

# CHAPTER FOURTEEN

## EXAMINATION OF WITNESSES

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### **1. DISCUSSION OF THE DRAFT AMENDMENT TO SECTION 166 OF THE CPA**

We commend the commissions recommendations to introduce, in the form of primary legislation, a prohibition on questions in cross-examination that are scandalous, vilifying, insulting, and unduly repetitive, needlessly annoying, intimidating or offensive.

Notwithstanding this, we are concerned that protection afforded by the proposed new section 166(4) of the CPA is insufficient as the forbidding of such cross-examination techniques is still left in the discretion of the court. The case law suggests that very often the presiding officer's themselves are equally if not more guilty of contributing to the traumatising of the complainant or other witnesses in sexual offence proceedings by virtue of the aggressive and insulting manner in which they relate to the witnesses.

As regards the Commission's recommendation that "*a witness, the accused or the state may object to questions which are scandalous, insulting or intended to annoy, or to the manner in which the cross-examination is being conducted*", we re-iterate the need to allow limited legal representation for complainants in sexual offence proceedings as a means of ensuring that the witnesses rights in this regard are in fact protected. Alternatively, witnesses need to be informed of their rights and a positive duty placed both on the prosecution and on presiding officers to ensure that witnesses are so informed.

Given the intention behind the Act and the recognition that testifying in sexual offence proceedings may be severely traumatising, we submit that it is wholly inappropriate

for an unrepresented accused to cross-examine the complainant or any other vulnerable witness, as contemplated by Section 13 of the draft Sexual Offences Bill, in sexual offence proceedings. Furthermore, we submit that the various protective measures either already in existence or proposed elsewhere in the Discussion Paper are not necessarily adequate to protect the complainant or other vulnerable witnesses either entirely, or in their current formulation. For example, even where a witness may be allowed to testify in camera, or in a separate room, unless the services of an intermediary are provided, the witness will still be required to answer to the unrepresented accused's voice, which in itself may be traumatising and severely negatively affect the witness's ability to testify. Surely this can never be in the interest of justice or the pursuit of the truth?

As regards the Commission's proposal that the court appoint a legal representative to conduct the cross-examination in question, the court is only empowered to make such an appointment once it has been established that the State legal aid is available to pay for such representative. This enquiry may cause an unreasonable delay in the proceedings and the State legal aid may not be available to pay for the representative concerned.

Accordingly, and in order to address the serious concerns regarding the questioning of a vulnerable witness by an unrepresented accused, we recommend that a provision echoing Section 6(3) of the Domestic Violence Act<sup>1</sup> be inserted in the final Sexual Offences Act as follows:

**"If in criminal proceedings involving the alleged commission of a sexual offence an accused is unrepresented, such accused shall not be entitled to cross-examine a vulnerable witness and shall put any question to such witness by stating the question to the court, or a court appointed intermediary, who shall repeat the question accurately to the witness, provided that the person through whom cross-examination takes place may refuse to relay questions that violates the dignity and privacy of the of the witness."**

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<sup>1</sup> Act 166 of 1998

Lastly, while we accept that in multi-defendant cases each accused is entitled to his or her own defence, we submit that co-accused should not be entitled to pose the repetitive questions to vulnerable witnesses merely as a tactic employed to confuse such witness. The reason for this is that such conduct is deliberately intended to further traumatise an already vulnerable witness thereby rendering him or her unable to give coherent testimony in circumstances where they would otherwise be able to do so. The very issue described in this paragraph further highlights the need to allow limited legal representation to complainants in sexual offence proceedings as such representatives would be empowered to intervene and object to inappropriate cross-examination in circumstances where the courts and prosecution have been notoriously reluctant to do so. Otherwise stated a legal representative would be able to ensure that the protective measures provided for in the Sexual Offences Act are not only applied but also that they are applied correctly. We again refer you to our more detailed submissions in this regard contained in Chapter 7.