



THE IMPACT OF CHANGING CRIMINAL JUSTICE RESPONSES TO CHILD VICTIMS OF SEXUAL ABUSE

Good intentions, questionable outcomes

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Published by the Criminal Justice Initiative of Open Society Foundation for South Africa
2nd Floor, Lobby 2, Block B, Park Lane, corner Park and Alexander roads, Pinelands 7405, South Africa
www.osf.org.za

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First Published 2008

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ISBN 978-1-920299-15-6

Produced by Greymatter & Finch www.greymatterfinch.com

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ACKNOWLEDGEMENTS

I would like to express my gratitude to the Open Society Foundation for South Africa for providing the platform to further the debate on these issues and for the opportunity to present these ideas. My thanks also go to a number of people who assisted in the development of the paper. Firstly to Cheryl Frank for essential guidance, structure, and editing of the paper, which I have appreciated greatly. I thank Tania Moodley and Tasneemah Nordien, of the RAPCAN Child Witness Project, who have provided valuable input on elements of this paper. Lastly, and importantly, my great appreciation to Jean Redpath for her insight, effort and attention to detail in reviewing and editing this paper.

Samantha Waterhouse¹

Resources Aimed at Preventing Child Abuse and Neglect

October 2008

ACRONYMS AND ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CCTV	closed-circuit television
CJS	criminal justice system
CPO	court preparation official
CPU	child protection unit
CRC	United Nations Convention on the Rights of the Child
CSO	civil society organisation
FCS unit	family violence, child protection and sexual offences unit
NPA	National Prosecuting Authority
NPF	National Policy Framework
RAPCAN	Resources aimed at the Prevention of Child Abuse and Neglect
SAPS	South African Police Service
SOC	sexual offences court
TCC	Thuthuzela Care Centre
UVPM	Uniform Protocol for the Management of Victims
VEP	Victim Empowerment Policy

EXECUTIVE SUMMARY

Children represent almost half the victims of known sexual abuse in South Africa. Evidence suggests there is a high degree of under-reporting. Child victims of sexual offences have different needs from victims of crime in general, due to the extent and nature of the trauma experienced, the additional vulnerability of children, social pressure by adults against a less-powerful child victim, and social support of the perpetrator. Children are particularly vulnerable, yet face the same process and procedures as adult victims in the criminal justice system (CJS).

Engagement in the CJS may result in further victimisation and even trauma to a child, or it may have a positive effect that assists the child in the process of recovery. Very often the result is dependent on the attitudes and competence of the people who interact with the victim as well as the nature of the procedures to which the child is subjected.

South Africa has an impressive legislative and policy framework supporting children's rights. However in some respects legislation has not yet evolved adequately to protect all child victims in the CJS, particularly in relation to protective measures for child testimony, such as the use of intermediaries or closed-circuit television (CCTV) testimony. Relevant policy, with commendable content, unfortunately has uncertain status and is frequently couched in language which escapes placing a firm obligation on the state. While some policy guidelines and directives are comprehensive, sometimes these have failed to be accompanied by training and adequate compliance mechanisms. The new sexual offences legislation addresses some concerns through requiring the development of new cross-cutting policy with training plans and providing for publication of these in the Government Gazette, parliamentary oversight is also required.

However, the criminal justice system is only one part of the broader child protection system, and this paper is concerned only with the criminal justice response. A number of

key issues relating to the management of sexual abuse of children are discussed. South African Police Service (SAPS) performance targets aimed at reducing the number of rape reports appear to have led to unwillingness to record reports of rape. Mandatory reporting is not accompanied by commitment to minimum standards of service delivery by the CJS. 'One-stop centres' are an excellent innovation, but not all children have access to these. The restructuring of family violence, child protection and sexual offences (FCS) units in the SAPS appears to have improved access to services in some areas but diluted the quality of these services to children in other areas. The roll out of further sexual offences courts, which have improved conviction rates, appears to be on hold. Poor implementation of the NPA's move to provide court preparation services caused confusion and reduced the quality of services provided to children. Protective measures available to child witnesses in court are used conservatively. Discriminatory rules of evidence against child witnesses remain in place.

In spite of many innovative and effective new models of service delivery, the performance of the CJS in relation to child victims remains generally poor. There appears thus to be a large gap between policy and practice and, in practice, inadequate weight is given to the rights of children.

Policy for the provision of counselling support for children is inadequate. Funding is limited for civil society organisations (CSOs) which provide victim support in the CJS as well as counselling. There is a general absence of effective accountability mechanisms for state and civil society service providers and poor provision for CSO participation in policy development. Poor performance of the CJS implies lost opportunities for crime prevention.

This paper recommends re-orientation toward children's rights in the CJS process. There needs to be improved access to quality services in the CJS, as well as victim support and counselling. Existing good practices of the SAPS, the NPA and the Department of Justice must be scaled up for all child victims; and greater specialisation is needed in both investigation and court processes. There is a need to improve the funding mechanism for CSOs which provide support services in courts. Accountability mechanisms are needed for all service providers and performance targets which harbour perverse incentives must be reviewed. Consultation with CSOs in policy development must be improved. Discrimination against children in court must be addressed urgently.

Overall, developments in policy and the legislation for the management of cases are positive. Funding commitments and other mechanisms are needed to ensure that determined policy and existing good practice models work to protect children's rights and improve service delivery for all children entering the CJS.

1. INTRODUCTION

The thought of children² being victims of sexual offences is often difficult to accept. Yet, children represent about half of South Africa's victims of sexual offences – and, in spite of their particular vulnerability, face the same processes for the administration of justice as adults.³ This means they must report the crime, face the many rounds of telling and re-telling of a traumatising experience of victimisation, play their role as witnesses in court proceedings against the offender (if one is apprehended) and thereafter seek to find some semblance of normality.

The nuances of this experience are more difficult to appreciate. Like adult victims of sexual offences, child victims become subject to misconceptions and prejudices held in society. These views, such as victim-blaming, are regrettably often amplified among service providers in the criminal justice system (CJS). The impact of these views is exacerbated by low levels of capacity to address the special needs of child victims as well as poor co-ordination and collaboration between role-players. The odds are stacked against the child victim in our CJS.

Yet over the past 15 years, there have been important shifts in criminal justice legislation, policy and practice aimed at improving the management of child victims and witnesses. This paper seeks to describe the relevant changes, to provide an assessment of the extent to which the nature and quality of services to child victims of sexual offences have improved and to make recommendations for further improvements in the system.

2. SEXUAL ABUSE OF CHILDREN IN SOUTH AFRICA

In order to understand data on sexual abuse, it is important to note the definition being used. Current police statistics are based on common law definitions of the crimes of 'rape'

and 'indecent assault'. But the legal definition of rape has been expanded by the Criminal Law (Sexual Offences and Related Matters) Amendment Act, the 'new Sexual Offences Act', to include a range of acts that have previously been considered indecent assault (discussed in more detail in section 4.2.1 below). These changes will affect the number of reported rape cases from December 2007, when the changes came into effect. The Act also creates the new offence of 'sexual assault' and cases currently recorded as indecent assault will in future be recorded either in this category or as rape. Victimisation surveys, on the other hand, use the broader term 'sexual assault', which describes a wide range of sexual crimes. For the purposes of this report, police reports of both 'rape' and 'indecent assault' are counted together as 'sexual offences' and compared to 'sexual assaults' reported in surveys.

Table 1 below shows the number of sexual offences against children reported to the South African Police Service (SAPS) from 2004/5 to 2006/7. These comprise just over 40% of the total number of rape cases (committed against both adults and children) and just under 50% of the total number of indecent assault cases reported in these years.

Table 1: Sexual offences against children reported to the SAPS

	2004/2005 ⁴	2005/2006 ⁵	2006/2007 ⁶	Total for 3 years
Rape	22 486	23 453	22 625	68 564
Indecent assault	4 829	4 762	4 710	14 301
Total rape and indecent assault	27 315	28 215	27 335	82 865

However, only a proportion of sexual crimes committed are ever reported. Under-reporting is a complex issue influenced by the psychological consequences of sexual assault such as denial, avoidance, subjective interpretation of the abuse and fear of the consequences of disclosing the abuse.⁷ The extent of under-reporting of sexual offences against children is unknown, however under-reporting is likely to be higher in cases involving children. The following factors undermine reporting in these matters:

- in many cases, the close nature of the relationship between the child and the perpetrator;
- the child's being confused about, or feeling responsible for, the abuse;
- the child's fear of reprisal by the perpetrator;
- the child's feeling protective of the perpetrator or family members;
- social taboos relating to sex and sexual abuse, resulting in shame and embarrassment;

- patriarchal norms through which children are entirely dependent on close male family members and which make exposure of these perpetrators extremely difficult; and
- complicity of family members in hiding the abuse.

The National Youth Victimization Survey (2005) showed that the majority (83.2%) of young people surveyed (aged 12 to 22) who said they had been victims of sexual assault had informed someone about the incident. Of these, only 11.3% reported to the police (63.3% told their parents).⁸ Similarly a Medical Research Council study found that only one in every nine rapes (11%) was reported to the police by adult victims.⁹ These survey findings on under-reporting suggest that 27 000 rape and indecent assault cases against children reported to the police in a single year actually represent at least 240 000 children sexually assaulted in that year. Because the extent of under-reporting in surveys is unknown, the true number may be even higher.¹⁰

The National Youth Victimization Survey referred to above suggests most children do inform family members of sexual abuse, yet fewer cases are reported to the police. Children cannot access the criminal justice system and other services without the support of adults. Unfortunately, perpetrators of sexual abuse are often adults with close ties to the child. Adults to whom the child reports may either minimise the seriousness of the abuse, disbelieve the child and support the excuses of the offending adult, or may themselves be emotionally or financially dependent on the abuser and thus discouraged from taking the matter further. A poor response by adults responsible for taking care of the child leaves the child with no route to services unless another adult intervenes, the abuse becomes life-threatening or the child grows older and is able to access help.¹¹

3. THE NEEDS OF CHILD VICTIMS IN THE CRIMINAL JUSTICE SYSTEM

Child victims of sexual offences have different needs from victims of crime in general. This is due to factors such as:

- the extent and nature of the trauma experienced;
- the additional vulnerability of children;
- social pressure by adults against a less powerful child victim; and
- social support of the perpetrator.

Close relationships between victims and offenders often add further layers of complexity to case management. Various forms of specialised support are required for proper case management to assist children in the CJS who have been sexually violated. Such support should recognise:

- the needs of victims of traumatic experiences;
- the needs of victims of sexual offences;
- the needs of child victims.

Experts in trauma recovery identify certain essential elements in assisting people who have experienced trauma. These include ensuring the safety of the victim, showing respect for the victim, building trust, and assisting the victim to restore a sense of control over their body and environment and over actions taken on their behalf.¹² Jordan's analysis of 89 different research reports conducted between 1971 and 2005 on the issue of rape in the criminal justice system found that most police services are unable to provide for a victim's need for respect, care, support and ongoing access to information.¹³ Criticism and ignorance displayed by service providers, which are rooted in the nature of the abuse and its impact on the victim, can compound the negative impact of the actual trauma on victims. It is important that people who interact with the victim are able to recognise the seriousness of the experience and the normal range of responses that victims may display.¹⁴ In particular, victim-blaming and the failure to place responsibility on the offender exacerbate the trauma of the victim and can negatively influence the healing process.

Victim-blaming and denial are particularly common in respect of victims of sexual offences in South African society and its criminal justice system.¹⁵ There is a tendency for adults to identify more with the alleged adult offender than with the child.¹⁶ Stereotypical thinking about the nature of rape and entrenched systems of patriarchy have undermined attempts at reforming criminal justice processes over the past thirty years.¹⁷ In his discussion on child sexual abuse accommodation syndrome, Summit explains how this plays out with child victims. He indicates that children who disclose sexual abuse are often fearful, tentative and confused about the abuse and about the impact that disclosure will have on their lives.¹⁸ When a child discloses, the person to whom they disclose is thus faced with a child who is uncertain and emotional, accusing an adult who seems reasonable and is often socially respected, who denies the allegation. In the majority of cases this results in scepticism, disbelief and even punishment of the child. This response can be witnessed in family members, educators, police, prosecutors and the courts. Thus victims who speak out must cope not only with the impact of the offence, but also with the unfounded perceptions and beliefs of the people with whom they interact. This may aggravate feelings of being responsible for the abuse and deepen the isolation, anger and pain experienced by the child.

The majority of sexual offences against children are committed by someone known to and trusted by the victim and the family of the victim.¹⁹ Complexities based on the nature of the relationship between the victim and the offender are more pronounced in sexual trauma; a close or dependent relationship between the offender and the victim increases the victim's sense of responsibility for and protection of the offender's well-being. The dependent nature of relationships between children and adults makes disclosure less likely and, where abuse is disclosed, the need for sensitive and skilled management of the case more critical.

Child sexual abuse often results in heightened feelings of shame and humiliation in the victim, requiring further measures to ensure that victims feel able to discuss the intimate details of the abuse.²⁰

Children have less developed communication and linguistic skills than adults and understand and interpret experiences differently to adults, based on their level of cognitive development. Thus, people who interview children and make decisions based on their responses require knowledge of developmental psychology and must be skilled in communication with children in order to avoid further confusion and manipulation of the child's account.²¹

Responding to child victimisation also requires attention to the needs of the adults who care for the child. The people closest to the child are likely to experience some degree of distress and even trauma. The responses of the child's caregivers after the disclosure of sexual abuse can strongly affect and influence the experience of the child.

The demands made by the justice system on victims who have been seriously traumatised by their experience are often at odds with their needs. Adolescent and adult survivors of sexual offences say they need and expect the criminal justice system to ensure that:

- justice will be served;
- the perpetrator will be held accountable and punished;
- they will be protected from further harm;
- they will be believed and taken seriously;
- there will be closure; and
- the case will be handled efficiently.²²

Studies have found that children and their caregivers express concern regarding postponements of the trial, long waiting times at court before testifying, their fear of seeing the perpetrator, recounting the often humiliating details of the event during evidence-in-chief, their distress during cross-examination and their anger when the accused is acquitted.²³ These experiences affect the emotional and psychological well-being of the child.

Children generally express extreme levels of fear related to facing the accused in court.²⁴ This includes fear that the accused may harm or even kill them.²⁵ A study by Kriel and Wohllitz found that children were also fearful of the consequences of the trial, for example, that family members might be angry with them or that they would be removed from the family as a result of the court case.²⁶ Children expressed concern regarding having to speak to strangers about their experience, and about the people in the court being angry with them. They were also concerned about their ability to understand court processes and the questions likely to be asked of them.

A child must overcome fear and anxiety, amongst a range of other emotional factors, in order to perform as a competent witness. These emotions, in addition to the formal court environment and procedures, result in stress and trauma to the child which impacts on the quality of the evidence provided by the child and may prevent the child from testifying fully.²⁷ A number of researchers argue that the adversarial trial system is in direct conflict with the needs of a traumatised child.²⁸ The formal courtroom environment is intimidating and alienating to children, often adding to the distress of the child; studies indicate that

a courtroom negatively effects children's recollection of events and that children provide information of a better quality when testifying in a private room.²⁹

Engagement in the criminal justice system may result in further victimisation and even trauma to a child, or it may have a positive effect that assists the child in the process of recovery. Very often, the result is dependent on the attitudes and competence of the people who interact with the victim, as well as the nature of the procedures to which the child is subjected.³⁰

4. LEGISLATIVE AND POLICY FRAMEWORK

4.1. The children's rights framework in South Africa

South Africa ratified the United Nations Convention on the Rights of the Child³¹ (CRC) in 1995 and the African Charter on the Rights and Welfare of the Child³² (ACRWC) in 2000. Both of these instruments recognise a wide range of children's rights, and require member states to protect these rights and to put in place measures to ensure their realisation. These rights in international law are complemented by the Bill of Rights in the Constitution of the Republic of South Africa³³ (the Constitution) and effected by a legislative framework, particularly the Children's Act.³⁴

4.1.1. *Freedom from violence and abuse*

Both the CRC and the ACRWC include the right to protection against child abuse and torture. State parties must ensure that legislative, administrative, social and educational measures are taken to protect children from a range of forms of violence, abuse, neglect, maltreatment or exploitation.³⁵ The measures should include: support to the child and caregivers, and measures for prevention, identification, reporting, referral, investigation, treatment and follow up on child abuse and neglect. There are also provisions requiring state parties to protect children from sexual exploitation, pornography and sexual abuse.³⁶ An Optional Protocol to the CRC, which addresses the sale of children, child prostitution and child pornography, has also been ratified by South Africa.³⁷

The Constitution provides all citizens, including children, the right to be free from various forms of abuse. Central amongst these are the rights to life³⁸ and to freedom and security of the person.³⁹ This last right includes the right to be free from all forms of violence whether from public or private sources, and not to be treated in a cruel, inhuman or degrading way.⁴⁰

Section 28 of the Constitution specifically addresses the rights of children. It provides that children have the right to be protected from maltreatment, neglect, abuse or degradation.⁴¹ This right is referred to in the objects clause of the Children's Act.⁴²

4.1.2. *Right to dignity, fair treatment and non-discrimination*

The Constitution also provides that all people have the right to respect and protection of their inherent human dignity.⁴³ Similarly the Children's Act states that in all proceedings, actions or decisions in matters concerning a child, the child's rights must be respected, protected, promoted and fulfilled. This includes respect for the child's inherent dignity, the right of the child to be treated fairly and equitably, and to protect the child from unfair discrimination on any grounds.⁴⁴

4.1.3. *The 'best interests of the child' standard*

Both the CRC and the ACRWC provide that the best interests of the child must be given primary consideration in all matters concerning the child.⁴⁵ The CRC only extends this to public and private social welfare institutions, whereas the ACRWC extends this responsibility further to 'any person or authority'.⁴⁶

The Constitution provides that the child's best interests are of paramount importance in every matter concerning the child.⁴⁷ The Children's Act emphasises the 'best interest of the child' standard: 'In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.'⁴⁸

The Act sets out factors to be taken into account in considering the best interests of the child in situations where removal of the child from the family environment is considered. These include:⁴⁹

- the child's physical and emotional security;
- the need to protect the child from any physical or psychological harm that may be caused by subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to exploitation or other harmful behaviour, including the possible degradation of and harm to children within the child protection and criminal justice systems; and
- avoiding or minimising further legal and administrative proceedings where possible.

4.1.4. *Child participation*

Both the CRC and the ACRWC provide specifically that in judicial and administrative proceedings that affect the child, the child must be provided with the opportunity to be heard, either directly or through an impartial representative.⁵⁰ The CRC and the Children's Act further provide that children have the right to give their opinion in all matters that affect them. The child's age, maturity and developmental stage must be taken into account in the way in which the child participates and, in the CRC, in the weight that is accorded to that opinion.⁵¹ In the child protection and criminal justice systems, these provisions mean that due consideration must be given to the opinions of the child.

4.2. Legislation addressing child sexual abuse

South African legislation addresses child abuse in different ways.

The Children's Act 38 of 2005 sets out principles of care and protection of children. Parental responsibilities and rights are defined and provision is made for children's courts in the child protection system. A National Child Protection Register is created. The abduction and trafficking of children is criminalised. The Act provides for improved access to health care for children, including access to contraception, and the right to give consent to medical procedures from the age of 12. The Act defines 'child abuse' as encompassing physical, sexual, psychological and emotional abuse, as well as bullying and exploitative labour practices. 'Exploitation' includes slavery, debt bondage and forced marriage, sexual exploitation, servitude, forced labour, prohibited child labour, and the removal of body parts. In addition the Act defines sexual abuse (discussed below).

The Children's Amendment Act 41 of 2007 provides for related services implemented by provincial departments. Areas of service delivery include early childhood development programmes, prevention and early intervention services, services to child-headed households and the provision of child and youth care centres. The Act sets out procedures for the protection of children, including mandatory reporting of suspected child abuse by a wide range of professionals. The Act provides for the development of norms and standards in the delivery of various services.

The Children's Act, as amended, was not fully implemented at the time of writing. The Children's Act replaces the Child Care Act 74 of 1983, which currently provides for the care and protection of children (via the child protection system). A number of other pieces of legislation relating to children are also repealed by the Children's Act.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('new Sexual Offences Act') reforms the law on sexual offences. Rape is redefined and a range of new sexual offences such as the *sexual exploitation of children* and *using a child for child pornography* (discussed in more detail below) are created. Compulsory HIV testing of alleged offenders, a sex offender register, and the development and monitoring of a national policy framework for criminal justice agencies are legislated. The Act reforms discriminatory court rules relating to complainants in sexual offences. However it fails to reform discriminatory rules against child complainants and fails to ensure uniform access to protective measures in court for children.

The Films and Publications Act 65 of 1996 as amended, makes the creation, production, possession or distribution of child pornography an offence.

4.2.1. Defining sexual abuse of children in legislation

Sexual abuse and exploitation in the Children's Act: The Act defines sexual abuse in relation to a child as sexual molestation or assault of a child as well as allowing this to be done to a child. The definition includes encouraging, inducing or forcing a child to be used for sexual gratification of another person; using a child or exposing a child to

sexual activities or pornography; and participating in or assisting in commercial sexual exploitation of a child.

Commercial sexual exploitation of a child is defined as 'procuring a child to perform sexual activities for financial or other reward', and includes prostitution, pornography and trafficking for sexual purposes. The Act provides that it is irrelevant who gains the reward or favour. While the term 'molestation' is not defined, it is clear that the intention is to create broad definitions that cover the range and complexities of adult involvement in child sexual abuse and exploitation.

Rape and sexual assault in the new Sexual Offences Act: The common law definition of rape was widely criticised, *inter alia*, because only penetration of the female vagina by a penis met the common law definition. The new sexual offences legislation broadens the definition of rape to include the penetration of any person's mouth, genitals or anus with the genitals of another person, as well as the penetration of a person's genitals or anus with any other body part, object or part of the body of an animal.

The common law definition of *indecent assault* included forcing a person to kiss, anal penetration of a person, or the penetration of a girl's vagina with an object or a body part other than a penis. The new sexual offences legislation has incorporated the *penetrative* acts previously classed as indecent assault into the newly-defined crime of rape. All non-penetrative sexual acts, such as forced kissing and touching are defined in the new Sexual Offences Act as *sexual assault*.

The new sexual offences legislation has retained lack of consent as an element of the definition of rape and as an element of various other offences. However *consent* now also covers un-coerced agreement. Agreement is not voluntary or without coercion where:

- threat of force or intimidation against the victim or another person or against the property of the victim is used;
- there is abuse of power or authority;
- the sexual act is committed under false pretences or by fraudulent means;
- the victim is asleep, unconscious, in an altered state of consciousness, under the influence of medicine, drugs or alcohol and judgement is adversely affected; and
- the victim is a mentally disabled person, or a child under 12 years of age.⁵²

We have yet to see how these factors will be applied by the courts. Key factors relating to children are the use of intimidation, threats and force against the child or people close to the child, and the abuse of power or authority.

A range of offences related to the *sexual exploitation of children* are created. These include:

- offering the services of a child for sexual exploitation;
- being involved in, promoting, or encouraging the sexual exploitation of a child;
- sexually grooming children;
- using children to create child pornography; and
- displaying genitals, pornography, sexual acts and sexual offences to children.⁵³

4.2.2. *Protective measures for complainants in court*

The Criminal Procedure Act contains provisions permitting complainants to testify in private, outside of the court environment and the presence of the accused.⁵⁴ These measures have the potential to reduce the levels of fear and anxiety experienced by child witnesses.

Intermediaries: Section 170A provides for witnesses under the age of 18 to testify outside of the court environment with the assistance of a person who acts as an intermediary. The child is in a separate room linked to the court via closed-circuit television (CCTV). The child cannot hear or see the proceedings but is questioned by the intermediary, who is able to hear the court proceedings through earphones. This procedure can only be applied if the witness will be exposed to undue mental stress or suffering if s/he testifies in the proceedings. A ‘trial within a trial’ is required in order to establish this. The new sexual offences legislation has expanded the application of this provision to adults assessed to have an intellectual age under 18 years. In addition, the court must enter into the record reasons for refusing an application for section 170A in respect of child witnesses under the age of 14.⁵⁵

CCTV testimony: Section 158 provides that any witness (child or adult) may give evidence (without the assistance of an intermediary) in a separate room linked via CCTV to the court. The court may order this only if the facilities are readily available or obtainable. In addition, the court must find that to make such an order would:

- prevent unreasonable delay; or
- save costs; or
- be convenient; or
- be in the interest of security or of justice or of the public; or
- prevent the likelihood that prejudice or harm might result to any person if s/he testifies at such proceedings.⁵⁶

Similar to the amendment of section 170A, the new sexual offences legislation requires that reasons for refusing an application for the use of CCTV for children under 14 must be entered into the record.

In camera proceedings: Section 153 sets out the circumstances in which criminal proceedings must not take place in open court. Where a witness is under 18, the court may direct that no person other than the witness herself and her parent or guardian be present during the proceedings.⁵⁷ The complainant is still required to speak in front of the accused and the other court role-players; however section 153 may be applied in conjunction with the application of sections 170A (intermediary testimony) or 158 (CCTV testimony).

These provisions have the potential to protect a child from further psychological stress and harm resulting from testifying in open court in the presence of the accused. Some of the harm associated with cross-examination of the child can be reduced and the child’s right to privacy and dignity can be protected.

4.3. Policy on the management of child victims of sexual offences

Three key policy documents relating to victim services have been developed. The Victim Empowerment Policy (VEP), developed out of the 1996 National Crime Prevention Strategy, sets out the roles of stakeholders, both public and private, in delivering services to victims.⁵⁸ The policy recognises child abuse and victims of sexual assault, amongst others, as priority areas.⁵⁹

The second key document is the Service Charter for Victims of Crime in South Africa (Victims' Charter) and accompanying Minimum Standards, developed by the Department of Justice and Constitutional Development, is designed to:⁶⁰

- eliminate secondary victimisation;
- ensure that victims are central to justice processes;
- provide for service standards; and
- provide for recourse when standards are not met in the CJS.⁶¹

The charter does not create new rights; rather, it restates existing rights of victims currently provided for in the Constitution and legislation in statements such as: 'You are entitled to receive documents that the law entitles you to have access to.'

The charter however places no firm obligation on the state; terms such as 'where possible', 'where relevant' and 'where available' are used throughout. This according to Frank 'significantly weakens the value of the Victims' Charter as a whole' and places the responsibility for accessing services on the victim and not on the state.⁶² This is particularly problematic where victims are not in a position to express their needs due to their age or mental state.

The third and last key document for victim services is the Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence and Sexual Offences (UPVM), developed by the NPA in 2005, is intended to complement the Victims' Charter by providing a framework for the regulation of services 'unregulated by the Victims' Charter' such as 'Victim Assistance and Preparation' services offered by civil society organisations.⁶³

These policies seem well-intended; however they all fall short of their objectives. In a recent review of victim policy in South Africa, Frank raises the following concerns:⁶⁴

- The status of the policies is unclear in that:
 - The VEP has no status as government policy; it is still in draft form in spite of its 1998 launch and programme implementation since 1999.
 - Section 234 of the Constitution provides that in order to deepen the culture of democracy, Parliament may adopt charters of rights consistent with the provisions of the Constitution. The Victims' Charter, while approved by Cabinet, has not been adopted by Parliament, and therefore does not have the status that could be afforded by the Constitution in offering an extension of rights.⁶⁵
 - The UPVM was sent out for public comment in 2005 but was still in draft form in March 2008.

- The Victims' Charter is limited in that it applies only to those victims who report the crime to the CJS. Victims who access services from the health and welfare systems or civil society organisations are thus not provided with the same 'right' to access quality services. This is particularly important given the low rate of reporting of crimes against children. The VEP, though, recognises all categories of victims and sets out responsibilities for a range of departments.
- The relationship between policies and accompanying minimum standards is unclear and thus confusing for service delivery.

4.4. Guidelines, directives and instructions

4.4.1. *National policy guidelines 1998*

The National Policy Guidelines for Victims of Sexual Offences were developed by an inter-sectoral task team in 1998 under the lead of the Department of Justice.⁶⁶ Guidelines were developed for:

- the South African Police Service;
- the Department of Health;
- the Department of Welfare (now Social Development) and appropriate NGOs;
- prosecutors at the Department of Justice (now the National Prosecuting Authority); and
- the Department of Correctional Services.

They are a comprehensive attempt to address service delivery to victims of sexual offences, incorporating in most cases specific guidelines relating to the management of child victims. The integrated approach to developing the guidelines resulted in consistency across different departments. The guidelines for the SAPS were particularly comprehensive, in that a range of important changes were made to standard investigation procedures for these cases. The major drawback is that these guidelines are not binding on government departments; however they have subsequently formed the basis of new binding instruments, discussed below.

4.4.2. *SAPS national instructions on sexual offences*⁶⁷

National instructions are binding on SAPS officers and failure to comply leads to disciplinary steps. The instructions provide comprehensive guidelines for SAPS members on the management of reports of, and investigation of, sexual offences. While they require a relatively good standard of service, implementation has been extremely poor and there has been no dedicated process of awareness-raising or training on the instructions at station level. Adherence has thus far been poor and discipline for members who fail to comply seems to be lacking.

4.4.3. *Department of Health National Sexual Assault Policy*⁶⁸

This policy was developed through a consultative stakeholder process including civil society organisations. The policy's goal is, 'To improve health care after sexual assault for women, children and men in South Africa'. Objectives include the establishment of 'designated, specialised, accessible, 24-hour health care service for the holistic management of patients to improve health status after sexual assault'. A critical provision is that victims are not required to report the crime to the police in order to access health services. In addition, services must be available on a 24-hour basis, and guiding principles and minimum standards must be met.

4.4.4. *National Prosecuting Authority policy directives on sexual offences*⁶⁹

These policy directives are binding on prosecutors. Key aspects include:

- specialist prosecutors are required to prosecute sexual offences;
- changing prosecutors during the course of the trial should be avoided at all costs; and
- prosecutors are required to consult with victims.

While all three documents discussed above include investigation, health care and prosecuting procedures for cases where the victim is a child, there are few specific provisions relating to the management of child complainants.

4.4.5. *National Policy Framework, directives and instructions in the Criminal Law (Sexual Offences and Related Matters) Amendment Act*

The new sexual offences legislation provides for the development of a National Policy Framework (NPF) to ensure a uniform and co-ordinated approach by government departments in the implementation of the Act; and to enhance the delivery of services to victims of sexual offences.⁷⁰ The Act also provides for an inter-sectoral committee to develop, guide and monitor NPF implementation.

The Act requires the development of national instructions for the SAPS, and policy directives for the NPA and the Department of Health on procedural aspects of investigation, health care and prosecution in sexual offence cases⁷¹ which must assist in achieving the objectives of the Act, which include:⁷²

- affording complainants the maximum and least traumatising protection the law can provide;
- protecting complainants from secondary victimisation and trauma by establishing co-operation between departments;
- implementing an effective, responsive and sensitive criminal justice system;
- giving proper recognition to the needs of victims of sexual offences through timeous, effective and non-discriminatory investigation and prosecution;
- entrenching accountability of government officials; and
- minimising disparities in the provision of services to victims.

Instructions and directives must be developed in consultation with other key departments. However, civil society participation is not required. This is mitigated by the fact that instructions and directives must be published in the government gazette.

The Act also requires the SAPS, the NPA and the Department of Health to develop training courses on the content of the national instructions/directives and the social context of sexual offences, which promote uniform norms and standards.

An extremely important requirement is parliamentary oversight in the form of regular reports to Parliament on the implementation of the NPF by the inter-sectoral committee, on departmental policy directives and on the development and implementation of training programmes.

5. CURRENT PRACTICE IN THE CRIMINAL JUSTICE SYSTEM

This section aims not only to provide a view of current systems and procedures in the criminal justice system, but also seeks to provide commentary on the issues that may affect children's qualitative experience of the system. While many of the systems and procedures may apply generically to other kinds of cases, this discussion seeks to highlight issues that emerge specifically in relation to sexual offences against children.

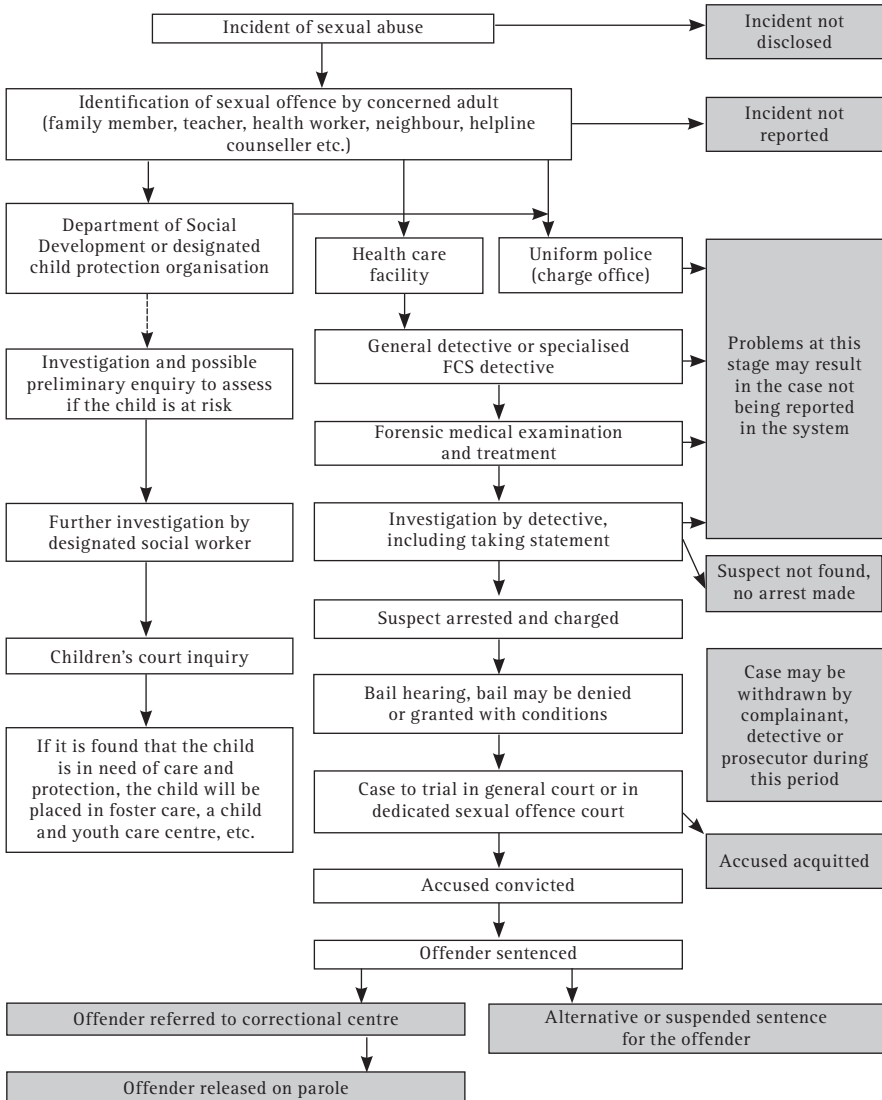
The criminal justice system is a part of the broader child protection system, which includes both civil and criminal justice systems, in particular the children's courts. Children's courts are civil in nature. Children who are 'in need of care' may be referred to a children's court, which makes decisions regarding the care and protection of children, such as the removal of a child from a parent and her placement in foster care or with adoptive parents. Children may also be referred to a children's court via a criminal case: the trial may be converted into a children's court enquiry if the court believes the child is 'in need of care'. The Child Justice Bill envisages that all 'one-stop' Child Justice Centres will contain both a specialised criminal court dealing with children as well as a children's court.

Thus the child protection system includes the agencies and departments of the criminal justice system, the Department of Social Development, designated statutory child protection organisations, and other counselling services to children. The Department of Health also plays a role in identification and treatment in some cases. The Department of Justice plays a role in respect of children's courts. This paper is concerned only with the criminal justice response.

5.1. Overview of criminal justice processes in response to child abuse cases

Figure 1 illustrates the processes applicable when a sexual offence against a child is reported to the police. Child abuse is usually identified by an adult before being formally reported into the system, often upon disclosure by the child. The case may be referred directly to the police or to a health care facility. Alternatively, it may be reported to statutory welfare

Figure 1: Criminal justice processes in response to child abuse cases



services that investigate the case and refer it to the children's court and/or report it to the police.

Reports to the police are usually made to uniformed police officials, mostly at the police community service centre or less frequently through calling the emergency police number

for assistance. The uniformed official is required to refer the child to a victim-friendly room at the police station, where the basic details of the incident are taken. The uniformed official is also required to notify a detective, who may or may not be a specialised detective. The child must be taken by the detective to a designated health care facility for a forensic medical examination. When a child is taken to a hospital first and not to the police, the detective must be called to the hospital. After the forensic medical examination, the case is investigated by the detective. The investigation encompasses taking the child's statement and collecting other necessary evidence. If the accused is arrested, a bail hearing may be held. Rape where the victim is under 16 years of age is a Schedule 6 offence, which means 'exceptional circumstances' must be shown for release on bail to be in the interests of justice. Bail may be denied or granted with or without conditions.⁷³ There is generally a waiting period of a few months before the case is referred to trial. Some cases are withdrawn or the decision is taken not to prosecute. An assessment to determine the readiness of the child to testify may be undertaken by a forensic social worker. Usually there are a number of postponements prior to commencement of the trial. If prosecuted, the accused may be acquitted or convicted. If convicted, a sentencing hearing will be held to decide on the sentence.

A range of sentences may be handed down. However, minimum sentencing legislation requires that people convicted of certain sexual offences against children under the age of 16 must be sentenced to life imprisonment unless substantial and compelling reasons exist. The accused is then referred to a correctional facility to serve the sentence and may be paroled after two-thirds of the sentence has been served.

A case may also be initially processed through the children's court independently of the criminal justice process. Where the child may be unsafe in his home environment and may consequently be in need of care and protection, the children's court comes into play. The matter must be investigated by a social service professional in a designated child protection organisation or the Department of Social Development. A children's court inquiry decides if the child is indeed in need of care and protection and will make a decision regarding the placement of the child. If the committing of a criminal offence is suspected in relation to the child, the matter must also be reported to the police.

The criminal justice process does not automatically offer emotional support to the child or the family. Victim support volunteers, more specialised civil society organisations (CSOs) and services provided by the provincial departments of social development are sometimes available but this is not required by law or policy.

Key issues in the process relating to the management of sexual abuse of children in the CJS are discussed below.

5.2. The reporting of incidents

5.2.1. *Perverse incentives in SAPS performance targets*

The legislated requirements for mandatory reporting to the police are in conflict with SAPS performance targets which seek to decrease the rate of 'contact crime' – this category

includes sexual offences – by 7% per year.⁷⁴ The performance targets operate to discourage the police from recording sexual offences.

Concerns have been raised for some time that the police exercise inappropriate discretion in deciding whether or not to record a case of rape. Research into women's experiences of the CJS in 1997 found that women reported not being allowed by the police to lay charges, or that rape matters were recorded as indecent assault or as assault with the intent to do grievous bodily harm.⁷⁵ In a study by CIET Africa in 1998, of 272 rape cases reported to the police only 17 resulted in a rape docket being opened for investigation.⁷⁶

Recently, non-governmental organisations working directly with victims of sexual offences have reported an increase in instances of the police failing to record rape cases.⁷⁷ They also provided case studies where station commissioners called alleged perpetrators and victims together for mediation. At a victim empowerment summit held in Polokwane in 2007, a senior superintendent argued the police could not open a case for every woman who claimed to have been raped, as it was necessary to first establish 'whether or not she was lying'.⁷⁸

The SAPS performance targets, introduced circa 2001, are thus compounding the problem of under-reporting. Clearly the incidence of rape will only be reduced as a result of, inter alia, societal change and comprehensive multi-agency strategies at all levels. The SAPS cannot be held solely responsible for reducing rape rates – as is implied by the targets set. The only way the police, in isolation from other departments, could possibly achieve the targets set is by negatively influencing reporting rates as described above.

In an environment of under-reporting, efforts by the SAPS to improve their responses to sexual offences should, on the contrary, result in an immediate and sustained increase in reporting. Increases rather than decreases in rape reporting rates should be expected if police performance improves. It is RAPCAN's view that such performance targets should be dropped in favour of qualitative evaluations of police performance in responding to victims.

5.2.2. Unintended consequence of mandatory reporting

The Child Care Act 74 of 1983 places an obligation on a range of professionals who work with children to report suspected abuse. The Children's Amendment Act expands the list to include a wider range of persons who may come into contact with children, such as child care centre volunteers, homeopaths and even traditional leaders. Any such person who on 'reasonable grounds' concludes that a child has been sexually abused must report this to a designated child protection organisation, the provincial department of social development or a police official.⁷⁹ After initial investigation, the possible committing of an offence must be reported to a police official.⁸⁰

The new sexual offences legislation requires that any person who has knowledge – as opposed to suspicion – of a sexual offence committed against a child must report this to a police official. It is an offence not to report such knowledge.⁸¹

While mandatory reporting has the potential to improve reporting rates, social welfare organisations have expressed concern that given the complicated nature of most child sexual abuse cases, mandatory reporting may lead to children who disclose feeling they have lost control of the situation too quickly and they may be more likely to retract the disclosure.⁸² This is particularly true in cases where the child feels protective of the offender and fears that the offender will be arrested and sent to prison.⁸³

Furthermore, according to Dawes and Mihloti, mandatory reporting in an under-resourced context could have these undesirable results:⁸⁴

- Lengthy investigations that deter witnesses and influence victims to retract allegations, resulting in a high number of ‘false negative reports’ – reports that are finalised as being unfounded even though abuse has actually taken place.
- Inadequate investigations that may also result in false positive identification of an accused.
- Selective investigations via screening and prioritising of cases that would lead to only investigating cases that are deemed to be more serious, which in turn would feed the rate of under-reporting.

In summary, there would be increased risk to the child.

Dawes and Mihloti point out that mandatory reporting causes resources to be directed at investigations and not towards necessary support services for children. Consequently, it is RAPCAN’s view that the obligation to report must be coupled with sufficient resources for the child protection system to respond to the increased number of cases.

5.3. Medico-legal services for victims

5.3.1. *One-stop centres improve care but many do not access ‘justice’*

One-stop centres – which provide for all services to complainants in one facility – have been established across the country over the past ten years. The best known of these are the Thuthuzela Care Centres (TCC) implemented under the leadership of the NPA through donor funding.⁸⁵ The NPA reported ten TCCs in the country at the end of March 2007, and plans to open a further five centres by March 2008.⁸⁶ In 2008, the Danish Embassy in Pretoria indicated that there are plans to develop a further 12 for a total of 22 TCCs by 2009.⁸⁷ As a result of the high number of children attended to at these centres, UNICEF has said that they will increase efforts to improve the child-friendly nature of the TCC facilities, encompassing specially trained nurses and caregivers to comfort children, installing two-way mirrors, posters and anatomically correct dolls.⁸⁸

These multi-disciplinary centres aim to reduce secondary victimisation, reduce finalisation time and improve conviction rates. Once a sexual offence matter is reported to a police station falling in the jurisdiction of the centre, the complainant is transported to the TCC, generally located at public hospitals. The centres provide for:⁸⁹

- comprehensive post sexual offence forensic medical examination and treatment;
- suitable victim-friendly facilities;

- provision of or referral to counselling services;
- reduced waiting times;
- court preparation services;
- prioritisation of cases by police stations;
- improved statement taking;
- prosecutor guided investigations;
- effective case management; and
- capacity building of criminal justice personnel related to the centre.

A study with 27 complainants by the Vera Institute of Justice in 2004 showed that the Cape Town-based TCC has improved the early care and treatment for these complainants.⁹⁰ Respondents were satisfied with the initial management of the case by the police and were referred to the centre within an hour of reporting. They also reported being satisfied with the medical examination, in spite of some having to wait for more than an hour for a doctor. While waiting, complainants were supported by nurses and/or counsellors. In addition to treatment, complainants had access to immediate crisis counselling at the centre. Detectives and prosecutors reported that complainants who had been attended to at the TCC were more likely to testify and were more prepared for court than other complainants.

While measures to reduce secondary victimisation and improve victim support at this centre seem to be having a positive effect, research suggests that the quality of the relationship between the SAPS and the NPA remains a concern in terms of the quality of investigation and case management.⁹¹

The NPA reports that the conviction rate at sexual offences courts (SOC), which deal with cases from TCCs, was 83% (of cases prosecuted) in the 2006/07 financial year, compared to a 65% conviction rate at other SOCs.⁹² However it must be emphasised that the majority of cases do not result in prosecution at all due to attrition at different stages of the investigation. Of grave concern is research which shows that only about 12% of the TCC cases reported to the police between 2001 and 2003 were referred to court for prosecution, of which a further proportion were withdrawn at court.⁹³ Conviction should always be viewed in the context of attrition rates. Emphasising conviction rates in this way can lead to the 'cherry-picking' of strong cases with the resultant appearance of success to the detriment of large numbers of victims whose cases are not prosecuted and who thus do not access justice.

The research suggests that the main success of these centres is related to the provision of victim support services and sensitive criminal justice personnel at the front end of the criminal justice process. In the absence of more comprehensive research, the extent to which all TCCs uniformly deliver these services is unclear. Concerns remain regarding the ability of this model to improve investigation and positive outcomes in the majority of cases.

5.4. Specialised police investigation: the rise and fall of family violence, child protection and sexual offence (FCS) units

International experience suggests a ‘highly tailored’ response is required for crimes with low conviction and high attrition rates.⁹⁴ Such a response includes dedicated specialised police and the delivery of services at multi-purpose centres. Various countries including some developing countries have established specialist units for the purposes of investigating specific crimes such as sexual offences and crimes against children. Evidence from these countries shows that specialisation results in better organisation, efficiency, consistency and improved conviction rates.⁹⁵ While South Africa initially embarked upon the route of specialisation, this has recently been reversed with the decentralisation of specialised services to police station level.

5.4.1 *The establishment of CPUs and the later FCS units*

A key development in the SAPS aimed at improving the policing of crimes against children was the establishment of the child protection units (CPUs) in 1986. Nine years later in 1995, these units were given a broader investigative mandate and became family violence, child protection and sexual offence (FCS) units. There was little change in FCS services in the first few years after 1995, with most specialised services delivered by units still referred to as child protection units.

The mandate of the FCS units is to investigate the following offences:⁹⁶

- Family violence: assault with intent to do grievous bodily harm; attempted murder.
- Child protection: rape; incest; indecent assault; attempted murder; assault with intent to do grievous bodily harm; common assault (under certain circumstances); kidnapping; abduction; crimes regarding the abuse/exploitation under the Prevention of Family Violence Act;⁹⁷ crimes with regard to the sexual exploitation of children under the new Sexual Offences Act;⁹⁸ Child Care Act;⁹⁹ Films and Publication Act with regard to child pornography.¹⁰⁰
- Sexual offences (victims 18 and older): rape; incest; indecent assault; crimes regarding the sexual exploitation of adults, under the Sexual Offences Act;¹⁰¹ crimes regarding sexual offences against adults, under the Prevention of Family Violence Act;¹⁰² crimes regarding sexual offences against adults under the Domestic Violence Act.¹⁰³

Both the CPUs and, later, the FCS units were separate from police stations, located in child-friendly offices serving many police stations in an area. In some areas, due to vast distances, detectives who had undergone FCS training were based at detective branches of local police stations. FCS detectives were required to attend the Child Protection Investigator’s Course or the FCS Course.¹⁰⁴ In many areas however there were no FCS- or CPU-trained detectives and most sexual offences against children were investigated by general detectives.

By 2002, only 53% of Child Protection Unit members had received specialised training and the number of FCS-unit members trained to handle FCS cases was around 24%.¹⁰⁵ In 2003, a Democratic Alliance report suggested that many FCS units were insufficiently

resourced (in terms of logistical and skilled human resources) to deliver on their mandate.¹⁰⁶ The SAPS committed to increasing their resources for the 2002/03 financial year.¹⁰⁷ The SAPS reported in 2006 that the number of FCS units had increased from 45 in April 2002 to 66 units in March 2006. The average number of members per unit in 2006 was around 22.¹⁰⁸

Around this time most conversions from CPUs to FCS units took place. For example, the two CPUs that served in the Western Cape transformed into 13 FCS units. This new structure led to a perceived improvement in services in the province because commanding officers indicated the units had adequate human and other capacity.¹⁰⁹ The best functioning units were those in which there were experienced CPU managers and detectives, who had been adequately trained and had ongoing support. Improvement in relationships between the SAPS and the NPA and medical officers was also evident, as well as better referral rates to support services, and improved investigation standards.¹¹⁰

5.4.2. Subsequent SAPS restructuring and the decentralisation of FCS services

The restructuring of the various police specialised units and management structures has been underway since 1999. In 2003, the safety and security minister, Charles Nqakula, noted that:

The restructuring of 500 specialised investigation units into three specialised components is well underway... It is envisaged, however that some units, such as those dealing with child protection and sexual offences, will retain some autonomy to deal with crimes that require their specialised skills and an independent identity.¹¹¹

In 2006, the SAPS announced specific changes relating to services based at area level, citing the need to increase access to services by devolving some services based at area level (including FCS units) to station level.¹¹² In a briefing to Parliament in March 2007, the SAPS indicated that the rationale for restructuring lay with various factors undermining police functioning:¹¹³

- experienced staff with specialised skills were situated at area level and not at station level;
- there were duplications of functions between area and station level; and
- there were too many levels of command.

The aim of restructuring was to better utilise the resources and expertise that were available at area level at station level, where they would directly impact on service delivery. Specialised units that were previously managed at area level were to be relocated to police stations.

At a briefing of civil society organisations (CSOs) to discuss the impact of the restructuring on the investigation of crimes against women and children, the SAPS indicated that the FCS units would not be closed but that they were to be multiplied and

made more accessible at station level. The SAPS reported that police stations were to be clustered in groups of approximately six police stations and that each cluster would be supervised by an 'accounting station' which would undertake the administrative duties for the stations of that cluster. The SAPS indicated in the press that most clusters would have a single FCS unit at the accounting station but that some specialised detectives would be based at police stations.¹¹⁴ In addition, uniform branch police officials would be trained to receive FCS-type crimes sympathetically and specialised detectives would investigate.¹¹⁵

The restructuring process was poorly communicated to the public, civil society and to police members themselves. Conflicting reports were provided by police officials at meetings with CSOs¹¹⁶ and in the press, raising concerns that the FCS units would be closed.¹¹⁷ This led to uncertainty amongst all concerned and had a negative impact on the morale of members of the FCS units.¹¹⁸

CSOs working with children have expressed concern that the devolution of FCS services to station level will result in a loss of critical specialised skills for investigation of FCS-type cases.¹¹⁹

A review of the restructuring process in each province undertaken by RAPCAN during the latter part of 2007 has shown that the provinces have interpreted the national orders on restructuring differently.¹²⁰ Some provinces have maintained the dedicated unit identity and located these services at accounting stations with detectives providing a service to the police stations that fall within the cluster. In other provinces, FCS detectives have been relocated to station level. Most provinces have sought to incorporate both models into their delivery of the service, particularly in provinces seeking to deliver services to rural areas.

The RAPCAN review shows that services have been strengthened at some police stations where specialised services had previously not been available, but in the majority of cases the decentralisation has led to a dilution of the quality of FCS services and even a complete lack of services in some areas.¹²¹ Problems have been identified regarding the management of FCS services, which in many provinces now falls under the head of detectives at the accounting stations.

In many areas, FCS detectives are now expected to investigate other matters as well as the mandated FCS offences. At some stations, resources such as cellphones and cars previously allocated at area level to FCS units have been reallocated by station management to general investigations.¹²² The result is that while detectives with the title of 'FCS detectives' are placed at individual or cluster stations, this distinction may only exist in name and critical specialised services are effectively unavailable to complainants.

The 2006 move to make FCS services more accessible has not been accompanied by a significant increase in resources to FCS units. In many cases, in order to achieve the desired effect of making services more accessible at station level, FCS units have indeed been disbanded and individuals or small groups of detectives have been sent to police stations. In many areas, given the backlog in training, untrained detectives have been placed or identified at local police stations and labelled as FCS detectives. They are supposed to provide FCS services, often without the benefit of specialised management support.

It is RAPCAN's view that specialised training alone does not constitute specialisation. Prior to the development of FCS units, in many areas FCS-type crimes were investigated by specially trained officials based at police stations who investigated sexual offences amongst investigating other crimes. During this time, challenges arose which presage current challenges:¹²³

- Good quality service was not systematic, but dependent on the inclination of individual detectives.
- Station managers were frequently unaware of critical differences in approach to investigating FCS matters in comparison to other crimes, resulting in detectives not being supported in the implementation of important procedures in the national instruction for sexual offences. Indeed, in some police stations detectives were discouraged from following the instruction.
- Station managers seldom understand the emotional impact of FCS crimes on detectives and their need for support and supervision.
- Expertise gained through training was lost by detectives when they returned to the more general organisational culture as opposed to an environment of like-minded individuals capable of maintaining levels of expertise and facilitating skills transfer between members.
- Specialised detectives were often expected to investigate general cases.

The decentralisation of FCS units to increase access can only be considered positive if the quality of the service is maintained. Written policy regarding the strategy for restructuring FCS services in the provinces is essential to ensure not only that a greater number of people are tasked with managing FCS cases at police stations, but also that a greater number of people are capable of doing so.

5.5. Courts and court procedures

5.5.1. *Dedicated sexual offences courts threatened*

Another important development in the management of child sexual abuse in the criminal justice system has been the establishment of dedicated sexual offences courts (SOCs) at some regional courts. The first SOC was established in Wynberg in Cape Town in 1993.¹²⁴ The NPA reports that by March 2007 there were 59 sexual offences courts and that there were to be an additional '15 more scheduled for each year'.¹²⁵

SOCs employ various measures to ensure improved prosecution of sexual offence cases. The blueprint for the requirements of sexual offences courts developed by the NPA requires that:¹²⁶

- Cases should be prosecuted by dedicated prosecutors with specialised training and expertise in prosecuting sexual offences.
- Courts must have access to closed-circuit television (CCTV) facilities and intermediaries to assist children to testify in the least threatening environment possible.
- Courts must have separate waiting areas to minimise contact between complainants and accused.

- Courts must provide on-site court preparation and support services for complainants and their families.

The *2006/2007 South Africa Yearbook* reports that by March 2007 almost half (26) of the 54 courts were blueprint-compliant.¹²⁷

Despite discrepancies in the standards of service, SOCs have improved the quality of prosecutions in sexual offence cases. Reyneke and Kruger conclude that blueprint sexual offences courts substantially improved the overall management of and access to justice in child sexual offence cases.¹²⁸ This includes improved turnaround times and better conviction rates. The provision for dedicated prosecutors promotes the development of expertise. A range of service providers are able to build effective working relationships with dedicated prosecutors which further enhances investigation and general case management. The NPA reports that over the past five years SOCs have achieved an average conviction rate of just under 65%, in comparison with a rate of under 50% in regional courts dealing with all matters including sexual offences.¹²⁹

In the Presidential State of the Nation addresses for 2004 and 2005, President Mbeki committed government to the continued development of these courts.¹³⁰ This conflicted with a moratorium placed on the establishment of further SOCs by the minister of justice, Bridgette Mabandla, in 2005.¹³¹ In her budget speech to Parliament she recognised the 'significant progress' of these courts, but expressed concerns regarding equal access to services because SOCs are better resourced than mainstream courts. She proposed a 'review of the impact, effectiveness and sustainability of specialised courts within the judicial system'.¹³² Reyneke and Kruger record that the NPA annual reports show that the number of SOCs increased from 39 at the end of the 2002/3 financial year to 51 by the end of 2003/4.¹³³ They note that by the end of 2005 the rate of development of these courts slowed considerably and only a further three courts were opened. Media articles and the 2006/7 NPA annual report indicate a renewed commitment to the establishment of these courts.¹³⁴ It remains to be seen if the target of 15 courts per year will be met.

5.5.2. *Confusion in court preparation services*

Court preparation services have for some years been delivered by CSOs to complainants in sexual offence cases in South Africa.¹³⁵ The purpose of court preparation is:

- to prevent and reduce secondary victimisation;
- to improve prosecution and conviction rates through providing child complainants, their caregivers and other witnesses with information and education regarding the processes and requirements of the trial; and
- to provide complainants and others with coping skills to manage the stress of testifying.

During 2006, the NPA undertook to directly provide court preparation services to victims of crimes 'and abused children in particular'. The 2006/7 annual report stated that by the

end of March 2007 some 137 court preparation officials (CPOs) would be appointed and provision for a further 72 posts for CPOs and five posts for supervisors had been made.¹³⁶ Initially, the commitment by the NPA to provide court preparation services was welcomed by civil society organisations. However, the NPA's plans have been fraught with conceptual and implementation problems.¹³⁷

In RAPCAN's view the programme model chosen by the NPA is problematic as the model was not selected on evidence-based practice and experts are of the opinion that aspects of the selected model have the potential to cause harm to the case and to the child.¹³⁸ An example is the use of a 'trick' which indicates to children that before testifying they are 'murky' and after testifying they will be 'clear' again. This suggests to children that there is something dirty or murky about them and misleads them into believing that the process of testifying and cross-examination is somehow cathartic.

The NPA did not conduct a comprehensive needs analysis nor consult with civil society stakeholders at the outset, which resulted in an implementation plan which duplicates services at some courts.

In RAPCAN's view the recruitment and selection of CPOs has been flawed. At times experienced applicants appear to be overlooked in favour of inexperienced staff. To compound the problem, training of CPOs only took place after many had begun delivering services to children. Furthermore there has been no effective induction process for CPOs at courts, nor is there a system for the management, supervision and debriefing of CPOs – all critical processes to ensure a high quality of service. Indeed prosecutors at many courts were not informed of the role of the new CPOs and how the services of the NPA CPO would relate to the established services delivered by CSOs.¹³⁹

It must be stressed that court preparation is delivered to extremely vulnerable children who have been traumatised and who are now engaged in criminal justice processes that are known to cause harm. While civil society organisations working in this field generally accept that working with child victims of trauma is serious and complex, the NPA's expectation that inexperienced CPOs should cut their teeth on these cases with little or no supervision is unacceptable and irresponsible.

CPOs are directly managed by senior public prosecutors whose experience and expertise are related to the management of witnesses and evidence. They are not trained in managing the psychological needs of witnesses. The NPA may consequently be safeguarding the quality of evidence (in terms of ensuring non-contamination and its general integrity) through CPOs, but the imperative to protect children from further trauma has been compromised.

This situation had been of grave concern to CSOs, who have communicated their concerns to the NPA. The NPA subsequently undertook to address these concerns and engaged in a process of consultation with CSOs and other experts during 2007. The NPA has as a result committed to a consultative process to establish minimum standards for the delivery of court preparation services and it is expected that these will be finalised by mid 2008. In addition, a team of independent consultants has been appointed to evaluate the

NPA model as well as other models being implemented by CSOs.

To avoid the duplication of service providers, the NPA has undertaken to appoint further CPOs only in courts where CSOs are not already delivering a service. In courts where both CSO and NPA staff are already based, the CSOs will continue to deliver services to children while the NPA will deliver services only to adult witnesses. An idea under consideration is to define court preparation as separate from court support, with the NPA delivering court preparation to witnesses and CSOs delivering court support. The major problem with this idea is that support is an integral element of the preparation process. Creating a new category of support introduces a new person in the chain of people in the criminal justice system with whom the child must interact.

A further consequence of the delivery of court preparation services by the NPA is the possible withdrawal by provincial departments of social development of funding for services delivered by CSOs.¹⁴⁰ In Gauteng this has been resolved through negotiation and by describing the CSO service as 'court support'.¹⁴¹

These later developments notwithstanding, it remains of concern that quality services delivered by CSOs in some courts have been irrevocably interrupted and replaced by poor quality court preparation at the expense of child witnesses.¹⁴²

5.5.3. Conservative and discriminatory application of protective measures

Feedback from prosecutors in sexual offences courts and from RAPCAN child witness project staff indicates that courts tend to be conservative in their application of provisions of the Criminal Procedure Act that can protect child witnesses from the emotional stress and trauma related to testifying.¹⁴³ The use of the intermediary system is discretionary and the test for 'undue mental stress or suffering' requires an application to be made in court, creating delays in the process. Furthermore the test is subjective and the decision is based on the court's interpretation of 'undue mental stress and suffering' and not on the actual needs of the child. In addition the extent to which prosecutors lead expert evidence on this question varies.

The United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime recognise that:

children...are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process.¹⁴⁴

Müller argues that it is in the best interests of children and in the interests of justice that all children have access to the intermediary system. She argues that intermediaries ameliorate the traumatic effects of giving evidence, while research shows that children provide more accurate testimony when protected from the adversarial court environment.¹⁴⁵ Likewise, the South African Law Reform Commission and many organisations providing services

to children have recommended to Parliament that this provision be available to all child complainants and witnesses.¹⁴⁶

A survey with court support staff, intermediaries and prosecutors at sexual offences courts in the Western Cape reveals that in courts where protection facilities are available, they are used regularly. However, while a minority of prosecutors indicated that application for use of the system should be made in the cases of all children, the majority indicated that the system was not required for children older than 12. A few indicated that children above the age of seven did not require the system and one even noted that it was 'better for the court/conviction' for children under the age of seven to testify in the court room. It was noted that children older than 12 mostly testify in the court room, however the CCTV system without an intermediary is applied in some cases for older children and in a very small number of cases the intermediary system is used for these children.¹⁴⁷

The respondents in this survey were in an urban setting. It is likely that these measures are used far less often in rural courts where the equipment and intermediaries are not as readily available, or where levels of specialisation are lower. The responses indicate that while some specialised prosecutors do understand the needs of children, many even in these dedicated courts lack knowledge regarding the impact on a child of testifying and have a poor understanding of the best interests of the child principle. In addition, there is poor understanding of the impact on the quality of the child's evidence when testifying in the presence of the accused and when exposed to direct cross examination.

The rights of child complainants who testify in the presence of the accused to equality, dignity and not to be treated or punished in a cruel, inhuman or degrading way are undermined for the majority of such complainants and seem to carry little weight in decisions whether to utilise the intermediary system. The High Court has found that the rights of the accused to see, question and cross examine his/her accuser are not undermined by the use of CCTV and intermediaries:¹⁴⁸

... Nor does this provision result in the infringement of any other constitutional right of an accused person to a fair trial.¹⁴⁹

The new sexual offences legislation requires policy directives for the NPA to describe the circumstances in which prosecutors must request the use of the intermediary system for witnesses and 'in particular child complainants below the age of 16 years old'.¹⁵⁰ The amendment to section 170A requires the court to place on record any reason for not appointing an intermediary when it is requested by a prosecutor for a child under 14. While these provisions will improve access to the system for children under 14, they imply that the use of the system is less important for children older than 14. It has been found by the Pretoria High Court that this provision is unconstitutional as it discriminates against older children. The decision has been referred to the Constitutional Court for confirmation.¹⁵¹ The same requirements and amendments are made regarding the application of section 158 in cases where the witness is a child, also sending the message that the provision is unnecessary for older children.

Children are defined in international treaties, our Constitution and the Children's Act as people under the age of 18 years. However the assumption is repeatedly made that younger children are more vulnerable within the criminal justice system than older children. Children of different ages are vulnerable in different ways. Older children tend to receive less support, are less likely to be believed, may be exposed to harsher cross examination in court and may be exposed to a greater degree of harmful assumptions by members of the criminal justice system.¹⁵² Court practice and the recent amendments ignore the repeated calls from numerous experts on child development and children in the criminal justice system that these measures should be applied for all children. But current practice is that in the vast majority of cases such measures are seen not as a right of all children but rather as a privilege offered to younger children.

5.5.4. Persisting discriminatory rules of evidence

Children are discriminated against on the basis of age through the rules of evidence. They are assumed in law to be inherently unreliable and less worthy of belief than adults. This is based on the following assumptions:

- children's memories are unreliable;
- children are suggestible;
- children are egocentric;
- children cannot distinguish truth from fantasy; and
- children do not understand the duty to tell the truth.

Research has tested these assumptions and found that children are not intrinsically more unreliable.¹⁵³ Many jurisdictions have responded to such research by removing requirements for testing the competence of children and allowing testimony where the child is capable of giving an intelligible account of events.¹⁵⁴ The United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime states that:

Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance.¹⁵⁵

However, it is standard practice in South African courts to test children's competence by questioning the child about the difference between truth and falsehood. Section 193 of the Criminal Procedure Act provides that a court will decide upon the competence of a witness – it does not require that all child witnesses be subject to a competence test. In many cases, children who are capable of describing their experience truthfully are ruled incompetent to testify because they are unable to describe the abstract concepts of truthfulness and lying. Studies show that children's response to the competence examination does not predict the truthfulness of their testimony. Furthermore, adults witnessing the child taking the

competence test are not any better able to distinguish the veracity of the subsequent testimony of the child.¹⁵⁶

In addition to competence testing, children are discriminated against in court through the application of what is referred to as ‘the cautionary rule’. The rule requires presiding officers to approach the evidence of children with caution. The cautionary rule against children’s evidence has not changed, despite the fact that it was scrapped in many other jurisdictions such as Canada and in all states in the United States during the 1980s.¹⁵⁷

5.6. Critical shortage of social workers

Social workers play an important role in the functioning of the criminal justice system. Employed either directly by the Department of Social Development or by CSOs, they are responsible for assessing children and providing the court with various reports, including reports on the child’s readiness to testify, reports relating to applications for protective measures, and reports on victim impact for sentencing hearings.

During RAPCAN’s review of FCS services, stakeholders, including government social workers from most provinces reported that poor quality service from the Department of Social Development frequently resulted in postponements as well as increased risk to children. The SAPS, NPA and civil society participants expressed extreme frustration over this issue.¹⁵⁸ In many areas there are no social workers on call after hours – when most reports of child sexual abuse are made. In some areas, social workers are reluctant to undertake assessments of children where this means they may be required to testify in court, as testifying is considered to be the most time-consuming of the duties they are required to perform.¹⁵⁹

The situation is largely caused by a shortage of social workers. The SAPS has recently employed a number of forensic social workers to work with their FCS services, which may alleviate the problem in some areas. Problems relating to the restructuring of FCS services will further affect the availability of social workers where they are most needed.

5.7. Poor performance of the criminal justice system

Not all cases reported to and recorded by the police result in a trial. ‘Case attrition’ occurs for various reasons:

- Cases are ‘undetected’ where the accused cannot be identified or found.
- Cases are recorded as ‘unfounded’, where the claim is believed to be false.
- Cases are withdrawn, either by the complainant or by the prosecution.

Some 27 335 sexual offence cases were reported to the SAPS during 2006/7 but only 15 715 cases were referred to court during this period, resulting in a ‘referral rate’ of about 43%.¹⁶⁰ Cases investigated in a year include cases reported in previous years but only referred in the current year.¹⁶¹

The ‘detection rate’ is the number of cases referred to court, the number of cases withdrawn plus the number of unfounded cases added up and calculated as a proportion of the total

number of cases investigated in that year. The SAPS reports that the detection rate, one of its performance measures, for all rape cases in 2006 was just under 57%. Cases recorded as unfounded or withdrawn consequently reflect well on police performance, creating perverse incentives. The incentive is to classify cases as unfounded or withdrawn. This may result in pressure being placed on complainants and their families to withdraw. Long periods of time between reporting the matter, and poor communication with complainants, also results in withdrawals.

Research into conviction rates in 2000 showed that the true conviction rate (convictions as a proportion of cases reported and recorded) for rape against children was around 9%.¹⁶² While there have been specific efforts to improve policing, prosecution and case management since 2000, it is difficult to gauge whether conviction rates have improved.

The Office of the Presidency provided some information in 2006 on conviction rates in its response to the United Nations Study on Violence against Children (table 2).¹⁶³ The figures give the number of cases reported in a particular year and the number of convictions obtained in that year – the convictions do not necessarily relate to the cases that were reported. It is thus conceivable that many convictions obtained in 2003 were of cases that were reported in 2001 or 2002 and that many of the cases reported in 2003 would only be finalised in 2004. Nevertheless the table shows that in 2003 the courts convicted 438 fewer rape cases than in 2002. This represents a drop of about 24% in the number of convictions from the previous year, while the number of reports increased over the same time period.

Table 2: Sexual Offences against children – percentage of convictions (2002 and 2003)

Sexual offences against children	2002			2003		
	Reported	Convicted	Per cent	Reported	Convicted	Per cent
Rape	17 096	1 817	10.63	18 078	1 379	7.63
Attempted rape	1 809	227	12.54	1 904	229	12.03
Indecent assault	3 880	611	15.75	4 415	537	12.16
Total	22 785	2 655	11.65	24 397	2 145	8.79

Table adapted from *Response from the Government of South Africa to the UN Study on Violence Against Children*.¹⁶⁴

The SAPS does not currently report on conviction rates in their annual reports. The SAPS annual report for 2006/7 indicates that they will commence reporting this information in the 2007/8 financial year.¹⁶⁵ ‘Conviction rates’ are calculated differently depending

on the perspective of the department reporting. The NPA and the Department of Justice record convictions as a proportion of cases prosecuted. This means that the conviction rate increases when fewer cases are prosecuted, creating an incentive to decline to prosecute cases. The annual report of the NPA for 2006/7 reports conviction rates of 85.7%, 87.4% and 72% for the high courts, district courts and regional courts respectively.¹⁶⁶ Neither the NPA, nor the Department of Justice disaggregate these conviction rates by offence categories, so the 'conviction rates' for sexual offences against children are unknown.

The NPA does, however, report on the conviction rates in dedicated sexual offences courts compared to other regional courts. The conviction rate for sexual offences in regional courts in 2006/7 was just under 50%, and 42% in 2005/6 while in dedicated sexual offences courts it is around 65%.¹⁶⁷ The proportion of sexual offence cases heard in dedicated courts is unknown and thus an overall conviction rate for sexual offence cases is unknown.

In RAPCAN's view, conviction rates should reflect the overall performance of the criminal justice system and be calculated as a proportion of cases reported.

6. DISCUSSION

In addition to the many issues raised in the preceding section in relation to the nature, quality and accessibility of services, the following discussion highlights some of the key concerns relating to the response to this issue.

6.1. The gap between policy and practice

The South African government has acknowledged the high rate of sexual offences, particularly against children. Such offences are prioritised by government. The policy and legislative framework for addressing the problem is in place, which has resulted in positive developments in key departments. These include the SAPS national instructions, the proliferation of specialised FCS services, and sexual offences courts and court preparation services. However, some of the developments have been plagued by serious problems.

While policy makes access to services possible, in practice, services are not universally available. Children's access to services is unequal, and depends on a range of factors. Many children are still exposed to serious victimisation in the very system that should protect them. The SAPS, NPA and Department of Justice are gradually increasing infrastructure and resourcing to meet the needs of children, but this is being done very slowly and often with temporary donor funding. There is currently no dedicated government plan to increase resources for access to services that meet the minimum standards of quality for all children in the system. This suggests that services aimed at delivery on the rights of child victims are currently considered to be 'nice to have'.

There is, throughout the system, poor understanding of the psycho-social impact of sexual abuse on children and the consequent needs of children and their families.

Furthermore, insufficient attention is paid to the aptitude and capacity of staff delivering services directly to child victims and to their resources, support and direct management. The result is that while senior managers may acknowledge the importance of a high quality service, this is diluted at delivery level to the extent that practices are in some case damaging to the child.

6.2. Children's rights not given adequate weight

There is a strong commitment to children's rights in the Constitution and the Children's Act. These include the right to equal protection and benefit of the law, human dignity, freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources and the right not to be treated or punished in a cruel, inhuman and degrading way. But these rights are generally undermined by criminal justice practice. These rights are also often in competition with the rights of accused persons.

In practice, the dignity of child victims is rarely a consideration in the CJS. Children are humiliated through processes such as cross examination and repeatedly exposed to psychological harm through the processes and by the individuals within the system. Yet these infringements on the child's rights are seldom even noticed, let alone considered, in decisions taken by police detectives and prosecutors.

Practices that recognise children's right to participate in decisions on matters affecting them are poor and there are no dedicated government strategies in place to improve this situation. Excluding children from giving evidence on the basis of their age is a clear example. In addition, the principle that the best interests of the child are of paramount importance is not widely understood. Decisions regularly give precedence to the interests of the criminal justice system and its organs over those of the child. The rights of accused persons are often accepted in courts without being balanced with due consideration against the rights of the child.

6.3. Lost opportunities for crime prevention

State responses to child victims should promote a broader crime prevention agenda. This can be achieved both by holding perpetrators accountable and by addressing the potential cycle of victimisation which occurs when child victims subject to poor responses themselves, develop offending behaviour. This requires a strong victim-centred approach, minimising secondary victimisation and promoting appropriate responses to child needs, as well as one which raises detection and conviction rates to prevent further perpetration by offenders. Obviously the CJS cannot hold every perpetrator accountable; however the high case attrition rate is of concern and must be addressed.

6.4. Inadequate psycho-social support for children

A significant gap in the policy framework is a requirement for victim support of children and their families. Support of a material and emotional nature in the direct aftermath of a crime and ongoing counselling and therapeutic services to address the trauma resulting from the

crime is needed. Anecdotal evidence indicates that children who receive counselling and support are less likely to withdraw their cases or have their cases withdrawn by the State. Such children also give better evidence. Because they have processed the meaning of the experience before going to court, they are less likely to be overwhelmed by the experience of testifying.

The long-term impact of sexual abuse on individuals is significant and access to counselling can mitigate some of these effects. However, counselling services are insufficient. Only a minority of sexually abused children access such services, whether provided by government or donor-funded CSOs. Services tend to be situated in urban areas and are so stretched that children are put on waiting lists of up to three months. Counselling children requires a high level of training and skill and should not be undertaken by lay counsellors.

6.5. Limited government funding of CSO services

While provincial departments of social development provide limited funding for victim support and psycho-social services, CSOs are largely dependent on international donor funding to provide these services. There is no system for CSOs to access funding for services delivered at court level from the NPA or the Department of Justice and Constitutional Development. Unfortunately, as these departments take over responsibility for intermediaries and court preparation from the Department of Social Development, funding that CSOs currently receive is withdrawn. Services of CSOs, often of superior quality, are as a result withdrawn in favour of weaker programmes.¹⁶⁸

6.6. Poor accountability mechanisms

Although both the SAPS national instructions and the NPA policy directives are binding on police and prosecutors respectively, the documents are not publicly available and can be accessed only through the complicated procedures outlined in the Promotion of Access to Information Act 2 of 2000. Complaints mechanisms are weak, and while larger CSOs have some success making complaints on behalf of victims, members of the public are generally unaware that there is cause to complain, that they can complain and what processes they need to follow.

The new Sexual Offences Act requires directives and instructions to be published in the Government Gazette. While the Act places no obligation on departments to consult with civil society in developing directives and instructions, the gazetting will at least provide some opportunity for civil society service providers to lobby regarding any necessary measures omitted.

Provisions relating to the National Policy Framework in the Act, particularly provisions for parliamentary oversight, have been welcomed by civil society organisations, given the persistent problems experienced by victims of sexual offences in the criminal justice system in spite of the many developments since 1994.

As with SAPS and the NPA, complaints mechanisms within the Department of Social

Development are weak and inaccessible. Other role-players, such as police and prosecutors, express frustration in addressing poor service delivery by government-employed social workers. While role-players in the CJS are generally able to hold CSOs accountable for poor service delivery, complaints mechanisms for clients of these services tend to be as weak as those of government departments.

More broadly, it can be argued that increased collaboration between government and civil society on service delivery coupled with dependence on government funding for CSO services has weakened civil society's role in holding government accountable.

Departmental performance indicators are insufficient to monitor and evaluate the full scope and quality of service delivery. Little emphasis is placed on quality of service delivered in the various annual reports of departments. Monitoring and evaluation by independent institutions is necessary to ensure that the full picture is presented. Systems for monitoring government seem to be poorly integrated into the programmes of many service delivery organisations. Poor monitoring is exacerbated by confusing and limited information released by government on their performance.

6.7. Poor civil society participation in policy and programme development

Consultation with civil society stakeholders on policy and programme decisions relating to services in which CSOs have expertise, for example in decisions relating to FCS services and the initial decisions regarding court preparation, is of concern. This poor recognition of the critical role that CSOs play in providing victim support and counselling throughout the criminal justice system can result in the development of poor quality programmes which do not take the psycho-social needs of children and their supporters into account. In this way new services designed to prevent further victimisation may in fact exacerbate it.

Consultation with CSOs is not required by the new Sexual Offences Act in the development of instructions and directives for departments, even though they deliver the majority of counselling and support services to children and have greater expertise in addressing the psycho-social needs of traumatised children in the context of the CJS. Thus participation of CSOs currently providing victim support is not required in developing the SAPS national instructions (while the SAPS is required to consult with the Departments of Health, Social Development, Correctional Services and the NPA). Likewise the NPA is not required to consult with CSOs that are providing court victim support services.

The development of instructions and directives provides an important opportunity to address gaps and inconsistencies in the management of child victims. At the same time there is a risk of losing good existing elements. The exclusion of CSOs from consultation, whose primary interest is in meeting the complex needs of victims and is not influenced by the need to meet performance targets, may also result in weaker policy directives.

7. RECOMMENDATIONS

7.1. General

7.1.1. Promoting children's rights

Staff at all levels of the system must receive training on the range of children's and victims' rights in the criminal justice process and their implications for practice.

7.1.2 Improving access to and quality of services

Implementation plans must be developed to translate commitments in policy and legislation into service delivery.

A comprehensive government plan must be developed to increase resources to all relevant departments and sectors to ensure that access to services meet minimum standards. This must include a plan to upscale counselling services. This plan must be developed in consultation with CSOs delivering these services.

7.1.3. Victim support and counselling

Policy-based commitment must be strengthened to promote the role of the CJS in crime prevention through victim support. Victim support must be provided to all children and their families at all stages of the process. This may be delivered directly by staff in the system or by dedicated victim support volunteers or officers.

Provision must be made, through legislation, for appropriate counselling for children. These services could be provided by the Department of Social Development directly, through CSOs that are funded by this department and by the Department of Health in appropriate cases.

7.1.4. Funding for support services

The creation of a mechanism for the provision of funding by the NPA and the Department of Justice to CSOs for the delivery of essential support services, such as court preparation and intermediaries, should be considered.

7.1.5. Accountability, monitoring and evaluation

Emphasis must be placed on developing and strengthening accessible complaints and accountability systems within the criminal justice system and within CSOs.

Government must formally consider CSOs as a source of information for monitoring the performance of the system. Processes for meaningful participation of appropriate CSOs in evaluating performance of the various departments and the CJS as a whole should be created.

7.1.6. Performance targets for crime prevention

SAPS performance targets must be altered to remove perverse incentives. Performance on crime prevention must be measured through evaluation of the impact of programmes run

by departments such as Social Development and Education in addition to those that fall within the Justice, Crime Prevention and Security cluster.

7.1.7. Consultation

The positive contribution of CSOs with expertise in the management of child victims in the system must be recognised through providing for their participation in the development of all relevant policy, strategy and guidelines.

7.1.8. Mandatory reporting and service delivery

Requirements for mandatory reporting of cases of child sexual abuse must be supported by criminal justice and child protection system requirements to improve standards of quality through the development of and adherence to minimum standards for service delivery to children, including criminal justice and associated psycho-social support services.

7.2. Criminal justice system

7.2.1. Specialisation

The quality of services is improved through specialisation in the system. Criminal justice system problems that undermine the effective investigation and prosecution of child sexual abuse must be addressed through greater specialisation.

All members of the CJS who interact with children in any capacity, including management, must be trained to understand the psycho-social needs of sexually abused children to avoid further victimisation.

Budgeting for integrated and quality services to child victims of sexual offences must be incorporated in national and provincial budgets.

Specialisation in terms of medico-legal, SAPS or NPA services must ensure the following:

- The capacity of local management staff in all relevant departments must be improved to enable effective management of service delivery to children and to enhance accountability.
- Managers must be grounded in the complexities of child sexual abuse and the impact of the CJS on children.
- Selection and recruitment procedures must test the aptitude of government service providers to work with children.
- Comprehensive initial training must be provided before service providers begin delivering services; in-service training must be provided.
- Performance management, support and supervision systems must be in place to recognise and address the impact cases involving children may have on service providers.
- Adequate human infrastructural and administrative resources must be provided for the delivery of services.

Improved treatment of victims at one-stop centres such as Thuthuzela Care Centres suggests it is important that a plan to promote their continued roll out and development be in place. Government funding for such centres must be in place as continued reliance on foreign donor funding is unsustainable.

The SAPS must ensure that specialised detective services are accessible to all victims. Measures to ensure that minimum standards of quality are met should be in place. While positive aspects of the recent restructuring process must be safeguarded, the negative impact of the process must also be addressed. National policy must be developed to safeguard the quality of services in different provinces and areas.

A comprehensive plan, including timeframes, for the roll out of dedicated sexual offences courts must be prioritised by the NPA and the Department of Justice and Constitutional Development. The goal should be for every child sexual abuse case that goes to court to be heard in a sexual offences court.

The quality of court preparation services must be addressed through the current processes of the NPA in partnership with civil society.

7.2.2. Discrimination against children in court

The Criminal Procedure Act 51 of 1977 must be amended to ensure that all child victims and witnesses have access to measures that protect them from further harm in court. In addition practice and legislation that unfairly discriminates against older children must be addressed through policy directives and changes to legislation.

The practice of testing the competence of children to testify and rules requiring a cautionary approach to children's evidence must be addressed through changes to legislation.

7.2.3. Social development

The capacity of the Department of Social Development to deliver general child protection services and the necessary services to the criminal justice system must be improved. Policy directives specific to this department must be developed; requirements resulting from policy directives or instructions of other departments must be incorporated.

8. CONCLUSION

Positive developments in policy and legislation relating to the management of child victims of sexual offences over the past decade have resulted in a relatively solid framework on which to base services to children. Government has repeatedly shown commitment to this issue at a strategic level. However, certain areas of policy, particularly relating to the management of children's evidence in court and access to psycho-social support have been neglected.

Government has been strengthening service delivery to children and taking greater responsibility for the delivery of services that have traditionally been delivered by CSOs. This has the potential to ensure that greater numbers of children have access to these services. Agencies such as the SAPS and the NPA have developed models of good practice with regard to the management of children's cases in the criminal justice system. Unfortunately, upscaling of these models to ensure that all victims access quality services has not been a priority. Where services have been upscaled, their quality has been undermined. The emotional needs of children, which relate to rights such as the right to human dignity, are poorly integrated into service delivery.

While developments show that government knows what must be done to improve the system, this has not been prioritised in terms of budgeting, and quality services to children are still the exception rather than the norm. Thus the positive policy and strategic developments have not yet had the desired impact for the majority of children who have been sexually violated.

ENDNOTES

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