A rapid review of the best interest of the child principle in the criminal judicial context

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Dissertation accepted in fulfilment of the requirements for the degree Master of Social Work in Forensic Practice at the North-West University

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Research is conducted under; Community Psychosocial Research (COMPRES) and ethically approved by Health Science Ethics Office for Research (HREC), NWU-00489-20-A1.

PREFACE

This thesis is dedicated to all the children who have experienced the horror of abuse, I hope and pray that this research will help in ensuring each one of you are protected when being brave enough to report your abuse.

Acknowledgements

There are a few special individuals to whom I would like to express my sincere gratitude:

- to my incredible parents, thank you for your love and support and unending encouragement – you both knew I could do this – thanks to you both I overcame this obstacle.
- to my son, you came into my life in the middle of it all, but you encouraged me to complete when I wanted to give up – you are an amazing individual - never forget that.
- to my sisters and nephews – you are simply the best, even thousands of miles away.
- to Natalie and Philip, there are no words, thank you for being the most incredible individuals I know and for all the love and support you have shown me, and for ensuring I accomplish my dream.
- Prof. Cornelia Wessels – thank you for ensuring I did not give up and for being encouraging, you are a true role model in this field, and I am privileged to have had you as my supervisor.
- To my Lord and Saviour, you gave me the people to help me and the strength to see this through, without you in my life I would not have succeeded -

  "For I know the plans I have for you declares the Lord." Jer. 29.11

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Acknowledgements

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A rapid review of the best of the child principle in the criminal judicial context

Student name: K. Hawthorn

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Supervisor: Prof C. Wessels

Master of Social Work in Forensic Practice
November 2022

Yours faithfully,
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31 October 2021

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Based on approval by the North-West University Health Research Ethics Committee (NWU-HREC) on 31/10/2021, the NWU-HREC hereby approves your study as indicated below. This implies that the NWU-HREC grants its permission that, provided the general and specific conditions specified below are met and pending any other authorisation that may be necessary, the study may be initiated, using the ethics number below.

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Principal Investigator/Study Supervisor/Researcher: Prof CC Wessels
Student: K Hawthorn – 26738694

Ethics number: N W U - 0 0 4 8 9 - 2 0 - A 1

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Yours sincerely,

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ABSTRACT

Keywords: child sexual abuse, child witness, child victim, judicial system, best interest of the child, intermediaries, secondary trauma

In this study the rapid review methodology was utilised to explore whether the best interest of the child is of paramount importance, as stated in various South Africa Acts. Data from 26 articles, with a fair to good methodological quality, was extracted and a summary of the studies was then drafted. International and local judicial processes were looked at to ascertain whether in practice the best interest of the child is always protected throughout the entire ordeal of testifying. An important finding was that all areas of the judicial system lack specialised training on how to deal with a child witness or victim, in most cases they are questioned as an adult. The procedures that are set out for dealing with CSA are not followed and further studies should be done to ascertain where the breakdown in implementing the guidelines occurs.

OPSOMMING

In hierdie navorsing is die vinnige hersieningsmethodologiese metode gebruik om onderesoek in te stel of die beste belang van die kind van kardinale belang is, soos bepaal in verkseie Suid-Afrikaanse wette.

Data uit 26 artikels, van redelike toto goeie kwaliteit, is bekom en ‘n opsomming van die studies is saamgestel.

Internasionale en plaaslike regsprosesse is bestudeer om to bepaal of die beste belang van die kind altyd in die praktyk beskerm word deur die hele beproweing van getuig.

‘n Belangrike bevinding was date alle areas van die geregtelike sisteem tekort skiet aan gespesialiseerde opleiding oor die wyse van hantering van ‘n kindergetuie of -slagoffer. In die meeste gevalle word hulle a volwassenes ondervra.

Die prosedure vasgestel om KSM te hanteer word nie gevolg nie en verdere studie behoort plaas te vind om te bepaal waar die tekortominge in die riglyne is.

Sleutelwoorde: kinder- seksuele misbruik, kindergetuie, kinderslagoffer, geregrelike sisteem, beste belang van die kind, tussengangers, sekondêre trauma

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CHAPTER 1
INTRODUCTION

1.1 ORIENTATION

The Convention on the Rights of the Child (The UN Convention on the Rights of the Child, 2012) "guarantees that every child, no matter where they live, is entitled to reside free from all forms of violence". UNICEF (United Nations Children's Fund, 2013) states "that on a daily basis children are exposed to, either as witnesses or as victims, physical, emotional, sexual violence and neglect or negligent treatment". The insidious nature and impact that any violence has on children should be recognised, as children are a particularly vulnerable group within our society. Many violent acts are committed by an individual that children know and in a location that should be safe, like their own home, school, and the child's immediate community.

The best interest of the child is set out in the Constitution of South Africa (Constitutional Law Constitution of The Republic of South Africa, 1996 Act, n.d.) under "Section 28 (2) where it states: "A child's best interests are of paramount importance in every matter concerning the child". As the word "paramount" is a stronger term to utilise than "a primary" consideration (the terminology of the African Charter), it would be thought that the child's best interest, in South Africa, would be more important than any other consideration. Unfortunately, the Constitutional Court has on numerous occasions rejected this view. In the matter of the Centre for Child Law v Minister of Justice and Constitutional Development the Court explained that the child's interests are more important than anything else. It is important to read and understand the forementioned in the context it is said. Not everything is unimportant where children are involved, and the context i n which the child finds himself must be taken into account. Reading the Constitution and the Convention it seems that the only difference in the two documents lie in the wording, and it does not necessarily mean that the one document put greater emphasis and importance on the best interest of the child. The importance stays the same in both the Constitution and the Convention.

Section 28(2) of The Constitution requires acknowledgement of the child's best interests 'in every matter concerning the child', and one could look at this 'phrase' as extending the scope of the principle to all fields of the law, which would include not only criminal law but also criminal justice and civil law. Terblanche (2012) advised "the extension of the best interest's principle beyond its application to family law has been precipitated by international documents on the rights of children, and specifically by the Convention".

Bonthuys as stated in Erasmus, (2010 p131) correctly points out "that the inclusion in the Constitution of the best interest principle – and a detailed list of children's rights – leads to the creation of two tensions, being:

(a) tension between the case-by-case application of the best interest principle versus the principled application of human rights and constitutional norms; and

(b) tension between the need to balance the rights and interests of children with the rights and interests of other family members, as well as with the needs of society at large".

Bonthuys argues "that some of our courts ignore the best interest 'right' completely, while others simply assume that the common law, as it currently stands, accurately reflects the best interests of the child, and a third category use the principle to revise or drastically change the rules of our common law" (Erasmus, 2010 p131). The best interest standard regarding children originates from the common law in South Africa. In family law it is used where there is a dispute regarding the care of the children after a divorce.

The opinion that 'the child's best interests are "more important than anything else"', meaning that they are paramount', has since Fletcher v Fletcher 1948 1 SA 130 (A) 134, been seen as part of our common law. This approach has been applied mostly in matters which relate specifically to family law, namely the custody of children in divorce proceedings, adoption, and foster care.

The best interest principle is at times also referred to as the 'welfare principle'. This leads to the question of whether the promotion of the 'welfare' of children is equal to the protection of their 'rights.' We need to draw a distinction between protecting children and protecting their rights. The welfare principle can be averse to children's rights, for "it supports not the right of children to make their own decisions, but the right of adults (such as judges, social workers or parents) to make decisions on their behalf" (Erasmus, 2010 p130). The latter is an especially important distinction to be made and should not be misinterpreted. Since the principle has now human rights characteristics, children must also be seen as having rights. For example, they have the right to get food, clothes, and housing.

There is no clear definition with regards to the best interest of the child, but various authors and legal rules have set out the criteria for the best interest of the child. For this study, the McCall v. McCall 1994 (3) SA 201 (C) case where Judge King sets out what one needs to consider when deterring the best interest of a child will be used:

"(a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;

(b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;

(c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;

(d) the capacity and disposition of the parent to give the child the guidance which he requires;

(e) the ability of the parent to provide for the basic physical needs of the child, the so-called "creature comforts", such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;

(f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;

(g) the ability of the parent to provide for the child's emotional, psychological, cultural, and environmental development;

(h) the mental and physical health and moral fitness of the parent;

(i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;

(j) the desirability or otherwise of keeping siblings together;

(k) the child's preference, if The Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;

(l) the desirability or otherwise of applying the doctrine of same sex matching;

(m) any other factor which is relevant to the case with which the Court is concerned."

From the above mentioned one must consider every child's uniqueness in the case before you. It is also clear that every child's developmental phase, environment, culture, and mental and physical health should be looked at before one can determine what will be in the best interest of the specific child.

According to Overs, Prinsloo, and Prinsloo (2000:25-26) "…the child's welfare should always be paramount and the legal system, where possible, needs to adapt to the child without the presumption of innocence being compromised for the accused" (Prinsloo, 2008). Due to the above several provisions were introduced into the Criminal Procedures Act 57 of 1977. Sections 158, 164 and 170A make specific provision to assist the child, whether they are the victim or the

witness. Ass per Prinsloo (2008) in practice it seems according to numerous case law cases that the child's rights are still not adequately protected. Examples of these cases in the case laws are:

- "State v V 1998 – relating to whether a child of 4 (four) years of age could been seen as competent as per the Criminal Procedures Act.
- State v Stefaans 1999 and State v F 1999 – use of an intermediary and the way in which a court appoints the intermediary. Court needs to show "undue" stress and conduct a proper investigation to establish whether factors were present to justify and application of Section 170A.
- State v V 2000 - minor children who had to testify after long delays in bringing the matter to court, due to the delay the children's testimonies were uncorroborated and this led to the court looking at the children's evidence with a cautionary approach.
- State v M 2000 (1) SACR 484 (WLD) – child being seen as an unreliable and untruthful witnesses".

Other cases that are reported and should be mentioned are:

- The Child Law Clinic in their written submission (dated 5 November 2007) with regards to issues raised by Judge Bertelsmann, as representative of the court, in the matters of State v Albert Phaswane (Case CC 192/07) and State v Aaron Mokoena (case no. CC 7/07) also pointed out "problems experienced by child victims and witnesses in the system, and more particularly regarding oaths and admonition, the appointment of an intermediary, proceedings being held in camera, lack of trained personnel and problems that arose during the translation by an interpreter"(Skelton, 2007).
- The case of S v M 2007 2 SACR 539 (CC) para 15, the court stated the following with regards to the child's rights:

"The ambit of the provisions [s 28(2) read with s 28(1)]47 is undoubtedly wide. The comprehensive and emphatic language of s 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; those statutes must be interpreted, and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which always shows due respect for children's rights". According to Skelton (2007) it is submitted, "… that the judgment in S v M clearly laid down the principle that the rights of children should not be entangled with that of their caregivers".

When one look at the child's rights and the best interest of the child it is also important to refer to the "United Nations Convention on the Rights of the Child, specifically Article 3(1) of the Convention that provides as follows:

> "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies the best interests of the child shall be a primary consideration'." (Zermatten, 2010).

In "Article 12.1 of the Convention it states:

> "States Parties shall assure to the child who is capable of forming his or her own views the rights to express those views freely and in all matters affecting the child the views of the child being given due weight in accordance with the age and maturity of the child'." (Archard & Skivenes, 2009).

The African Charter on the Rights and Welfare of the Child is another important reference that specific refer to the best interest of the child. "Article 4 states the principle as follows:

> '"1. In all actions concerning the child undertaken by any person or authority the best interest of the child shall be the primary consideration.
>
> 2. In all judicial or administrative proceedings affecting a child who can communicate his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law'" (The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective, 2009).

From the above there are various national and international legislation that specifically look at the principle of the best interest of the child. There are also reported court cases that must be considered. This research study is part of a bigger investigation that will take place in four (4) provinces of South Africa. The overhead goal in the bigger investigation is to develop a validated measuring instrument to measure the best interest principle of the child in the South African Legal System in an objective and relevant way. To compile the constructs of such a measuring instrument, a systematic overview of the existing national and international literature with reference to the best interest principle will be one of the constructs to establish on a macro-level the present contributing factors maintaining the best interest principle of children in the courts. The value of such a measuring instrument will be to enable the Legal System in South Africa, as

well as the Department of Social Development, to revise on a regular basis their practice and guidelines, and to make the necessary adjustments.

The aim of such a measuring instrument will be to display the applicable and complete list of contributing factors; to be specific enough to identify the contradictions of the legal system; to be able to distinguish between the human interactive factors and the structural, and process factors that can influence the best interest of the child. Further, it must also be sensitive enough so that the voids in situations where the best interest of the child is not protected can be accurately identified.

In this research study the researcher will examine all these factors, as well as other factors contributing to or influencing the best interest of the child principle in the South African Legal System, through a Rapid review.

1.2 PROBLEM STATEMENT

In South Africa, child sexual abuse become more and more a problem and the alarming fact is that the prosecution of these cases is very low (Chetty, 2006). Our law states "…that the best interest of the child is of paramount importance and Section 28 needs to be taken into consideration with regards to any matter involving a child as a victim or a witness". Looking out for the child's best interest starts from the second they disclose abuse, or it is discovered that a child is being abused. The SAPS is the first interaction the child will have with the judicial process and in many cases, they are untrained in working with children, let alone taking a statement from a child. The FCS is not stationed in most police stations and Conradie (2003) is of the opinion that, "…therefore in many cases an untrained officer will take the statement, incorrectly, which in turn can lead to the version in court being different from the initial statement".

The questioning of a child's credibility is always an area of concern and in many cases the child does not understand what is being asked of them, i.e., when taking the oath. Long delays occur in hearing abuse cases; in some instances, the first court date can be two years after the matter was reported. These untenable delays can lead to young children especially, forgetting critical information or becoming confused around time frames and exact details. (Conradie, 2003; Prinsloo, 2008).

The questioning of the child is also an area where all individuals working on the case need to be assisted and trained on how to work with children, especially young children. This relates to all court officials, prosecutors, and defence attorneys. They need to understand the child's developmental level to ensure that the questions are posed in a manner they understand. The

type of questions needs to be looked at, i.e., open-ended questions rather than closed questions – using who and what questions. In South Africa, the NPA struggle with huge backlogs and do not even have the manpower to listen to all court cases. Prosecutors look at which rape cases to prosecute based on the availability and quality of evidence in the docket. The resources available and the performance measures play a significant role in deciding what case will be set down for trial, as well as the amount of time allocated for preparation and prosecution. Prosecutors, in the year 2018, signed performance contracts committing themselves to achieve a 69 per cent conviction rate with regards to sexual offences cases, this was on top of their requirement to finalise 15 cases a month. Research showed that these requirements played a part in prosecutors deciding what cases to proceed with. (Machisa et al., 2018).

The case overload at courts influences the proceedings of a case. In some courts up to 15 cases are set down for trial a day, which is an impossible feat, with cases then being rushed through court and plea deals being made so that the prosecuting authority can meet their targets. (Machisa et al., 2018).

South African law states, "… that it is in the best interest of the child to have an intermediary assigned to them for the duration of the trial but again this law is open to interpreted by judge assigned to a child abuse case. It is not compulsory to assign an intermediary, but the law does state that, if the prosecutor does not ask for one, it is the responsibility of the presiding officer to appoint one, which is rarely done" (Prinsloo, 2008). The problem is that not all courts have entrance to intermediaries and in most cases, they also do not have the facilities to accommodate the child and the intermediary. In a third world country like South Africa, it is not possible to have all the facilities that is needed for a child who is either in court as a victim or as a witness. The worst cases are in the deep rural areas of South Africa where there are no facilities to accommodate the children.

The lengthy delays experienced in finalising child abuse cases is not in the best interest of the child as they are not allowed to engage in therapy to deal with what has happened to them. Due to it being felt, an unwritten law, that the child could be coaxed into saying something that is not true or did not happen - which is unfair on the defendant. For this reason, the child must sit with the pain of what happened to them for extended periods of time which can cause untold damage to them.

Consequently, the individuals who participate in child abuse cases not being properly trained secondary trauma can be experienced by the victim, as they must continually relive and retell what happened to them to various people at various times. This secondary trauma can manifest

other problems in the life of the victim, not only in childhood but into adulthood as well (Nomdo et al., 2014).

The researcher will look at the areas of concern that have been highlighted in previous articles, to understand whether the best interest of the child is being taking into consideration when involved in a criminal case.

According to Chetty, (2006); Conradie, (2003); Conradie and Tanfa, (2005); Meintjes and Collings, (2009); Prinsloo, (2008) there are various areas of concern that can lead to the best interest of the child not being considered in criminal courts, these are to name a few:

- the long periods of delays where children are involved;
- the inability of the child to make a statement on the one side and the inability of the police to take a statement from the child contributes to discrepancies in the initial police statement compared to the evidence provided by the child in court;
- children who are not prepared to go to court;
- the child's credibility being questioned;
- many prosecutors have no training in asking developmentally appropriate questions to the children who were sexually abused.

1.3 RESEARCH QUESTION

What, from the literature, are the contributing factors to child-centred court practices and the consistency with which the best interest of the child in the judicial system are applied?

1.4 RATIONALE FOR THE STUDY

This study forms part of a bigger study that focuses on the best interest of the child in the criminal system. The contribution that this study aims to make is to explore and identify the factors that contribute to the best interest of the child in the South African Criminal Justice System. The new knowledge will assist the researcher to ensure that all the factors that might have an influence on best interest of the child in the criminal system will be adapted to develop a measuring scale that will assist the court in future.

In the rapid review study all relevant articles and case law, both locally and internationally, was looked at, to ascertain whether the procedures that are in place are being adhered to and according to literature, what are the factors that should contribute to the best interest of the child in the criminal system.

Case law is defined as "reported decisions of appeal courts and other courts which make new interpretations of the law and, therefore, can be cited as precedents. These interpretations are distinguished from "statutory law" which is the statutes and codes (laws) enacted by legislative bodies, "regulatory law" which is regulations required by agencies based on statutes, and in some states, the Common Law. Case law is studied to understand the application of law to facts and learn the courts' subsequent interpretations of statutes." (Case Law legal definition of Case Law, 2008)

1.5 AIM

To identify by means of a rapid literature review, available evidence of factors that influence the effective implementation of best interest of the child principle in the criminal justice system

1.6 METHODOLOGY

In this specific study the objective was to obtain a rapid review of literature pertaining to factors influencing the best interest of the child (BIOC) in the judicial and other systems. Hence a Cochrane type rapid review design will be utilised. Utilising this design will assist the researcher to obtain a detailed overview of literature and an accurate description of the BIOC construct and its boundaries so that a precise idea can be gained regarding the focus of the BIOC measure (De Vellis, 2012).

According to Harker and Kleijnen (2012) and Tricco et al. (2015) there was "a need in health research for guidance and guidelines for reviews that are able to answer the stipulated research question rapidly, efficiently, competently and satisfactorily". The authors are of the opinion that "… there are no final definition of what a rapid review is and how exactly the methodology of a rapid review differs from a full systematic review*."* The best way to look at a rapid review is that "it is *a* type of knowledge synthesis in which components of the systematic review process are simplified or omitted to produce information in a short period of time"*.*

In accordance with Harker and Kleijnen (2012) "…there is no agreed and tested methodology, and it is unclear how rapid reviews differ from systematic reviews*."* In their results "they concluded that there was a significant positive correlation between the number of recommended review methodologies utilised and length of time taken in months." In this study the design of a rapid review will be used as set out by Khangura et al. (2012) as evidence summary methods. The researcher followed "an outline 8 (eight) step approach:

Step One: Needs Assessment.

Step Two: Question development and refinement.

Step Three: Proposal development and approval.

Step Four: Systematic literature search.

Step Five: Screening and selection of studies.

Step Six: Narrative synthesis of included studies.

Step Seven: Report production.

Step eight: On-going follow-up and dialogue with knowledge users."

Only 6 (six) of the proposed steps will be taken for the aim of this rapid review.

(Khangura et al., 2012).

1.6.1 Question Development and Refinement

According to Steward (2014) and Crisp (2015) "…it is important to embark upon a broad search of information that is currently available". In that way the researcher makes sure that the question is not only focused but also relevant. When the researcher starts with the research, she set out her search strategy by identifying the necessary but also relevant bibliographic databases and the searching terms that she will be used (Crisp, 2015; Uman, 2011). The techniques that were used to find additional studies include searching key journals by hand and to check articles reference lists (Crisp, 2015; Uman, 2011). These methods of searching assist the researcher to identify literature that was published and unpublished.

Explicit inclusion and exclusion criteria can according to Crisp (2015) constrain search strategies. By breaking down the review question into the Cochrane acronym PICO (or PICOC), which stands for participants, intervention, comparison, outcomes (and context), it was useful to ensure that one decides on all key components prior starting the review (Crisp, 2015; Uman, 2011; University of York, 2009). However, Crisp (2015:287) and University of York (2008:13) stated that it is acknowledged that some of the PICOS elements may not be relevant in some reviews as not all studies involve comparison groups

and interventions. At this stage, the researcher had to look at the publications status and language restriction that were to be included in the review. The researcher needed to ensure that all aspects of the studies of interest were captured but it needed to be practical as if not it could have led to the screening being overly complicated and time consuming. A raid evidence assessment could also be utilised as a possible 'mini' systematic review. (Steward R, 2014) These reviews tend to be less ambitious in scope with a narrower topic focus. Steps must be taken to ensure that precision is maintained although the time frame is limited.

1.6.2 Searching Literature in a Systematic Way

As most bibliographic databases enable the researcher to be more precise and to use more advanced and complex searches. Boolean operators were used to limit searches and specify search parameters (Boland et al., 2014, p. 45).

The researcher utilised a reference librarian who assisted with developing an electronic search around the words identified and in relation to the topic. This assisted the researcher in ensuring that articles collected by the researcher were verified as well as the reference librarian discovering other articles of interest on reference sites the researcher did not have access to or were missed.

1.6.3 The Screening and Selection of Articles

The screening of the selected articles was done after the search of all the articles. According to the University of York, (2008) the study selection can be done in two stages.

The initial task was to sources articles based on the title and information sources in the abstract. If the criteria were met, then the researcher would read the full text to ascertain if it was relevant or the aspects highlighted referred to a different area of research.

1.6.4 Narrative Synthesis of Included Studies

In this step, the researcher examined the full-text paper to identify whether the specific study fits the inclusion and exclusion criteria and exclude ones that do not fit the criteria (Crisp, 2015). According to Uman (2011) it can be helpful to create and use a simple data extraction form or table to organise the information extracted from each reviewed study, see annexure 1. Each included full-text paper would therefore be critically appraised for methodological quality and a general critical appraisal guide (Uman, 2011).

1.6.5 Report Production

The last step in the review was to summarise the findings and report on the rapid review. (Boland et al., 2014) explained that when the reviewer writes up the research it must be clear about the decisions that have been made, as well as how these decisions have impacted the conclusions stated. When reporting on the review, the researcher used the PRIMSA (Preferred Reporting Items for Systematic Reviews and Meta-Analysis) guidelines (Crisp, 2015; Moher et al., 2009).

1.7 CRITERIA FOR CONSIDERING STUDIES FOR THIS REVIEW

For this review, the researcher used the relevant PICOS elements:

Population	"The included population should be relevant to the population to which the review findings will be applied. Inclusion criteria should be defined in terms of the study of interest" (University of York, 2009)	Best interest of the child in the judicial system child victim of sexual abuse child witness of sexual abuse
Intervention/comparators	"What is being done for the participants, potential participants, or stakeholders? The nature of the interventions explored in the review should be carefully defined. The same applies for the comparator."	Not applicable
Outcomes	"A review should explore a clearly defined set of relevant outcomes"	To understand whether the best interest of the child is adhered to in a criminal case, specifically sexual abuse cases where the child is a victim or a witness. To ascertain if clear criteria exist with regards to implementing the policy of

		the best interest of the child in all criminal cases, where the child is a victim or witness. Articles included related to the phenomenon: “best interest of the child”.
Study design	“Types of studies included in the review may include a range of study designs to address the question of the review.” (University of York, 2009)	As this review incorporates a literature review of articles where a child has been a victim or a witness in a sexual abuse case, a qualitative study was included.

(Hemingway, 2009; Uman, 2011)

1.8 INCLUSION CRITERIA AND EXCLUSION CRITERIA

1.8.1 Inclusion criteria

- Steward (2014) advised that, “…a rapid review has a narrower regional or topic focus and a pragmatic decision to achieve the review in the tight timeframe is to include articles published in English and Afrikaans”. Non-English language papers will be acknowledged but were excluded from the study.
- Case law that was used was only reported when decisions of appeal courts and other courts which make new interpretations of the law was made and therefore, can be cited as precedents relating to child victims and witnesses in the South African Criminal Judicial Systems.
- Case law from 1994 until present was used.
- Journal articles from 1994 until present were used.
- Literature relating to the best interest of the child – prior to 1994 to ascertain the change in the law with regards to child victim and witnesses in the Criminal Judicial System was included.
- Conference proceedings were included when a full text or extractable summary could be located.

- All matters that relate to a child victim or child witness in a sexual abuse case that are prosecuted with the context of the criminal judicial system were included.

The reason for the inclusion of articles from 1994 is because the Constitution of South Africa Act 1996 was drafted after 1994 and the best interest of the child is stated in Section 28(2) of the said Constitution.

1.8.2 Exclusion criteria

- All cases relating to children that are not related to a sexual abuse offence i.e., divorce matters.
- Case law prior to 1994 unless referred to in a case under review.
- Articles that are duplication of research results.
- Theses, dissertations, and mini dissertations.
- Journal articles prior to the year 1994.
- Articles or case law that refer to child offenders and their best interest.

1.9 SEARCHING METHODS TO IDENTIFY RELEVANT STUDIES

1.9.1 Electronic searches

The following databases was utilised by the researcher: A-Z Journal List, Jstor, LexisNexis, eJuta, GoogleScholar, EbscoHost, all these electronic resources are available to the researcher on the NWU Ferdinand Postma Library. These databases were identified as their search results yielded articles significant to the primary research outcome.

To increase the efficiency of this study, the researchers focused on terms such as ‘best interest of the child’, ‘children involved in South African criminal judicial system’ and ‘protection of child witnesses’ along with text searches of ‘best interest’, ‘sexual abuse’, ‘child witness’, ‘paramount importance’, ‘children’s rights’, ’cross-examination of a child’; “child witness”, “intermediaries”, and “reliable and unreliable child witness.”

1.9.2 Search strategy

(“best interest”) AND (judicial system) OR (court); (“best interest”) AND (child+) OR (adolescent) AND (victim) OR (witness); (child) AND (“criminal judicial system”) OR (Court) AND (“South Africa”); (“best interest of the child”); (“paramount importance”) AND (“child+”); (“child witnesses”) AND (“protection”)

1.9.3 Searching other resources

The researcher worked through the reference lists of all eligible studies included in the review to obtain relevant articles that may have been missed through the electronic searches. Cochrane reviews on best interest of the child, children in the criminal judicial system, children as witnesses, children as victims of violent crimes, will be obtained and screened for eligible primary studies.

1.10 REPORTING STUDY SELECTION

The researcher made use of a flow chart showing the number of studies remaining at each stage, see Figure 1. The University of York (2009) stated that, "… decision to exclude studies may be reached at the title, the abstract, or at the full paper stage".

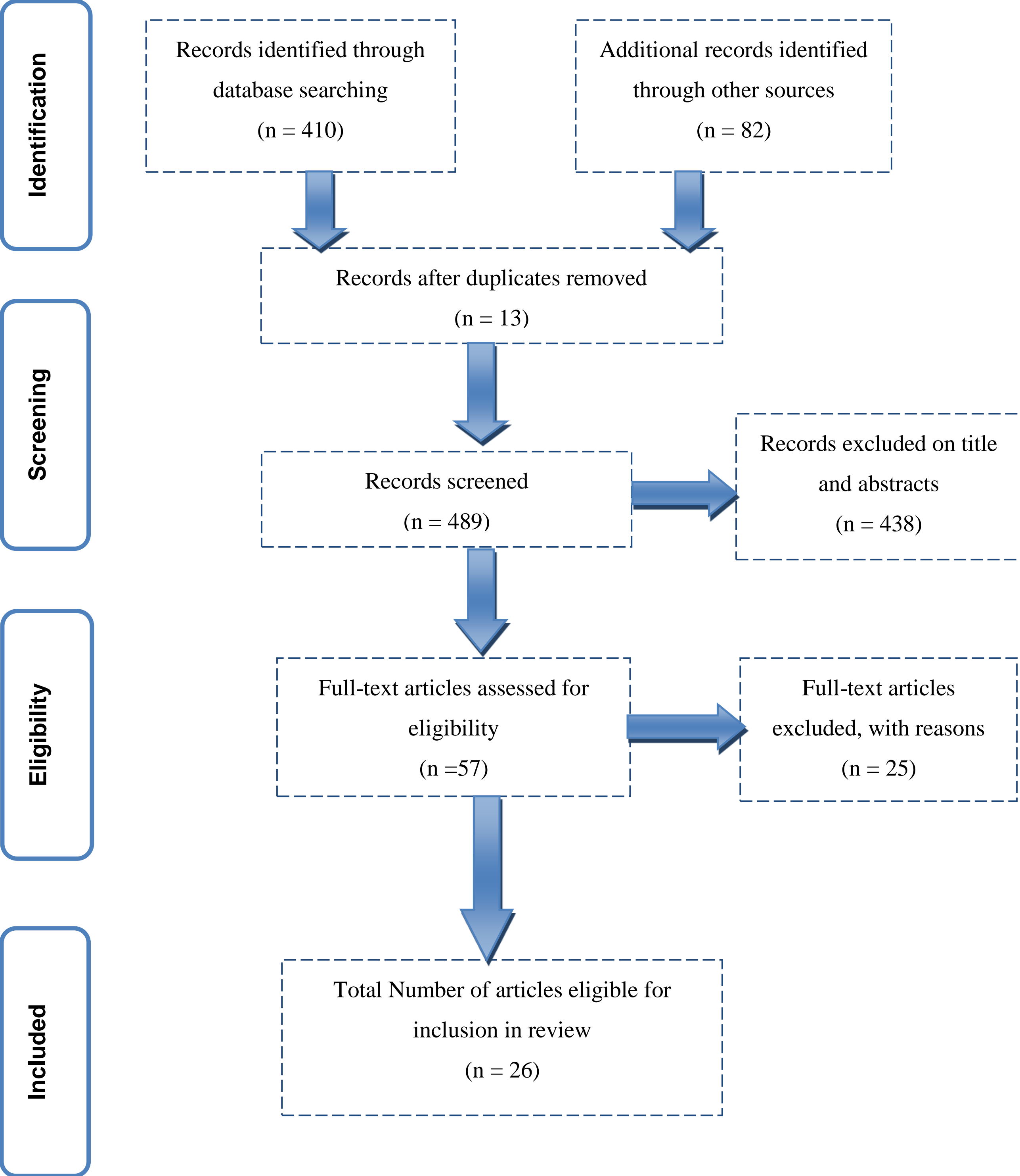
1.11 QUALITY ASSESSMENT OF ARTICLES

The researcher and the study leader reviewed the selected full text studies according to standardized criteria to decide whether each study had a sound scientific base and whether it had been properly designed and appropriately executed (Davids & Roman, 2014).

1.12 DATA EXTRACTION, SYNTHESIS, AND MANAGEMENT

The researcher and her study leader went through all the information of the studies extracted in the first round. The requirements for data extraction should always be formulated around the review question (University of York, 2009). A data extraction form was used to extract the data. (Annexure 1).

Figure 1-1 PRISMA Flow Diagram



1.13 ETHICS

Strydom, (2011, p. 114) defines ethics “as a set of moral principles which is suggested by an individual or group and it is widely accepted and offers rules and behavioural expectations about the most correct conduct towards experimental subjects and respondents, employers, sponsors, other researchers, assistants and students”. The ethical risk level for this study was identified as low by HREC.

Ethical issues the researcher considered during the preparation and publishing of this review were:

- The researcher ensured that contributors to the research were properly acknowledged.
- Plagiarism was always avoided. People’s research that was used in the review, was described in the researcher’s own words, with appropriate citations. (Wager & Wiffen, 2011, p. 131)
- The researcher and study leader applied to HREC for ethical permission. The received an ethics number: **NWU-00489-20-A1.**
- Transparency, according to Wager and Wiffen (2011, p. 133), “ is an important ethical issue during a rapid review”, therefore the researcher declares any potential conflict of interest”. The fact that the researcher used a data extraction form, ensure transparency.
- In the beginning phase both the researchers decided which data to include. The inclusion in the research was evaluated for ethical irregularities (Vergnes et al., 2010, p. 771). The decision of the reviewers to only include peer reviewed articles in the study may limited the inclusion of unethical studies.

1.14 LIMITATIONS OF THE STUDY

The following limitations were identified:

- Only electronic databases subscribed to by the North-West University were used. Other databases which are not subscribed to by the library of the North-West University could not be searched and therefore this can be considered a limitation. An attempt to overcome the limitation was made by hand search of key journals and reference of articles.

- Only articles with a full text in English and Afrikaans were considered and it is possible that relevant studies were missed.
- Theses, dissertations, and mini dissertations were eluded which can be considered as a limitation, as it is possible that relevant studies were missed.
- The Rapid review was not done in a team and a co-reviewer was only used at certain stages of the search and for the critical appraisal. However, the review was done under the supervision of an experienced researcher and supervisor.

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CHAPTER 2
LITERATURE REVIEW

2.1 INTRODUCTION

A literature review has been done to provide a clear picture of the available literature with the aim to have a better understanding of the identified problem. In accordance with several researchers: De Vos et al (2011); Grinnell and Williams (1990) a literature review is important because it will assist the researcher to understand the context of the current project and to link it to what was previously done in the specific field.

The researcher went through the literature she retrieved to make sure if it will assist with answering of the question. At that stage she made sure what literature was relevant and what was irrelevant for the purpose of the study. All the irrelevant literature was excluded. This method assists the researcher to make sure that only the literature used will assist to summarise, compare, and synthesises the published findings.

2.2 DEFINITION OF CONCEPTS

The main concepts and definitions will be discussed to assist and make clear what is meant by certain terminology in the context it is being discussed in.

2.2.1 Best interest of the child (BIOC)

There is no clear definition with regards to the best interest of the child, but various authors and legal rules have set out the criteria for the best interest of the child, more specifically with regards to a child involved in a divorce matter.

When it comes to sexual abuse there is no cut and dry criteria, but Section 28(2) of the Constitution of the Republic of South Africa, 1996 plays a major role to understand the best interest of the child.

> "Section 28(2) – "child's best interests are of paramount importance in every matter concerning the child".

From the literature reviewed it is the researchers view that looking at the BIOC in sexual abuse cases (especially within the criminal justice system) the child's age, maturity level and cognitive development needs to be considered at all levels. In this context, the BIOC includes ensuring that the child is properly briefed with regards to the impending court proceedings, one needs to ensure that the child is fully aware of what will occur when they

appear in the court room; ensuring that the child is protected from additional humiliation and further abuse by making sure that their identity or any information that will disclose their identity is not disclosed in familial incest cases. Following along this line of ensuring the child is not further traumatised, the judge needs to ensure that, prior to the case being presented, the court room is evacuated of all spectators. Only parents/caregivers are allowed in the courtroom, as all matters involving minors must be held **in camera.**

2.2.2 Child Abuse

Childline South Africa (Childline South Africa, n.d.) defines child abuse as **"Any interaction or lack of interaction by a parent or caretaker which results in the non-accidental harm to the child's physical and/or developmental state".** The term child abuse must be seen in a much wider contexts, as it includes physical injuries to children as well as emotional abuse, sexual abuse, and neglect (Childline South Africa, n.d.)

The Children's Act 38 of 2005, as amended defines abuse, **"**in relation to a child, to mean **'any form of harm or ill-treatment deliberately inflicted on a child, and includes**-

(a) assaulting a child or inflicting any other form of deliberate injury to a child.
(b) sexually abusing a child or allowing a child to be sexually abused.
(c) bullying by another child.
(d) a labour practice that exploits a child; or
(e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.'"

From the above-mentioned abuse must be seen in a context that include all types of abuse. For this study, it is important to include all types of abuse.

2.2.3 Child Sexual Abuse

There is a lack of consensus with regards to a definition around child sexual abuse. Berliner in Myers (2011) defines Child Sexual Abuse as "any sexual activity with a child below the legal age". The principle behind this is that a child younger than 16 years is not legally capable to give consent to any sexual activity. The central aspect that one needs to consider when trying to define child sexual abuse is to differentiate between contact and non-contact child sexual abuse. As per Richter et al., (2004) contact sexual abuse include all forms of physical contact when there is a sexually abusive act. Non-contact sexual abusive acts refer to using children in pornography or prostitution.

Aucamp et al (2013: p124) is of the opinion that most definitions of sexual abuse focus on either the legal definition of sexual abuse or the psychosocial definition of abuse. As far

as the South African context, they are of the opinion that it is more important to look from a more psychosocial perspective at the problem, because it then integrates the legal parameters of behaviour that is seen as abuse. The Criminal Law Sexual Offence Amendment Act, 32 of 2007, defines sexual abuse making it clear that "any exposure of a child to sexually inappropriate stimuli, can be included but are not limited to only sexual penetration, it also includes sexual violation and a child who has to witness sexual acts". In contrast is the Childrens' Act, 2005 definition of sexual abuse that is more descriptive and is set out as follows:

"(a) sexually molesting or assaulting a child, or allowing a child to be sexually molested or assaulted;
(b) encouraging, inducing, or forcing a child to be used for the sexual gratification of another person;
(c) using a child in/or deliberately exposing a child to sexual activities or pornography; or
(d) procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child."

2.2.4 Child Victim and Child Witness

The Centre for Child Law (2008: p14) write in their booklet, Justice for Child Victims and Witnessed of Crime, that children under the age of 18 who are exploited to crime are victims of crime or witnesses of crime.

Boezaart's (2013) view of the South African Victim's Charter is that one must see the child witness and child victim much more broadly and includes not only the child as victim but also them working directly with the child and the child's immediate family. Spies (2006) is of the opinion that the child witness is a child who gives oral evidence in the court under oath.

2.2.5 Open-ended and closed questions

When the court proceedings start a child will be exposed to various types of questioning from both the prosecutor and the defence attorney, and in some instances from the judges themselves. The researcher chose to define open and closed questions so that the reader understands exactly what is meant by this as later discussed in the literature study.

Poole and Lamb (2009: p145) is of the opinion that, “Open-ended questions allow children to select the specific details they will discuss” and one should “… encourage multiple-word responses”. Spies (Spies, 2006) states that “…in practice these questions usually begin with wh- being what, when, who, where or how”. Using this means of questioning has shown that significantly longer and more detailed responses are given if one uses focused prompts.

“Closed questions provide only a limited number of options, for example multiple choice questions and yes-no questions”, (Poole and Lamb 2009: p146). One can argue that closed-ended questions typically have various categories, as stated above, but also includes tag formats which are often classified as suggestive due to them implicating an expected response.

Often missing from the commonly noted forms of closed-ended questions is a potentially highly influential question form, being declarative questions. Klemfuss, Quas, and Lyon (2014: p780 and 781) are of the opinion “… that these forms of questions take the form of statements that are to be accepted or rejected, i.e. Did he hurt you?” and “…that closed-ended questions including suggestive questions are utilised more during cross-examination to minimize and control a witness’s response”.

2.2.6 Intermediaries

Any victim, it does not matter if a child or an adult experience trauma when they must be a witness in court. The purpose of an Intermediary in the case of a child is to reduce the trauma that they can experience when they are confronted with the perpetrator in a court setting. In Section 170A of Criminal Procedures Act 51 of 1977, states:

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

The intermediary is a qualified individual, social worker, teacher, psychologist who has working knowledge of children. This individual is there so that the child is not intimidated by standing in the witness box and being bombarded with questions by, at times, aggressive looking defence attorneys. The intermediary should also

be able to advise the court when the child needs to have time to regroup due to them being emotional or tired. Intermediaries are there to help the child not hinder the process.

2.2.7 Cautionary approach

The cautionary rule is a rule of law which obliges a court to warn itself of the danger of convicting a person based on the evidence of a single witness, specifically when the crime involved is one of a sexual nature (Boezaart, 2013, Chetty, 2006; Conradie & Tanfa, 2005). The cautionary approach should be applied carefully, because there are evidence that the child will not per se be telling lies and seen as a unreliable witness. Unfortunately, there are professionals working in the field of sexual abuse who proceed from the point of view that children are imaginative and suggestible and are therefore not reliable witnesses in court and therefore use the cautionary approach.

2.2.8 Inquisitional Law

With inquisitional law the presiding officer of the court, usually the judge, does the investigating into the case before him/her, and all the evidence is taken down in writing (Müller, 2000). The accused is “seen as the object of the inquiry and therefore has no procedural rights”. The confrontation in this law “takes place primarily between the accused and the court instead of between the two parties” as can be seen in accusation law. The modern approach is to view the inquisitorial procedure as “a seemingly scientific search for the truth rather than a dispute” whereby the presiding officer makes an objective and comprehensive analysis of the offence by assimilating all the evidence available” (Müller, 2000).

2.2.9 Accusation Law

Wauchope in Schoeman (2005: p 32) states that “South Africa is a common law country that follows the accusatorial system of justice. The South African procedural and evidentiary rules are based upon the accusatorial principles, as well as the common law system of evidence”. This system operated where the opposing parties, and not the court, are in principle responsible for presenting evidence in support of their respective cases. This is done according to procedural principles and exclusionary rules, which promote “morality” and secure “confrontation” (Schoeman, 2005, p. 32)

Meintjes-Van der Walt as stated in Schoeman (2005,32) express: "The accusatorial system depends largely on the ability of lawyers to expose the weaknesses in witnesses and their testimony through cross-examination."

In this system the burden of proof is whether the state can, beyond a reasonable doubt, prove that the accused is guilty. "If the prosecutor cannot prove the case beyond a reasonable doubt and in the mind of the presiding offer there is reasonable doubt, the accused must be acquitted", Schoeman (2005,32).

2.2.10 Competence and Credibility

A witness competence and credibility are measured by their capacity to provide reliable testimony. They must also be able to recall what happen to them and the ability to communicate in detail what happen. The court is not always convinced that a child understands the difference between a lie and the truth and the consequences of not telling the truth. Although the High Court found that they are satisfied if the child can tell exactly what happened to them it will still be a problem if they do not understand the difference between the truth and a lie, their evidence would then be not seen as credible and reliable, (Boezaart 2013)

2.2.11 Secondary Trauma/Victimisation

Richter sees secondary trauma or secondary victimisation as anything that can or does re-evoke the initial trauma in an uncontained or uncaring or unprotected way (Richter et al., 2004).

The mental health profession views secondary trauma in a similar vein to Richter stating that the indirect response, specifically by individuals and institutions, to the victim can lead to re-traumatization of the victim. (The Department of Justice and Constitutional Development Gender Directorate, 2008)

A victim can be re-traumatised by attitudes, processes, actions and even omission, whether they are intentional or not. This can be seen when a victim is not treated with respect and/or dignity, the treatment received is unsympathetic, the version of the victim's story is not believed and, in some cases, where the victim is blamed for the sexual abuse.

If there is a lack of or insufficient support services available to assist a victim of sexual abuse of any kind, interpersonal or institutional or even broader social levels, the victim can experience the trauma all over again. (Boezaart, 2013).

2.3 LEGAL FRAMEWORK UTILIZED

2.3.1 South African Constitution

The most important bill in South African after 1994 is the Constitutional Bill of Rights 1996 rights of children and Section 28 of the constitution sets out exactly what the rights of children are and how they must be protected.

If one looks at themes in children's rights one looks at the need for firstly protection and secondly autonomy. During the formative years of a child's life, one needs to remember that the child is still highly dependent due to the fact of their lack of capacity and general vulnerability, meaning protection of children in their formative years is crucial. This dependency reduces gradually as they get older but guidance and support from parents/caregivers is still evident. If a child is old enough and able to give witness in a court provision must be made to give them the opportunity.

Section 28 clearly sets out that all children are to be protected from neglect, abuse, maltreatment, and degradation. Section 28(1) and (2) are the framework in our law and policies, especially in the context of sexual abuse, which look to ensure that the right to dignity, security and privacy of a child is seen to always be respected and adhered to.

Section 28 is not merely the principle which assists in the interpretation of rights, it is a right in itself. Even though the word "paramount importance" is used, in an empathic context, one needs to ensure this does not automatically override all the other rights. This right exists in a non-hierarchical system, so it has the capability to be limited. (Boezaart, 2013, pp. 280–281).

2.3.2 The Children's Act 38 of 2005 as amended.

This legislation was provided to set out procedures to care for children who are among other things neglected and abused. The Children's Court has jurisdiction to make a finding as to whether a child has been exposed to circumstances that could result in physical, sexual, or mental abuse or whether a child has been physically, sexually, or mentally abused. The following sections is important if one look at the best interest of the child: Section 7 sets out the standards that are to be applied when one looks at the general aspect of the best interest of the child and Section 9 of the act deals specifically with the best interest of the child.

2.3.3 The United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (hereinafter referred to as CRC) was the first step taken in 1989 towards the history of child rights. In accordance with Richter et al, (2004) South Africa ratified the CRC in 2000 and in so doing undertakes to incorporate the provisions set out in the CRC into domestic law, as well as agreeing to comply with all monitoring requirements.

In general, the CRC covers different rights that are applicable to children. In this one document both socio-economic, civil, and political rights of children are spelled out. Although the age of a child is defined as "a person below the age of 18 years, it also opens the opportunity to nations to change the 18 years to their specific country needs".

South Africa has aligned itself to this as is evident in both the constitution and Children's Act but has chosen to utilise the definition of a child as set out in the African Charter. In the CRC there are four general principles, which are fundamental in the implementation of the entire convention, these principles are: Non-discrimination - Article 2, Best interest of the child – Article 3, Right to life survival and development – Article 6, and Respect for views of the child – Article 12. For the purposes of this research Article 3 and 12 will be discussed. From the start it is important to know that the best interest of the child that is set out in Article 3 of the CRC did not invent this principle. The principle is found in numerous articles and general comments. In short it is spelled out that in all actions concerning children the child is of paramount importance. It also applies to legislative administrative and judicial bodies to make sure that the child's rights and interests will not be affected by their decisions.

The best interest principle is not a stand-alone principle it needs to be viewed with the other general principles to ascertain what the best interest of the child is in a specific situation. Article 3 (1) notes that "the child's best interest should be a' primary consideration in all actions that concern a child, which shows that the best interest is not an overriding factor that is to be considered but ALL (emphasis added?) competing and conflicting interests must be considered". The duty of consider mean really consider and not only noted (Boezaart, 2013, pp. 318–319).

The importance of Article 12 is the fact that if the child can form their own views, they have the right to express these views if it can have an influence or effect on their life. According

to this article, the child must get the opportunity for expression by himself or through a representative.

The committee outlined its view that article 12 highlights the role of the child as an active participant in the promotion, protection, and monitoring of their rights. It needs to be noted that the words “child participation” are not used in article 1 but the committee explains its objectives to advance child participation There are two levels of interpretation. Firstly, that the child has the right to express their own views in the case that they are affected and secondly the child’s voice must be heard in all proceedings where they are involved. It is important to notice that it can also be done through legal presentation.

2.3.4 African Charter on The Right and Welfare of the Child

The charter was adopted in 1990, but due to ratification by 15 (fifteen) OAU members required, it only came into effect on 29 November 1999, with South Africa signing on 7 January 2000. It needs to be stated that this charter is not well-known in South Africa or in Africa, but since the African Union (AU) the Charter has been brought into the fold of the new continental organisation.

“The main features of the charter are:

- The best interest of the child
- Principle of non-discrimination
- Primacy of charter over harmful cultural practices and customs”.

In the charter the best interest of the child refers to the responsibility of the state to measure all aspects where the child is involved. Therefore, all policies regarding children must take that into account. In all circumstances the child must be the primary consideration. Like all the previous bill’s the charter also defines the child as a human being below the age of 18. (African Charter on the Rights and Welfare of the Child, 1990; Boezaart, 2013)

2.3.5 A comparison between the African Charter and the Convention of Children’s Rights

The ACC increases the protection of children in several ways specifically around child soldiers, child marriages, and child refugees.

For the above and any issue involving a child, the best interest of the child needs to be of primary consideration. The wording differs in the two documents. In the ACC it speaks of best interest of the child being of primary consideration and in the CRC, it refers to the best interest of the child as “a” primary considering in actions involving children. The CRC uses the “a” instead of “the” setting out that the best interest of the child is not of primary importance (Boezaart, 2013).

2.4 REPORT OF PARLIMENTARY TASK GROUP ON SEXUAL ABUSE OF CHILDREN 2002

Even though South Africa ratified the CRC in 1995 pledging to take appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence or exploitation including sexual abuse. Legislation affecting children has taken the rights of a child into consideration; however, emerging policies are not having adequate impact on a child’s safety. The state committed to protect its most vulnerable and dependable citizens from all forms of abuse and violence but unfortunately the situation remains grave.

In 2001, after yet another shocking case of very young children being raped, the National Assembly resolved on 14 November 2001 that public hearings be held to inform cabinet of the causes of these crimes, as well as what solutions are available to minimise the abuse on our children. According to Richter et al (2004) not all policies and the criminal justice system protect the rights of children and they expose them to unexperienced police officers, and that leads to secondary trauma (Richter et al., 2004).

The new Family Violence, Child protection and Sexual Offences (FCS) unit was established through the task force, and it was hoped with the development of this unit there would be an equitable distribution of resources. The task team emphasises that in all cases the best interest of the child affected by CSA must be paramount.

The following recommendations were made by the task group:

- The amendment of the Sexual Offences Act; and better cooperation between the different professionals working with the child.
- Schedule 6 of the criminal procedure amendment act dealing with bail was to be amended to include the rape of boys under 16; and stated where a male under 16 years was in sexual relations it should be seen as statutory rape.

- More programmes must be developed and be in place to educate members of SAPS who deal with sexual abuse cases and the FCS offices should have funds to deliver their duties These services must also extended to all provinces.
- Disciplinary procedures must be in place if in any way they obstruct the sexual abuse matter, either through bad investigation, work, or corruption.

Having looked at the law that governs a child and more specifically the best interest of the child, we will now go through the process that a child witness or victim must travel to get justice, specifically where a child has suffered sexual abuse. We need to ask ourselves then, as we look at the justice process, is the best interest of the child considered at each stage of the journey or what can be done to ensure that justice is attained for each child?

In the South African context, it seems that the criminal justice system is still not equipped to protect children and fails to protect children from further victimisation that leads to secondary trauma. Many of these have been addressed by the SA Law Commission 2002 (Richter et al., 2004). But it comes back to the different role players and processes to be implemented to ensure the reform of the criminal system.

A multidisciplinary approach is required from SAPS, NPA, social welfare services, and civil society, to ensure that there will be a proper and expeditious management of the investigation and prosecution of child sexual offences. There are standing operating policy documents, protocols, and guidelines to be followed with regards to a child sexual abuse case, but these documents are not enforceable and there is no accountability for non-implication. This needs to be changed and the guidelines and policies should be enforced.

The Parliamentary Task Group on Sexual Abuse (2000) points to evidence that there was a divergent standard and procedures for survivors and witnesses, this shows that there was no clear approach to dealing with sexual offences in the criminal justice system. Participating in any court proceedings is expensive and challenging. Many sexually abused victims and witnesses are made to endure lengthy court proceedings under circumstances that do not cater for their emotional needs.

In many cases the Task Team mention that justice officers are not trained to investigate sexual abuse cases. Specially in cases where the child is still young, and their competency level is low.

The Task Team recommend the following:

- “Effective prosecution.
- Department of Justice established clear guidelines for handling cases involving sexual offences.
- Training of these guidelines is to be mandatory for all levels of personnel in court system.
- Give precise statistical information with regards to exploring strategies for improving the conviction rate.
- NDPP issue directive to the effect that a case can only be withdrawn against an alleged perpetrator of a sexual offence by the Director of Public Prosecutions.
- NDPP issue a directive instructing all judicial officials to report corruptions concerning the withdrawal of sexual offence cases.
- The Court to give priority to cases involving sexual violence and these cases must be completed in the shortest possible time.
- The Officials in criminal prosecuting system to have the access to adequate resources and advanced technology to assist with securing convictions.
- Evidence.
- Cautionary rule should be abolished for evidence given by women, children, and single witnesses in sexual offence cases.
- Previous sexual history of complainant cannot be used as admissible evidence in a sexual violence case at any stage of the proceedings.
- Protection of survivors.
- All personnel dealing with a case involving sexual offences must undergo mandatory training, so they are equipped with necessary skills to deal with a survivor of a sexual crime. The training is to be an upgrading of their skills and is to form part of the system of performance appraisal to ensure that the state employs the most appropriately skilled personnel in courts dealing with sexual offences.
- Cultural and language aspects need to be considered and personnel with training need to be provided.
- Vulnerable witnesses, including children, must be able to claim special protection during the trial.
- Need to make it illegal to publish identity of survivors of sexual violence cases and accused before found guilty or charged and anyone contravening this needs to be criminally prosecuted”. (Richter et al, 2004:304-322)

2.5 CRIMINAL JUSTICE PROCESS WITH REGARDS TO A SEXUAL ABUSE CASE

2.5.1 DISCLOSURE

The Children's Act (Children's Act 38 of 2005 as Amended, n.d.) make provision for mandatory reporting for certain professionals but also for family members, neighbours, friends, and people in the community. If there is any suspicion, it must be reported either to the police or any designated welfare organisation.

2.5.2 POLICE INVESTIGATION

The police role in child sexual abuse is set out and governed by the Criminal Law (Sexual Offences) Amendment Act 32 of 2007, National Police Guidelines and in Gauteng the Gauteng Multi-disciplinary Child Protection and Treatment Policy.

This is the first line of support in most incidents. If a good police response is received it helps vindicate the victim's experience of abuse and gives them some sense of confidence in the judicial system. On the contrary, if a victim's experience at the hands of a police officer is poor, they will question the judicial process, and this could lead to the increase in a victim's vulnerability and therefore to further abuse, or to the victim withdrawing the case and not proceeding any further.

As per the National Police Guidelines for the SAPS (National Policy Guidelines for Victims of Sexual Offences - National Guidelines for prosecutors in sexual offence cases, 2007) there are two ways that an individual can report the abuse: either by telephone or in person. "If the person calls the police station to report the abuse, then a police patrol unit needs to be dispatched immediately to the crime scene to secure evidence and assist the victim" and "…the officer talking the call needs to ascertain from the victim if they require an ambulance and if they are still in imminent danger?".

"When an individual arrives to report a case, or police are informed, and the statement needs to be taken, the police officer needs to respond to a CSA matter with empathy, patience, professionalism, and sensitivity. When a child needs to make their statement, it should not be in public, in the charge office or in front of their classmates". The child should be taken to a private room to allow the child the opportunity to relate the incident without fear of being overheard, which could lead to victimisation within the community setting. A child should always be accompanied by an adult and the FCS unit needs to be contacted immediately.

It is known that many cases reported to the police are not proceeded with and some are not even recorded as a complaint. To avoid this kind of situation the police should not be granted discretion to determine if a case is to be proceeded with or not (Richter et al., 2004, pp. 217–218).

While one is waiting for the investigating officer or FSC officer to arrive the first officer on the scene needs to ensure that the victim is never left alone. They constantly need to be with them. During this time, they can advise them of the process that will follow and all the police personnel that will be involved, i.e., investigating officer, fingerprint expert, photographer/video unit and tracing/crime prevention unit. This time helps create a bond of trust between the victim and the SAPS member letting the victim know they are not alone and will be protected every step of the way. The SAPS members need to show empathy, not sympathy, to the victim.

Once a docket is opened and allocated, the investigating officer has the duty to trace the perpetrator, arrest him/her, oppose bail, investigate the criminal complaint, gather evidence, forward the docket to the prosecutor, and keep the victim appraised of developments in their case. One needs to remember that as soon as the CSA case has been reported to the police, it becomes a state case. (Conradie, 2003; Conradie & Tanfa, 2005)

The National Guidelines(*National Policy Guidelines for Victims of Sexual Offences - National Guidelines for Prosecutors in Sexual Offence Cases*, 2007) states "it is the police's duty to ensure that the child is prepared for court and that they are taken to the court room prior to proceedings". The best time would be the day before to familiarise them with the court room, as well as for pretrial consultation with the prosecutor - which is essential. Ensure that the child receives a copy of his/her initial statement so he/she can read through it again or that it is read to the child, depending on the age and developmental stage of the child. The aspects of matters being held "in camera" need to be explained to the child again assuring him/her that they will be protected.

Conradie (2003) advised that "in the South African Law Commission 2002 it was found that police investigation procedures were insensitive to the state a child was in when his/her statement was taken or when he/she was testifying in court". This shows that the police's understanding of a child's cognitive development, both as witness and complainant, is very limited. It was also found that they have limited knowledge of the National Police Guidelines and Multidisciplinary Protocol. It was seen that police unduly

exercise discretion with cases where the child is below the age of 16 years. Statements were taken by inexperienced police officers and not well-trained specialized FCS officers. There is poor investigation of cases due to the workload and little to no feedback if given to the victim or their parent/caregiver. Medical examinations are required and, in many cases, the J88 – the medical form – is lost as parents or the victim themselves need to go to a hospital or clinic to have the form completed, and upon return to the police station, the officer is not there, and the form is misplaced as it is not immediately placed into the docket (Conradie, 2003; Conradie & Tanfa, 2005).

Communication between the police and the victim needs to be implemented and it will also assist when the alleged perpetrator applies for bail. The victim needs to be aware that bail has been applied for and they need to be made aware that they can participate in this process as far as it is appropriate or required (Richter et al., 2004, pp. 217–218)). It is stated in the National Guidelines that regular updates must be given, even if there is no positive progress to report, so that the victim will be reassured that their case is still being dealt with and has not become a "forgotten" case. This also continues to keep the trust relationship between the victim and the investigating officer/SAPS strong.

It has also been noticed that, if there is an affiliation between the victim and alleged perpetrator, irrespective of the child's age, the police tend not to investigate the matter as they view it as a false charge of rape. With informal settlements being part of our landscape, the police are finding it hard to trace both victims and alleged perpetrators, which has a negative impact on the investigation and subsequent arrest.

Due to the police being inexperienced in dealing with CSA cases the poor statements taken at the onset hamper the cases when forwarded to the prosecutor and they then need to exercise discretion on whether to proceed (Conradie & Tanfa, 2005).

2.5.3 COURT SYSTEM

South Africa uses the adversarial manner, which allows for little or no involvement by the presiding officer. The question needs to be asked if we need to move to an inquisitional system specifically in cases of child sexual abuse to ensure that there is greater protection and co-ordination of the matter. In Europe it is seen that utilising the inquisitional approach ensures that there is a greater gathering of information and oversight into procedural matters around the case (Richter et al., 2004, p. 219).

Once the complaint has been filed the role of the complainant/victim is limited to that of State Witness (Conradie, 2003). It is the prosecutor's responsibility to ensure that the child is properly prepared for court, which means working through the child's initial statement with them and if any inconsistencies are apparent clearing them up. The child needs to be fully briefed around what will happen and he/she can even be taken into the court room, and have it explained who will be sitting where and where the child will be standing to testify, if no intermediary has been requested. The prosecutor is the one who does the application to ensure that the child testifies via an intermediary. The BIOC is always of paramount importance in South African Law, and this can be seen by the inclusion of intermediaries in our statutory system. The Criminal Law Amendment Act of 135 of 1991 (Criminal Law Amendment Act 135 of 1991, 1991) inserted Section 170A with regards to intermediaries, which provided for the appointment of intermediaries for children, involved in sexual abuse cases, due to their youthfulness and vulnerability.

Regarding inconsistency of the application for intermediaries the constitutional court advised that, if the prosecutor does not ensure assessments for an intermediary have been done, it is the responsibility of the magistrate to do so. The enquiry as to the use of intermediaries is specifically for the child complaints of a sexual offence nature.

Even though intermediaries were important as stated by the constitutional court, the usage of intermediaries is still not being effectively rolled out and used. An intermediary is utilised to assist a child witness to remove all the hostility and aggression that arises from being questioned by making the question more understandable/child friendly. In many courts the unfortunate reality is that intermediaries are looked upon purely as interpreters, nothing else. The intermediary is powerless as they are not able to advise prosecutors or the defence that a youth will not understand what is being asked – could they again make it simpler – as well as being helpless to argue that questions should not be asked in a particular sequence or not phrased in a certain manner, due to them being seen as interpreters and their job is to ask the youth the question as directed (Conradie & Tanfa, 2005; Jonker & Swanzen, 2007).

The South African judicial system gives the accused perpetrator the right to be confronted face-to-face by the alleged child victim. Due to this, many courts will utilise the services of intermediaries and where possible close circuit televisions. The objective of this is to improve inappropriate and insensitive treatment of the victims (Conradie & Tanfa, 2005). The identity of a child is prohibited from being published, hence all cases involving a child

are held in camera. In certain courts the direct and scary confrontation by the alleged perpetrator of the child victim is minimized due to the usage of one-way mirrors, close circuit television system and intermediaries. Unfortunately, many courts do not have these facilities and a child has to come face-to-face with his/her perpetrator which can cause additional trauma for the child (Conradie, 2003)[and](Mellor & Dent, 1994).

Consequently, the confrontation style is not in the best interest of the child, and it should be changed to an inquisitorial system. In this system, only a well-trained presiding officer asks the child questions, and the child does not even need to be in court. A voice stress detector can be used to interview a child and the perpetrator prior to the court hearing, and this can assist in replacing the cross-examination questions. Without this system in place, we work with what we have, and it has been found that defence attorneys and magistrates do not fully understand the cognitive development of the child victim or witness. This limited knowledge leads to insensitive treatment of the child and secondary victimisation occurs and, most importantly, is not in the best interest of the child (Conradie, 2003).

Child victims are often left feeling marginalised due to the proper prosecutorial services not being rendered to them. Attributable to the "National Policy Guideline (*National Policy Guidelines for Victims of Sexual Offences - National Guidelines for Prosecutors in Sexual Offence Cases*, 2007) not being followed, secondary victimisation is occurring, and it is also exacerbated due to the high turnover of prosecutors and lack of experience by others". The Guideline (*National Policy Guidelines for Victims of Sexual Offences - National Guidelines for Prosecutors in Sexual Offence Cases*, 2007) "state that there should be specialised prosecutors assigned to CSA cases and the prosecutor assigned to the case needs to be involved from when the docket is handed to them until a final decision is reached by the court". If there "is no private waiting area for the child victim and their family at court; therefore, they are confronted by the perpetrator and their family in the corridor of the court. The prosecutor needs to ensure that no unnecessary delays will be caused during the trial due to incomplete investigations being done, which is not done and therefore continual postponements frustrate the child, as well as the child not being fully prepared for the harrowing experience they will be subjected to when they get into court. Inordinate delays in finalizing the case hampers the child's healing and adds to his/her traumatisation". Consequently, "the public has no confidence in the system and therefore many individuals do not report their abuse or sexual assault (Conradie, 2003).

If “specialised techniques are developed, this will assist the prosecutor when presenting the case but will more importantly protect the child from additional traumatisation and humiliation during the investigation process” (Richter et al., 2004, p. 219). Attributable to a child’s identity being prohibited from being published; the proceedings are also held in-camera – meaning that “the public is excluded from the trial”. The court is obliged to conduct proceedings in-camera when an accused is under the age of 18 years. It is at the discretion of the court to continue proceedings in public even if a child witness is compelled to testify. This has been questioned but it has been stated by the constitutional court that, although the trial is held in-camera and it violates the accused’s right to a public trial, such violation is justified in terms of the limitation clause. This guarantees that a child will be protected during the criminal justice process encouraging more children to come forward and disclose abuse (Conradie & Tanfa, 2005; Prinsloo, 2008).

The Law Commission recommended that “the cautionary rule be abolished specifically when it comes to children involved in sexual abuse cases”(Commission, 2002; Richter et al., 2004).

“When coming to cross-examination the witness or victim, defence attorneys tend to use offensive and aggressive techniques, despite the ethical and evidential rules in existence. One needs to bear in mind that there is no regulated legislature for cross-examination. In many instances, prosecutors and presiding officers are unaware of the boundaries relating to cross-examination rules and therefore, are unable to protect the witness or victim. In Jonker and Swanzen (Jonker & Swanzen, 2007) it states that “literature shows giving evidence is emotionally traumatic and at times developmentally and cognitively impossible for a child”. Zajac stated that “child complainants described cross examination as very distressing and stated that the behaviour of the defence attorney was the most frightening aspect of the trial” (Righarts et al., 2013; Zajac et al., 2012). Due to this, the questioning of a child witness is very specialised. Prosecutors and defence attorneys are not trained in the correct methods to work with children.

When one looks at the reasons that cross examination causes problems for children one needs to acknowledge that the defence attorney is allowed to ask suggestive questions and court records bear witness to this fact (Righarts et al., 2013). To ensure a child is at ease and working with a person one needs to start all questions by asking neutral or positive aspects about him-/herself, his/her family, and experiences. For prosecutors, especially, rapport building is a very useful tool. One needs to remember that leading

questions are allowed in cross-examination, but the defence wants to discredit the child and their statements. As stated in Ahern, “prosecutors do not necessarily utilize more helpful questioning techniques than defence attorneys” and in a systematic review undertaken by Evans et al, as stated in Ahern’s, “they assessed the syntactic complexity of questions and found no difference between prosecutors and defendants attorneys” (Ahern et al., 2015).

Prior research by Sternberg as stated in Aherns (Ahern et al., 2015) found “that without special training, interviewers fail to ask open-ended questions or ask the child to narrate an event during rapport building”. Attributable to lack of instruction, poor quality rapport-building, and closed-ended questions most child witnesses underperform.

It is not compulsory, at present, but all presiding officers should undergo sensitisation training to be able to deal more aptly with child victims and witnesses of sexual abuse. With special focus on suggestibility competence of the witness, memory recall, propensity to be truthful or to lie, these areas should be known but are not (Richter et al., 2004, p. 221).

Schiller and Spies (Schiller & Spies, 2006): in their research made it clear that the legal profession, specifically the state prosecutors, are overloaded with work and that the needs of a child, who has been sexually abused are seriously neglected; and this leads to victimisation. Schiller and Spies spoke to several magistrates, and they all stated that prosecutors are ill-equipped with the necessary skills and knowledge with regards to dealing with these children.

2.6 Conclusion

If one looks at the above information one can immediately see that nothing in our judicial system is geared to ensure that the BIOC is a priority when dealing with the reporting of the sexual abuse or during the entire court proceedings.

We have so many legal documentation or frameworks in place from our own constitution where Section 28 clearly protects the interest of a child. We have the Children’s Act 38 of 2005 as amended setting out the general aspects to be followed with regards to the BIOC and then Section 9 states that the child’s best interest is of paramount importance, a statement that has caused much deliberation within the legal world. Boezaart (Boezaart, 2013, pp. 280–281) stated that this right – the right of the BIOC – “does not automatically override other rights and as a right in in a non-hierarchical system it is capable of being

limited”. There is no cut and dry definition around the BIOC, and this can also be seen when looking at the international documentation South Africa has entered specifically the CRC and the ACC. In these two policy documents, when referring to the BIOC, there is one difference and that is in one word. The CCR uses the word “a” showing that the child’s best interest is not of primary importance, whereas the ACC states “the best interest of the child is of primary consideration and this difference is carried through in every article written about the BIOC”. It is the researcher’s view that until a clear definition is reached, locally and internationally, there will always be questions asked and debates held about the terminology “the best interest of the child”.

Then moving onto the Task Group that was formed in South Africa to look at the sexual abuse of children in the year 2002 and the guidelines that were put in place for each department: it is sad to say that very little, if any, of those guidelines are in operation today. Most of the failing of what the task force set out to accomplish is not operational, due to shortage of staff, shortage of training and no one is held accountable for what they do, as well as the guidelines are not enforced.

The guidelines drafted, if followed, would assist the courts and the court personnel, the police and all medical individuals as NGO’s involved on what to do and how to work with a child who reports that they have been sexually abused. The judicial system is not geared to work with children and in many cases, children are treated like adults, especially during cross-examinations, as well as when initial statements are taken. No one recognises their developmental stage and how best to communicate with them to ensure that the correct information is elicited from them.

The researcher has conducted a rapid review with regards to the best interest of the child in the judicial system and chapter 3 consists of an article that draws on a body of scientific literature examining the effect the judicial system has on a child who has been sexually abused and journeys through the judicial process.

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ADDENDUM FOR CHAPTER 3

As per the journal instructions the review articles may not be more than 6000 words. Only for the purpose of examination is the articles currently more than 13 000 words.

The researcher will edit the article to 6000 words, as prescribed by the journal, prior to it being submitted to the journal.

The researcher will also ensure that the referencing is done according to the journal requirement, namely Vancouver style not APA style utilised by the University.

CHAPTER 3

A rapid review of the best interest of the child principle in the criminal judicial context

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Abstract

In this study the rapid review methodology was utilised to explore whether the best interest of the child is of paramount importance, as stated in various South African Acts. Data from 26 articles, with a fair to good methodological quality was extracted and a summary of the studies then drafted. International and local judicial processes were looked at to ascertain whether in practice the best interest of the child is always protected throughout the entire ordeal of testifying. An important finding was that all areas of the judicial system lack specialised training on how to deal with a child witness or victim, in most cases they are questioned as an adult. The procedures that are set out for dealing with CSA are not followed and further studies should be done to ascertain where the breakdown in implementing the guidelines occurs.

Keywords: child sexual abuse, child witness, child victim, judicial system, best interest of the child, intermediaries, secondary trauma

3.1 INTRODUCTION

In accordance with Bonthuys, stated in Erasmus (2010), there are three arguments about the best interest in South Africa. The first argument is that the courts ignore the best interest principle entirely. The second argument is that our common law, as it stands, reflects the principle. The final argument is that the principle must be revised to change the rule of common law.

The best interest principle is at times also referred to as the ‘welfare principle’. This leads to the question of whether the promotion of the ‘welfare’ of children is equal to the protection of their ‘rights’. We need to draw a distinction between protecting **children** and protecting their **rights**. The welfare principle can be averse to children’s rights, for it supports not the right of children to make their own decisions, but the right of adults (such as judges, social workers, or parents) to make decisions on their behalf.

The opinion that “the child's best interests are ‘more important than anything else’ meaning that they are paramount has”, since Fletcher v Fletcher 1948 1 SA 130 (A) 134, been considered part of our common law. This approach has been applied mostly in matters which relate specifically to family law, namely the custody of children in divorce proceedings, adoption, and foster care.

There is no clear definition with regards to the best interest of the child, but various authors and legal rules have set out the criteria for the best interest of the child. In the divorce matter McCall v. McCall 1994 (3) SA 201 (C) Judge King “…set out what should be considered when deterring the best interest of a child, but this in essence relates purely to custody issues around a child and not the best interest of a child during a criminal trial where the child was the victim or is a witness to a sexual offence”.

There are various areas of concern that can lead to the best interest of the child not being considered, to name a few:

- Court cases are postponed for many times, sometimes it takes three to four years to finish a case. This is problematic if children are involved because they can only start with therapy when the court case is dealt with.
- Several factors contribute to discrepancies in the initial police statement compared to the evidence provided by the child in court.
- In several cases the child’s credibility is questioned by the defence.
- When working with child witnesses in court the prosecutors need special training to question the child. The developmental phase of the child will play an important role in how the question should be asked. Unfortunately, not all prosecutors have training in how to properly question a child who has experienced sexual abuse. (Conradie & Tanfa, 2005); (Chetty, 2006) (Meintjes & Collings, 2009) (Prinsloo, 2008) (Conradie, 2003).

Case law is defined where cases are reported and decisions of appeal courts and other courts make new interpretations of the law and, can therefore, be cited as precedents. These interpretations are distinguished from “statutory law” which is the statutes and codes (laws) enacted by legislative bodies, ‘regulatory law’ which is regulations required by agencies based on statutes, and in some states, the Common Law. Case law is studied to understand the application of law to facts and to learn the courts’ subsequent interpretations of statutes.

The rationale for the study is to critically review the literature on studies addressing the review question:

Is the best interest of the child taken into consideration before, during and after the criminal procedure where the child is a victim or a witness?

3.2 METHODOLOGY

A rapid review of literature was carried out and guided by the search criteria to retrieve all relevant articles and case law, both locally and internationally, to ascertain whether the procedures that are in place are being adhered to , according to the literature are the factors that should contribute to the best interest of the child in the criminal system.

3.2.1 The search criteria

The search strategy was designed to access both published and unpublished materials from the year 1994 to date and the countries with studies that met the criteria were included. There was no exclusion based on where the study was done if the materials related to any aspect where a child was a victim or witness to sexual abuse.

The literature review was conducted using the electronic data bases A-Z Journal List, Jstor, LexisNexis, eJuta, Google Scholar, EbscoHost. All these electronic resources were available to the author on the NWU Ferdinand Postma Library. To increase the efficiency of the study, the author's focused on terms such as 'best interest of the child, 'children involved in South African criminal judicial system', 'protection of child witnesses' along with text searches of 'best interest', 'sexual abuse', 'child witness', 'paramount importance', 'children's rights', 'cross-examination of a child'; 'child witness', 'intermediaries', and 'reliable and unreliable child witness'. The types of studies considered for inclusion in this review were:

3.2.2 Inclusion criteria

- A Rapid review has a narrower regional or topic focus and a pragmatic decision to achieve the review in the tight timeframe was to include articles published in English and Afrikaans.
- Case law that is being reported are the decisions of appeal courts and other courts which make new interpretations of the law and, therefore, can be cited as precedents relating to child victims and witnesses in the South African Criminal Judicial Systems;
- Applicable Case Law from 1994 until present;
- Journal articles from 1994 until present;
- Literature relating to the best interest of the child – prior to 1994 to ascertain the change in the law with regards to child victim and witnesses in the Criminal Judicial System;

- Conference proceedings where a full text or extractable summary could be located;
- All matters that need to relate to a child victim or child witness in a sexual abuse case that is prosecuted with the context of the criminal judicial system.

The reason for the inclusion of articles from 1994 was because the Constitution of South Africa was drafted after 1994 and the best interest of the child is stated in Section 28(2) of the said constitution.

3.2.3 Excluding criteria

- All cases relating to children that were not related to a sexual abuse offence i.e., divorce matters.
- Articles that was a duplication of research results.
- Thesis, dissertations, and mini dissertations.
- Articles or case law that refer to child offenders and their best interest.

Non-English language papers will be acknowledged, but excluded from the study, because the reviewers can only comprehend English and Afrikaans as a language.

The authors worked through the reference lists of all eligible studies that were included in the review to obtain relevant articles that might have been missed through the electronic searches. Cochrane reviews on best interest of the child, children in the criminal judicial system, children as witnesses, children as victims of violent crimes, were also screened for eligible primary studies.

For this review, the researcher used the relevant PICOS elements:

Population	"The included population should be relevant to the population from which the review findings will be applied. Inclusion criteria should be defined in terms of the study of interest" (University of York, 2009, p. 8).	Best interest of the child in the judicial system child victim of sexual abuse child witness of sexual abuse
Intervention/comparators	"What is being done for the participants, potential participants,	Not applicable

	or stakeholders? The nature of the interventions explored in the review should be carefully defined. The same applies for the comparator".	
Outcomes	"A review should explore a clearly defined set of relevant outcomes".	To understand whether the best interest of the child is adhered to in a criminal case, specifically sexual abuse cases where the child is a victim or a witness. To ascertain if clear criteria exist with regards to implementing the policy of the best interest of the child in all criminal cases, where the child is a victim or witness. Articles included related to the phenomenon: "best interest of the child"
Study design	"Types of studies included in the review may include a range of study designs to address the question of the review" (University of York, 2009, p. 9)'	As this review incorporates a rapid review of articles where a child has been a victim or a witness in a sexual abuse case, a qualitative study was included.

(Hemingway, 2009; Uman, 2011)

3.3 RESULTS

3.3.1 Summary of electronic searches

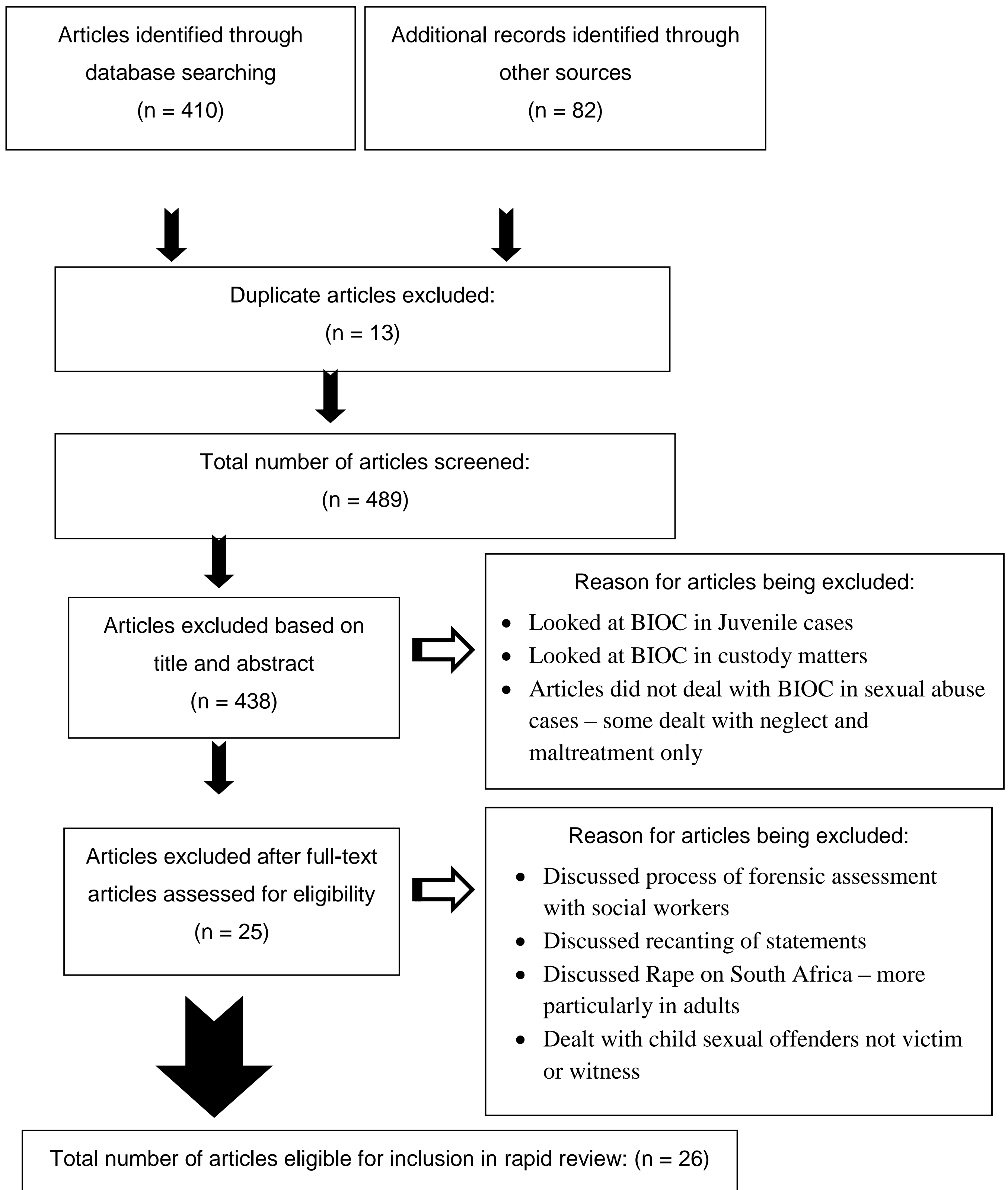
When reporting on the review, the researcher will use the PRIMSA (Preferred Reporting Items for Systematic Reviews and Meta-Analysis) flow diagram that will be adapted to illustrate the data-collection process.

An initial 410 articles were initially identified through the electronic search and an addition 82 through other sources. Thirteen articles were excluded due to duplication leaving a total of 489 articles to be screened, based on their titles, and abstracts.

A total of 438 articles were excluded based on the titles and the abstracts, this was due to the articles focusing on BIOC in juvenile cases, custody matters, or the articles did not deal with BIOC in sexual abuse cases.

A further 25 articles were excluded after the full-texted articles were assessed due to various reason that are listed in the below flow diagram. The final sample to be utilised in the rapid review is 26 articles.

Figure 3.1. PRIMSA flow diagram (Crisp 2015, Moher et al., 2009)



The 26 articles referred to in Figure 1 met the inclusion criteria and form part of the rapid review. All 26 articles were retrieved from electronic searches and a detailed analysis of the full text was done with regards to the inclusion/exclusion criteria

The reference list of these articles was hand searched and relevant articles that were found were also included in the rapid review.

3.3.2 Demographic Characteristics

Table 1 reveals information about the demographic characteristics of the included articles that were extracted by means of a data extraction form.

Table 1 - Demographic Characteristics

Country	Total Number of Papers Data Extracted From	Authors of Papers Data Extracted From
South Africa	11	(Ali, 2017) (Reyneke, Kruger – 2006) (Prinsloo – 2008) (Jonker, Swanzen – 2007) (MatthiaS, Zaal – 2011) (Meintjes, Collings – 2009) (Conradie – 2003) (Meintjes – 2000) (Prinsloo – 2010) (Kruger, Pretorius, Diale – 2016) (Shiller, Spies – 2006)
Sweden	1	(Ernberg, Tidefors, Landström - 2016)
USA	9	(Caprioli, Crenshaw - 2017) (Robinson -2015) (Evans, Lyon – 2012) (Stolzenberg, Lyon – 2014) (Stolzenberg, Pezdek – 2013) (Awan – 2015) (Regan, Baker – 1998) (Brewer, Rowe, Brewer – 1997) (Klemfuss, Quas, Lyon – 2014)
New Zealand	2	(Righarts, Zajac, Hayne - 2015) (Zajac, O'Neill, Hayne – 2012)

United Kingdom	2	(Mellor, Dent – 1994) (Ahern, Stolzenberg, Lyon – 2015)
Switzerland	1	(Zermatten -2010)

Annexure 3.1 shows the information about each publication included in the rapid review, with the following information:

- ❖ "General Information:
  - Researcher performing data extraction,
  - Date of data extraction,
  - Identification features of the study,
  - Record number,
  - Author,
  - Article title,
  - Type of publication,
  - Country of origin
- ❖ Study Characteristics:
  - Aim/Objective of the study,
  - Study design,
  - Recruitment procedures,
  - Participants,
  - Sample size
- ❖ Outcome Date/Results:
  - Unit of analysis/outcome,
  - Statistical techniques used,
  - Types of analysis used in study,
  - Additional outcomes,
  - Note fields"

3.4 DISCUSSION OF RESULTS

3.4.1 THEME ONE – INTERMEDIARIES

The fact that the Best Interest of the Child ('BIOC') is always of paramount importance in South African Law, has the effect that other measures must also be in place. One of these measures is

intermediaries that assist that the child is not direct confronted with the perpetrator in the court. The fact that South Africa is serious about the best interest of the child can be seen by the inclusion of intermediaries in the South African statutory system. The Criminal Law Amendment Act of 135 of 1991(Criminal Law Amendment Act 135 of 1991, 1991) inserted, Section 170A with regards to intermediaries, which provided for the appointment of intermediaries for children, involved in sexual abuse cases, due to their youthfulness and vulnerability.

South Africa is noted as one of the few countries that has placed reliance on intermediaries. An intermediary is a specifically skilled individual who assists a child to communicate during court proceedings, usually in a separate room. The separate room is electronically linked to the court room by audio speakers and either a closed-circuit TV or a one-way mirror. The intermediary translates the question posed into a language the child will understand, without changing the general purport of the question. Only the intermediary hears the questions but those present in the courtroom hear the answers and anything else that occurs in the witness room. In essence the intermediary can be seen as the shield to protect the child from aggression and intimidation that may be directed at the child if they were in open court. The intermediary also has the duty to inform the presiding officer when the child is tiring, losing concentration or is too emotional to continue (Jonker & Swanzen, 2007; Matthias & Zaal, 2011).

Even though South Africa is noted as having intermediaries, since 1993, the judicial system from the outset found itself unable to solve two major problems: availability of adequately trained intermediaries and the availability of electronic equipment in the room where the child and the intermediary is accommodated. Not all magistrate courts in South Africa have these facilities available. For evidence to be led through an intermediary the court needs to be satisfied that certain specific criteria have been met. The presiding officer must be convinced that a child under the biological or mental age of 18 years will experience stress when they testify, before they will give permission that a competent person as an intermediary can be appointed. This person will assist the child to give age-appropriate evidence (Matthias & Zaal, 2011).

In Matthias and Zaal (2011: p257) it states "in the case of S v Stefaans 1999 (1) SACR 182 (C) that it is almost inevitable that a child sexually assaulted and in the throes of a court case could be exposed to further trauma. This additional trauma could be as or more server than the trauma caused by the crime itself". Since some children will inevitably suffer some form of stress in court, the term "undue stress" is difficult to grasp and understand. Undue stress should be looked at as a form of stress which is greater than the stress originally experienced by the child witness or any witness of a sexual offence.

The understanding of the word ‘undue’ has been seen in various ways by magistrates as there is no cut and dry description or definition about this in the Criminal Procedures Act. Some magistrates see it as an expert witness being called to state their expert view on this point. Although the intermediary needs special training they should not be seen as expert witnesses. Their only task is to relay the words/questions the defence attorney and prosecutor ask to the child, in such an age-appropriate way that the child will, according to their developmental phase, understand the question and the intermediary will then report to the court the words of the child. (Matthias & Zaal, 2011).

After the case of S v M & P where judge Bertelsmann sought to declare Section 170A unconstitutional specifically around ‘undue stress’ Section 170 A (1) Criminal Law Amendment Act and the word ‘may’ in Section 170 A (7) Criminal Law Amendment Act. It was found that Bertelsmann J. misread the grounds with regards to when a child must have already experienced undue stress or suffered before an intermediary can be appointed. This is inconsistent with Section 28(2) of the Constitution, the 1989 CRC and indeed Section 170A itself. In fact, Section 170A (1) Criminal Law Amendment Act is proactive as it is stated/written to prevent the child from being exposed to undue mental stress or suffering because of testifying in court. Regarding inconsistency of the application for intermediaries the constitutional court advised that the magistrate need to make sure that an assessment was done by the presiding officer for an intermediary.

The Constitutional Court is of the opinion that the best interest of the child must guide the courts whether to appoint an intermediary. In each case the specific circumstances and unique facts must be considered when a decision is made. In conclusion the constitutional court remarked on discretion:

> ‘… solution lies in making judicial officers and prosecutors aware of their constitutional obligation to ensure that the BIOS are of paramount importance in criminal trials involving child complainants and are protected as required by Section 28(2) of the Constitution and Section 170A (1) of the Criminal Procedures Act. In this context, judicial education in this area may be of vital importance … so to training of prosecutors.’ (para131)

Explanation for wording in Section 170A (7) Ngcobo J. advised “it serves merely to remind presiding officers of the greater vulnerability of younger children”. It does not, however, mean that an intermediary should not be appointed, or CCTV should not be used for children who are 14 years and older. (Para 161)” (Matthias & Zaal, 2011: p264).

The aim of the intermediary was to assist child witnesses by the removing of hostility and aggression from questions through changing the question to be more understandable to the child, when necessary. Unfortunately, intermediaries are many times viewed just as interpreters and advised to ask the question as it was phrased. In some cases, they are powerless to comment on a question and whether the child understands it or not. They are also powerless to intervene and argue that questions should not be asked in a particular sequence or not phrased in a certain manner, due to them being seen merely as interpreters at times (Jonker & Swanzen, 2007)·Coughlan and Jarman, as well as Muller, as set out in Jonker and Swanzen (2007: 106) state that "the context within which the child offers their testimony may cause more harm than worth". Those who hoped to act as intermediaries to assist in making the process easier for a child, are afforded with the age-inappropriate expectations of the child and a stern focus on the rights of the accused.

3.4.2 THEME TWO – COMPETENCY AND CREDIBILITY

In many jurisdictions, worldwide, witnesses are expected to affirm they are telling the truth, in some way or another and it is typically by taking an oath. For a child witness some are too young to fully grasp what is being asked, so their understanding of what the truth is, is applied and is commonly known as that truth-lie competency. In some countries the truth-lie competency requirement has largely disappeared (Evans & Lyon, 2012)· Although competency inquiries have been eliminated in countries like Australia, New Zealand, England, Scotland, and Canada the competency questions are still asked during forensic assessment interviews with the child (Evans & Lyon, 2012).·

In Section 162 of the Criminal Procedure Act 57 of 1971 it clearly states that all witnesses need to give evidence under oath or confirm they will tell the truth and if due to religious beliefs they won't take the oath(Kruger, Pretorius; Diale, 2016).· In South Africa the competency of a child witness was investigated by the South African Law Commission during 2001. It was then recommended that no witness should be disqualified from testifying because they are not able to distinguish between the truth and a lie. The important aspect will be that if they understand the question that is being asked and they can answer it in such a way that the court is satisfied and understand them it will be acceptable. Unfortunately, this decision was made on the cognitive ability of the child and no clarity was given with regards to who will perform the evaluation, as well as how it will be done (Jonker & Swanzen, 2007).··

In research that has been done by Kruger et al. (2016) they found that there was still no standardised competency assessment procedure in South Africa available, that is also evidence based...Professionals, like forensic social workers relied on their own interpretations of testimonial competency assessments.

Youth who find the competency questions, asked in a courtroom, difficult will more than likely be rejected and considered as a resistant witness. Due to this they will be seen as being susceptible to cross examination and this leads to the prosecutors refusing to prosecute the case, especially if the case involved a very young victim.

The stressful environment of the courtroom as well as the cognitive development of the child and their motivational difficulties also pay a huge factor in whether the case is prosecuted or noted. These factors are not only looked at in victims that are very young but also in older youth. Research shows that the performance of a child witness suffers when they are in the courtroom as opposed to being in the prosecutor's office or a non-threatening environment.

One common problem is that defence attorneys are more prone to ask age-inappropriate questions during the competency inquiry (Evans & Lyon, 2012). In New Zealand it is found that defence attorneys ask complex and grammatically confusing questions to children and that is not in the best interest of the child.

Evans (2012) advised that the older a child is the more likely to answer the competency questions, but one still needs to consider the content of the questions. Youth make fewer errors with identification questions as opposed to definition questions or questions around differences. Morality questions, especially when evaluation/consequence questions are asked are difficult for youth but where the concept being looked at was a positive or negative fewer errors were noted.

It was interesting to note that most children will respond in the third person or using an impersonal pronoun. It was also noted that children would more accurately reply to a question about a truth rather than about a lie (Evans & Lyon, 2012).

Children, 6 (six) years and older, generally are more accurate in answering competency questions because they have been prepped prior to the court appearance around what will occur and how the questioning could go. One needs to remember that questioning of child witnesses starts even before they enter the courtroom. It starts at the investigation into the allegations. Competency questions are asked from this point. So, literally from the start, the child is exposed to competency questions in different formats.

It is also at this stage that the prosecutor may decide to withdraw the case due to how the child answers and this area needs to be closely looked at. As with defence attorneys asking difficult questions, to confuse the child, investigators do not change their line of questioning to be child and age appropriate, causing children to answer incorrectly or appear to be unsure. Training, for the initial individuals working with children, around using sensitive methods to assess competency, is required.

In many countries they do not use a competency test any more. They are satisfied if the child promises to tell the truth (Evans & Lyon, 2012). In South Africa the forensic social worker will evaluate the child's competency before the forensic assessment. When the case goes to court the presiding officer must also evaluate a witness's testimony for credibility and reliability (Meintjes & Collings, 2009),if they are of the opinion that the child will not be able to answer the questions in court they will not go on and put the child under unnecessary stress and secondary trauma. They will then explain to the parents that in the case of sexual abuse, the case never expires. Whenever the child is ready the case will be re-open.

3.4.3 THEME THREE – CROSS EXAMINATION

Cross Examination has always been seen to serve two main functions:

- "Elicit favourable evidence by having witnesses agree with facts supporting the cross-examination lawyers' case; and
- Weaken opposing sides case by discrediting unfavourable evidence or the individual that is providing it" (Zajac et al., 2012).

Many experts have argued that cross examination is always important, even in the case where the child is the victim. Cross examination is the primary way to ensure the truth emerges. Jonker and Swanzen (2007) are of the opinion that giving evidence is always traumatic and can be emotional at times. Children's experience of cross examination might sometimes be more negative than those of older people. One of the reasons therefore is because of their developmental stage they in and cognitively they are unable to follow court proceedings. Zajac et al., 2012 and Righarts, et al. 2013 mention that children often give feedback that when they were cross examined during the trail, was very traumatic for them and that the behaviour of the defence attorney frightens them in such a way that they could not remember anything. Due to this, the questioning of a child witness is a very specialised field. In South Africa prosecutors and attorneys have not been trained to work with children in the court or are knowledgeable about children's

different developmental stages. They need to be trained in child development and how to ask questions according to children's developmental phase and cognitive ability.

When one looks at the reasons that cross examination causes problems for children one needs to acknowledge that the defence attorney is allowed to ask suggestive questions and court records bear witness to this fact. (Righarts et al., 2013) Children need to cope with the usage of abstract language, and they must face processes and standards that are strange and meaningless to them. Cross examination is not only traumatic but can also result in inaccurate evidence. It is well known that the defence is obliged to attack the child's credibility to highlight, or attempt to, inconsistencies and discredit the evidence of the child. All this happens in a hostile environment unfamiliar to a child who now must reveal, through questions, intimate and emotional events (Jonker & Swanzen, 2007; Righarts et al., 2013).

Another area of concern is that in many cases it occurs after months, sometimes even years, after the allegations have been made, the accuracy of recall by the child declines over time. Due to this fact many commonwealth countries now videotape or pre-record the child's direct evidence, as soon as the allegation is made, and it is provided in legislations for cross examination to be pre-recorded as well, but unfortunately in practice cross examination occurs in the court room.

3.4.3.1 The -WH question

In cross-examination one area of concern is when a child is unsure or unaware that they can answer or question with "I don't know" or "I don't remember". An avoidant child can use these statements, but one needs to understand that a child assumes an adult expects them to know the answer and therefore will guess or invent an answer if they are not given the permission to say "I don't know" (Arnold & Fields, 2009)(Ahern et al., 2015).

Children face the wh-question numerous times in a day, for example: "Who left the door open?" or "What have I told you to do after eating?" or "Where are the keys, you were the last with them?" and if a child's answer is "I don't know!" this response and the youth are met with hostility and disbelief. Young children, to keep themselves safe, can give a false answer.

To ensure a child is at ease and working with a person one needs to start all questions by asking neutral or positive aspects about themselves, their family, and their experiences. Rapport building is important to build a trustworthy relationship with the child and to assist the child to tell the truth and to inform the court about things what happen to them that is not in their reference. Sexual activities and exposure to a penis is certainly not part of their daily life and in court they must

answer questions about these things. Prior research by Sternberg as stated in Aherns (Ahern et al., 2015: p487) found that "without special training, interviewers fail to ask open-ended questions or ask the child to narrate an event during rapport building". Due to lack of instruction, poor quality rapport-building, and closed ended questions most child witnesses underperform. Prosecutors and defence attorneys are used to ask what or how questions and in their reference of work they are unfamiliar with 'tell me more' questions.

From the above prosecutors and defence attorneys' knowledge and skills in in how to cross question children are not contributing to the best interest of the child. Children are vulnerable and should be cross questioned in an age-appropriate way. Secondary trauma must be minimised.

3.4.4 THEME FOUR – THE CAUTIONARY APPROACH IN SOUTH AFRICAN COURTS

The cautionary rule that has been applied to child witnesses "can be seen as having been steadfastly applied in South Africa even though it is not a legal or codified requirement. Its legal basis, the underlying rationale, was never questioned" (Meintjes, n.d.).. In the case of the Director of Public Prosecution v. S, the Regional Court found that three cautionary rules had to be applied to the evidence given by child victims: they are the only witness in the case, there are an allegation of sexual offence and they worked with a child who is the witness. This means that their evidence had to be of an extremely high quality prior to any conviction being possible. It was stated that, because these three cautionary rules came into play, it was almost impossible to secure a conviction (Meintjes, n.d.). This case was taken to the High Court and the Judge, Kirk-Cohen's judgement was that the fact of each case is more important than the cautionary rule. It should also not be blanketly applied due to a victim and/or witness being a child. In more recent years several authors pleaded for reconsideration of the cautionary rule if a child is involved as the witness and has to testify Combrink, as stated in Meintjes (Meintjes, n.d.p.42) "points out that even though there is strong empirical research indicating that there is very little reason to assume per se that children are more unreliable than adults, he goes on to state that it is no longer sufficient to reply that the cautionary rule 'has developed over many decades and is founded on the practical experience of legal practice' he called for the rule to be immediately re-assessed".

Zieff, in Meintjes(Meintjes, n.d.) also advised that the cautionary rule no longer has an influence of the value of evidence that is obtained from children. There is also the opinion that one cannot say children are less competent or accurate in giving evidence than adults. Empirical evidence has shown that children are not any less credible in areas of witness assessment, i.e.,

"suggestibility and fantasy". Due to these finding this rule needs to be re-evaluated and the rationale for corroborating evidence called into question to back up a child's testimony. One must rather apply the common-sense approach where distinctive treatment of the child witness is warranted. Just like adults, children can also tell lies but no evidence exists that they are less reliable than adult witnesses.

In recent times, changes have occurred with regards to the cautionary rule and legislature abolished the rule in respect of complainants of sexual offences as it was seen as being unfairly discriminatory. Having said that the other two areas namely a child witness and a single witness still must withstand the cautionary rule.

How can it be in the best interest of a child to be subjected to the cautionary rule just because of their age or since there were no witnesses to the abuse. To ensure a conviction the statement given by the child must be of a very high quality. In most cases to assist the case expert witnesses, by way of Forensic Social Workers, are called to collaborate the child's statement. Immediately applying a child's age and cognitive development should not be a reason to instantly be cautious. The same as specifically looking for inconsistencies and areas where the child could have been influenced, lacked detail, or changes their initial statement does warrant that a child be lying.

After the initial questioning, a child could remember more about the event and provide more graphic and detailed information even through the details being given were not in the initial statement given to police. One always needs to be bear in mind that for a child to disclose it is a traumatic event, especially if the alleged perpetrator is a family member. The researcher feels that each case should be looked at individually and on its own merits as setting a specific set of rules or precedent in law is not in the best interest of any child, specifically the cautionary rule.

3.4.5 THEME FIVE – SECONDARY TRAUMA

After disclosing the abuse initially, it is only the beginning of an arduous process of moving forward to break the silence of abuse and without strong support from one's family and friends it is not an easy process to go through as an adult and it's even worse as a child. As the process of the criminal investigation unfolds, the child must deal with intimidating (and at times confusing) interactions with the judicial system and all the individuals involved therein. "If a child is unable to fully disclose early in the investigation or is too anxious, the matter is not taken to court and therefore silencing the child is reinforced, even by people they trust or are meant to trust" (Caprioli & Crenshaw, 2017).The researcher is of the opinion that the investigating officer at the SAPS who initially takes the disclosure statement needs to form a relationship with the child so that the

child feels comfortable and safe to open-up. Almost no child, will just blurt out in its entirety, what has occurred to them because we know that children are advised to keep 'the secret' and tell no one. The anxiety and over wellness that the case is postponed several times can contribute that the child feels unheard. In some cases, the child is blamed by family members that they disclose in the first instance. All of this can cause secondary trauma. (Caprioli & Crenshaw, 2017).

If a matter goes to court the proceedings itself can cause secondary trauma to the child, especially because they are now within a new and strange environment, that can be hostile. They are removed from their attachment figure and must go with a stranger – the intermediary if the use of an intermediary has been applied for. Secondary victimization can manifest itself in many ways, namely: depression, psychosomatic symptoms, feelings of guilt, phobias, nightmares, and behavioural disorders(Caprioli & Crenshaw, 2017; Conradie, 2003).

The South African Law Commission (2002: 57-58) as stated in Conradie (Conradie, 2003) states "the need for prosecutors, defence attorneys and magistrates to fully understand the cognitive development of the child as either a witness or complainant. The lack of proper services in the prosecutorial services that are supported to look after the best interest of the child, leave them feeling marginalised" (Conradie, 2003).

If the National Policy Guidelines were implemented properly, secondary victimisation of a child would be averted. Due to there being a high turnover within the prosecuting profession, this impacts negatively on the standard of prosecution, lack of experience in prosecuting child abuse cases and this in turn increases the child's trauma during the case.

In many courts in South Africa the child and parent/caregiver/guardian do not have private waiting areas. Many times, they must sit with the perpetrator and/or with the family as well. Postponements discourage a child and their parents/caregiver from continuing. Inordinate delays in finalising the case hamper the child's healing process and just adds to his/her traumatisation.

Prinsloo (2008: p59) reflects that "the case of S v Mokoena and S v Phaswane 2008 (2) SACR 230 the judge advised that cognisance needs to be taken of the fact that children by their very nature re ill-equipped to deal with a confrontational and adversarial setting, especially where sexual crimes and assaults are involved". This secondary victimisation may be just as traumatic and damaging to a child's emotional and psychological well-being as was the original victimisation. Prinsloo advised "that the court therefore concluded, at the very least, the criminal procedures and court could do, was ensure that the criminal justice system was administered in such a fashion to protect the child from any further trauma and ensure they are treated with proper

respect and dignity and that the status is unique as they are vulnerable young human beings" (Prinsloo, 2008).

One area where there is no definitive way forward is with regards to pre-trial therapy. From the researcher's point of view, it is not in the best interest of the child to not have some form of therapy to assist the youth to deal with all they have experienced. There is a general statement amongst social workers, especially in the forensic section, that they have advised not to do therapy prior to the court case, for fear of contamination. Children are resilient but the trauma they had to endure while being sexually abused is not something they can just bounce back from and if they received help to deal with what had happened and with ways to work through it and deal with it, the researcher believed secondary trauma can also be avoided. Is the child properly prepared for court, if not then due to the sheer magnitude of what is happening the child can be traumatised hence why proper preparation for a child is of the utmost importance.

3.4.6 THEME SIX – INTERNATIONAL TRENDS IN APPLYING BEST INTEREST OF THE CHILD TO COURT MATTERS

In Sweden it is estimated that 'only 10 per cent of the sexual abuse cases that are reported are prosecuted' in contract to the United States of America (USA) where 52 per cent are carried forward and in Iceland 26.3 per cent. These are just a couple of figures and below the various international countries way of handling these cases will be discussed.

3.4.6.1 Sweden

Ernberg (2016) advises that if a child is under 15 years of age, they do not testify in court. They will be questioned at a facility like a children's home or at a police station. Specially trained police officers are used to question the children. The interview is videotaped and presented in this format to court, therefore the court does not have the opportunity of cross question the child directly. The quality of the interview is vital as in most cases this is the only evidence to take to court. The Supreme Court of Sweden is of the opinion that the testimony from a child needs to be long, coherent, clear, detailed, consistent, and free from ambiguous statements. The problem with this is that some children, especially pre-schoolers, are not able to give lengthy detailed accounts causing their testimonies to be considered brief, vague, and inaccurate (Ernberg et al., 2016).

3.4.6.2 <u>United States of America (USA)</u>

In the United States of America different guidelines were promulgated. All these contain recommendations for protecting children's best interest through the legal process. However, courtroom procedures vary greatly amongst American jurisdictions since individual judges are given discretion with regards to the use or non-use of alternative witness procedures i.e., close circuit TV, barrier between the child and the alleged perpetrator as well as establishing the child's competency (Robinson, 2015) .

The USA criminal system wrestles with trying to maintain a balance between protecting the interest and welfare of victims/witnesses with the defendant's Sixth Amendment Right. In protecting the child, it means someone physically shields the child from their alleged perpetrator. In protecting the child in this manner, it is possibly infringing on the defendants right to face-to-face confrontation and to cross-examination of the witness, this right outweighs the possible trauma to the child.

There has been much debate about the possible dangers and trauma that a child may endure due to testifying in an open court. The act of testifying in court has been analysed principally for its short-term effect on a child. The research in the USA is mixed in that some studies found that testifying generates adverse outcomes and other demonstrated that there was a lack of negative impact if the child participated in the court proceedings.

Quas as stated in Robinson (2015:169 and 170) was involved in a long-term study of children testifying and after 12 (twelve) years "…the universal factors that could be associated with a child experiencing the outcome as negative was by not testifying which led to the accused received a more lenient sentence, the child experiencing severe prolonged abuse and testifying on multiple occasions. It can be said that a child having to testify multiple times seems to be the factor most consistently associated with negative outcomes. If a child must recount and re-experience their story on numerous occasions it is this reliving that causes the child more harm, than their experience of being in a courtroom".

Some courts in the USA have taken more contextual, courtroom centred measures in acknowledging the fear and anxiety a child may experience due to the unfamiliar setting of the court room. Whitcomb, in Robinson (Robinson, 2015: p170) states "how the courtroom environment should look… providing a small chair for the child, seating the judge on the same level as the child, asking the judge not to wear the traditional robe, asking attorneys to modulate their voices when addressing the child, using developmentally appropriate language when

questioning the child witnesses, and accommodating the child's school or nap schedule and need for frequent breaks".

The main reason for implementing these 'shielding measures' was that it was assumed that what children fear the most with regards to testifying is having to do so in the presence of the abuser – facing the abuser, not the court environment. Unfortunately, some have suggested that the 'shielding measures' blatantly violate the Sixth Amendment.

It was established that the court needed to identify three findings to conclude that the child did not have to testify in court, these being individualised case-specific findings, secondly trauma would befall the child if they testified in open court – purely based on the presence of the defendant, and thirdly the child's emotional distress must be greater than '*de mimimis*'. Even though these special procedures are available in all courtrooms, it is surprising to note that they are not routinely utilised.

Currently it is the case that the court has ruled that 'testimonial' hearsay is no longer permitted unless the defendant's legal team has had the chance to cross-examine the child witness and we all know this normally occurs in the courtroom during trail, hence it is forcing a child to testify in open court (Robinson, 2015).

3.4.6.3 England and Wales

The Youth Justice and Criminal Evidence Act of 1999 ("YJCEA") sets forth criteria for witness competence especially competence roles for a child deemed vulnerable and intimidated. "A child is deemed vulnerable if they are under the age of 18 (eighteen) years, suffer a mental disorder, have significantly impaired social or intellectual functioning or are physically disabled. A child is deemed to be intimidated if they suffer from fear or distress in relation to testifying. In most cases a child will be deemed to be vulnerable".

A child victim or witness is immediately allocated a "witness care officer" who will guide the child through the entire judicial process as well as accompanying the child to court. The care officer does not testify on behalf of the child but can indicate to the judge, during the proceedings, if a question posed is inappropriate or can be disturbing to the child. It is the judge's discretion to as to whether a pre-recorded testimony can be utilised in court, one thing regarding this pre-recording is that the judge needs to be assured the interview was conducted properly.

Other than the pre-recording of the child testimony, a child under the age of 17 (seventeen) years can testify via closed circuit television and in this manner the defence can question the child

directly, but the child does not have to face the alleged perpetrator. If closed circuit television is not available a barrier can be erected in the court room which will also prevent the youth from having to face the alleged perpetrator and this will also put the child at ease.

The legal team can be asked to remove their wigs and gowns so that the child can feel more comfortable. The judge can ask that the court room be cleared and that the matter be heard 'in camera' especially if the child is very young. Very young children are also allowed to be aided by an intermediary (Mellor & Dent, 1994). If one looks at the England/Wales approach to handing child sexual abuse cases the most noticeable difference from the United States of America if the presence of the "witness care officer" (Robinson, 2015).

3.4.6.4 Israel

Israel's legal system is an adversarial one which is governed by common law. One needs to see that the procedures that are in place with regards to a child witness testifying are not adversarial. The Hallmark of the Israeli legal system towards child witnesses is the use of intermediaries. These intermediaries control the child's entire interaction with the court. The Law of Evidence Revision (Protection of Children) was enacted in 1955 and it states that children under the age of 14 (fourteen) years are not to be subjected to cross-examination and that in intermediaries would be utilised to testify in their place. The child is interviewed by a specifically trained intermediary using the structured protocol from National Institute of child Health and Human Development ("NICHD"). Here the competency of the chid is determined by the intermediary only, as no other professional can be present.

"The intermediary sets forth how and when the child will participate in the court proceedings. If a child must testify, which is rarely, screens, or closed-circuit television links can be utilised, and the intermediary will accompany the youth to court".

The drawback to this system is that there are few prosecutions and convictions as the Israeli law states that there must be corroborating evidence if child is not personally testifying. It is difficult in child sexual abuse cases to have corroborating evidence as, in most cases, the only witness is the child. A child between the age of 12 (twelve) and 14 (fourteen) years old can choose to testify themselves and this circumvents the need for corroborative evidence.

3.4.6.5 Norway

Norway's legal system is an inquisitional not an adversarial system. In Norway a child only provides evidence on one occasion which is during the pre-trial deposition and this ideally, occurs

within 2 (two) weeks of the crime being committed. This pre-trial deposition, which is recorded, is conducted in front of a police officer and the child specialist and this process is called the Field Investigative Interview of Children (FIIC). A judge will be assigned to oversee the deposition but the specialist in interviewing children will conduct the interview. To eliminate a child under the age of 16 (sixteen) years to testify, and they are rarely forced to testify in open court, the hearsay evidence (pre-recorded interview) is admissible, the videotape of the pre-recorded interview with the child is shown during the trial.

This interview is conducted with the judge, prosecutor, and defence attorney observing via a one-way mirror. The child is totally unaware that the interview is being recorded or that the legal team is observing the process. It is permissible for the legal team to ask questions or ask for clarity on a specific statement, all via the specialist. There is no opportunity in the Norwegian legal system for the defence team to cross-examine a child witness (Robinson, 2015).

It has been seen that exposing the child victim or child witness to the court proceedings prior to them appearing can elevate their stress and in turn enable this could lead to the child giving a more effective testimony. It is felt thought that exposing the child to the adversarial system could result in them having a greater fear and mistrust for the system and therefore not testifying.

In the United Kingdom and South Africa, therapeutic intervention is delayed until after the court proceedings have concluded claiming any intervention could interfere with the child's memory and can be perceived as coaching. In the USA they see therapeutic intervention and preparation for court as proceeding together as part of one programme to help the child victim/witness (Mellor & Dent, 1994).

The International Criminal Court (ICC) has sought to actualise the principles of protection and participation embraced by the UN Convention of the Right of the Child ("CRC") "by addressing some issues". The Rome Statute and Rules of Procedure and evidence ("RPE") established "protections in the ICC specifically for vulnerable individuals i.e., child victims and child witnesses". The Rome Statute and RPE established "special measures to protect children during investigation and prosecution of cases' and required that all ICC staff who deal with child victims and child witnesses have expertise in dealing with children's issues" (Awan, n.d.).

The provisions set down by the Rome Statute call for prosecutors to take appropriate measures are to ensure that there is an effective investigation and prosecution of crimes falling within the jurisdiction of the ICC. The ICC needs to ensure that protection, physical and the psychological well-being, dignity and privacy of the child victim or child witness is maintained. Portions of the

proceedings may be held ‘in camera’ and allow specific testimony by way of electronic or other special means.

“If the child victim or child witness is related to the accused, a son or daughter, then they do not need to make a statement, unless they elect to do so. A Victims and Witness Unit (“VWU”) was created under the Rome Statute, and this is to ensure child protected and with consent of parents an individual can be appointed to support the child through all stages of proceedings”.

“The ICC seeks to prevent traumatization and physical injury by ensuring specific protection measures are set up, such as in cameral interviews to be used and employing individuals, who are trained to deal with issues that involve violence against children” (Awan, n.d.).

3.4.7 THEME 7 – PROCEDURES IN SOUTH AFRICA

- Looking at child sexual abuse one needs to adjudicate the process that is in place for a child to report/disclose what has occurred to them. The investigation of sexual crimes against children begins when the crime is reported to FCS. The Children’s Act (2005) make provision for mandatory and voluntary reporting.
- “Mandatory Reporting:
    - A designated person, as described in Section 54 of the Criminal law (Sexual Offences) Amendment Act 32 of 2007 (Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, n.d.) states any person who has knowledge of a sexual crime against a child must report it to the police.
    - Section 110 (1) of the Children’s Act 38 0f 2005 (Children’s Act 38 of 2005 as Amended, n.d.) it sets out who the designated individual s are who must report, even if they suspect a child is being abused, sexually or in any form they are, child and youth care workers, nurses, doctors, teachers, social workers etc. and they need to report their suspicion to the police, a social worker or a designated child protection organisation.
    - Section 110(2) stats any person can report suspected abuse to a social worker or a designated child protection organisation.
    - If professionals that are set out in Section 110 (1) are aware of abuse and do not report it, they can be criminally charged”.
- “Voluntary reporting:
    - The child, with their family, goes directly to the police station and makes a statement that they were abused, sexually or physically or they report abuse in any form”.

With this information one sees that the police are the first line of reporting and therefore should respond empathically, with patience and professional sensitivity(Conradie, 2003).

How a child is received by the police is likely to vindicate the victims experience of abuse, and if the response received from the police is good this will increase the child's confidence in the criminal justice system. "A poor response can invalidate the child's experience, destroy their confidence that justice will be served and increase the likelihood that the abuse case is withdrawn which can lead to an increasing the child's vulnerability to further abuse" (Conradie & Tanfa, 2005).

The police role in child sexual abuse is set out and governed by the Criminal Law (Sexual Offences) Amendment Act 32 of 2007, National Police Guidelines and in Gauteng the Gauteng Multi-disciplinary Child Protection and Treatment Policy. "The framework set out in these documents advised that the role of the police is accepting criminal complaints, arresting perpetrators, opposing bail, investigating the criminal complaint, gathering evidence, forward the case to the prosecutor and keeping the victim appraised of developments in the case" (Conradie, 2003; Conradie & Tanfa, 2005).

As soon as a case of rape/indecent assault is reported the matter is referred to the family violence, child protection, and sexual offences (FCS) unit – if one does not exist in the area then a specialised member of the SAPS needs to do the interview with the child. "When the statement is being given, it needs to be done privately and not in public at the charge office" (Conradie & Tanfa, 2005).

Conradie (Conradie, 2003) stated that the South African Law Commission had found that police investigation procedures towards children who had been sexually assaulted was insensitive specifically towards the state "that the child was in when making their statement. It was also seen that they fail to comply with the National Police Guidelines Multidisciplinary Protocol. The police exercise undue discretion around cases that involve a child under the age of 10 (ten). Statements are taken by inexperienced ordinary police officers, not trained FCS officers". Once the docket is opened and the investigating officer assigned, they need to start investigating immediately but due to workload one sees poor investigation around cases.

The perpetrator needs to be traced and arrested, police need to oppose bail, and most importantly the police officer need to keep the family updated on the case i.e., has the perpetrator been arrested, has bail been denied, or granted etc. It is the police's responsibility to ensure that the victim received a forensic medical examination, but this is not followed through. In many cases

the J88 form is given to the family to take to the doctor or hospital to be completed. This can cause evidence to be lost or misplaced as the J88 is not immediately put back into the docket. Once all information is received and the investigation completed the officer will hand the docket to the prosecutor to ascertain if the matter is strong enough to get a conviction if the matter goes to trial.

Conradie (Conradie, 2003) states that if a relationship exists between the child and the perpetrator the police tend not to investigate and prosecute irrespective of the child's age as they view it as a false rape charge. The police also state that with informal settlements it is difficult for the police to trace perpetrators. Due to inexperienced police officers taking statements which are incomplete and poor this hampers the assessment of a case by the prosecutor, leading to the prosecutor declining to prosecute a case.

When the docket arrives on the desk of the prosecutor, the following needs to be considered:

- "Successfully diverting the perpetrator for the criminal process (usually where perpetrator is a juvenile).
- The seriousness or lack of seriousness of the case.
- Discretionary grounds.
- The offender's presumed innocence (Conradie, 2003)(Conradie & Tanfa, 2005).

It is the prosecutor's responsibility to ensure that the child is properly prepared for court which means working through the child's initial statement with them and if any inconsistencies are apparent in clearing them up. The child needs to be fully briefed around what will happen and they can even be taken into the court room, and have it explained who will be sitting where and where the child will be standing to testify, if no intermediary has been requested. The prosecutor is the one who does the application to ensure that the child testifies via an intermediary. The child and family need to be advised that once a perpetrator has been arraigned and pleased to the charges the case cannot be withdrawn.

The South African judicial system gives the accused perpetrator the right to be confronted face-to-face by the alleged child victim. Due to this "…many courts will utilise the services of intermediaries and where possible close circuit televisions. The objective of this is to improve inappropriate and insensitive treatment of the victims"(Conradie & Tanfa, 2005). The child's identities are prohibited from being published hence all cases where a child is involved are held in camera. In certain courts the direct and scaring confrontation by the alleged perpetrator of the

child victim is minimized due to the usage of one-way mirrors, close circuit television system and intermediaries. Unfortunately, "many courts do not have these facilities and a child has to come face-to-face with their perpetrator which can cause additional trauma for the child" (Conradie, 2003) (Mellor & Dent, 1994).

Attributable to the confrontation style not being in the best interest of the child, it should be changed to an inquisitorial system. In this system only, a well-trained presiding officer asks the child questions, and the child does not even need to be in court. A voice stress detector can be used to interview a child and the perpetrator prior to the court hearing, and this can assist in replacing the cross-examination questions. Without this system in place, we work with what we have, and it has been found that defence attorneys and magistrates do not fully understand the cognitive development of the child victim or witness and this limited knowledge leads to insensitive treatment of the child and secondary victimisation occurs and most importantly is not in the best interest of the child.

Child victims are often left feeling marginalised because of proper prosecutorial services not being rendered to them. Due to the National Policy Guideline not being followed secondary victimisation is occurring and it is also exacerbated due to the high turnover of prosecutors and lack of experience by others. There is no private waiting area for the child victim and their family at court therefore they are confronted by the perpetrator and their family. Continual postponements frustrate the child as well as not being fully prepared for the harrowing experience they will be subjected to when they get into court. Inordinate delays in finalising the case hampers the child's healing and adds to their traumatisation. Consequently, the public has no confidence in the system and therefore many individuals do not report their abuse or sexual assault (Conradie, 2003).

3.5 CONCLUSION

As one looks at what has been discussed, one can see various areas that raise concern and areas that, by law, should be implemented but are not. Sexual abuse of children is prevalent and the BIOC is not considered during this legal process of prosecution. It was found in literature, both locally and internationally, that although there are policies and procedures in place when dealing with children as witnesses or victims these are very seldom make use of.

Our Constitutional Court stated that if a prosecutor does not make an application for an intermediary, when a child is involved in a sexual abuse case, as either a witness or a victim, the Magistrate must intervene and make the necessary application.

The authors believe that there should be no choice in this matter and that it should be the duty/role of The Magistrate to ensure that an intermediary is part of the proceedings.

Even though South Africa places reliance on intermediaries there are very few fully trained intermediaries as well as a problem being there are not enough venues available to utilise the services of intermediaries. An intermediary is a professional individual and can be from the social work field, teachers, and psychologists. Professional training is required for these individuals, and this is needs to be sourced and made readily available so that more individuals can be trained to assist these young children during this traumatic time.

Our Constitutional Court in South Africa advised that one needs to be bear in mind each case needs to be looked at individually so that justice is served accordingly. The authors would suggest that in a case where a child is younger than 14 years of age that the application for the appointment of an intermediary is compulsory, but for a child older than 14 years of age they can be consulted, in chambers, to ascertain what their preference would be, to have an intermediary or to face the alleged accuser in court. For an older child this shows that their interests are being respected and their views acknowledged as some children will want to stand and face their abuser.

Looking at the credibility and competency of a child, one sees how individuals interpret thing in their own way. Purely because a child cannot take an oath does not mean that they are incapable of knowing and distinguishing between telling the truth and lying. Unfortunately, prosecutors will refrain from prosecuting due to the age of a child, this is totally against our constitution and the BIOC. A Magistrate should be the only individual to question a child around telling the truth or telling a lie to ascertain if the said child understands. The words right and wrong can also be used to reduce fear and tension for the child.

Credibility and competency questions are part of a child's experience from when they first report sexual abuse as it starts with the police and moves through social workers and prosecutors and defence attorneys. One needs to be aware that defence attorneys will always ask age-inappropriate questions to show the child's incompetence and untruthfulness. They also ensure that their questions are complex and grammatically confusing for the child.

The type of questioned asked also needs to be addressed as, as stated by Evans (Evans & Lyon, 2012) a child can identify more with a question around identification than around definition.

When it comes to this aspect it may be to the advantage of a child if specific questions were set or the style of questioning was prescribed to ensure the child can respond correctly and age-appropriately.

One needs to always bear in mind that children are prepped for court, and this assists the child to deal with the ordeal they are about to face. Some children show no emotions and can be emotionally stunted. This should not be held against them, and it should not interfere with how others view their credibility or competency. South Africa should follow the trend in other countries and set aside the competency test and just the magistrate asks or instructs the child to tell the truth.

A child views cross-examination as one of the most distressing aspects of the trial. Neither prosecutors nor defence attorneys are trained to question children and for that matter neither are magistrate.

Defence attorneys specifically use misleading questions and grammar that is not age-appropriate to aid in discrediting the child. Prosecutors need to ensure that they build a rapport with the child to ensure that the child feels trusted and that they are supported by the individual who is supposed to be ‘on their side’.

The authors are of the opinion that due to the lack of training in questioning children the ‘I don’t know’ or ‘I don’t understand’ aspect is not correctly communicated to the child – the child is not put at ease to use these phrases both with the prosecutor and especially with the defence.

Training around the use of wh- questions needs to be given as this will ensure more accurate narrative responses which then will lead to the prosecutor, especially, to asking the child to ‘tell me more’. The defence attorney should be instructed to ensure that their line of questioning is age-appropriate to avoid misleading or confusing a child even through their ai is to discredit the child’s statement.

One needs to look at aspects of the interpretations of law and this could clearly be seen in the case when applying the cautionary approach. In the past, it was stated that single witnesses and children were not trustworthy, and their evidence needed to be of an extremely high quality. This discriminated a child involved in sexual abuse cases as in most cases there was no witnesses. The researcher is of the opinion that the cautionary law should be amended to abolish all aspects not just the aspect of complaints of sexual offences. Because this rule still being in play it can also

lead to children not being willing to continue with the case as they are already discriminated against before they have even taken the stand.

With some laws in place to try and prevent re-traumatisation, postponing the case is one area that has largely been overlooked by law makers. The law needs to provide for a swift trial with as few postponements as possible, as the more postponements that occur the more discouraged the child becomes and this has led to children not wanting to proceed. Attributable to these continually delays the child from starting the healing process and moving on – no therapy is allowed until the trial is over, as the legal fraternity feels that a child can be easily influenced, and the evidence contaminated. In the courtroom environment with no separate waiting areas for the child victim or witness and their family, having to encounter the accused and their family can be very traumatic.

The inexperience of prosecutors is also an area of concern as some prosecutors do not know the first thing about being involved in a sexual abuse case. In some cases, due to the turnover of prosecutors the child is subjected to having to retell and retell their account of what occurred, to each new prosecutor, before even setting foot in the court room. In the writer's view, this can be off putting for the child as well as the family as the law is not protecting the child but rather continually re-traumatise the child and due to the delays, the child is not able to get the necessary therapy to begin healing.

When one looks on the international front various procedures are set and followed. In Sweden, a child is interviewed at home and that interview is videotaped so that the child does not have to appear in formal court. For this to be successful the quality of the initial interview needs to be exceptional. The only downfall in that the Swedish court wants long, coherent, clear, details, consistent, and free from ambiguous statements. For a very young child this can prove to be a problem. So even through the child's best interest is taken into to ensure they are not subjected to the court experience and cross examination the requirements for the statements need to be looked at.

In the United States of America (USA) it has been proven that testifying over and over and reliving it each time is detrimental to the well-being of the child and creates a negative outcome. Some courts have looked at it and made the courtroom more child friendly i.e., child chair present, asking attorneys to modulate their voices and ensuring a child's daily routine is not interrupted – especially for very young children.

Having shields to protect the child from seeing the accused is another suggestion, but this is a controversial issue in the USA as some argue that it is in contravention of the sixth amendment, so there is no cut and dry ruling in the USA when working with child witnesses or victims.

English law on the other hand ensures that from the onset of an abuse case being reported that the child is assigned a "witness care official". The sole duty of this individual is to guide the child, and their family, through the entire legal process that lies ahead. The individual does not testify for the child but is able to advise the judge if the proceedings are inappropriate or distressing to the child. This shows that the BIOC is considered. Pre-recording of statements is at the specific judge's discretion is the child is not testifying via close circuit TV, where this is not available then a barrier is erected in the court room, as in the USA, to ensure the child is comfortable and feels safe. In England the attorneys can also be asked to remove their wigs to ensure a more child friendly environment and is it's a very young child testifying an intermediary can be utilised.

The presence of the witness care officer is an aspect that should look at and considered worldwide, as it creates trust with the child and the family as well as ensuring that they are kept up to date with regards to all aspects of the case.

In Israel they deal with child victims and witnesses. The law practise is the adversarial system but when it comes to child witnesses and child victims in sexual abuse cases this system is not utilised. All children have a trained intermediary, who like the witness care official in England, is assigned to the child immediately. These individual questions the child, in accordance with the NICHD protocol, and they determine the child's competency, not the judge.

This does not detract from questions from the defence attorney, the judge, or the prosecutor as they are all present when the child is questioned and can ask questions, ask for clarity on a statement but it is all done through the intermediary and the best is that the child is not aware that the questions are coming from these individuals.

Unfortunately, the drawback is ensuring everyone is available at the same time as the child's testimony is given and as per Israel law that should be within 2 (two) weeks of the incident. The initial statement is also videotaped in front of the police and a child specialist. The judge oversees the deposition, and the videotape is then played back in court during the trial.

As in Israel, the Norway legal system prevents cross-examination by the defence attorney when a child is involved.

The ICC staff dealing with children need to be trained and be experts in their field. The ICC also sees it as important for all matters relating to children to be made 'in camera' and through electronic means. This needs to be carried through in all countries but as seen it is not adhered to.

Each country discussed has pros and cons with regards to their legal system but aspects of each could be taken and a worldwide ruling made to ensure that children who are victims or witnesses in a sexual crime are protected.

If the authors look critically, the videotaping of the initial interview, by a qualified intermediary, is a positive step as it can prevent traumatisation of the child when they must repeatedly relive what happened to them with each new adult they meet within the legal system. Ensuring that the court is made more child friendly, less hostile, puts a child a little more at ease and makes the experience a little less frightening. The biggest challenge is to ensure that the child is protected from having to face the alleged perpetrator, so if no close circuit television is being utilised then a barrier needs to be erected between where the child will testify and the defence team.

The writers are of the opinion that a child over the age of 14 (fourteen) years can be asked if they would like to stand in court and face the alleged accused but one needs to remember that all children under the age of 18 years of age benefit from the same protections – so even if they are over 14 years of age they are still allowed an intermediary and testify via close circuit television.

In South Africa reporting of sexual crimes are mandatory, for all professionals working with children or voluntary – where the child goes to the authorities themselves. Unfortunately, mandatory reporting is not always adhered to by the individuals set out in the act, it is the authors view that individuals do not want to be the first reporter as they are not prepared to go to court and testify so they will wait for someone else to report or the child to report themselves. As a professional working with children if one suspects any form of abuse it needs to be investigated and reported or one can be criminally prosecuted for not protecting a child.

The FCS should be involved immediately when a case of sexual abuse, or any abuse, is reported to the SAPS, since they are the experts in this field and there will therefore be no incorrect or incomplete statements taken.

Unfortunately, many police stations do not immediately inform FCS and inexperienced police officers take the initial statement which is to the detriment of the child's case. It has been seen that in some instances the police themselves decide which cases are to be prosecuted. They feel

that if it is family incest the child is just angry and wants to get back at the person, the same if a child is under the age of 10 (ten). This practice needs to be eliminated as the only individuals who can decide on prosecution if the prosecutor's office and the ultimate decision around prosecution lies with the highest authority in our country's legal system being the National Prosecuting Authority.

In South Africa it is the prosecutor's responsibility to ensure that the child is correctly and properly prepared for court and the use of intermediaries needs to be enforced, it is stated on our law that intermediaries are to be utilised when a child testifies, but they are seldom called on and in some cases are only used as interpreters.

The intermediary is there to assist the child, and to ensure that re-traumatisation is kept to a minimum, by building rapport with them and being with them the entire period of the trial. Due to a relationship built with the child, the child will feel comfortable and at ease to speak openly about that they have experienced. The child is not subjected to the attacking tone of the defence attorney as the intermediary rephrases, so the child should never feel they are at fault and are lying – even though this is what the defence would like to portray.

Training of all court staff is something that needs to be addressed by the South African Legal fraternity as a priority especially for individuals who will be dealing on a continual basis with children who have been exposed to sexual abuse, or any abuse.

The court environment needs to be looked at and made a little more child friendly or at least protect the child from having to face the alleged accused, ensure there is a private waiting room for the child and their family to sit, to eliminate them having to sit with the alleged accused and their family as this can lead to undue stress and anxiety as well as intimidation and threats being made towards the child and their family.

Looking at all aspects it is the writers view that the BIOC is not considered before, during or after a sexual abuse trial. The tragedy is that there is mechanism written into our countries law as well as international law that South Africa has agreed to adopt which governs how a child is to be treated during this traumatic time, but none are followed. The writer would recommend that as in England an individual is immediately assigned to work with the child and their family for the duration of the trial. Utilising intermediaries in cases should not be the exception they should be the norm and immediately assigned. The usage of the child testifying via closed circuit televisions is of paramount importance, to ensure the child is protected from the alleged abuser as well as ensuring the proceedings are held 'in camera'.

The main area of concern, and this is the concern in many countries, is the child's exposure to being cross-examined but again with a qualified intermediary any questions posed by the defence can be asked to and answered by the child. The intermediary or if an individual is assigned to the case, as suggested, they can also indicate to the judge when the child is getting tired, is overly emotional or needs a break, as well as if the questions are not inappropriate leading to undue stress on the child.

3.6 RECOMMENDATIONS

For the convictions to be successful the system needs to seriously look at what is in place. From the literature research, it seems that there are various gaps that are still not in place to protect the BIOC. The systems that are written into our law need to be implemented, as if they are correctly implemented then a child having experienced sexual abuse will be able to have a fair trial and justice can be served.

Further research and a training program should be drafted with regards to the need to train all court personnel to work with children in an age-appropriate manner. This should also be extended to defence attorneys.

3.7 LIMITATIONS

Even though valuable information was produced through this research, the researcher has identified several limitations:

- The search strategy utilised the electronic databases subscribed to by the North-West University only. Databases not subscribed to by the North-West University could not be searched and therefore were excluded and this could be considered a limitation.
- Some key words were used interchangeably in the articles; therefore, it is possible that relevant articles may not have been included.
- Only articles in English and Afrikaans were considered, due to cost constraints and therefore it is possible that relevant research and studies was missed.
- Articles based on the South African content were few which caused a limitation in that the researcher had to rely on international articles.
- Many of the articles initially sourced looked at the best interest of the child within the family law aspect and not where the child was the victim or witness in a criminal case.

- Actual case studies involving CSA were not obtained from the judiciary to look at how many cases are dismissed or prosecuted due to the child's involvement i.e., the child's statement, questioning during the proceedings.
- The rapid review was not done in a team and a co-reviewer was only used at certain stages of the search and for the critical appraisal. However, the review was done under the supervision of an experienced researcher and supervisor.

3.8 FURTHER STUDIES

The researcher is of the view that further studies could be done with the emphasis more on South African cases. What could be looked at is exactly how the child is questioned in the South African Judicial System and how this influences the outcome of the case. Case files could be obtained from the courts and the cases analysed.

The effect of the untold rule that a child involved in a sexual abuse case is denied therapy to deal with what has occurred to them, while the judicial process is in place, can take its toll on a child in various ways. One could include the effect the long delays have on the child psychologically during and after the judicial process.

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CHAPTER 4
FINAL CONCLUSION, LIMITATIONS AND RECOMMENDATIONS

4.1 FINAL CONCLUSION

The central research question that this study wanted to answer was:

> Is the best interest of the child taken into consideration before, during and after the criminal procedure has been followed in the South African Criminal Judicial System, where a child is victim or a witness?

The BIOC is an area that has been discussed and written about in policies, acts, and guidelines set but none of these have been fully put into practice.

Section 28 of South Africa's Constitution very clearly sets out that the BIOC is of paramount importance, but this importance varies depending on who presides over the child sexual abuse case.

From the onset of reporting the matter to the SAPS to the courts the entire process is ill equipped to deal with and work with CSA cases. The SAPS are not trained to assist a child, and this leads to the child having to give his/her statement numerous times to numerous individuals and in some instances, if the alleged abuser is a family member, the SAPS will not even investigate it.

When the child gets to court there is just as much disrespect or disdain for the child victim/witness. Court rooms are a scary place for any child, even adults are anxious when having to appear in court. If one then thinks what children, who have been sexually abused, must face - it is or can be a terrifying time for them.

In our law we have provisions which allow a child to testify in a separate room with the aid of an intermediary. The intention of this is to protect the child from having to face the offender directly. These excellent provisions, if implemented and work according to how they were meant to be implemented, would benefit, and aid a child testifying in a sexual abuse case. These provisions set out clearly in the judgement of Director of Public Prosecutions v. Minister of Justice and correctional development (Director of Public Prosecutions, Transvaal v. Minister for Justice and Constitutional Development, 1999) it was stated that provision needed to be made for intermediaries, separate testifying room, one-way mirrors and closed-circuit televisions (CCTV) and sexual offences courts, to deal

specifically with sexual abuse crimes was to be established to avoid secondary trauma being inflicted on the child victim or witness.

If one looks at the report issued by the Centre for Child Law - Making room: Facilitating the testimony of child witnesses and victims (Law, n.d.) since 2015 one can see that not many courts were and are equipped to deal with sexual abuse cases where the child was the victim or the witness.

Intermediaries are still in great demand and NGOs are offering this service to try and assist but even with their assistance the need is not being met (Jonker & Swanzen, 2007).

In our courts currently the following inadequacies can be seen, where the best interest of the child is totally not being considered:

- No adequate space
    - No separate waiting area for the child leading him/her to at times come face to face with the alleged offender and his/her family, which could lead to secondary trauma occurring.
    - Testifying rooms in most offices are also used as offices and most certainly not child friendly.
    - Child friendly rooms should be created with toys, puzzles, and other items to keep a child busy with while he/she waits.
- Intermediaries
    - Not all individuals acting as intermediaries are properly skilled and trained to perform this function;
    - there is no proper debriefing available, or even offered, to these individuals;
    - most work on a contract basis which can lead to job insecurity.
- Refreshments are to be available for the child witness/victim as if a child is hungry or thirsty, he/she will not fully focus or concentrate, which could hamper him/her testifying.

Prosecutor and defence attorneys are not trained to work with child victims and/or witnesses and one should look at this being a specialised area in the court system ensuring that these individuals are properly trained on how to work with; especially questioning a child who has been sexually abused or witnessed sexual abuse.

4.2 RECOMMENDATION

From the above one can deduce that there are still lots of areas that need to be addressed before we can state that the best interest of the child is considered every time, they enter a court room either as a victim or as a witness.

Intermediaries need to be put in place, in each court, and as per the act, if the prosecutor does not ask for an intermediary. The Magistrate needs to instruct the court to appoint one. Intermediaries need to be properly trained to ensure that the defence is unable to question the reliability of the intermediary and that the questions are posed to the child as asked/stated by the prosecutor or defence attorney.

Our justice system needs to ensure that what has been stated by justice will occur, namely sexual offenders' courts should speed up the trail and eliminate lengthy delays and trials. This needs to be put in place urgently and the staff based in these courts need to be fully trained in working with children.

Included in the justice system is the SAPS who needs to understand that their initial interaction with the child is crucial. A skilled and dedicated individual needs to take the statement, to avoid the statement being seen as incomplete or not enough evidence given in it.

4.3 EVALUATION OF RIGOUR

To determine if the research question was answered in a rapid, effective, competent, and satisfactory manner the rigour of the study was assessed.

This rigour was completed using the framework set out by Whittemore and Knafl, addressing the following stages:

- Problem identification
- Literature search
- Data evaluation
- Data analysis

(Whittemore & Knafl, 2005:552)

During this research, the researcher used the design of a systematic review to conduct a rapid review. It needs to be stated that there is no final definition explaining how the methodology of a rapid review and a systematic review differ. (Harker & Kleijnen, 2012, pp. 397–399; Tricco et al., 2015, p. 224)

4.4 PROBLEM IDENTIFICATION STAGE

Problem identification is the initial stage of any review method and sets out clearly the problem that the review will be addressing as well as the purpose of the review. (Whittemore & Knafl, 2005. P548)

In this research a focused and relevant review question was developed leading to the identification of a researchable problem with clear review purposes.

The Rapid review Methodology utilised in this study was focused with clear boundaries.

4.5 LITERATURE SEARCH STAGE

Whittemore and Knafl state that **“well-defined literature search strategies are critical for enhancing the rigour of any type of review.”**(Whittemore & Knafl, 2005. P548). Any incomplete or biased searches could result in databases being inadequate which could have the potential of producing inaccurate results.

The researchers rapid review ensured the research was conducted with rigour as the review was pre-planned as per a specific protocol.

To ensure a comprehensive and broad search was done clear inclusion and exclusion criteria was set. A search term was created, with the assistance of the co-reviewer, as well as utilising a variety of combinations of key search words.

The search, using the above method, was documented, and clearly described.

The electronic data bases at the North-West University was thoroughly explored. A co-reviewer assisted in reviewing the screening process according to titles and abstracts. Full text articles were also reviewed as per the stipulated inclusion and exclusion criteria.

To ensure a high quality of research articles only peer reviewed articles were utilised.

4.6 DATA EVALUATION STAGE

To ensure quality of each study the researcher, with an experienced co-reviewer, critically appraised each study in accordance with the instrument adapter from Davids and Roman (Davids & Roman, 2014, p. 233).

The entire research process is documented, in detail, to ensure that the rapid review is transparent and replicable.

4.7 DATA ANALYSIS STAGE

The goal of this stage is to ensure that there is a thorough and unbiased interpretation of the primary sources used, as well as an innovative synthesis of evidence (Whittemore & Knafl 2005, p.550)

The researcher, with the assistance of the co-reviewer, developed a form to assist with extracting relevant data from the selected studies, and the extraction of data was done by only one reviewer. The findings were reported and presented in a manner that was as complete as possible and in a manner that would be understandable and minimise bias.

4.8 ETHICAL ISSUES

A high moral standard was maintained by the researcher during each stage of the research. Contributors to the research were properly acknowledged and cited throughout. Plagiarism was always avoided. Transparency was also ensured through accurate data extraction (Wager & Wiffen, 2011, p. 133). The researchers jointly made the decision to only include peer reviewed articles in the study limiting the inclusion of unethical studies.

Ethical Approval was obtained from HREC of the Faculty of Health under Ethics number: **NWU-00489-20-A1.**

4.9 LIMITATION OF THE STUDY

Only electronic databases subscribed to by the North-West University were used. Other databases which are not subscribed to by the library of the North-West University could not be searched and therefore this can be considered a limitation. An attempt to overcome the limitation was made by the hand search of key journals and reference of articles.

Due to the time limit and cost restraints of the study, only articles with a full text in English and Afrikaans were considered and it is possible that relevant studies were missed.

Theses, dissertations, and mini dissertations were eluded which can be considered as a limitation as it is possible that relevant studies could have been missed.

The rapid review was not done in a team and a co-reviewer was used at certain stages of the search and for critical appraisal. The review was, however, done under the supervision of an experienced researcher and supervisor.

4.10 RECOMMENDATION FOR FURTHER STUDIES

Research is needed with regards to the ways in which training can be implemented in a cost-effective manner for all court personnel to ensure that the best interest of the child witness or victim is addressed.

Research is required with regards to the impact that no pre-trial therapy is allowed on a child who has been sexually abused. Instead of the “they said” statement it needs to be proved that pre-trial therapy contaminates evidence.

Further research is required with regards to the trauma a child witness or victim must endure due to the long delays and continual postponements in cases.

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ANNEXURE 1: DATA EXTRACTION FORM

General Information: Researcher performing data extraction	Kathleen Hawthorn	Kathleen Hawthorn	Kathleen Hawthorn
Date of data extraction	9 August 2017	17 September 2017	17 September 2017
Identification features of the study	Child sexual abuse, criminal justice system. Legislative developments	Child sexual abuse, Prosecution, children's testimony	Child sexual abuse, court, child witnesses, silencing, disclosure courthouse dogs, trial
Record number	1	2	3
Author	Mohammad Imran Ali	Emelie Ernberg, Inga Tidefors, Sara Landström	Sarah Caprioli and David A. Crenshaw
Article title	The legislative developments in the criminal justice system of SA addressing child sexual abuse: Lessons for other developing countries	Prosecutors' reflections on sexually abused pre-schoolers and their ability to stand trial	The culture of silencing child victims of sexual abuse: Implications for child witnesses in court
Type of publication	SA Journal Child Abuse Research SARCA	Journal Child Abuse & Neglect	Journal Journal of Humanistic Psychology
Country of origin	SA	Sweden	USA

Study characteristics Aim/objective of the study	Aim: To provide a literature analysis regarding current legislation pertaining to the sexual abuse of children in SA. Objectives: the ability of the criminal justice system to protect children against sexual crimes; to undertake a theoretical and historical overview of the legislative developments in SA addressing child sexual abuse; an examination of the basic features of the legislative developments addressing child sexual abuse in SA and its comparison with the legislative developments in the criminal justice system of other developing countries (Pakistan, India)	Aim: to investigate prosecutors' experiences of preparing for and prosecuting suspected child sexual abuse cases with pre-school aged victims.	Aim: to examine the contributing factors to the culture of silencing and how we might change these stubborn forces of oppression that persist despite a profusion of research and knowledge in the field of child sexual abuse.
Study design		Qualitative	Qualitative

Recruitment procedures		Prosecutors were contacted by 2nd Author via email or in person.	Focus on interventions relevant to disclosure and testimony within the criminal justice system toward the goal of creating a comprehensive process that truly works to see, hear, and protect the most vulnerable victims.
Participants		Specialized child prosecutors 37-73 years old	
Sample size		9 prosecutors 6 women and 3 men	
<u>Outcome date/results</u> Unit of Analysis/Outcome		Focus group recordings were transcribed	
Statistical techniques used			
Type of analysis used in study		Thematically Themes – 2 main themes and structured into 2 sub-themes.	Thematically

		1 pre-schoolers' ability to stand trial – role of words and the role of emotions 2 pre-schoolers' as vulnerable victims – let down by the legal system and let down by grown-ups	
Result of study analysis (themes and findings)	Child sexual abuse is a major problem in almost all societies. The definition of violence against children has different meanings in different countries and in different cultures. Only a few countries	Reliability and credibility of sexually abused pre-schoolers and their testimony might be influenced by a number of verbal and non-verbal factors and that there are several obstacles preventing prosecutors from prosecuting these cases	
Additional outcomes			
Note fields			

General Information:	Kathleen Hawthorn	Kathleen Hawthorn	Kathleen Hawthorn

Researcher performing data extraction			
Date of data extraction	17 September 2017	17 September 2017	17 September 2017
Identification features of the study	Child sexual abuse; Children's testimony; Prosecution	Cross-examination; children's testimony; compliance; repeated interview-ing; delay	Child victims; sexual abuse, witnesses, secondary trauma and victimisation; accusational law
Record number	4	5	6
Author	Jana Robinson	Saskia Righarts, Fiona Jack, Rachel Zajac, Harlene Hayne	JM Reyneke & HB Kruger
Article title	The experience of the child witness: legal and psychological issues	Young children's responses to cross-examination style questioning: the effects of delay and subsequent questioning	Sexual offences courts: Better justice for children?
Type of publication	Journal International Journal of Law and Psychiatry	Journal Psychology, crime & law	Journal Journal for Juridical Science
Country of origin	USA	New Zealand	SA
<u>Study characteristics</u> Aim/objective of the study	Aim: To examine current research on the child's experience in the	Aim: to assess whether the changes that children make	Aim: to examine the prescribed blueprint for Sexual Offences Courts

	criminal courtroom, focusing on competence and other obstacles unique to children and the alternative procedures that have been implemented in attempts to overcome the limitations of the child witness. To explore how landmark US Supreme Court decisions involving the Sixth Amendment's Confrontation Clause have changed the child witness experience in the U.S.	during cross-examination would persist To assess the effect of delay on cross-examination	To determine whether blueprint-compliant Sexual Offences Courts contribute to better justice for child victims of sexual offences.
Study design	Qualitative	Experimental procedure	Qualitative evaluation
Recruitment procedures		Five- and six-year-old children from 2 New Zealand primary schools. Children were from lower- to middle-income socio-	

		economic backgrounds.	
Participants			
Sample size		N=76	
Outcome date/results Unit of Analysis/Outcome	Thematically		
Statistical techniques used		All statistical comparisons involving analyses of variance (ANOVAs), t-test and chi-square tests include Cohen (1988) measures of effect size (*F, d and w*; respectively). The power of the test at detecting a medium effect *(f =.25, d=.50, w=30)* is provided for all non-significant analyses; these values represent the probability of rejecting the null hypothesis should a medium-sized or larger effect exist.	
Type of analysis used in study			

Result of study analysis (themes and findings)	The child should testify as few times as possible. The child should face away from the defendant. The use of intermediaries is unlikely in the American adversarial system and the sheer size of the U.S. population makes “witness care officers” rather unfeasible. Walk the child through the case. Maintain sensitivity for the child’s developmental and chronological age. If possible, appoint counsel, a Guardian Ad Litem or a victim advocate for the child. Children should be made aware of their rights.	The free recall information that children provided during the direct examination interview was brief but highly accurate. During cross-examination, children made a large number of changes to their direct examination reports. Cross-examination exerted a robust negative effect on children’s accuracy, regardless of the delay between direct and cross-examination	
Additional outcomes			

Note fields			

General Information: Researcher performing data extraction	Kathleen Hawthorn	Kathleen Hawthorn	Kathleen Hawthorn
Date of data extraction	17 September 2017	17 September 2017	17 September 2017
Identification features of the study	United Nations Conventions on the rights of the Child; children's rights in criminal justice system; Criminal Procedure Act; child witnesses; child victim; court	Child witness - Rights of children - Judgements - Intermediary system - Sexual violence - Victims - Court process - Prevention - Family violence - Assistance to victims This	Best interest of child victims and witnesses; criminal justice system; cross-examination; credibility/reliability; child witness; accusatorial system
Record number	7	8	9
Author	Johan Prinsloo	Gert Jonker and Rika Swanzen	Retha Mentjes and Steven J. Collings
Article title	In the best interest of the child: The protection of child victims and witnesses in the SA criminal justice system	Intermediary services for child witnesses testifying in South African criminal courts	Issues raised by Judge Bertelsmann in connection with child sexual abuse victims and witnesses: The role and submission of the South African Professional Society

			on the Abuse of Children
Type of publication	Journal SAPSAC	Journal International Journal on Human Rights	Journal Child Abuse Research
Country of origin	SA	SA	SA
<u>Study characteristics</u> Aim/objective of the study	South Africa's ratification of the United Nations Convention on the Rights of the Child (CRC) in 1995 paved the way for far-reaching policy and legislative changes. Despite this undertaking, as well as the fact that certain children's rights are guaranteed vide section 28 included in Chapter 2 (Bill of Rights) of the Constitution (Constitution of the Republic of South Africa, 108 of 1996), children's rights within criminal justice system are still neglected. Although the	Aim: To highlight those crimes against children and the subsequent criminal proceedings where the child is required to testify as a witness occurs frequently enough to warrant intermediary services to all child witnesses. Practical implications will be highlighted in order to improve the current intermediary process, regionally, provincially and nationally. Firstly, it will reflect on the intermediary services provided for child witnesses in some areas in the western suburbs of Johannesburg; secondly, it will	Overview of issues raised by Judge Bertelsmann in connection with child sexual abuse victims and witnesses. Provides description of the role and submission of the South African Professional Society on the Abuse of Children with respect to these issues and summarises Judge Bertelsmann's judgement on the matter.

	Criminal Procedure Act 51 of 1977 was amended to allow for a more child-friendly environment and procedures, they were still inadequate. What rules have been made by court involving young victims and/or witnesses	discuss practical experiences and supportive literature, as well as the Bethany House's experience with the project Child in Crisis Foundation (SA).	
Study design	Qualitative Research	Pilot Project	
Recruitment procedures		Trained intermediaries	
Participants		Magisterial courts	
Sample size		Magisterial courts currently served, namely 3 Randfontein Roodepoort and Westonaria	
<u>Outcome date/results</u> Unit of Analysis/Outcome	Case Law	Database was created to record all cases where intermediary was requested	
Statistical techniques used			

Type of analysis used in study		Thematical Themes - 6 main areas looked at all within specific magisterial district	
Result of study analysis (themes and findings)	From the various cases presented it was found that in many cases curator ad litem is absent; due to young victims and/or witnesses being involved a lengthy trial is not recommended and this is occurring; there is a shortage of trained intermediaries; the right of the accused is still taken into consideration when deciding if the child victim and/or witness has the right to testify via close circuit TV	1. Magisterial Districts served - Cases per magisterial district and police areas Rate of Child witnesses and perpetrators per magisterial district 2. Description of child witnesses - Demographic 3. Types of crimes against the victims 4. Perpetrator relationship to child 5. Description of perpetrator – demographics 6. Outcome of cases	Various issues were highlighted that needed to be revised, namely the way in which a child witness and/or victim is questioned – need to use language applicable to the child's developmental stage. Look at using expert witnesses more to assist. Intermediaries need to assign, as well as having these kinds of cases finalised speedily to present secondary trauma and to enable the child to receive therapy to help them deal with what they have experienced
Additional outcomes			Annexed to article the Guidelines on Justice for chill

			victims and witnesses of crime as well as those drawn up by the International Bureau of Children's Rights
Note fields			

General Information: Researcher performing data extraction	Kathleen Hawthorn	Kathleen Hawthorn	Kathleen Hawthorn
Date of data extraction	17 September 2017	17 September 2017	17 September 2017
Identification features of the study	Policing Practice; courtroom practice; best interest of the child; intermediaries; confrontational questioning	Competency, children, oath, question type	Cautionary rule; corroborative evidence, child sexual abuse; child victim, child witness
Record number	10	11	12
Author	Herman Conradie	Angela Evans	Retha Meintjes
Article title	Are we failing to deliver the best interest of the child?	Assessing children's competency to take the oath in court: The influence of question type on children's accuracy	A call for a cautionary approach to common sense
Type of publication	Journal Crime Research in South Africa	Journal Law and Human Behaviour	Journal CARSA

Country of origin	SA	USA	SA
Study characteristics Aim/objective of the study	Aim is to emphasise the ways in which we are policing and adjudicating crimes against children in South Africa. To set the scene for achieving this goal, brief exposition of the state of the nation and the state of the child is analysed first	This study examined children's accuracy in response to truth–lie competency questions asked in court. .	Court does not have to apply the cautionary rule before a conviction can take place where a child has given evidence in a sexual abuse case. Due to the state having to prove the guilt of the accused beyond a reasonable doubt there are certain cases where caution may not be necessary, but in other cases the court may be unable to rely solely upon evidence of a single witness. It has be held by the High Court that a factual basis must exist before caution is to be applied to cases of sexual complaints
Study design	Qualitative	Sampling	
Recruitment procedures		Case studies reflecting the testimonies of	

		children testifying in child sexual abuse cases – in California jurisdiction as well as appellate cases across the United States of America	
Participants		The participants included 164 child witnesses in criminal child sexual abuse cases tried in Los Angeles County over a 5-year period (1997–2001) and 154 child witnesses quoted in the U.S. state and federal appellate cases over a 35-year period (1974 – 2008).	
Sample size		164 from California jurisdiction and 154 from appellate cases	
<u>Outcome date/results</u> Unit of Analysis/Outcome		2727 competency questions were asked of the child witness, 1291 from Los Angeles cases and 1436 from US Appellate cases 46% (N = 126) were meaning questions	

		and 54% (N = 1481) were morality questions. No significant difference between the two areas under review	
Statistical techniques used			
Type of analysis used in study			
Result of study analysis (themes and findings)	Need to look that it is in the best interest of the child that the policing of crimes against children need to be expanded and enhanced by adding to the investigating, state funded services, a lawyer, a social worker, counsellor and a pastor. Best interest for the inquisitorial system to be implemented during these court hearings. All laws need to be changed to be child friendly – then we can convincingly claim to be looking out for the	The results revealed that judges virtually never found children incompetent to testify, but children exhibited substantial variability in their performance based on question-type. Definition questions, about the meaning of the truth and lies, were the most difficult largely due to errors in response to "Do you know" questions. Questions about the consequences of lying were more difficult than questions evaluating the morality of lying.	A distinctively more benign approach is needed when dealing with child witnesses due to them being less mature, a child is less developed than and adult witnesses, they are not as able to deal with the harrowing cross-examination, they are less able to deal with equivocal statements, they are less equipped with communicative skills etc. So, in this case the common sense approach would be warranted for child witnesses. Like adults a child witness

	best interest of the child	Children exhibited high rates of error in response to questions about whether they had ever told a lie. Attorneys rarely asked children hypothetical questions in a form that has been found to facilitate performance. Defence attorneys asked a higher proportion of the more difficult question types than prosecutors. The findings suggest that children's truth–lie competency is underestimated by courtroom questioning and support growing doubts about the utility of the competency requirements	maybe lying but there is no rational justification that exists for a child witness to be considered less reliable than an adult witness
Additional outcomes			
Note fields			

General Information: Researcher performing data extraction	Kathleen Hawthorn	Kathleen Hawthorn	Kathleen Hawthorn
Date of data extraction	17 September 2017	17 September 2017	1 September 2017
Identification features of the study	Child sexual abuse, court proceedings, child witness, evidence, corroborating evidence, competency or incompetency of child to testify	Child sexual abuse, disclosure, children's testimony	Child witness, child victim, question styles, justice system, evidence, defence questions, criminal trials
Record number	13	14	15
Author	Kathleen D. Brewer; Daryl M. Rowe and Devon D. Brewer	Stacia N. Stolzenberg and Thomas D. Lyon	J. Zoe Klemfuss, Jodi A. Quas and Thomas D. Lyon
Article title	Factors related to prosecution of child sexual abuse cases	How Attorneys question children about the dynamics of sexual abuse and disclosure in criminal trials	Attorney's questions and children's productivity in child sexual abuse criminal trials
Type of publication	Journal Journal of Child Sexual Abuse	Journal Psychology, Public Policy and Law	Journal Applied Cognitive Psychology

Country of origin	USA	USA	USA
Study characteristics Aim/objective of the study	How factors regarding the victim, offender, abuse situation and case evidence were related to prosecution decisions in child sexual abuse cases. Regarding victim-offender relationship, prosecution was most likely to prosecute if offender was a stranger, least likely if abuse occurred from biological nuclear family member	Aim is to understand how attorneys ask child witnesses in sexual abuse cases about their prior conversations about sexual abuse in court as a means of determining the veracity of abuse allegations. Look at how prosecutors and defence attorneys are likely to differ in their strategies, examine the research that seemed most relevant to arguments that sexual abuse has or has not occurred looking at: a) the dynamics of sexual abuse and disclosure in criminal cases and b) children's tendencies to succumb to suggestion or influence	The objective of the study is to look at the type of questions children are asked in court, how much information children provide when answering those questions and the links among questions, answers and the outcome of the case

Study design	Research of cases that went to court	Systematic study	Systematic study
Recruitment procedures	Data was collected from an agency in the south western USA which serves child sexual abuse victims and their families. Cases referred were from the police, department in Department of Social Services, the country child abuse registry or local medical facilities	Information on all felony sexual abuse charges under Section 288 of the California Penal Code filed in Los Angeles County from 2 January 1997 to 20 November 2001 were requested	Data collected from criminal trials involving allegations of child sexual abuse
Participants	Closed sexual abuse cases	Sexual abuse cases heard in the Second District of the California Court of Appeals	Transcripts from criminal cases
Sample size	1139 files between June 1989 and November 1990	72 cases were examined 0- child witness was under the age of 18 when sexual abuse occurred.	42 criminal transcripts from cases of alleged child sexual abuse in Los Angeles Country
Outcome date/results Unit of Analysis/Outcome	Analysing case transcripts from court – variables were identified	Analysed trial transcripts from the appeals court with	Analysed trial transcripts from criminal court

		regards to sexual abuse cases	
Statistical techniques used			
Type of analysis used in study	19 variables were identified – Four measured on internal scales Fours measured on ordinal scales 11 measured on nominal scales	Coding scheme used	Coding scheme
Result of study analysis (themes and findings)	Several factors relating to the decisions made by prosecutors, no discernible based on gender or ethnicity. The victim's age was significantly – older children more likely to be prosecuted than younger child victims – older present as more credible witness. Offenders relationship with victim was mildly associated with prosecution status – results showed less	Several themes were identified namely, question-answer characteristics – which found defence attorneys ask more leading questions. What was striking was both attorneys mainly asked "yes" or "no" questions and the child did not voluntarily elaborate. Child never spontaneously referred to conversations and depended on the attorney's questions – the emphasis on	Look at moving towards an updated or modified question type classification scheme. Declarative questions not been of particular interest in the past but are used frequently by attorneys, particularly defence attorneys, these could function like suggestive questions to minimize child's response. What attorneys say while questioning the child seems to matter

	likely to prosecute if offenders were part of biologically-related nuclear family. Strongest predictor of prosecution was number of victims as well as if abuse happened recently. If medical evidence was available cases more likely to be prosecuted. This study showed only what cases were prosecuted and not how and why decisions were made.	yes/no questions probably decreased both the productivity and accuracy of responses as it produces fewer details and less accurate details than recall questions. Conversation with suspects - prosecutor asks more about suspects statements than the defence Disclosure: Extent – both attorneys asked large number of questions about child's prior disclosures Disclosure: Questions about truthfulness and overt accusations of coaching - extensively questioned children about disclosures and asked overtly if they were telling the truth and if they were influenced and coached	more to the court seemingly then the child's response – jurors more sensitive to information provided by attorneys then by child. Children's response it can be noted that there were no differences in any of the analyses between the declarative and traditional suggestive question categories and children's productivity. Children's productivity across age was similarly low in response to declarative question and traditionally suggestive questions.

		Disclosure: Motives–Prosecutors twice as likely to ask about motive for nondisclosure and almost twice as likely to ask about motived for disclosing -this is generally done with younger children	
Additional outcomes			
Note fields			

General Information: Researcher performing data extraction	Kathleen Hawthorn	Kathleen Hawthorn	Kathleen Hawthorn
Date of data extraction	17 September 2017	17 September 2017	17 September 2017
Identification features of the study	Eyewitness memory; forced confabulation; child witness; children's memory; suggestibility; developmental differences	Court preparation, child witness, judicial system, sexual abuse,	Best interest of the child, criminal court, sexual abuse, child sexual abuse,
Record number	16	17	18
Author	Stacia Stolzenberg and Kath Pezdek	Anne Mellor and Helen R. Dent	Naila S. Awan

Article title	Interviewing child witnesses: The effect of forces confabulation on event memory	Preparation of the child witness for court	Balancing a child's right to be heard with protective measures undertaken in "the best interest of the child": Does the International Criminal Court get it right
Type of publication	Journal Journal of Experimental Child Psychology	Journal Child Abuse Review	Journal Children's Legal Rights Journal
Country of origin	USA	United Kingdom	USA
Study characteristics Aim/objective of the study	Age differences in rates of forced confabulation and memory consequences thereof were assessed using a recall task similar to real forensic interview procedures.	Outline some of the obstacles to children giving effective evidence in England and Wales and how these might be overcome or at least minimized. The apparent gulf between the recommendations from research and the actual support which a child witness is likely to receive is highlighted. A practical application	Issues involving children's rights often require the balancing of competing interests in order to determine what course of action is in "the best interests of the child." Determining the extent of a child's right to participate in judicial and administrative proceedings, such as criminal trials before the International

		of these recommendations is demonstrated by description of a single case study involving a programme of preparation to assist a child witness to give evidence in court.	Criminal Court ("ICC"), is one example of a situation in which a balancing of children's interests is required.
Study design	Quantitative	Qualitative	
Recruitment procedures	Recruited from private elementary school in Los Angeles County – western United States	One case study	
Participants	110 children, 55 6-year-olds 55 9-year-olds		
Sample size	110 – 14 excluded due to having seen target video, 1 could not answer, Total sample = 95		
<u>Outcome date/results</u> Unit of Analysis/Outcome	. Data coding – digitally recorded and later transcribed and coded for answerable and		

	unanswerable questions		
Statistical techniques used			
Type of analysis used in study			
Result of study analysis (themes and findings)	These findings suggest that pressing child witnesses to answer questions they are initially reluctant to answer is not an effective practice, and the consistency of children's responses over time is not necessarily an indication of the accuracy of their eyewitness memory	Guidelines could help clarify acceptable practice and enable those involved in this work to prove an effective service	The ICC has opened its doors to children through the crimes defined as being within its jurisdiction as well as its definition of who it considers to be a "victim." These actions make it all the more apparent that the ICC must make serious efforts to not only provide children with a voice but also protect them from harm. The ICC has largely met this challenge and sought to uphold CRC principles related to participation and protection. It not only provides children with the right to participate in proceedings that

			they did not themselves initiate, but the ICC also has a number of measures in place that recognize that children must be treated differently than the average adult witness or victim.
Additional outcomes			
Note fields			

General Information: Researcher performing data extraction	Kathleen Hawthorn	Kathleen Hawthorn	Kathleen Hawthorn
Date of data extraction	17 September 2017	17 September 2017	17 September 2017
Identification features of the study	Cross-examination; child witnesses; children's testimony; suggestibility	Sexual abuse; criminal case; child victim, child witness; best interest of the child	Children; "best interest of the child" principle; international law; Convention on the Rights of the Child; Committee on the Rights of the Child; implementation
Record number	19	20	21

Author	Rachel Zajac; Sarah O'Neill and Harlene Hayne	Johan Prinsloo	Jean Zermatten
Article title	Disorder in the courtroom? Child witnesses under cross-examination	The constitutional right to protection of child victims and witnesses in the South African criminal justice system: Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and others	The best interest of the child principle: Literal analysis and function
Type of publication	Journal Developmental Review	Journal Child Abuse Research: A south African Journal	Journal International Journal of Children's Rights
Country of origin	New Zealand	SA	
Study characteristics Aim/objective of the study	When a witness gives evidence in an adversarial criminal trial, there are two main questioning phases: direct examination and cross-examination. Special provisions are sometimes made for children to give direct evidence,	The complexity surrounding the prosecution of criminal cases in which young victims or witnesses are involved, especially in cases of sexual abuse, remains controversial and often results in the criminal justice	The Best Interest of the Child principle is an innovative concept introduced by the United Nations Convention on the Rights of the Child. It serves as a foundational element of the Convention and has been identified by

	but the majority of child witnesses are still cross-examined. While several decades of research have demonstrated how to elicit children's direct evidence in a manner that promotes completeness and accuracy, the cross-examination process directly violates many of these principles. Here, we outline the characteristics of cross-examination, particularly as it pertains to children, and we review research about its impact on children, their testimony, and their credibility. We consider options for reforming the cross-examination process and propose avenues for future research	system being blamed for neglecting the needs and welfare of child victims and witnesses. It is therefore argued that a progressive justice system requires a flexible interpretation of the legal rules regarding the giving of testimony, to ensure that children's unique vulnerability is taken into consideration and their needs served. It is argued that, even though some of the fundamental international rights may not be repeated explicitly in section 28(2) of the Constitution, they are critical prerequisites setting children’s right to special care apart from other fundamental rights and thereby creating the only instance of	the Committee on the Rights of the Child as one of the Convention's four general principles. Despite limited historical references to this idea in the late 19th and early 20th centuries, this is a distinctly contemporary legal concept. As a result, its content and functionality has been the subject of thorough academic study as well as systematic examination and elaboration in jurisprudential settings. The paper makes a significant contribution to this interpretive dialogue by providing a conceptual and literal analysis of the principle, including as it relates to other articles of the Convention. The political dimensions of the principle are

		the precedence of one fundamental right over others. The Constitutional Court acknowledged that the constitutional principles pertaining to the special nature of children’s rights apply to all children who are witnesses in criminal trials. However, while recognising that there is a need to protect child witnesses and especially complainants in sexual cases, the Court arrived at the conclusion that it is essentially a matter of statutory interpretation rather than of the constitutional status of a number of issues previously identified by the High Court	also considered with a view to its practical implementation at the national level.
Study design	Thematical	Interpretation of statutory law	Qualitative

Recruitment procedures			
Participants			
Sample size			
<u>Outcome date/results</u> Unit of Analysis/Outcome			
Statistical techniques used			
Type of analysis used in study			
Result of study analysis (themes and findings)	Recent research has made it clear that cross-examination is unlikely to be the truth-finding tech- nique that many believe it to be. Instead, the style of questioning typically used during this process directly contravenes almost every principle scientifically established for obtaining complete and accurate evidence from any witness, particularly a child. Of specific	It has been one of the objectives of the case in question to realise "the constitutional purpose of avoiding disruptive legal uncertainty". In the opinion of the author, this objective has not been realised. Although the Constitutional Court recognised the fact that the meaning of the phrase "undue mental stress or suffering" was not defined in the	The best interest of the child principle is one of the most important provisions of the CRC and one of the most difficult to explain. Yet, it would be seen to be impossible to work with the CRC without having any idea of this rule of procedure, or to be operating under the assumption that everyone is acting in the best interest of the child/children. What we need is a more objective

	concern, the types of questions typically employed during cross-examination have been shown to exert a significant negative effect on the accuracy of children's reports about personally experienced events. The difficulty that children experience during cross-examination appears to be widely recognized, there appears to be resistance to its reform. Some progress in designing effective interventions has been made, with preparation programs that give children practice and feedback at answering cross-examination-style questions achieving promising results. The legislature and judiciary also need to be open to	Criminal Procedure Act 51 of 1977, it did not care to provide any practical directives in this regard, even though this omission created significant legal uncertainty.	understanding of this concept since there is a serious risk that vastly different decisions can be reached and justified as being in the best interest of the child, depending on the person who subjectively "interprets" what is in the best interest of an individual child/group of children

	alternative means of gathering and testing children's evidence.		
Additional outcomes			
Note fields			

General Information: Researcher performing data extraction	Kathleen Hawthorn	Kathleen Hawthorn	Kathleen Hawthorn
Date of data extraction	17 September 2017	17 September 2017	17 September 2017
Identification features of the study	Child witness; witness demeanour; sexual abuse, credibility	Interview instruction, rapport building, sexual abuse, questioning of child witnesses and/or witnesses	
Record number	22	23	24
Author	Pamela C. Regan and Sheri J. Baker	Elizabeth C. Ahern, Stacia N. Stolzenberg and Thomas D. Lyon	
Article title	The impact of child witness demeanour on perceived credibility and trial outcome in sexual abuse cases	Do Prosecutors use interview instructions or build rapport with child witnesses?	

Type of publication	Journal Journal of Family Violence	Journal Behavioural Sciences and the Law	
Country of origin	USA	United Kingdom	
<u>Study characteristics</u> Aim/objective of the study	Examines how child witness demeanour at the moment of courtroom confrontation with the defendant affects the trial outcome and the perceived credibility of the child witness in sexual abuse cases.	Purpose of the study was to evaluate how prosecutors question children in criminal trials of alleged child sexual abuse, focusing on prosecutor's administration of interview instructions and rapport building with children and their responsiveness.	
Study design	Study had two parts - Phase 1 (descriptive) utilized a free response format to explore the affective and behavioural responses. Phase 2 (experimental) investigated the impact of presence or absence of one of these expected	Transcript was reviewed	

	responses (i.e., crying)		
Recruitment procedures		Cases during the period of 2 January 1997 to 20 November 2001 filed in Los Angeles County	
Participants			
Sample size	Phase 1 - 27 undergraduate students Phase 2 - 31 undergraduates	235 of the 309	
Outcome date/results Unit of Analysis/Outcome	Phase 1 -- expected a child victim of sexual assault to demonstrate upon first confronting the defendant in the courtroom. The most frequently cited responses included crying, fear, and confusion. Phase 2 - perceptions of a criminal case involving a male adult defendant charged with molestation of his 6-yr-old daughter.		

Statistical techniques used			
Type of analysis used in study			
Result of study analysis (themes and findings)	Participants who read about a child who cries upon initially confronting the defendant perceived her as more honest, credible, and reliable than a calm child, and they were more likely to convict the defendant	Prosecutors failed to effectively administer key interview instructions, build rapport, or rely on open-ended narrative producing prompts during this early stage of questioning. Moreover, prose-cutors often directed children's attention to the defendant early in the testimony. The productivity of different types of wh- questions varied, with what/how questions focusing on actions being particularly productive. The lack of instructions, poor quality rapport-building, and closed-ended questioning suggest that children	

		may not be adequately prepared during trial to provide lengthy and reliable reports to their full ability.	
Additional outcomes		The findings also point to that children's cognitive and emotional needs may be overlooked in criminal court, arguing for changes in the training and supervision of legal professionals responsible for questioning child witnesses. More work is required to ensure that one understands the child's performance as witness and foster means through which both comfort in the courtroom and their ability to provide more complete and reliable reporting is enhanced	

Note fields			