CHAPTER FOUR

4. Review of Relevant Literature, Policies and Legislation

This section of the report reviews the literature, policies and legislation relevant to child sexual abuse. It is against these documents that submissions and evidence were received by the Commission. Legislation discussed in this section is the Criminal Procedure Act and the Child Care Act, the Prevention of Family Violence Act and the Domestic Violence Act. Policies reviewed are the Gauteng Multi-Disciplinary Child Protection and Treatment Protocol[34] and the National Policy Guidelines[35] . This chapter is divided into the pre-trial, trial and post-trial sections, thus following the path followed by an abused child when seeking recourse from the criminal justice system.

4.1 Pre-Trial Procedures

4.1.1 Disclosure

Disclosure is the revelation of an incident of abuse by a child to a third party. Disclosure can be made to a parent, guardian, teacher, friend, medical doctor, psychologist, relative, neighbour, the police, social worker, priest, community care worker or any other person who has some kind of relationship with the child or assumes a position of authority in relation to the child.

Disclosure can either be purposeful or incidental[36]. Purposeful disclosure occurs where the child has made a conscious decision to reveal the incident of abuse while incidental disclosure, as implied in the term, occurs incidentally and not as a result of the child willingly revealing the incident of sexual abuse e.g., where a child, while being examined by a medical doctor, displays behaviour indicating trauma or where a parent sees or notices strange behaviour or marks on the child.

Sexual abuse of children often occurs in private and has far reaching implications for the child. Inevitably it results in an experience of intrusion and in feelings of helplessness, confusion, anger, aggression, guilt and betrayal. Since disclosure is the initial step in the child's healing process and often precipitates intervention, the circumstances and manner in which disclosure occurs and is handled is critical. The nature and manner of disclosure and the response to it has a bearing on the trauma to the child, the child's response to counselling and the conduct of subsequent legal proceedings.

Given the importance of disclosure to the child's healing process and in legal proceedings, it is pivotal to understand how and under what circumstances children disclose incidents of abuse and to develop an appropriate response to such disclosure. Inappropriate responses to disclosure retard the child's healing process, jeopardise subsequent legal proceedings and expose the child to secondary victimisation.

Literature indicates that disclosure of a sexual offence is a slow and painful process and that full disclosure is seldom made when a child makes the first report[37] .

Disclosure is instead a fragmented process that occurs over a period of time. A study conducted by Teena Sorensen and Barbara Snow in Utah between 1985 and 1989 seems to support these assertions[38]. Sorensen and Snow analysed a sample of 600 cases in which they were involved as therapists/evaluators. These cases involved victims of sexual abuse aged between 3 and 17 years. Confirming the above assertion that disclosure is a slow process, the study found that disclosure occurs in the following progressive stages:

> denial: this normally happens when a child is questioned about the abuse or he/she is identified as a potential victim and put under pressure to tell;
> tentative disclosure: when the child partially acknowledges the abuse and gives vague information about it;
> active disclosure: when the child makes a personal admission of having experienced sexual abuse;
> second denial: the second denial may be prompted by the child's personal need to protect his/her loved ones from trauma; and
> reaffirmation: full account of the abuse.

In the study, of all children who denied the abuse, only 7% moved to full reaffirmation, making tentative disclosure a common progression from denial (78% of submitters). Only 11% of submitters were able to make full disclosure without showing characteristics of denial or tentativeness. Ninety-six percent (96 %) of the subjects ultimately moved to the reaffirmation stage. The study also revealed that the progression to reaffirmation varied and was unique to each case. Some children move from denial to tentative disclosure to reaffirmation in a single session while others took several months to reach the reaffirmation phase.

The study further revealed that incidental disclosure is the most common type of disclosure (74%). Although disclosure by age grouping revealed no propensity to disclose purposefully or incidentally, preschool children are more likely to disclose incidentally and adolescents are more likely to disclose purposefully. Factors precipitating incidental disclosure range from exposure to the perpetrator (where the child was known to have spent a considerable time with the perpetrator), display of inappropriate sexual behaviour by the child, a child uttering an inappropriate statement (e.g., 'suck on my pee pee mommy"), breached confidence (where a child disclosed to someone confidently), confession after a child was pressurised, physical signs e.g., identified through medical examination.

Factors precipitating purposeful disclosure include education awareness through school programmes, influence of peers (where a child victim follows the trait of a friend who related an experience of sexual abuse), proximity to the offender (it is sometimes when the offender leaves that the child feels safe enough to disclose), where the atmosphere is conducive to disclosure (a child being bathed may be reminded of the touching that occurred during the sexual encounter) and disclosure by adolescents in an expression of anger at the perpetrator.

4.1.2 The Duty to Report Child Abuse

Disclosure by a child, whether incidental or purposive, often leads to a report being lodged with appropriate authorities. Universally there are two approaches to reporting child abuse which includes sexual abuse, namely, mandatory and voluntary reporting. Mandatory reporting occurs where a designated person is under an obligation to report a case of child abuse that comes to his/her attention under certain specified circumstances. Voluntary reporting is where there is no obligation on a person to report abuse, even where he/she acquires knowledge of abuse in the context of his/her profession.

South Africa has a statutory framework for the mandatory reporting of abuse against children. The statutory duty to report incidents of abuse against children is set out in section 4 of the Prevention of Family Violence Act[39] and section 42 of the Child Care Act[40] , as amended.

Section 4 of the Prevention of Family Violence Act provides for mandatory reporting to a police official, Commissioner of Child Welfare or to a social worker by any person who examines, attends to, advises or cares for any child in circumstances which ought to give rise to a reasonable suspicion that such child has been ill-treated, or suffers from any injury, the probable cause of which was deliberate.

The Child Care Act makes it mandatory for every dentist, medical practitioner or nurse who examines or attends to any child in circumstances which gives rise to a suspicion that the child has been ill-treated or suffers from any injury, single or multiple, the cause of which probably might have been deliberate, or is undernourished, to immediately, in the prescribed manner[41] , notify the regional director of Health and Welfare of the district in which the child is in.

Mandatory reporting is not without its weaknesses. Save for the Western Cape, the reporting system is not functional in other provinces.[42] Divergent views regarding the purpose of reporting exists[43]. There is no consensus on whether reporting serves as a catalyst for child protection or whether it is used for policy formulation purposes. Where a reporting system is not accompanied by adequate infrastructure to ensure an appropriate response, the child's vulnerability is inevitably increased. Mandatory reporting is further criticised for its potential to reduce child abuse to a social phenomenon exclusive to indigent communities, further distorting the already distorted public opinion on the causes of child abuse.[44] Van Dokkum[45] argues that there is greater visibility of child abuse incidents in public hospitals where authorities are most likely to report the abuse as opposed to private hospitals where only the middle class go for medical treatment.

Despite the existence of a statutory framework for reporting of child abuse in South Africa, reporting of child abuse cases remains low. The table below indicates a significant increase in the number of sexual offences against children reported to the South African Police Services (SAPS) nationally between 1994 and 1998[46] .

Sexual offences against children Under 18	1994	1995	1996	1997	1998
Rape	7559	10037	13859	14723	15732
Sodomy	491	660	893	841	739
Incest	156	221	253	224	185
Indecent assault	3904	4044	4168	3902	3744
Various offences in terms of the Sexual Offences Act[47]	1094	1121	1160	904	804

Although an increase in cases reported to the police is estimated, the possibility of a significant amount of cases going unreported still exists. Research has shown that a number of victims of sexual offences opt not to vindicate their experiences of sexual abuse through the criminal justice system[48] . Reasons advanced for failure to report cases to the police hinge on fear of secondary victimisation at the hands of the legal system. Other reasons include:

the child's feelings of shame, guilt, humiliation and embarrassment towards him/herself, the child's feelings of shame and pity towards the perpetrator (this often happens where the perpetrator is known to the victim);

the child's need to protect others e.g., parents/caregivers, peers, boyfriend or teacher;

fear of not being believed especially where he/she displays no physical signs of violence;

the child's fear of reliving the experience and anxiety to move on with his/her life; and

the child's fear of upsetting the stability of his/her family especially where the offender is the breadwinner. The child may even be pressurized not to report the incident of abuse to his/her mother where the father is the perpetrator.

The Human Rights Watch Report (2001)[49] further reports a persistent response pattern whereby schools devalue children's reports of sexual violence and harassment. Reports by students are often accompanied by inappropriate or complete failure by the school authorities to confront the violence, discouraging the children to seek help or where complaints were lodged, from pursuing them.

Reasons advanced by submitters to the Human Rights Watch study for reluctance to report incidents of sexual violence to the school authorities include:

hostile or indifferent response by the school authorities;

fear of being disbelieved;

a victim being shy to speak up;

turning a blind eye to or underplaying the sexual violence incident,

fear of violent backlash by both the child and the teacher to whom the report is made;

inappropriate response to the sexual violence by the authorities e.g., by reinforcing violence as a mechanism of dealing with the problem or by imposing punishment disproportionate to the sexual violence;
child's fear of marginalisation, ostracism and ridicule by peers; and
abusive teachers using status and authority to discourage children from disclosing sexual violence.

According to the report, teachers are ignorant of the procedure on how to deal with sexual violence. Fear of violent backlash by the teacher to whom the report is made also prevents them from reporting the abuse. Other reasons for poor response to sexual violence by schools include the need to protect the school's reputation, the school prioritising other social problems i.e., lack of food and teaching facilities.

Where the school failed to, or responded inappropriately to sexual violence, submitters in the Human Rights Watch Report reported feelings of helplessness, disempowerment and invalidation of their experiences of sexual abuse. Where the school responded appropriately e.g., by confronting the violence, respecting the wishes and confidentiality of the children and giving children regular feedback on how their complaints were being handled, submitters reported feeling believed, empowered and assured of their safety.

4.1.3 The Role of the Police

Research singles out the SAPS as the first line of support for most persons who have suffered sexual abuse[50] . A good police response to a victim of sexual abuse is likely to vindicate the victim's experience of abuse, thereby increasing his/her confidence in the criminal justice system. Conversely, a poor response is likely to invalidate the victim's experience of abuse, thwart his/her confidence in the criminal justice system, discourage him/her from resorting to the criminal justice system for assistance in the future, thereby increasing the victims' vulnerability to further abuse. It is therefore critical that the police respond to reports of sexual abuse with empathy, patience, professionalism and sensitivity.

The role of the police in sexual abuse cases is set out in the Criminal Procedure Act[51], National Policy Guidelines and the Gauteng Multi-disciplinary Child Protection and Treatment Protocol. In terms of the framework set out in these documents, the role of the police in sexual offence cases includes accepting criminal complaints, arresting the perpetrator, opposing bail, investigating the criminal complaint and gathering evidence, forwarding the case to the prosecution for a decision on whether to prosecute or not and keeping the victim appraised of the progress in the case.

Receiving Criminal Complaints

It is the role of the police to receive criminal complaints. The child, his/her parents/caregivers or any other person who has the duty to report child abuse may lodge a criminal complaint with the police. Sexual abuse cases may also come to the attention of the police by way of referral by the Director-General of Welfare, acting in terms of section 42 of the Child Care Act and regulations promulgated in terms of the Act. Lodging a complaint with the police sets the criminal process in motion. Despite

the existence of policy guidelines and the Multi-Disciplinary Protocol, the exact procedure followed when reporting a child sexual abuse case differs from area to area. What is set out below is standard practice as set out in the Multi-Disciplinary Protocol and National Guidelines.

A complaint of sexual abuse may be lodged at any police station or with 10111 (the police toll-free emergency number), regardless of where the child or perpetrator lives or where the incident of sexual abuse occurred. The child does not have to report personally to the police station to lodge a complaint. The police may be called to where the child is, to take the complaint from him/her. When the report is made, only a skeleton statement need be taken. The child is not required to lay out all details of the sexual incident at the first interview with the police. A detailed statement is taken by the investigating officer once one is appointed, and *only when the child has sufficiently recovered*[52] to be able to give a detailed account of the abuse. The police have *no discretion*[53] whether to accept or decline a complaint.

Once reported, a case will be referred to the CPU[54] where one exists in the locality or to a specialist member where a CPU does not exist. The Multi-Disciplinary Protocol provides for careful cooperation between the police and the Welfare Department, as the criminal process may not always be in the best interest of the child. In all instances, children should be treated with care, patience, respect and empathy. A child should not be made to make a statement in public at the Community Service Centre (Charge Office). He/she should be allowed the opportunity to relate the incident in private.

The child's statement must be taken with professionalism, care and accuracy. The statement should be read back to the child and/or his/her parent/caregiver whereupon the child or his/her parent/caregiver will sign it. The officer taking the statement must relate to the child and his/her parents/caregivers the criminal process, his/her rights as the complainant, including the right to information on the investigation and court process, the right to know when the perpetrator is arrested or released on bail, any bail conditions imposed by the court, when the perpetrator will appear in court and when the child and other witnesses will be expected to testify. The child also has the right to be given the case number, name and contact details of the investigating officer who will handle his/her case. Once a report is lodged, and a skeleton statement taken, a docket will be opened, recorded in the Crime Administration System (CAS) and a case number allocated.

Investigation and collection of evidence

After a docket is opened, an investigating officer is allocated to the case. His/her duties include tracing the perpetrator if no arrest has been made, obtaining evidence and any other information necessary to secure a conviction, oppose bail if it is in the interest of justice that the perpetrator be detained in custody, keeping the complainant appraised of progress in the case, informing the child and his/her parents/caregivers if the perpetrator is released on bail, liaising with the prosecutor regarding the direction of the investigation and presenting the docket with all the necessary evidence to the prosecutor and preparing the child for court.

Investigation is a critical stage in the criminal process. The manner in which an investigation is conducted will determine whether a prosecution will ensue and if it does, the standard of evidence presented in court.

It is the role of the investigating officer to take a statement from the child with sufficient detail to cover all the elements of the alleged offence. The investigating officer also takes statements from other witnesses to the extent that they support evidence made in the child's statement or prove any element of the alleged offence. He/she also ensures that the child attends forensic medical examination if the child has not been so referred by the Community Service Centre officer. If the child has already presented for the forensic medical examination, the investigating officer ensures that the forensic medical report is collected from the examining medical officer and safely kept in the docket.

Once all the statements are taken, and necessary evidence to secure a conviction is collected, the investigating officer will place the docket before the prosecutor for a decision whether or not to prosecute.

Arrest and Bail

If no arrest has been made, the investigating officer will trace the perpetrator following all possible leads. In terms of section 40 of the Criminal Procedure Act, the police have the power to arrest a suspect without a warrant in *inter alia*, the following circumstances: where an offence (or attempted offence) is committed in the presence of a police officer concerned or where the police officer reasonably suspects a perpetrator to have committed a schedule 1 offence.[55]

The police officer's duty to arrest as set out in section 40 is discretionary. Once an arrest is made, he/she will ensure that the perpetrator appears in court within 48 hours and oppose bail if the perpetrator's release on bail is contrary to the interest of justice. If the perpetrator is released on bail, it is the investigating officer's duty to inform the complainant.

In terms of section 60(1) of the Criminal Procedure Act, an accused who is in custody in respect of an offence shall be entitled to be released on bail pending disposal of the case. However, section 60(11) states that where an accused is charged with an offence referred to in either schedule 5 or 6 of the Act, the court shall order that the accused be detained in custody until he/she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release. Rape is the only sexual offence that falls within the scope of section 60(11).

Withdrawal of Cases

Since the prosecution of criminal cases vests in the Prosecution Authority, once a case is lodged with the police, it becomes the State's case. The role of the complainant and his/her parents/caregiver becomes limited to that of a State witness. They do not have the capacity to make any decision regarding the case, including a decision to withdraw the case. Such a decision may only be made by the Prosecution Authority. It is a decision not lightly reached. In terms of Policy Directives issued by the National

Prosecuting Authority, a case may only be withdrawn on compelling grounds e.g., if it appears after thorough investigation that there is no reasonable prospect of a successful prosecution.[56] Where the National Director of Public Prosecutions (NDPP) or a Director of Public Prosecutions (DPP) ordered the prosecution, their prior authorisation is required before a case is withdrawn. Their advice should also be sought where a case is of a contentious or sensitive nature, where the case is a high profile case or where the case involves a matter in which a policy decision is required. A withdrawn case may be reinstated at a later stage e.g., where further evidence comes to light.

Once the accused has been arraigned and has pleaded to charges preferred against him/her, a case may not be withdrawn.[57] If for any reason, the prosecutor decides not to proceed with a prosecution, it will amount to stopping a prosecution as referred to in section 6(b) of the Criminal Procedure Act. A decision to stop a prosecution is also not taken lightly, more so because it will result in the acquittal of the accused. The case may not be reinstated even where further evidence is found at a later stage. A criminal case may only be stopped where if during the proceedings, it becomes clear that it would be impossible to obtain a conviction, or where the continuation of a case become undesirable due to exceptional circumstances.[58]

4.1.4 Forensic Examination and Medical Treatment
Taking the child for a medical/ forensic examination

Every sexually abused child has to undergo a medical examination. The purpose of the examination is to gather forensic evidence. It is very important that the child presents for the forensic examination as soon as possible after the sexual abuse incident, and within a maximum of 72 hours after the incident. He/she should not wash or change clothes prior to the examination, as doing so may obliterate the evidence. However, in terms of the National Instructions, a forensic examination must still be conducted, even where the child presents after 72 hours of the sexual abuse incident.

The National Policy Guidelines recognises that a child may present for a forensic examination prior to lodging a criminal complaint. This could happen where the child does not want to lay a charge but requires medical treatment before laying a charge or is simply unaware of the process to follow. Whatever the reason, the child should not be turned away without the examination being performed and treatment given.

It is not only the child who is required to undergo a forensic examination. Perpetrators may also be subjected to such an examination as part of the evidence gathering process. Such examinations are conducted in terms of sections 37(2), 222(2) and 225 of the Criminal Procedure Act[59] in cases where the perpetrator is arrested early enough to obtain meaningful forensic evidence.

Until very recently, a district surgeon or a doctor in private practice performed forensic examinations. District surgeons were employed by the Department of Health either on a full or part-time basis. Their duties included examining complainants who have suffered violent crimes, termination of pregnancy where a child or woman fell pregnant as a result of rape, treatment of prisoners, conducting autopsies, executing

drunk driving tests and performing any other medical duty arising in the context of state function. In 1999, in a surprise announcement, the Minister of Health replaced district surgeons with a new system of Accredited Health Care Professional (AHCPs)[60] . Henceforth, AHCPs were to conduct forensic examinations and provide other services previously rendered by district surgeons.

Although all persons who have suffered sexual violence are required to undergo a forensic examination, such an examination can only be performed with the consent of the child's parents/caregivers. Consent to a forensic examination is given by completing the SAP 308 form. The investigating officer will normally complete the form for the child or his/her parent or guardian to sign. Any other form of written consent is also acceptable. A child of 16 years of age can complete the form without the authority of his/her parents/caregivers. Where the parents/caregivers unreasonably withhold consent to an examination, the parents/caregivers cannot be traced or for any other reason, they are unable to give their consent, a magistrate can be approached for consent[61] .

The AHCP conducting the forensic examination will record his detailed findings in the J88 form. He/she will also take samples using the crime kit provided by the investigating officer. Samples must be sealed, clearly marked for identification purposes and referred to the Police Forensic Science Laboratory for testing. Where a sexually active child engaged in sexual intercourse with other persons 72 hours prior to the sexual abuse incident, samples must also be taken from such persons for testing.

It is the responsibility of the investigating officer to collect both the completed J88 form and the sealed crime kits from the AHCP.

Medical Treatment for the Child

Both the National Policy Guidelines and the Multi-Disciplinary Protocol provide for the treatment of the child by the AHCP. Treatment to be administered includes post exposure prophylaxis (PEP) for sexually transmitted diseases (STDs), (there is no provision for the supply of PEP for HIV/AIDS as it is not government policy to provide free PEP for HIV to children who have suffered sexual abuse), the morning after pill where the child has reached puberty, termination of pregnancy where the child fell pregnant as a result of sexual abuse and treatment for any injuries suffered by the child during the sexual abuse incident.

The AHCP must also:

give the child information on follow up services;
refer the child for counselling to the local welfare or NGO service;
refer the child to the local Primary Health Centre (PHC) for treatment if he/she cannot treat the child;
refer the child to the local Family Planning Centre for contraception if she is in puberty and give the child information about HIV/AIDS; and
refer him/her for counselling for HIV and for HIV testing if the child or his/her parents/caregivers want the child to test for HIV.

4.1.5 The Role of the Prosecutor

The prosecution function vests in the National Prosecution Authority (NPA) by virtue of powers vested in it by the National Prosecuting Authoring Act 32 of 1998. Prosecutors in the lower courts and State advocates in the High Courts represent the Prosecuting Authority.[62] The role of the prosecutor is primarily to ensure justice where there has been transgression of the law. The prosecutor is described in the NPA Policy Directives[63] as "the people's attorney" who represents the administration of justice in the prosecution of criminal offences. He/she is tasked with assisting the court to arrive at a just verdict by guiding the police through the investigation process, making the decision to prosecute, addressing the court on bail, presenting evidence in court, arguing cases and helping the court arrive at a just sentence in the event of a conviction.

In prosecuting sexual abuse cases, the prosecutor is bound by the Criminal Procedure Act. He/she also derives guidance from the National Policy Guidelines and the NPA Policy Directives. The Multi-Disciplinary Protocol does not set any standards for prosecutors. The NPA Policy Directives sets general minimum standards for prosecutors in the execution of their duties while the National Policy Guidelines set specific guidelines for the management of sexual offences.

The decision to prosecute

On receiving the docket from the investigating officer, the prosecutor has to decide whether or not to proceed with a prosecution. He/she can only so decide if after assessing all available facts, information and circumstances, there are prospects of a successful prosecution.[64]

In making such an assessment, he/she is required to consider the possibility of successfully diverting the perpetrator from the criminal process,[65] the seriousness or lack thereof of the matter;[66] and discretionary grounds, i.e., compassion. Overall, a decision to prosecute consists of weighing demands of fairness and consistency, the need to protect the victim and the community from crime and to respect the offender's presumed innocence.

If the prosecutor is of the opinion that the docket does not have sufficient information to enable him/her to decide whether or not to prosecute, he/she may refer the docket with clear instructions back to the investigating officer for further investigation. In the event of the prosecutor declining to prosecute, his/her decision marks the end of the matter unless further information is obtained in which case the investigation will be reopened and the docket referred back to the prosecutor for his/her decision. In the event of the prosecutor deciding to prosecute he/she will place the matter on the roll for the perpetrator's first appearance in court, assist the court in arriving at an appropriate bail amount and/ or oppose bail if it is in the interest of justice that the perpetrator be kept in custody, guide the investigation officer through the investigation if any further investigation needs to be conducted, once the investigation is complete, decide in which court the matter is going to proceed and enrol the matter for trial in that court and start making preparations for trial.

Preparing for court

Since it is the prosecutor who will present the victim's case in court, he/she is responsible for all the court preparation that needs to be done. After enrolling the matter for trial, the prosecutor will issue a subpoena to the child and all other State witnesses, specifying the date, time and court in which they are required to report in order to testify. In terms of the National Policy Guidelines, the prosecutor is required to thoroughly consult with the child, all witnesses who will testify on behalf of the State, the investigating officer, social worker (if any is involved in the case) and the AHCP. He/she is also required to keep the child and or his/her parents/caregivers appraised of developments in the case.

During consultation with the child, the prosecutor is required to go through the statement made to the police with the child to refresh his/her memory and clear out any inconsistencies. He/she must ascertain what fears, if any, the child has, and attempt to allay these. He/she is also required to explain the court process to the child in order to equip him/her to understand the proceedings and to familiarise him/her with the courtroom. If the child will be using the services of an interpreter, the prosecutor is also required to ensure that the child has met the interpreter and/ or intermediary, as they will be working together throughout the case. The prosecutor must do the same with all other witnesses who will testify on behalf of the State.

When consulting with the AHCP, the prosecutor is required to familiarise him/herself with the medical terminology that will be employed in the trial and the implications of the AHCP's findings to enable him/herself to lead the AHCP's expert testimony coherently. He/she must furthermore confirm with the investigating officer that all the necessary documentation and exhibits to be used at the trial are available. If the investigating officer will be testifying in court, the prosecutor must consult with him/her as well.

4.1.6 Support for the child

Children who have been subjected to sexual violence require therapeutic support ranging from counselling to emergency shelter. Within government, it is the role of the Department of Welfare to provide such support. Non-governmental organizations are also instrumental in providing support to children who have suffered sexual violence.[67]

Minimum standards for providing support to children who have suffered sexual violence are set out in the National Policy Guidelines and in the Multi-Disciplinary Protocol. These instruments emphasize the need for the training of providers of support services to equip them to respond sensitively and appropriately to children who have suffered sexual violence[68] .

The role of the social worker, psychologist and other support groups as set out in the National Policy Guidelines and Multi-Disciplinary Protocol include making contact with a child who has suffered sexual violence, conducting risk assessments and ensuring the child's protection from vulnerability to violence, continuously collaborating with the police, AHCP and the prosecutor throughout the criminal

proceedings and providing counselling to the child and his/her family throughout the criminal justice process.

In exercising these duties, social workers, psychologists and other health care workers are required to create an environment of trust between him/herself and the child as he/she will require intimate details from the child; to accept that the incident of sexual violence as reported by the child did occur and avoid sceptical questions or questions that display a judgmental attitude; to assure the child that the sexual violence did not occur as a result of his/her fault and that help is available to him/her; to allow the child to verbalise his/her feelings, including feelings of anger; to allay the child's fears and to show sympathy for his/her plight and to safeguard the best interest of the child at all times.

Social workers and other support providers are required to link up with criminal courts or Sexual Offences Courts (where they exist), prosecutors, the police, CPUs (where these exist), Primary Health Care Clinics and the AHCP to ensure an integrated and coordinated response to sexual violence against children in all areas. The development of a directory of services available in every area to children who have suffered sexual violence is also advised.[69]

Procedure to be followed in supporting a child[70] :

A social worker is required to ensure that the case is dealt with at an agency where the matter is reported, irrespective of where the child lives. If the child lives in another area, the case must then be referred to the agency in the area where the child lives for follow up.[71] In compliance with section 42 of the Child Care Act, a social worker is required to report a case of sexual abuse to the police if a criminal complaint has not yet been lodged with the police. Consultations with the child should take place in private, a child should be interviewed first, and then his/her parents/caregivers. A social worker is required to strive to preserve the child's family and to remove the child only as a last resort.[72] Where the perpetrator is the child's family member, initial effort should be made to remove the perpetrator. The support of other family members in protecting the child from further abuse should be enlisted. Social workers are required to work closely with parents/caregivers to ensure that the child is not exposed to further abuse at home and assist the abuser to seek effective treatment and to provide the child and his/her family with information to assist the child including information on the role of the police, the criminal justice process, what will be expected of the child and his/her parents/caregivers in this process and information about medical risks, i.e., STDs, HIV/Aids and available medical treatment.

4.1.7 Specialised Sexual Offences Courts

A specialised Sexual Offences Court is a court based at regional level and dedicated to sexual offence cases. The first was established in Wynberg Cape Town in 1993 in response to the increase in sexual offence cases in that region. The objectives of the court are to improve inappropriate and insensitive treatment of victims of sexual offences in the criminal justice system, create an integrated approach to the management of sexual offences by various agencies and ultimately, improve the reporting, investigation, prosecution and conviction rate in sexual offence cases[73] .

The Wynberg Court differs from ordinary Regional Courts in that two prosecutors (with an interest in sexual offence cases), instead of one, are assigned to each court. This enables the prosecutors to spend a sufficient amount of time preparing for cases, e.g., consulting with witnesses, guiding the investigation and conducting in loco inspections without wasting court hours. Prosecutors take turns in presenting their cases in court thus allowing each other sufficient preparation time.[74] Unlike in other courts where dockets change hands each time the perpetrator appears in court, Sexual Offences Court prosecutors are allocated a docket from the time a decision to prosecute is made. Once allocated, the prosecutor handles a case to the end;[75] There is a waiting room where a victim waits in private away from accused ravaging corridors until he/she is called on to testify.[76] An AHCP and a Victim Support Services Coordinator[77] are also located at the court for the convenience of victims[78] .

The court was evaluated by Rape Crisis, Africa Gender Institute, the South African Human Rights Commission and the University of Cape Town's Institute for Criminology in 1997. An extensive evaluation report published after the evaluation rated the court partially successful in eliminating victim trauma, establishing collaboration between various agencies dealing with sexual offences and in improving reporting, prosecution and conviction rates in the Cape Town area. The report called on the Department of Justice to effect a number of improvements to the court to ensure full realisation of the court's objectives.[79] These include:

> the initiation of an integrated and coordinated multi-agency project on sexual offences to secure the commitment of all role players to specialised Sexual Offences Courts;
>
> all criminal justice officials including magistrates should receive on-going training to enhance their capacity to respond appropriately and sensitively in sexual offence cases;
>
> district surgeons should be available 24 hours a day to ensure prompt execution of forensic examinations; and
>
> mechanisms to maximise victim's access to information on the criminal process, complaints mechanism and progress made in their cases should be developed.

The report also called on the Department to develop a blue print for Sexual Offences courts based on the improved Wynberg model to form the basis for the establishment of other Sexual Offences Courts in the country.

Towards the end of 1999, with the financial support of the Canadian International Development Agency (CIDA), the Sexual Offences and Community Affairs Unit at the NDPP's office announced a plan to establish 20 further Sexual Offences Courts in various areas around the country to afford more victims of sexual offences the sensitive treatment afforded to victims in the Cape Town area by the Wynberg Court. More sexual offence courts have since been established in other parts of the country. However, there is no strategy in place for monitoring and evaluating the courts.

4.2 Trial Procedures

The trial is the culmination of the process initiated when the complainant laid a charge of sexual abuse. As mentioned earlier, it is important that the child is prepared for trial so that he/she may know at any given point in the trial where the process is and what is expected of him/her.

It is during the trial that the child's allegations of sexual violence and the accused's defence to those allegations are tested. The quality of evidence gathered during the investigation, and the cooperation of all role players throughout the case normally determines the outcome of the case. The child and his/her family normally expect conviction of the accused to vindicate the child's experience of the sexual violence. It is in this regard that the diligence with which the prosecution is carried out becomes important. The child's preparedness for trial or lack thereof will also determine the child's performance when called upon to testify.

On the day of trial, the child and his/her parents/caregivers are expected to arrive at court very early, normally around 9.00 a.m., and to alert the prosecutor to their presence. If the prosecutor has not had the opportunity to consult with the child and other witnesses and to prepare the child for trial, he/she will do so as soon as the child and or his/her family arrives in court. The child and his family (together with other State witnesses if there are any) will be made to wait in a private waiting room (if one is available) to avoid contact with the accused and or his family and friends.
If the accused, complainant and other witnesses are present in court, the trial will proceed on that day.

4.2.1 Special measures for children

The Criminal Procedure Act makes provision for measures aimed at accommodating special needs of a child witness. These include in-camera proceedings, prohibition against publication of a child's identity and the use of intermediaries.

In-camera proceedings

Generally, criminal proceedings take place in open court.[80] Section 153 of the Criminal Procedure Act provides an exception to this general rule. In terms of the section, the public may be excluded from trial where it appears to the court that there is likelihood that harm may result to any person if such person testifies in open court.

The constitutionality of section 153 has been questioned. This issue was settled in *Nel v Le Roux NO*[81] where the constitutional court held that although the section violates the accused's right to a public trial guaranteed in section 35(3)(c), such violation is justified in terms of the limitation clause.

In cases where section 153 applies, the court should mero muto order the courtroom to be cleared. Notwithstanding a section 153 order, judgement and sentence will be given in open court if the court is satisfied that the identity of the complainant or witness as the case may be, will not be revealed.

There is no doubt that section 153 is instrumental in protecting children who have suffered sexual violence when they testify in court. It also guarantees children protection during the criminal justice process thereby encouraging children to come forward.

Prohibition against publication of a child's identity

To alleviate the vulnerability of persons who have suffered violent crime from further violence, section 154 of the Criminal Procedure Act prohibits the publication of certain information relating to criminal proceedings. The prohibition relates to publication of an identity of any complainant where the court has made an order in terms of section 153(3) or publication of information relating to a charge referred to in section 153(3) where the accused has not appeared in court or where he/she has appeared, but has not pleaded to the charge.

Use of intermediaries, close circuit television and one-way mirrors

The Criminal Procedure Act contains provisions that make it possible for the child witness to testify outside court, namely, section 170A and section 158(3).
In terms of section 170(A), where in criminal proceedings, the court is satisfied that testifying in open court will expose a child under 18 to undue mental stress or suffering, the court may appoint a competent person as an intermediary to enable the child to give evidence through the intermediary. An intermediary is a person appointed by a court pursuant to section 170(A) to enable a child to testify outside court by assisting the court in relaying questions from the prosecutor, court and defence to the child and the child's response back to the court. This is normally done through close circuit television (CCTV) where a court is equipped with such a device. A child and the intermediary sit in a room adjacent to the court from where the child will answer questions posed to him/her. The court is able to see the intermediary and the child through the CCTV. Where a court is not equipped with CCTV, a one-way mirror is used. The use of these devices is authorised in terms of section 158(3) of the Criminal Procedure Act.

A number of people have been identified competent[82] to act as intermediaries. They include psychologists, paediatricians,[83] psychiatrists,[84] family counsellors (appointed in terms of the Mediation in Certain Divorce Matters Act),[85] childcare workers;[86] lay counsellors, educators (including retired educators);[87] and social workers.[88]

The constitutionality of section 170(A) was attacked *in K v The Regional Magistrate NO and others*[89] where it was argued that (a) the use of intermediaries impairs proper cross-examination thereby infringing on the accused's right to a fair trial, (b) the physical separation of the child from the accused violates the accused's right to a public trial. After examining the purpose of section 170(A), the court found that ordinary procedures in the criminal justice system are inadequate to meet the child's special needs and that the section was designed to address these special needs. The court equated the role of the intermediary to that of an interpreter and found that the use of an intermediary does not exclude the accused's right to cross-examine the

child. The court further found that the accused's right to a public trial is not violated by the separation of the child from the court.

4.2.2 Cautionary Rules

Cautionary rules are evidentiary rules of practice that require presiding officers to exercise caution prior to accepting the evidence of certain category of witnesses.[90] Such rules are based on the assumption that the witness adducing the evidence, for some reason, has diminished credibility[91].

Until very recently, three types of cautionary rules found application in sexual offence cases against children namely, caution against the evidence of women and girl children in rape cases, caution against the evidence of a child witness and caution against the evidence of a single witness. These rules evolved because the collective wisdom and experience of judges have found that certain kinds of evidence cannot be safely relied on unless accompanied by some satisfactory indication of trustworthiness, e.g., corroboration.[92]

Cautionary rule in rape cases

The rationale behind the application of caution in accepting evidence from women and girl children in rape cases is explained as follows in the South African Law Commission's 1985 Report on Women and Sexual Offences where the Commission refused to scrap this rule:

'Rape usually takes place in secret and it is easy to lay a false charge and difficult to refute it. Furthermore, a complainant could be motivated by an emotional reaction or an innocent man may be falsely accused because of his wealth and the complainant may be forced by circumstances to admit that she had intercourse and then willingly represent intercourse as rape'

Since then, the rule became the subject of legal scrutiny[93] until repealed by the Supreme Court of Appeal in a landmark ruling in the case of S *v Jackson.*[94] Upholding the State's argument that the notion that women (and girl children) are habitually inclined to lie about being raped was without any basis. The court found that the rule is based on an irrational and outdated stereotypical perception about women being unreliable. Since the majority of complainants in rape cases are women, the court found the rule to discriminate against women.

Although the Jackson judgment is hailed for scrapping the discriminatory cautionary rule in rape cases, it has been criticised for leaving latitude for the continued application of the cautionary rule in rape cases by citing with approval an English judgment where the court held that in order for the rule to find application in rape cases, there needs to be an evidential basis for suggesting that a complainant is unreliable.[95] Statutory intervention may therefore be necessary to ensure the total exclusion of the cautionary rule in rape cases.

Cautionary rule against the evidence of a child witness

Like the evidence of women and girl children in sexual offence cases, the evidence of children (in all cases) is treated with caution. It has been argued that the evidence of a child witness is objectionable because children's memories are unreliable, children are egocentric, highly suggestible, have difficulty distinguishing fact from fantasy, often make false allegations (particularly of sexual assault) and that children do not understand the duty to tell the truth.[96]

This rule has been steadfastly applied in South Africa and in other countries without interrogation and without regard for its lack of a sound legal basis.[97]

It was not until 1989 that the British Home Office Committee under the leadership of a Court Judge, Mr. Justice Piggott, questioned the blanket application of the cautionary rule against children. He called on courts to open up to what other disciplines can teach them about the features of children's evidence and the circumstances under which a child is likely to adduce false evidence[98] . The Judge advocated a new and more targeted approach to the admissibility of evidence of children**.** He argued that there is nothing wrong in the current approach of seeking corroboration of children's evidence, the only problem occurs when courts start losing sight of why corroboration is sought. Age and immaturity are simply not sufficient grounds for seeking corroboration.

In *The State v S* (Regional Court Judgment) the court acquitted a father on charges of sodomising his two children after finding that given the applicability of the cautionary rule against a complainant in sexual offence cases, the evidence of a child witness and the evidence of a single witness in that case, the State's evidence had to be of extremely high quality to be admissible. Inevitably, the compounded effect of three cautionary rules, when applied in one case, makes a conviction virtually impossible.[99] On appeal the court overturned the acquittals arguing with reference to the Jackson judgment, the rationale for doing away with the discriminatory nature of the compulsory application of cautionary rules in sexual offence cases. As argued by Judge Fagan, there is no justification for treating children as less reliable than adult witnesses[100] . Such differential treatment is not only warranted, it violates the child's right to equal treatment before the law and equal protection of the law.

In order to be responsive to the reality of children, the courts need to take into account the cognitive and emotional developmental reality of children when assessing a child's evidence. The fact that a child is less developed than an adult and hence less able to withstand vigorous cross-examination, less equipped to deal with equivocal statements and with less developed communication skills, should instead dictate in the child's favour rather than a sweeping unfounded assumption that a child is inherently unreliable as a witness. Statutory intervention may be necessary to settle the existing uncertainty regarding the judicial approach to the admissibility of a child's evidence.

Cautionary rule against the evidence of a single witnesses

As with the other cautionary rules, the cautionary rule against a single witness developed out of judicial practice.[101] Over the years, courts have warned against too much reliance being placed on the evidence of a single witness.[102] Despite a clear statutory provision in section 208 of the Criminal Procedure Act that an accused may be convicted of any offence on the single evidence of any competent witness, courts continue to apply caution when assessing the guilt of an accused person based on the evidence of a single witness.

De Villiers JP is often blamed for creating a leeway for the continued and unabated application of the cautionary rule against the evidence of single witnesses. In the *Mokoena* case, the judge warned that section 208 should only be relied on where the evidence of a single witness is clear, and satisfactory in every material respect. The section should not be invoked where the witness has an interest or bias adverse to the accused, where he/she has made a previous inconsistent statement or where he/she contradicts him/herself in the witness box. Hoffman and Zeffertt have expressed regret at the application of the De Villiers dictum as a salutary guide to the interpretation of section 208. [103] They warn against blanketly following the approach followed by De Villiers in *Mokoena* lest too much focus on the witness's interest or bias distracts from assessing the possibility of the witness's testimony being substantially true.

The cautionary rule against a single witness finds application in most sexual offences cases as incidents of sexual violence often take place outside the public domain. If courts follow the approach in the *Mokoena* judgment, that children's memories are unreliable, that children are egocentric, highly suggestible, have difficulty distinguishing fact from fantasy, often make false allegations and that children do not understand the duty to tell the truth, the likelihood of the admissibility of the evidence of a single child witness becomes too remote when assessing the evidence of a single witness in a sexual offence cases. This accounts for low conviction rates in sexual offence cases against children. As argued by Hoffman and Zeffert, an approach that puts the court in a position to assess the truthfulness of a child's witness in the light of all the other circumstances of the case is a sensible one[104] .

4.3 Post-Trial Procedures

In therapy, children who have been subjected to sexual violence commonly express their feelings in the following words: 'I am damaged, I am powerless, why me? I feel confused, I often feel sad, people think I am ugly, sometimes I wonder why I am alive.'[105] These expressions are indicative of the profound and devastating effects of sexual violence on children. Experiences of sexual violence negatively affect a child's internalisation of the 'self' and adversely affect the child's interaction with other people[106] .

Sexual violence is even more devastating on a child when perpetrated by someone close to the child. What aggravates the child's devastation in such cases is the nature of the relationship with the perpetrator. Abuse is the last thing the child expects from

the perpetrator as often the child looks up to the perpetrator for protection. Where the perpetrator has a close relationship with the child, the child normally first experiences the sexual act as love, and as intrusion fear and hate intensifies, the child has feelings of confusion.[107]

The child's experience of abuse is further compounded during the criminal process, as this process does not take into account the child's cognitive development. During this process, children re-experience intrusion, helplessness, aggression, threats, feelings of guilt, being bad and lack of faith in what they have told the court.[108] Often these feelings are further aggravated by a negative court outcome. Discharge of the accused is likely to cast doubt on the child's truthfulness and self-esteem, and contribute to the child's feelings of guilt and self blame.[109]

From the above it is clear that post-trial arrangements are critical to the child's healing process. More often than not, if a child was privileged to receive therapeutic interventions when the case of sexual violence was reported to the police, such intervention is unlikely to proceed after the trial has been finalised. The National Policy Guidelines do not recognise the role of the social worker in the child's healing process after disposal of the criminal matter. On the other hand, the Multi-Disciplinary Protocol provides that a child who has been abused is entitled to treatment for the trauma suffered[110] . The trauma can occur before, during and after the statutory process.[111] It further provides for the termination of specialised child protection and treatment services when (a) the involvement of Child Protection and Treatment Services Professionals is no longer necessary and (b) only when a treatment plan for all parties involved has been completed.[112] Therefore treatment of the child should continue even after disposal of the criminal matter.

4.3.1 Treatment

It is pivotal for a child who has suffered sexual violence to undergo treatment. Although the Multi-Disciplinary Protocol emphasises that treatment for the child should be kept separate from the criminal process and that ideally, treatment should not be offered by a statutory social worker, the Protocol also recognises that this is not always possible in the South African context of scarce resources. The Protocol therefore encourages statutory social workers to incorporate therapy in all areas of their work.

The Multi-Disciplinary Protocol provides for the following forms of treatment for the child: trauma debriefing, crisis intervention counselling, supportive counselling, specialised therapy, psychological assessments, group therapy and support groups.

Although a child is an individual, he/she is part of one large family system. Because families live together, they develop reciprocal patterns of behaviour. It is for this reason that the Multi-Disciplinary Protocol advocates that a child not be treated in isolation from the rest of his/her family. Therefore, not only does a child who has suffered sexual violence need therapy, the rest of his/her family do as well.

The Protocol provides for the following forms of intervention for the family: conjoint family therapy, parental education, individual work with children, couple counselling, parent-child enrichment and sibling enrichment.

During the literature review no research outlining shortcomings in the provision of treatment to children who have suffered sexual violence was encountered. This points to the need for research in this area.

4.3.2 Placements

The family preservation model underpins the treatment and placement provisions of the Multi-Disciplinary Protocol. The model is based on the philosophy that although children are individuals, they need and thrive within permanent families, whether biological or foster. Family preservation and the need to protect children need not be in conflict. Even when faced with a crisis, parents/caregivers love their children and with help and support, they may be able to acquire skills to care for and protect their children.

After any form of abuse, the safety of the child has to be guaranteed as part of the child's healing process. Although in certain instances removal of a child may be seen as an easy route to a child's safety, it is not always the best option. The Multi-Disciplinary Protocol emphasises that children yearn to stay where they belong, with their families. It is extremely difficult to convince a child of his/her worth after removing him/her from a family which is perceived unworthy, but with whom the child identifies. The Protocol encourages welfare workers to, in recognition of this reality, focus their efforts on assisting families to build safe relationships and caring interactions.

Where the need for family preservation and the child's safety do not balance, arrangements for the alternative placement of the child should be made. The child and his/her family should be supported throughout this process. The child and his/her alternative family also require support throughout this process. A permanent plan must be formulated to ensure observation of the child's best interest.

The Child Care Act makes provision for the removal of a child considered to be a child in need of care. A child in need of care is a child who *inter alia* lives in or is exposed to circumstances which may seriously harm his/her physical, mental or social welfare, is in a state of physical or mental neglect or has been physically, emotionally or sexually abused by his/her parents/caregivers or a person in whose care or custody the child is.[113] Any child who has been sexually violated (whether by a family member, neighbour or stranger) may, depending on the circumstances of each case, qualify as a child in need of care in terms of section 14(4).

A children's court may, pending an inquiry into whether a child is a child in need of care, authorise the removal of a child to a place of safety if during any proceedings before the court it appears to the court that it is in the interests of the welfare and safety of the child to be removed to a place of safety. The court may also ratify the removal of a child to a place of safety by a social worker, a police or other authorised officer if the child was removed in circumstances where the delay in obtaining authority would have been prejudicial to the child. During the inquiry, the court may

request a social worker to furnish it with a report into the circumstances of the child and his/her parents/caregivers and/ or guardian.[114] At the end of the inquiry the court may order[115] that a child be returned to the parent or guardian in whose custody the child was before the inquiry, subject to supervision by a social worker and or compliance with any conditions that the court may determine; that a child be placed with a suitable foster parent designated by the court subject to supervision by a social worker; that a child be sent to a children's home or a school of industries designated by the Director-General of Welfare.

Once granted, an order for the removal of a child is subject to revision by the children's court every two years.[116] The order may be extended for a further two years at a time until the child turns 18.[117]