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criminal activity: crossing the void
between child justice and the worst forms
of child labour**

**Paper presented at the RECLISA Southern African
regional child labour conference**

Jacqui Gallinetti



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Abstract

Child justice reform in South Africa is ongoing, with the long-awaited Child Justice Bill still not finalized. However, since the early 1990's, the South African criminal justice system, as far as it pertains to children, has been undergoing practical changes that are in effect progressively bringing it in line with South Africa's obligations in terms of the UN Convention on the Rights of the Child. Although there is no legal framework for it, diversion has been implemented in many areas and there are constant attempts to ensure children are not kept awaiting trial in prison giving substance to the detention as a last resort principle. In addition, our superior courts have handed down numerous decisions that deal with the rights of children in trouble with the law, setting precedents in the absence of legislation.

South Africa has signed and ratified the ILO conventions on minimum age of employment and worst forms of child labour. In addition, South Africa has drafted a child labour action plan to manage a range of child labour issues as well as worst forms of child labour in SA. Following the Child Labour Programme of Action, a study concentrating on children used by adults to commit crimes has been undertaken in South Africa and pilot projects aimed at addressing the problem are underway.

This paper illustrates the need for co-operative governance between various government departments in addressing the phenomenon and working towards its elimination. It argues that the emerging child justice system in South Africa and other southern African countries must engage with the issue within the confines of the judicial process in order to ensure that the instrumental use of child offenders is properly combated and such children are treated appropriately, given their status as both victim and offender.

1. Introduction

Child justice reform in South Africa is still ongoing, with the long-awaited Child Justice Bill still not finalised. However, since the early 1990's, the South African criminal justice system, as far as it pertains to children, has been undergoing practical changes that are in effect bringing it somewhat in line with South Africa's obligations in terms of the UN Convention on the Rights of the Child. Although there is no legal framework for it, diversion has been implemented in many areas and there are constant attempts to ensure children are not kept awaiting trial in prison – giving substance to the detention as a last resort principle. In addition, our superior courts have handed down numerous decisions that deal with the rights of children in trouble with the law – setting precedents in the absence of legislation.

At the same time, South Africa has signed and ratified the ILO conventions on minimum age of employment and worst forms of child labour. In addition, South Africa has drafted a child labour action plan to manage a range of child labour issues as well as worst forms of child labour in SA.

So historically, while there seems to be a general understanding that children accused of crimes are entitled to certain rights and procedural guarantees by the South African government, it appears little thought has been given to the issue of child offenders also being victims of a worst form of child labour, namely, due to their use by adults or older children to commit offences. It is only recently that this phenomenon has been recognized and action steps proposed to combat the problem.

Following on from the Child Labour Programme of Action, a study concentrating on children used by adults to commit crimes has been undertaken in South Africa and pilot projects aimed at addressing the problem are underway.

This paper will look at the concept of children used by adults to commit crime, its place in international law and documents and the South African research findings and pilot programmes in order to illustrate the need for co-operative governance between various government departments in addressing the phenomenon and working towards its elimination.

2. Child justice in South Africa

Whereas, prior to 1994, special focus had been placed on children accused of crimes and detained for their political beliefs, once the transition to a democratic form of government occurred, attention turned to children who were detained for common criminal offences. During the 1990's, concerted efforts were undertaken by both government and non-governmental organizations to ensure that the rights of children in conflict with the law were adequately protected.

First, in 1995, section 29 of the Correctional Services Act was amended to allow for the release from detention of all children in prison awaiting trial except in certain limited circumstances. Unfortunately, due to the fact that welfare facilities could not cope with the sudden influx of children, the implementation of this provision was not successful and section 29 was amended again. This amendment, which came into effect in May 1996, provided for the detention of children awaiting trial who were older than 14 years of age and who were charged with certain offences. Although it was only intended to be in force for a maximum period of two years, due to a drafting error the provision remains on the Statute books today. Since September 1996, when there were only approximately 600 children awaiting trial in prison on any one day, this amount steadily increased to the point when, in March 2000, a total of 2800 children were being detained countrywide.

Second, a further development occurred with South Africa's ratification of the United Nations Convention on the Rights of the Child (CRC), by which South Africa bound itself to take all

appropriate legislative and other steps to implement the rights recognised in the Convention. Furthermore, a number of these rights are given constitutional protection in our final Constitution. These include, *inter alia*, the provision that in all actions undertaken concerning children, their best interests are of paramount importance and must be a primary consideration (article 3(1) of the CRC and section 28(2) of Act 108 of 1996) and the provision that where a child is deprived of his or her liberty, this can only occur as a measure of last resort and for the shortest possible period of time (article 37(b) of the CRC and section 28(1)(g) of Act 108 of 1996).

It was against this backdrop that, in 1996, a project committee of the South African Law Reform Commission was appointed to investigate juvenile justice. The Child Justice Bill was a product of four year's work that included extensive consultation with role-players, experts and even children themselves. It was released by the South African Law Reform Commission in 2000 and introduced into parliament by the Department of Justice in 2002 as Bill 49 of 2002. At the time of entering the parliamentary process the Bill had undergone some changes at the hands of the State law Advisors, but essentially the substance of the Bill remained the same and the changes were mainly technical in nature.

In its 2002 form the Child Justice Bill sought to address the problems encountered in the field of child justice as it exists within the framework of current legislation. These problems center around the fact that the criminal procedure framework governing the criminal justice system is essentially the same for children as it is for adults. There are some small exceptions, for instance, the fact that court proceedings must be held *in camera* for child accused and that children can be sentenced to reform schools in addition to the other competent sentences under the Criminal Procedure Act 51 of 1977.

The Child Justice Bill was aimed at protecting the rights of children accused of committing crimes as well as regulating the system whereby a child is dealt with and ensuring that the roles and responsibilities of all those involved in the process are clearly defined in order to provide effective implementation. The effect of the Bill being adopted as legislation would be to revolutionise the criminal justice system in South Africa in so far as it affects children in conflict with the law.

That version of the Child Justice Bill was of paramount importance for a number of reasons. Firstly, once enacted, the Bill would have ensured that South Africa is complying with its international, regional and constitutional obligations that it has undertaken to meet under the Constitution and by ratifying the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child. Secondly, the Bill provided for a comprehensive and cohesive system for the management of young offenders. This systematic approach would have streamlined the criminal justice system and provided a framework for inter-departmental co-operation on issues that require departmental officials to work in conjunction with each other rather than in isolation. Thirdly, the Bill ensured that children in trouble with the law were afforded protections that are guaranteed to them in law as well as creating a balance with the needs of the community so as to ensure that the safety and security of society were prioritised.

It should be stressed that the enactment of the 2002 Bill should not have been seen as "being soft on crime". While combating crime is a dire need in South Africa today, those efforts must be directed and co-ordinated in such a way that, in the case of children, the rights of the accused are protected and steps be taken by the State to manage the offender in a way that will impact on and change behavior patterns to prevent reoffending. It is argued that an overall punitive approach, especially towards child offenders, is not desirable except in necessary cases, and that restorative justice and the systems that will facilitate this should be prioritised.

In 2003 the Portfolio Committee on Justice and Constitutional Development held public hearings and were briefed by government departments and civil society on Bill 49 of 2002. During the debates that took place before the Portfolio Committee in 2003, the Bill appeared to undergo certain changes.

Although the ethos of the Bill remained the same in that the processes of assessment, diversion, the preliminary inquiry and alternative sentencing remained intact, the overall child rights nature of the Bill that focused on the individual child offender was whittled away by the Portfolio Committee. The result was that at the end of 2003, the Bill was not yet finalized but was far more punitive in nature and did not allow for many of its provisions to apply to children charged with serious scheduled offences. One example of the new nature of the Bill is that it would appear that the benefits of diversion, which were potentially available to all children charged with any crime under Bill 49 of 2002, are now only available to children charged with less serious and petty crimes. Likewise, children charged with serious offences will not be assessed by a probation officer and will not appear before a preliminary inquiry – processes that were put in place in order to manage a range of issues from age determination to placement of the child in order to ensure the child is detained as a matter of last resort and for the shortest possible period of time¹.

However, after the debates in 2003, parliament recessed for the elections in 2004 and since that time, the Bill has not been debated again before the Portfolio Committee. Its “non-appearance” has been the issue of many debates and theories, however there have been no answers forthcoming from the legislature as to where it is and why the Portfolio Committee has not proceeded with it.

3. Children used by adults to commit crime as a child justice issue

3.1 International background to the phenomenon

The first reference to children being used by adults to commit crime (CUBAC) is made in the United Nations General Assembly (GA) Resolution 43/121 of 8 December 1988 on the use of children in the illicit traffic in narcotic drugs and rehabilitation of drug addicted minors². This followed two previous General Assembly Resolutions on the international campaign against drug abuse and the illicit traffic in drugs³. Resolution 43/121 recognised that drug dealing organizations make use of children in the illicit production and trafficking of drugs and condemned such actions, urging States to join together to establish national and international programmes to protect children from involvement in illicit production and trafficking, as well calling on States to protect them from consuming drugs. It also called on States to promote the adoption of laws to provide for suitably severe punishment of drug trafficking crimes that involve children.

Resolution 43/121 was followed by the much broader General Assembly Resolution 45/115 of 14 December 1990 on the instrumental use of children in criminal activities. This Resolution recognized that, within the traditional forms of child exploitation, the use of children in criminal activities has become an increasingly grave phenomenon, which represents a violation of social norms and a deprivation of the right of children to proper development, education and upbringing, and which prejudices their future⁴.

The resolution’s preamble goes on to recognize that there are categories of children, such as those that are runaway, vagrant, wayward or ‘street’ children, who are targets for exploitation that includes seduction into drug trafficking and abuse, prostitution, pornography, theft, burglary, begging and homicide for reward. The General Assembly accordingly requested States to take measures to

¹ While no new official version of the Bill exists, the author was present at all of the Portfolio Committee debates and kept personal notes of the changes to the Bill.

² See too, in this regard, article 33 of the Convention on the Rights of the Child (1989), which provides that ‘State Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.’

³ GA/RES/41/127 of 4 December 1986 and GA/RES/42/113 of 7 December 1987.

⁴ Paragraph 7 of the Preamble.

formulate programmes to deal with the problem and to take effective action by, including (but not limited to measures to ensure appropriate sanctions are applied against adults who instigate the crimes).

The Commission on Narcotic Drugs that falls under the auspices of the UN Economic and Social Council has addressed the issue of youth and drugs in three specific reports to the Council⁵. In only one of the reports is there reference to children used in the illicit production and trafficking of drugs – and even in this instance there are only two oblique statements relating to this issue⁶.

Specifically referring to GA Resolution 45/ 115, the International Association of Prosecutors and the International Centre for Criminal Law Reform and Criminal Justice Policy released *Model Guidelines for the effective Prosecution of Crimes against Children*⁷. Under the section dealing with pre-trial decisions, the guidelines specifically deal with CUBAC in paragraph 11:

“Children who engage in criminal activities through coercion by others who profit by their acts should be considered victims of exploitation rather than perpetrators of crime. Prosecutors should treat these children as victims and should actively pursue charges against the adults involved.”

The explanatory note emphasizes the need to make justice personnel sensitive to situations of social risk that cause children to be used by adults and older children to commit crime. In addition, appropriate sanctions should be applied against adults who are the instigators of crimes, rather than against the children involved who are victims of criminality by virtue of their being exposed to crime.

The recent *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* also deal with CUBAC⁸. This document contains good practice guidelines based on relevant international and regional norms, standards and principles and provides a practical framework to assist in the review of national law and policy, design and implementation of law and policy, guide professionals working with child victims and witnesses.

In all of the above instances, CUABC is dealt with within the confines of the criminal law and criminal justice system. The international documents recognize the phenomenon of CUBAC and call for its management within the criminal justice system. Importantly, the vulnerability of child offenders to adult manipulation is recognized and the prosecution of adults is emphasized.

3.2 CUBAC in South African child justice

Criminal law provisions relevant to this phenomenon are largely uncodified and rest on common law definitions of offences developed since Roman Dutch law was received at the Cape of Good Hope. The first premise is that both an adult and a child involved in the same offence would ordinarily be liable as co-perpetrators of that offence, and would theoretically be equally liable to prosecution and conviction, provided the child is over the minimum age of criminal responsibility (7 years). Adult influence would, however, serve as a factor to be considered in mitigation of the sentence of the child and could also serve to aggravate the sentence received by the adult offender. Unless the defence of duress could be successfully raised by the child concerned so as to vitiate *dolus*, voluntary participation in the act would usually be sufficient to ensure a conviction⁹.

⁵ E/CN.7/1999/8 of 11 January 1999 (Youth and drugs: a global overview); E/CN.7/2001/4 of 6 December 2000 (World situation with regard to drug abuse, with particular reference to children and youth) and E/CN.7/2002/3 of 21 December 2001 (Prevention of the recreational and leisure use of drugs among young people).

⁶ E/CN.7/2001/4 of 6 December 2000 at p. 5 and p. 23.

⁷ Copy on file with Community Law Centre.

⁸ The unofficial version of these guidelines was released by The UN Commission on Crime Prevention and Criminal Justice at its 14th session (23-27 May 2005). A copy of this document is on file with the Community Law Centre.

⁹ See, in general, De Wet and Swanepoel *Strafreg* (4th ed) Butterworth and Co 1984.

The above propositions evidently mirror the position adopted by the Portfolio Committee on Justice and Constitutional Development, who during the deliberations in 2003 rejected the proposal in the version of the Bill proposed by the South African Law Commission to create an independent (statutory) offence for which an adult who used a child during the commission of the offence could be prosecuted (in addition to any prosecution as perpetrator or accomplice to the original offence, such as housebreaking). Instead, later versions of the Bill (which are not yet publicly available) reportedly contain a clause requiring that the use of a child during the commission of an offence being considered an aggravating factor at sentence.

As far as an adult ‘instigator’ is concerned, a conviction on the grounds of the doctrine of common purpose, or as an accessory after the fact, is also possible where the actions of the accused adult do not indicate actual participation in the commission of the offence itself, but where such adult ‘commissioned’ the act in question, or has rendered assistance subsequently. A practical example might be where adults wait outside whilst a house is wrongfully broken into, and then assist with the get away and disposal of the proceeds of the offence.

Even though at common law, the person who conspires with or incites another to commit a crime would in any event be vested with criminal liability himself or herself on the basis that he or she meets the definitional requirement to be convicted either as a co-perpetrator or as an accomplice, prevailing legal uncertainty around the liability of the inciter or conspirator who did not actually participate in the commission of the wrongful act led to statutory intervention as early as 1914¹⁰. The applicable statute has been redrafted several times, and conspiracy to commit a crime is now punishable in terms of section 18(2) of the Riotous Assemblies Act 17 of 1956¹¹. In essence, a prosecution for conspiracy can only succeed if “there is a definite agreement between two persons to commit a crime”¹². However, the conspirators do not have to know the identity of all the other conspirators, which means that a gang boss whose underlings recruit children for the purposes of committing crime would be liable as a conspirator even though he was unaware of the identity of the children who were actually recruited¹³.

Incitement to commit a crime is also punishable under the Riotous Assemblies Act¹⁴. The inciter would be convicted either as co-perpetrator or as accomplice to the crime. Originally it was held that an element of persuasion of the perpetrator by the inciter must be present, but this view was overturned in the Appellate Division in 1996, and it is immaterial whether the person at whom the incitement is aimed is susceptible to persuasion¹⁵. The emphasis is on the conduct of the inciter, not the incitee – therefore; the means used to influence the incitee are not relevant. The inciter must consciously seek to influence another to commit a crime, thus if the incitee lacks culpability (e.g. because he or she is below the minimum age of criminal culpability), the inciter cannot be convicted.

Therefore, South African law, while having provisions that can assist in the investigation and prosecution of adults who use children to commit crime, has not really applied its mind to the particular phenomenon of CUBAC – save for one clause in the Child Justice Bill that has now been changed to state a principle that has always existed, namely the use of children by an adult is an aggravating factor in the sentence of the adult.

¹⁰ De Wet and Swanepoel op cit at p 205.

¹¹ C Snyman “Criminal Law” (4th ed) Butterworths publishers, Durban at p 292.

¹² Ibid.

¹³ Ibid at p 294.

¹⁴ Section 18(2), which makes it an offence to ‘incite, instigate, command or procure any other person to commit an offence’.

¹⁵ S v Nkosiyana 1996 (4) SA 655 (A).

4. Children used by adults to commit crime as a child labour issue

4.1 International Labour Organisation Conventions

Child labour, strictly defined, is work that affects the child's enjoyment of his or her fundamental rights: civil, political or economic, social and cultural - particularly the broad right to survival and development of the child. The relevant ILO Conventions, the UN Convention on the Rights of the Child (CRC) and a number of domestic laws call for the elimination of child labour (with priority being given to its worst forms). According to the ILO's International Programme on the Elimination of Child Labour (IPEC), "not all work performed by children is child labour: [child labour] depends on multiple factors, including, but not restricted to, the age of the child, the duration for which the activity is performed, the nature of the activity, the conditions of work, or a combination of these and other factors"¹⁶.

The conceptual dilemma relating to child labour, at least as regards age, is partly resolved by the provision in the ILO Minimum Age Convention (No. 138) requiring the setting of the minimum permissible age at which children can work and that this age must not be set below that of fifteen years (for developed countries) and fourteen years (for developing countries). Such minimum age excludes "light work" in which the minimum ages of 13 and 14 are applicable for developed and developing countries respectively.

Further, certain types of work are deemed out-rightly hazardous as clearly spelt out through a number of instruments, particularly the latest ILO Convention (No.182) on the Elimination of the Worst Forms of Child Labour, which, in Article 3 sets out the worst forms of child labour (WFCL), namely:

- All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom, and forced or compulsory recruitment of children for use in armed conflict;
- The use, procuring or offering a child for prostitution, for the production of pornography or for pornographic performances;
- The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; and
- Work, which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

The ILO Convention on the Worst Form of Child Labour also requires ratifying states (of which South Africa is one) to take time bound measures to prohibit and eliminate the worst forms of child labour (WFCL).

4.2 CUBAC as a worst form of child labour in South Africa

The South African Constitution (Act 108 of 1996), in section 28, provides that children under 18 have a right to be protected from work that is exploitative, hazardous or otherwise inappropriate for their age. The constitutional and other superior courts have not yet had occasion to interpret this particular section of the Constitution.

In essence, the above provision would appear to include work that is detrimental to children's schooling, or detrimental to their social, physical, mental, spiritual or moral development. This constitutional principle, which is also in line with South Africa's international obligations, has been given effect to in domestic law through the Basic Conditions of Employment Act (75 of 1997). This legislation provides that children under the age of 15 are prohibited from engaging in work¹⁷.

¹⁶ "IPEC Report on action against child labour 2003-2004: progress and future priorities", IPEC, 2003, p.12.

¹⁷ Subject to exceptions as further discussed.

The draft South African Child Labour Programme of Action (CLPA) was provisionally approved by representatives from various government departments on 4 September 2003, subject to certain amendments and the costing of the recommended actions steps to be implemented by the key government departments. It was submitted to Cabinet for noting in July 2005.

The CLPA executive summary notes that, following on from South Africa's ratification of the International Labour Organization's (ILO's) Minimum Age for Admission to Employment Convention 1973 and the Worst Forms of Child Labour Convention (Convention 182) of 1999, as well as the inclusion of a clause in the South African Constitution ensuring children the right not to be subject to exploitative labour¹⁸, the South African government has been involved in a long process of adopting appropriate policies and a national child labour action programme to combat child labour. This involved extensive consultation with the South African public and key stakeholders from government and civil society, as well as with children.

In drafting the CLPA, certain principles were adhered to and these included the prioritisation and identification of the worst forms of child labour for South Africa, the examination of best practices elsewhere, sustainability and the avoidance of duplication¹⁹. CLPA has identified a wide range of activities that fall under the mandate of various government departments and agencies, some of which are already contained in existing policy and others that are new and will require expenditure and budgets²⁰. In doing so, Annexure A of CLPA sets out the actual action steps that have to be undertaken by designated stakeholders including the Departments of Justice (DoJ), Social Development (DoSD), Education (DoE), Labour (DoL), Correctional Services (DoCS) and South African Police Service (SAPS) as well as employers and NGOs. These steps include policy development, public awareness campaigns, collection of data and statistics and training, amongst many others.

The key elements of CLPA are²¹:

- The rollout of programmes on poverty alleviation, employment, labour, and social matters in areas that involve work that is harmful to children
- The promotion of new legislative measures aimed at prohibiting the worst forms of child labour
- The strengthening of national capacity to enforce legislative measures
- Increasing public awareness and social mobilization against the worst forms of child labour.

One of the worst forms of child labour in South Africa that is identified by CLPA is the instrumental use of children to commit illicit activities, by adults or older children (CUBAC).

In relation to children used by adults (or older children), CLPA identified specific actions steps concerning children who are used by adults in offending which form recommendations 56 – 59, namely:

- Regarding the involvement of children in production and trafficking of drugs and other illegal activities, an important element of investigation and prosecution should be finding and prosecuting adults (or sometimes other children) using the children or benefiting from the children's illegal activities, if any. *Lead institution*: Department of Justice. *Secondary institutions*: National Prosecuting Authority (prosecution of those using children) and SAPS (identification of those using children who are in conflict with the law, and investigating cases against them)
- Where children commit crimes, the diversion of such child offenders away from prison should be the preferred option for children. Where appropriate, prosecution of a child should be converted to a children's court inquiry, after conviction. *Lead institution*: Department of Justice. *Secondary institutions*: Department of Social Development, National Prosecuting Authority (prosecution of

¹⁸ Section 28 (1)(f).

¹⁹ CLPA nee CLAP, p. 3.

²⁰ CLPA nee CLAP, p.3-4.

²¹ CLPA nee CLAP, p. 4.

those behind children, and diversion programmes), SAPS (identification of those using children who are in conflict with the law, and investigation of cases against them)

- Formal education or vocational training should be offered to all children, whose sentence involves deprivation of liberty, including those held while awaiting trial. *Lead institution:* Department of Education. *Secondary institution:* Department of Correctional Services
- Authorities holding children in custody should be allowed to continue requiring of them to work. Work is preferable to children being bored and feeling useless. However, policy should be formulated on when children deprived of their liberty may be required to work, and when such work should be remunerated. This policy should be in line with national and international protective laws on children. *Lead institutions:* Department of Correctional Services, Department of Education (reform schools). *Secondary institution:* Department of Social Development

It is noteworthy that while CUBAC is seen as a worst form of child labour and for the first time comprehensively dealt with by CLPA, the action steps and obligations fall on the departments responsible for the criminal justice system.

This is where the challenge of implementing the CLPA lies – working towards the elimination of a worst form of child labour in a system where labour issues are traditionally foreign.

5. Efforts to prohibit and eliminate CUBAC in South Africa and how co-operative governance plays a key role

5.1 CUBAC research findings and pilot design

The programme Towards the Elimination of the worst forms of Child Labour (TECL) is a technical assistance project to the Department of Labour (DoL) and is essentially an executing agency for the Child Labour Programme of Action (CLPA). TECL contracted consultants to investigate and design three pilot projects, aimed at addressing activities of children that are likely to adversely affect their development. These pilot projects address the issues that have been identified as worst forms of child labour in South Africa and these include CUBAC.

The work on CUBAC initially involved a three-phase project that took place in 2005. The three phases involved the following:

- **Phase 1: Rapid Assessment**

This involved a report on an initial national stakeholder analysis conducted with relevant national and provincial government departments as well as members of civil society, namely, NGO service providers and academics. It included qualitative and quantitative research as well as a literature study to determine an initial assessment of the nature, causes and extent of CUBAC including the identification of four potential pilot sites for the following phases of the projects. This was conducted between December 2004 and February 2005.

- **Phase 2: Baseline Survey**

This involved further and more detailed qualitative and quantitative research at the four identified potential pilot sites to inform the design of the pilot projects as well as to finalise the selection of two pilot sites. The final two pilot sites are the locations at which the actual identified interventions are being piloted during 2006, namely Mitchell's Plain (Western Cape) and Mamelodi (Gauteng). The Baseline Survey ran from April 2005 and was completed in mid- August 2005.

- **Phase 3: Project Design**

This involved the actual design of programmes and interventions aimed at addressing the relevant issues affecting CUBAC at the two pilot sites.

- **A separate child consultative research study**

to explore the experiences of children and results of that process. This study was consolidated into a separate publication that contains the information and analysis produced from the research.

The Rapid Assessment established that there was no specific policy document that related directly to CUBAC. The completed questionnaires received revealed that only one respondent had not encountered children used by adults or other children to commit crimes in the course of his or her work. The remaining responses all indicated that this is a real phenomenon that occurs in relation to children in trouble with the law. However, it is apparent that because there are no record-keeping procedures for this, the information that has been received is largely anecdotal and based on the respondents' personal experiences. In addition, in answer to questions as to the nature of the relationship between the child and the person using him or her to commit a crime, a broad spectrum of individuals that use children for this purpose was mentioned, including parents, school friends, and gangs. Again, although this was a small study sample, it was noted that action against adults is not pursued, and that children testifying against the adult perpetrator appears to be uncommon and seldom occurs. It was concluded that there are inadequate follow up mechanisms to ensure that adults involved in using children are detected, investigated and punished.

The Baseline Study involved further and more detailed qualitative and quantitative research at the four identified potential pilot sites in Khayelitsha, Westbury, Mitchell's Plain and Pretoria to examine the extent, nature and causes of CUBAC, inform the design of the pilot projects as well as to finalise the selection of two pilot sites. A number of recommendations and suggestions came to the fore for the implementation of the pilot during the consultation process with the national and provincial stakeholders that included recommendations relating to site selection, the key role to be played by probation officers and the need for record keeping.

The Baseline Survey concentrated on four sites selected during the Rapid Assessment process, namely, Khayelitsha, Mitchell's Plain, Westbury and Pretoria. One of the principal aims of the Baseline Survey was to recommend two of these sites as the sites for the actual implementation of the pilot projects. Therefore, while the data elicited during the Baseline Survey contained information on what the pilot interventions should consist of, the research also needed to determine the suitability of each site for the pilots. The factors used to determine these suitability-included levels of inter-sectoral co-operation and availability of services at each of the four sites. Ultimately, all the study participants were in agreement that Mitchell's Plain and Mamelodi were the two most suitable pilot sites.

Recommendations on what the pilot programmes should concentrate on were made during both the Rapid Assessment and Baseline Study. These recommendations then informed the pilot programme design, together with two main principles: mainstreaming and sustainability. The pilots therefore comprise of a range of activities:

- **Programmatic interventions**

The design of prevention and diversion programme content that is specific to CUBAC to be offered during the pilots to complement ordinary criminal justice practice and mainstream CUBAC into programmatic interventions for children.

- **Assessments and probation officers**

During the Baseline Survey everyone was in agreement that in order to identify CUBAC, CUBAN needs to be considered in the assessment procedure. Some participants to the study felt that the assessment form should be changed to include questions that would lead to the identification of CUBAC, whilst others felt that an instruction/directive to probation officers needed to be drafted to ensure that they were mindful of CUBAC during the assessment phase. This directive would also include triggers/ indicators of risk to assist probation officers in the identification of CUBAC.

- **Instructions to police and prosecutors**

During the Baseline Survey it became apparent that there was a need for instructions for police and prosecutors relating to the investigation and prosecution of CUBAC cases. These instructions

would be official departmental instructions that are mandated by the national and regional offices of SAPS and the NPA.

- **Local co-ordination**

It also became evident through the Baseline Survey that the efforts around CUBAC at the pilot sites will involve an array of different role-players. In order for there to be a coordinated and holistic approach to the management of CUBAC at the pilot sites, local co-ordination is necessary to ensure inter-departmental and service delivery co-operation is effected.

- **Management protocol or guidelines for CUBAC**

Although unofficial it was felt that a document setting out all basic action steps and responsibilities of each role-player for the management of CUBAC should be developed. The reason for this is that, not only would such a document raise awareness about CUBAC and the legal basis for specific action in this regard, the document would serve as a reference tool for role-players to refer to when faced with a CUBAC case. In addition, because of the identified need for inter-departmental co-operation, such a document would inform all the relevant role-players (governmental and non-governmental) what their colleagues' duties were in respect to CUBAC.

- **Research**

The study respondents all conceded that there is a lack of quantifiable information on CUBAC. They therefore stressed the need for data gathering in relation to CUBAC related matters. It was also recommended that all the information gathered, qualitative and quantitative, during the running of the actual pilot processes be documented to inform the further rollout of this programme to other provinces.

- **Awareness raising**

What became unmistakably evident during the course of both the Rapid Assessment and Baseline Survey was that no-one had ever really applied their mind to the phenomenon of CUBAC prior to this study. There is, therefore, a pressing need to engage in extensive information dissemination and promotion of informed debate around the issue. In addition, the interface between child justice and child labour needs to be explored more extensively to ensure that a level of sensitivity and consciousness around the victimization and abuse of CUBAC children is achieved.

5.2 Child labour, child justice and co-operative governance

The Child Justice Bill goes a long way to provide for a criminal justice process specific to the needs and situation of children who are in conflict with the law so as to avoid their being treated and dealt with inappropriately to their age. The objectives clause serves an important function in that they provide the context in which the Bill as a whole must be read and interpreted. Of particular importance is the reference to co-operation between all government departments and other organisations and agencies. It is submitted that, until the advent of the draft Child Justice Bill in 2000 there has been little inter-departmental co-operation around issues of child justice. The various role-players performed their tasks and functions in isolation and also without much interaction with outside organisations and agencies. It is argued that for the proper functioning of a child justice process as envisaged by the Bill it is necessary that a holistic approach be fostered and that officials from the various departments and outside organisations start to regard all participants in the child justice process as colleagues, instead of just those in their own field or sphere of operation.

The government departments that are involved in child justice include the departments of justice, social development, correctional services, education as well as SAPS and the NPA. Each has its own roles and responsibilities, however they cannot be viewed or carried out in a vacuum. Each role-player in the criminal justice system is but a cog in a wheel and in order for the wheel to turn each cog operating properly and in tune with the others. The drafters of the Child Justice Bill recognized this and ensured that inter-departmental co-operation was a core feature of the Child Justice Bill.

Since the Bill was released by the South African Law Reform Commission, the various departments have recognized the need for this co-operation and have been steadfastly working towards an integrated approach to child justice. Perhaps the leading example of this commitment to such co-operation has been the establishment and workings of the Inter-Sectoral Committee on Child Justice (ISCCJ). This is a committee at national level, led by the Department of Justice, with representatives from all the relevant justice departments and organizations within government. It has achieved much since its inception – from a decrease in the numbers of children awaiting trial, to the roll-out of one-stop-child justice centres to co-ordinating training on child justice. The co-operative nature of its work has had a knock-on effect with similar committees being established at provincial level – the most successful thus far being in the Western Cape.

In order for the linkages between child labour and child justice in the form of CUBAC to operate with in such a scheme of co-operative governance, the framework needs to be in place. It is argued that this is not quite the situation at present. Although most government departments approved CLPA, the inter-departmental co-operation needed for CUBAC seems to be absent. Indeed, if one looks at the action steps in relation to CUBAC, they are framed as being the responsibility of identified departments instead of the overall responsibility of the child justice system. While single departments have defined roles, the interconnectedness is missing from the picture. This is evidenced by the fact that the Department of Labour, lead department for CLPA, is patently missing from child justice and CUBAC discussions.

On the other hand, the Department of Justice and the ISCCJ have readily embraced the concept of CUBAC as well as the pilot programmes. The recognition of the phenomenon of CUBAC as a issue in child justice is being mainstreamed into criminal justice plans and policy. However it is questionable whether the labour issues attendant to the problem are being dealt with and co-operation between the justice cluster and the Department of Labour appears to be a gap that needs to be addressed if the CLPA is to achieve its full objectives.

6. Conclusion

CUBAC as a category of children within the child justice field is well on its way to being recognized at a national level. In the areas of the pilot sites, activities are underway to ensure that the problem is addressed at provincial and local level. These activities, although initiated through a labour initiative, have been integrated into criminal justice policies and practice. However, it must be borne in mind that child justice in South Africa is still a developing field and that CUBAC is a relatively new issue that role-players must engage with. The fact that the Department of Labour is removed from the criminal justice process is somewhat disconcerting. Co-operative governance between the justice departments is also relatively new and systems to enhance this are continuously being reviewed, revised and developed. For CUBAC to be dealt with as a worst form of child labour (as opposed to purely a category of child offenders with special needs) and a child justice issue there needs to be co-operation beyond that which is specific to the criminal justice system.