170A does not exclude the right to cross-examine. In fact s170A(2)(a) expressly says that cross-examination must take place via an intermediary. The emphasis in this application was on the fact that the cross-examination had to take place through the medium of an intermediary. It was the use of the intermediary which it was felt unduly fettered the right to cross-examination for "questioning through an intermediary may destroy the effectiveness of cross-examination" especially as the intermediary has the power to convey only the general purport of the question unless the court directs otherwise (at 409I).

The court at 409J accepted that cross-examination was a powerful weapon which often played an important part in a trial court's decision. However, the court emphasised that the object of cross-examination was twofold, namely, to elicit information that was favourable to the party conducting the cross-examination, and also to cast doubt upon the accuracy of evidence given against the party. The court is entitled to intervene to prevent counsel from "conducting a bullying or intimidating form of cross-examination" or if the questioning appears to be calculated at confusing the witness (410D-E). Therefore, a determination whether a limitation of the accused's right to cross-examination has

resulted in the denial of a fair trial will depend on the circumstances of each particular case.

The right which the accused has to a fair trial must be balanced with the protection of a child's interests. In examining the latter, the court accepted that the incidence of crimes involving the abuse of children had risen significantly in recent years. Other factors that had to be taken into account included the following: fear of investigation and trial seriously impeded the combating of these crimes; child witnesses experienced significant difficulties in dealing with the adversarial environment of a courtroom, especially the aspects of confrontation and cross-examination; and children experience great difficulty in understanding the language of legal proceedings and the role of the personnel involved (410G-H). The court accepted that children have difficulty in communicating in the court context where the manner in which questions are posed may distort the meaning attached to the child's language. The court experience amounts to a second victimisation, where the victim must relate in graphic detail the abusive acts perpetrated upon him. This all occurs in the presence of the alleged perpetrator, after which the victim is subjected to intensive, often protracted and aggressive, cross-examination by the accused or his representative.

The secondary victimisation may be as traumatic and as damaging to the emotional well-being of the child as the original assault. At 411D-E the court came to the following conclusion:

"It is sufficient to say that I am quite convinced that a child witness may often find it traumatic and stressful to give evidence in the adversarial atmosphere of the courtroom, and that the forceful cross-examination of a young person by skilled counsel may be more likely to obfuscate than to reveal the truth. Moreover, criminal prosecutions may be thwarted because of the unwillingness of young witnesses to subject themselves to the ordeal of the court hearing, even if the proceedings are *in camera*. From these remarks it seems to me to be obvious that the ordinary procedures of the criminal justice system are inadequate to meet the needs and requirements of the child witness."

The court accepted that s170A was designed to address the imbalance and to provide protection for the young witness. The question raised in this case, therefore, was whether in protecting the child in this way an accused person's right to a fair trial was violated. In evaluating s170A the court highlighted the fact that the section did not preclude an accused from representing himself or from being represented by counsel. The accused also is not prevented from asking questions in cross-examination either personally or through his representative. The cross-examiner's questions are put to the witness by the intermediary. The court at 411I held:

"This does not appear to me to be a limitation of the right to cross-examine. The intermediary acts, in a sense, as an interpreter: and interpreters are widely used in all of the trial courts in the country."

The court further accepted at 411J-412A that it was not only the content of a question that was important in cross-examination but also the "intonations of voice and nuances of expression". It was, therefore, possible that the forcefulness and effect of cross-examination could be blunted when an intermediary was used, but this did not mean that the accused would be denied the right to a fair trial, since the court also had to take into account the interests of the child witness.

Melunsky J pointed out at 412B-C that, although criminal proceedings should be scrupulously fair, it did not follow by implication that a modification to the accepted rules of evidence and procedure would automatically be open to objection. He used the Canadian decision in **R v Levogiannis** (1993)18 CRR (2d)242 to support this point. Judge L'Heureux-Dubé explained at 250 that the criminal process must enable a presiding officer to get at the truth of a case while simultaneously providing the accused with an opportunity to present a proper defence. Rules of evidence and

procedure were constantly evolving, and the trend in Canadian courts was to remove those procedures which created barriers to ascertaining the truth. This was supported by the decision in *Regina v Toten* (1993)16 CRR (2d)49 (Ontario C.A.) where Doherty JA explained at 58:

“The public adversarial process is, however, a means to an end – the ascertainment of truth – and has virtue only to the extent that it serves that end. Where the established process hinders the search for truth, it should be modified unless due process or resource-based considerations preclude such modification.”

Applying these principles, Melunsky J at 412E-F held that the use of an intermediary did not affect the fundamental fairness of the judicial process, since the witness could be questioned on all aspects of his evidence while at the same time the intermediary could play a role in balancing the interests of the accused with those of the child witness “by allowing the latter to be integrated into the criminal justice system without disturbing the fundamental fairness of the process”.

A further issue which had to be addressed by the court was whether the authority given to an intermediary to convey “the general purport” of any question resulted in such unfairness to an accused that it interfered with his fundamental rights. It was argued that the use of an intermediary unreasonably restricted the accused’s right to cross-examination. The applicant argued that a cross-examiner had the right to decide how he wished to phrase his questions and, by allowing the intermediary to “filter” the questions, the planned line of cross-examination could be completely frustrated and derailed.

The court held at 412H-J that there were sound reasons why the intermediary was entitled to convey only the general purport of the question since it enabled a child witness to participate properly in the system. According to *S v Gidi and Another supra* at 540E, questions should always be put in a form that is understandable to the witness. There is the danger that a child, especially a very young one, may not understand or appreciate the content of a question. It is, therefore, in the interests of justice for questions to be posed to children in a way appropriate to their development. This assists the court in their function of establishing the truth without depriving the accused of his right to cross-examine. In addition, the role of the intermediary is very limited. He is not permitted to change the question. He must convey the content and meaning of the question in a language and form that is understandable to the child. A further control is provided by the presence of the presiding officer who monitors the proceedings and can see whether the intermediary carries out this function properly without the accused being prejudiced in any way. In terms of s170A, the court has the power to intervene and insist that the intermediary should convey the actual question and not just the general purport.

It was conceded by the court that the application of this section could in certain instances give rise to unfairness to the accused, but it was the duty of the presiding officer to guard against this (413E). Du Toit et al (1997:22-31) emphasise that the court must ensure that the fundamental purpose of cross-examination is not frustrated. The accused must be given an opportunity to present his case by putting pertinent and probing questions to any person who testifies against him. The controlling factor should always be the right to a fair trial.

8. IMPLEMENTATION ISSUES RELATING TO SPECIALIST INTERVIEWERS

Implementing a specialised interviewer scheme in an adversarial environment requires certain adaptations and often gives rise to difficulties with implementation. Some of these implementation encountered in different international jurisdictions, and these are highlighted below:

8.1 Persons who can be appointed as a specialist interviewer

Different jurisdictions have identified different categories of persons who can be appointed as

intermediaries, communication assistants or facilitators. Generally, the basic requirement is that the individual should have some ability to communicate with children, which is why many jurisdictions use educators, social workers, youth care workers and people who have experience working with children.

Identifying who can act as an intermediary will also depend on the number of cases going through the court process which involve children, as this has implications for whether the appointment is made on an *ad hoc* basis or a permanent basis. In South Africa, for instance, there are presently in excess of 70 sexual offences courts throughout the country, which hear only cases involving sexual offences, which means that the need for intermediaries became so intense that the country had to resort to the permanent employment of intermediaries to ensure that these individuals were available in these courts on a daily basis. Where the need for intermediaries is not that high, it is possible for arrangements to be made between government departments for the use of individuals from other departments to assist as specialist interviewers. When South Africa first introduced intermediaries, the Department of Justice used social workers from the Department of Social Development to assist as intermediaries. However, when the need for intermediaries became too great, it no longer became feasible.

Closely related to this is the issue of finances. If a new post has to be created for the specialised interviewer, then finances have to be available. This is also applicable where *ad hoc* specialists are used, who are not in the employ of government. This is why some countries, like Zimbabwe, have trained their interpreters to become intermediaries as this meant they did not have to create new posts or find funding for these posts.

However, the key factor for identifying professions who would be able to act as intermediaries is the ability of an individual to communicate with children and to have the necessary knowledge and experience of working with children.

8.2 Qualifications

Thus far, no country has a qualification specific to intermediaries, although a decision has been made to investigate this avenue in South Africa. The trend is to appoint intermediaries who have qualifications in other disciplines, most notably that of social work, psychology or education. When somebody has been appointed as an intermediary, they are in most countries required to undergo training that is usually conducted in-house. In South Africa the intermediaries are trained at Justice College and in Zimbabwe they are also trained within the judicial colleges. In the United Kingdom, a specialised training course has been developed by a university for intermediaries, and, once they have successfully completed this training, individuals can apply to be registered as such.

Training is essential for individuals who are appointed to act as intermediaries. Even though they may have a qualification in the social sciences or education, they will have to be trained on how to use their skills and knowledge within the legal framework. Ordway (1981:189), in proposing the existence of an official like the intermediary, was of the opinion that this person would have dual qualifications. They should be qualified to deal with victims of child sexual abuse as well as be familiar with legal practices:

“In order to be truly helpful in this role, the expert should understand the importance of objectivity and be familiar with pretrial and trial procedures. Such training could be provided by court personnel or through experience. The expert must realize the dual purpose of the job; to aid the child and to help the trier of fact rationally decide whether to believe the child.”

Although the functions of intermediaries vary in different countries, there is nevertheless a core component of topics that they would have to be well-versed in in order to perform their role as an

intermediary, facilitator or communicator. South Africa conducted a study into the training requirements of intermediaries and found that a qualified individual would require a strong theoretical knowledge of the following topics as well as practise in implementing this knowledge. The topics that have been identified include, at a minimum, the following:

- Child Development: Cognitive and Socio-emotional Development
- Understanding the way Memory works in Children
- The Effects of the Accusatorial System on Children
- The Disclosure Process
- The Impact of Trauma
- Communicating with Children in a Forensic Environment
- Communication Skills
- The Use of Anatomically Detailed Dolls
- Cross-examination and the Child Witness
- The Competency Examination of Child Witnesses
- The Legal Process
- Relevant statutes and policies
- The Role and Functions of the Intermediary
- Preparing Children for Court
- Legal Terms and Terminology
- Report Writing
- Case Management
- Applicable administrative procedures

It is, however, recommended that training be standardized to ensure that all interviewers receive the same training.

8.3 Functions of the specialist interviewer

As the role of the specialist interviewer varies in different jurisdictions, so do their functions. Generally, the main functions of the specialist interviewer relate to enabling the court role-players to communicate effectively with the child in an attempt to improve the accuracy of the child's evidence as well as reduce the secondary trauma that the child may experience as a result of the questioning process. The exact manner of performing this function also differs from country to country. Some countries allow the interviewer to change the wording of the question to enable the child to understand the question while other countries insist that the interviewer repeat the exact words used by the courts. Others are not allowed to convey the questions but can only listen to the questions of the court and intervene if the questioning is developmentally inappropriate.

In addition, some are required to provide reports for court, assist with the preparation of child witnesses, assist with the police interview of the child, ensure that the child is referred for further assistance and provide court support to the child.

Because specialist interviewers operate within a legal framework, it is important that their functions be clarified. For instance, concerns have been raised about intermediaries being alone with child witnesses. As pointed out earlier, in England the intermediary is not allowed to be alone with the child and the interviewing police officer usually sits in during the assessment to prevent allegations that the child has been coached. In South Africa, intermediaries are not allowed to have any knowledge of the details of the case, although they are allowed to spend time alone with the child to

build rapport. It is, therefore, very important that guidelines be developed that clarify precisely the functions of the specialist interviewer.

Suggested guidelines would include the following:

- Specialist interviewers are impartial officers of the court and do not represent or favour any party.
- Specialist interviewers should not assume the guilt of any person.
- Assessment:
 - When requested to make an assessment as to whether a child will require assistance with communicating in court, interviewers must meet with the child.
 - A file should be opened for each child and a written report filed on the assessment.
 - When assessing the child, the interviewer may not discuss the details of the offence.
- Specialist interviewers must develop rapport with the child:
 - Interviewers must at all times remain neutral.
 - Interviewers must not discuss the details of the case with the witness before the latter testifies.
 - Interviewers must make sufficient time available to develop rapport with the child before the trial.
- Specialist interviewers must provide support for victims and their families:
 - Interviewers must at all times treat the child and their family with respect and dignity.
 - Interviewers should provide emotional support and assistance.
 - Emotional support and assistance refers to the giving of information about court and procedures to allay fears and concerns, providing food and water where necessary and where possible, accompanying the child, distracting the child with play and offering emotional empathy.
 - Interviewers may not discuss the case with the child or the family nor become personally involved in the dynamics of the case.
- Specialist interviewers must offer court preparation:
 - Court preparation is a life skill; it is an educative programme and not therapy.
 - The details of individual cases are never referred to.
 - Should a child wish to discuss the details of their case, interviewers must direct the child to the prosecutor or social worker, whichever may be applicable.

8.4 Availability of specialist interviewing service

There is also no uniformity in terms of whom the specialist interviewer will be able to assist. In some jurisdictions, this service is limited to child complainants only, others limit it to sexual offences matters only while others extend it to all child witnesses. Other schemes are limited to victims of particular offences, like section 306ZK of the New South Wales Criminal Procedure Act 1986, which is confined to cases involving personal violence other than sexual offences. Some schemes are available to both defendants and other witnesses as is the case under s 106F Evidence Act 1906 (WA), which applies only to children. Some apply only to witnesses and complainants but not to defendants (section 106R Evidence Act 1906 (WA)). In South Africa it applies to any witness under the mental or biological age of 18, irrespective of the offence.

8.5 An officer of the court or not

Since the specialist interviewer is required to assist the court to communicate with the child, it is essential that this person be neutral and not favour any side. To this end, some jurisdictions have insisted that the intermediary take an oath that they will convey the communications accurately and to the best of their ability. This is particularly relevant where the interviewer is not in the permanent employ of the court, and is appointed on an *ad hoc* basis. Where the interviewer is permanently employed within the justice sector, they will be required to be sworn in like any other officer of the court but would not be required to take the oath every time they appeared thereafter. In **S v Motaung**, case no. CC79/05 High Court (SECLD) the intermediary was not required to take an oath after her appointment and the High Court held that a failure to administer an oath or affirmation to the intermediary constituted an irregularity. The court explained it as follows:

“An intermediary plays an important role in the process of presenting evidence to the court in a fair and proper manner, which is the best reasons to require an oath or affirmation. Furthermore, while the introduction of the intermediary procedure to avoid distress to a child witness is to be welcomed, it must not be forgotten that the price to be paid is an inroad upon the fundamental rule of our criminal procedure that the accused is entitled to be confronted by the accuser in open court. The impact of this inroad must be reduced as much as possible. One procedural method of reducing it is to require the intermediary to perform his or her functions in accordance with an oath or affirmation which acknowledges the solemn and important function he or she performs in the courts. The oath or affirmation will ensure that the intermediary appreciates the need to convey properly, accurately, and to the best of his or her ability the witness’s evidence to the court, and, where necessary, to convey the general import of what is said to and by the witness. An intermediary performs a similar function to that of an interpreter. It is recognised that although there is no statutory direction in the Supreme Court Act 51 of 1971 that an interpreter be sworn, a failure to swear him in constitutes an irregularity which may amount to a fatal irregularity. The administration of an oath to an interpreter is governed by practice and the rules of admissibility of evidence, and is now formalized by Uniform Rule 61(1) and (2) and Magistrates’ Courts Rule 68(1) to (5). In my view the same rules of practice require that an oath or affirmation be administered to an intermediary in every case as a matter of course, unless intermediaries in full time employment of the State are required to take a general oath in the same way as full-time interpreters.”//

9. CONCLUSION

An accused is entitled to a fair trial and this is the cornerstone of ensuring that quality justice is delivered. One aspect of achieving a fair trial is to ensure that witnesses provide accurate and complete evidence. However, when the witnesses are children, there are a number of barriers to obtaining best evidence. One such barrier is the questioning of children in the courtroom. Research has shown that children have cognitive and linguistic limitations which make it impossible for them to partake effectively in the questioning processes in court, resulting in inaccurate evidence and secondary trauma for the children.

Practices undertaken in different countries have shown success in assisting children to communicate in the courtroom by the appointment of a specialist interviewer. Various models of this concept have been introduced, but the main aim of such an interviewer is to assist the child to communicate accurately and more effectively during the questioning process. Overall, the evidence to date is that intermediary schemes offer significant potential for facilitating the reception of evidence of people with complex communication needs. It would, therefore, seem that the use of a specialist interviewer to assist in obtaining accurate evidence from a child witness would go a long way to ensuring the right to a fair trial.

BIBLIOGRAPHY

- Brennan, M. and Brennan, R. 1988. **Strange Language - Child Victims under Cross-examination.** Wagga Wagga.
- Cashmore, J. and Trimboli, L. 2005. **An Evaluation of the New South Wales Child Sexual Assault Specialist Jurisdiction Pilot.** New South Wales Bureau of Crime Statistics and Research. Sydney.
- Cossins, A. 2009. *Cross-examination in child sexual assault trials: evidentiary safeguard or an opportunity to confuse?* **MULR** 33: 68 at 80.
- Hanna, K. et al. 2010. **Child witnesses in the New Zealand criminal courts: a review of practice and implications for policy.** Institute of Public Policy, Auckland University of Technology.
- Hannaa, K., Davies, E., Henderson, E. and Hand, L. 2013. *Questioning child witnesses: Exploring the benefits and risks of intermediary models in New Zealand.* **Psychiatry, Psychology and Law.** 1-16.
- Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models in New Zealand
- Henderson, E. 2016. Helping communication-impaired defendants and witnesses. New Zealand Law Society. <http://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-902/helping-communication-impaired-defendants-and-witnesses>. Accessed 3 march 2019.
- Home Office. 1989. Report of the Advisory Group on Video Evidence. London: Home Office.
- Home Office. 1998. Speaking up for Justice. London: Home Office.
- Mattison, M. and Cooper, P. 2017. *Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model.* **The International Journal of Evidence & Proof.** Vol. 21(4) 351-370.
- Müller, K.D. and Tait, A.M. 1997. *The child witness and the accused's right to cross-examination.* **TSAR.** 3:519.
- Müller, K. and Marowa-Wilkerson, T. 2011. *An innovative approach to the use of intermediaries: lessons from Zimbabwe.* **Child Abuse Research South Africa.** Vol 12(2).
- Ordway, D.P. 1981. *Parent-child incest: Proof of trial without testimony in court by the victim.* **University of Michigan Journal of Law.** 15:133.
- Perry, N.W. and Wrightsman, L.S. 1991. **The Child Witness: Legal Issues and Dilemmas.** Sage Publications: California, USA.
- Plotnikoff, J. and Woolfson, R. 2010. *Cross-examining children - testing not trickery.* **Arch. Rev.** 7.

- Plotnikoff, J. and Woolfson, R. 2015. **Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants**. Bristol: Policy Press.
- Tillet, D. 2011. **"Did you Not Say No?" How Cross-Examination May Influence Child Witnesses' Accuracy and the Viability of the 'Intermediary' Solution**. Bachelor of Laws (Honours) dissertation. University of Otago Dunedin .
- Zajac, R., Gross, J. and Hayne, H. 2003. *Asked and answered: questioning children in the courtroom*. **Psychiatry Psychol. & L.** 10:199.
- Righarts, S. 2007. **Reducing the Negative Effect of Cross-Examination Questioning on the Accuracy of Children's Reports**. PhD Thesis, University of Otago.
- Tasmania Law Reform Institute. 2016. **Facilitating equal access to Justice: An intermediary/communication assistant scheme for Tasmania?** Issue Paper 22.

ANNEXURE A: Section 170A of the Criminal Procedure Act 51 of 1977 (South Africa)

170A Evidence through intermediaries

(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

(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.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place-

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

(4) (a) The Minister may by notice in the Gazette^{19*} determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

(b) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister, with the concurrence of the Minister of Finance, may determine.

(5) (a) No oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection (4) (a), at the time when such oath, affirmation or admonition was administered or such evidence was presented. (b) If in any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of such appointment, was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection (4) (a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to-

(i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

(ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

- (6) (a) Subsection (5) does not prevent the prosecution from presenting anew any evidence which was presented through an intermediary referred to in that subsection.
- (b) The provisions of subsection (5) shall also be applicable in respect of all cases where an intermediary referred to in that subsection has been appointed, and in respect of which, at the time of the commencement of that subsection-
- (i) the trial court; or
 - (ii) the court considering an appeal or review, has not delivered judgment.
- (7) The court shall provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of child complainants below the age of 14 years, immediately upon refusal and such reasons shall be entered into the record of the proceedings.
- (8) An intermediary referred to in subsection (1) shall be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary.
- (9) If, at the commencement of or at any stage before the completion of the proceedings concerned, an intermediary appointed by the court-
- (a) is for any reason absent;
 - (b) becomes unable to act as an intermediary in the opinion of the court; or
 - (c) dies, the court may, in the interests of justice and after due consideration of the arguments put forward by the accused person and the prosecutor-
 - (i) postpone the proceedings in order to obtain the intermediary's presence;
 - (ii) summons the intermediary to appear before the court to advance reasons for being absent;
 - (iii) direct that the appointment of the intermediary be revoked and appoint another intermediary; or
 - (iv) direct that the appointment of the intermediary be revoked and that the proceedings continue in the absence of an intermediary.
- (10) The court shall immediately give reasons for any direction or order referred to in subsection (9) (iv), which reasons shall be entered into the record of the proceedings.

ANNEXURE B: LIST OF PEOPLE WHO CAN ACT AS AN INTERMEDIARY (SOUTH AFRICA)

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 speciality 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 speciality 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 Masters' 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).

ANNEXURE C: JOB DESCRIPTION OF INTERMEDIARY IN SOUTH AFRICA

Intermediaries have two statutory functions, namely, to enable the witness to understand the question and, secondly, to protect the witness from the hostility and aggression of the courtroom questioning. In addition to these statutory functions, intermediaries are required to perform certain additional functions. These include:

- Be culturally diverse and able to accommodate different languages and cultures
- Be accessible to the child witness
- Be sensitized towards dealing with children who are victims of abuse
- Assess the needs of the child witness i.e. the concentration span and sleeping and feeding patterns
- Establish rapport with the child before going to court
- Assess the need for an intermediary to be appointed
- Determine the developmental level of the child as well as mentally handicapped witnesses
- Assist and advise prosecutors when having to consult with children
- Attend to the needs of child witnesses and their parents
- Render assistance to children who are traumatised or stressed, as well as the parents where necessary
- Provide advice to prosecutors on issues relating to child victims of abuse i.e. process of disclosure, delayed reporting, the grooming process etc.
- Advise on the need for forensic assessment or therapeutic intervention in the case of child witnesses
- Advise on operational needs i.e. anatomically correct dolls, furniture etc
- Be able to use anatomical dolls
- Assist and advise parents on how to deal with problems experienced by parents with their traumatised child
- Any other functions which may be approved from time to time by the Department
- Keep appropriate registers with reference to all of the above duties
- Completion of registers and statistics and timeous submission thereof to management
- Comply with instructions from supervisor/manager
- Maintain diaries to facilitate the allocation of court dates
- Compile prescribed statistics and submit to the Court Manager and subsequently to NOC
- Maintain monthly programmes for court appearances
- Maintain a database of *ad hoc* intermediaries
- Compile monthly reports to direct supervisor and provincial manager
- Ensure compliance with DPSA policies such as leave policy and working hours thus contributing towards optimal utilization of court hours
- Maintain and develop excellent working relationships with all the court role-players
- Attend stakeholder meetings
- Take part/initiate community outreach activities, educating members of the community on the Criminal and Children's Court Justice Systems, as well as the existence and purpose of the intermediary system.