



Children Used by Adults to Commit Crime

Situation Analysis and Pilot Design

Children Used by Adults to Commit Crime:
Situation Analysis and Pilot Design

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For:

The programme Towards the Elimination of the worst forms of Child Labour Programme (TECL)

A project in support of the Child Labour Programme of Action for South Africa

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National Prosecuting Authority

Office of the Rights of the Child

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This publication forms part of a series addressing Children Used by Adults to Commit Crime (CUBAC). Such use of children is considered a worst form of child labour in terms of the Worst Forms of Child Labour Convention of the International Labour Organisation. The initial series includes the following publications:

- Situation Analysis and Pilot Design
- Prevention Programme Manual
- Childrens' Perceptions of their Use by Adults in the Commission of Offences
- Diversion Programme Manual
- Guidelines for Role-players in the Criminal Justice System

Copies of these publications can be obtained from: The Children's Rights Project, Community Law Centre, University of the Western Cape, Private Bag X17, Bellville 7535. Tel: +27 21 959 2950 • Fax: +27 21 959 2411 • Email: jgallinetti@uwc.ac.za

This series was produced as part of the implementation of the Child Labour Programme of Action for South Africa, which is a national partnership initiated by the South African government. Civil society partners comprise organised business, organised labour and non-governmental organisations. The overall lead government department is the Department of Labour, and the lead department on the CUBAC project is the Department of Justice and Constitutional Development.

The series relates to a set of pilot projects addressing CUBAC, which was designed by consultants contracted by the programme *Towards the Elimination of the worst forms of Child Labour* (TECL). Regarding its programme in South Africa, TECL is an executing agency for key elements of the Child Labour Programme of Action, as a partner of relevant government departments, regarding their obligations. Funding for the pilot projects and for the publications was obtained from the US Department of Labour, through the International Labour Organisation.

The views expressed in this publication are in all cases those of the writers concerned and do not necessarily reflect the views of the Department of Labour, the ILO, TECL, or any other organisation.

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Foreword

This study records the results of a situation analysis and baseline study to explore the use of children by adults and older children in the commission of crimes, which has been identified as a worst form of child labour. It builds on South Africa's commitment to address child labour, as evidenced in the constitutional protection accorded this group of children, as well as early ratification by the South African government of ILO Convention 182 concerning the elimination of the worst forms of child labour. South Africa's founding policy framework has been agreed inter-sectorally and the Child Labour Programme of Action (CLPA) approved by Cabinet.

The implementation of ILO Convention 182 is marked by the need for the design and implementation of targeted measures to address the situation of children involved in the worst forms of child labour. This study constitutes the first step in the process of achieving that goal. The document also records the manner in which sites for the implementation of the pilot projects were selected, and provides a detailed action plan to guide government action, as well as that of other role players in the realization of the measure envisaged by Convention 182.

Government remains committed to facilitating the prevention and intervention measures identified during this research to ensure that children are not used by adults in the commission of offences. The programme is not only important from a crime prevention perspective, but in addition contributes significantly towards the fulfillment of children's rights more generally. This study makes an invaluable contribution to our understanding of the phenomenon of instrumentalisation of children for the commission of crime, and provides a sound platform for further action.



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Cheryl Frank and Lukas Muntingh conducted the research with children and developed the programmatic interventions for children.

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Abbreviations

AFReC	Applied Fiscal Research Centre
CASE	Community Agency for Social Enquiry
CIAC	Crime Information and Analysis Centre
CLPA	Child Labour Action Plan
CRED	Creative Education for Youth at Risk
CRC	Convention on the Rights of the Child
CUBAC	Children used by adults or older children to commit crimes
DCS	Department of Correctional Services
DoCS	Department of Correctional Services
DoE	Department of Education
DoJ	Department of Justice
DoL	Department of Labour
DoSD	Department of Social Development
DPP	Directorate of Public Prosecutions
DSD	Department of Social Development
DSS	Department of Social Services
DSSPA	Department of Social Services and Poverty Alleviation
GA	General Assembly
GN	Government Notice
GPAC	Gauteng Programme of Action
HSRC	Human Sciences Resource Council
ILO	International Labour Organization
IMC	Inter-Ministerial Committee on Youth at Risk
IPEC	International Programme towards the Elimination of Child Labour
IPMCAT	Intersectoral Protocol for the Management of Children Awaiting Trial
ISCCJ	Inter-sectoral Committee on Child Justice
LSO	Learner Support Officer
MADAM	Multi-Agency Delivery Action Mechanism
MPD	Metropolitan Police Departments
NGO	Non-Governmental Organisation
NICRO	National Institute for Crime Prevention and the Reintegration of Offenders
NPA	National Prosecuting Authority
NPS	National Prosecuting Service
RAR	Reception, Assessment and Referral centres or Reception, Arrest and Referral centres
RJC	Restorative Justice Centre
SALC	South African Law Commission (now South African Law Reform Commission)
SAPS	South African Police Service
SAYSTOP	South African Young Sex Offenders Programme
SOCA	Sexual Offences and Community Affairs Unit
YES programme	Youth Empowerment Scheme programme
YDO	Youth Development Outreach
UN	United Nations
WC	Western Cape
WFCL	Worst Form of Child Labour

Chapter 1

Introduction

1.1 South Africa's Child Labour Programme of Action

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 taken 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 labour,¹ the South African government has been involved in a long process of adopting appropriate policies and a national Child Labour Programme of Action 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 duplication.² 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 budgets.³ 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 and Constitutional Development, Social Development, Education, Labour, Correctional Services and South African Police Service as well as employers and NGOs. These steps include, amongst many others, policy development, public awareness campaigns, collection of data and statistics and training.

The key elements of CLPA are:⁴

- The provision of programmes on poverty alleviation, employment, labour, and social matters in areas that involve work that is harmful to children
- The promotion of new legislation aimed at prohibiting the worst forms of child labour
- The strengthening of national capacity to enforce such legislation
- Increasing public awareness and mobilising society 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). The identification of this as a child rights issue and more particularly a child labour issue is set out in more detail in the literature review in Chapter 2 below.

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:

1 Section 28 (1)(f) and (e).

2 CLPA, p. 3.

3 CLPA, p. 3 - 4.

4 CLPA, p. 4.

- Regarding the involvement of children in the production and trafficking of drugs and other illegal activities, an important element of investigation and prosecution should be finding and prosecuting the 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 them. 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 those using 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 in custody 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

Recommendations 56 and 57 cover these points: they propose that where children commit crimes, the diversion of such child offenders away from prison should be the preferred option for children. Where appropriate, the CLPA also recommends that criminal prosecutions of children should be converted to children's court inquiries, after conviction. As far as adults using children are concerned, the CLPA proposes that an important element of investigation and prosecution should be locating and prosecuting the adults (or sometimes other children) who are using the children to further their own criminal intentions, or who are benefiting from the children's illegal activities.

1.2 Background to TECL

The programme Towards the Elimination of the worst forms of Child Labour (TECL) is a technical assistance project to the Department of Labour and is essentially an executing agency for the Child Labour Programme of Action, which has been adopted by a wide range of South African government departments including those responsible for justice, social development, labour, education, safety and security and local government, as well as by other agencies.

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 following three issues that have been identified as worst forms of child labour in South Africa:

- commercial sexual exploitation of children and child trafficking
- children used as water carriers by households situated far from safe water sources
- children used by adults in the commission of offences

1.3 The plan for managing the problem of children used by adults to commit crime

The initial design of the three pilot projects was intended to be effected in three similar phases for each of the projects. This plan has remained for the CUBAC project, and the phases were thus as follows:

- **Phase 1: Situation Analysis.** 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 a literature study and qualitative and quantitative research to provide an initial assessment of the nature, causes and extent of CUBAC as well as 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 Study.** This involved further and more detailed qualitative and quantitative research at the four identified potential pilot sites to determine the design of the pilot projects as well as to finalise the selection of two pilot sites. The final two pilot sites are where the identified interventions will be piloted during 2006. The Baseline Study ran from April 2005 and was completed in mid- August 2005.
- **Phase 3: Project Design.** This involved the actual design of programmes and interventions to address CUBAC issues at the two pilot sites.

A separate child consultative research study to explore the experiences of children was conducted. A total of 541 children were consulted through the process. This number included 420 children that were awaiting trial in Secure Care Facilities (SCFs) i.e Mogale, Leseding and Jabulani Centres in Gauteng and Bonnytoun and Horizons in the Western Cape, and 121 children in a secondary school i.e. Westbury Secondary School in Gauteng. Overwhelmingly, the groups noted that factors at home were one of the main causes of children getting involved in crime, and noted a number of issues in the home that could influence this, including poverty in families, parenting skills and family relationships.

The use of drugs and alcohol, and particularly what was characterised as addiction, emerged as a significant theme throughout this study. This was raised as one of the reasons for children becoming engaged in crime for the first time (raised by 29 of the 41 groups). The nature of the influence of drugs especially was characterised in terms of desperation. This was often described by children as the drugs 'making' children commit crime.

Overall, the children indicated that adults actively involved children in crime, through direct and indirect means. The direct involvement of children by adults in crime (noted by 30 of the 41 groups), was described as engaging children as accomplices in the commission of crimes. This included committing crimes together, children acting as look-outs, adults taking children to crime scenes, adults overseeing the commission of the crime, and adults paying children for the commission of crime. This also involved using children to sell drugs.

In addition, children described more indirect involvement of adults in engaging children in criminal activities, and these were described in 32 of the 41 group discussions. Such acts consisted of buying stolen goods, showing children how to commit crime and providing the means to do so (such as guns).

This study was consolidated into a separate publication that contains the information and analysis produced from the research.⁵

This publication details the process and findings of the Situation Analysis and Baseline Study and also contains information on how the pilot projects have been designed so that an insight on the planned implementation is possible.

The next stage of the overall programme aimed at combating and eliminating CUBAC as a worst form of child labour is the implementation of pilot programmes at two sites to test their success, and to identify and address problems. The intention is that following these pilots, the project will be rolled out in other areas of South Africa as part of the larger CLPA , and policy proposals mainstreamed in accordance with lessons learnt.

5 Frank, C and Muntingh, L. 2005. Children Used by Adults to Commit Crime (CUBAC): Children's Perceptions. Pretoria: International Labour Organisation.

1.4 Concepts and definitions relating to CUBAC

From the commencement of the Situation Analysis phase, it was evident that there were a number of conceptual and definitional issues relating to CUBAC. The first concerned the extent and scope of meaning of the notion of children being **used** by adults or older children in the commission of crimes.⁶ From consultations and discussions throughout this project, it appeared that the term could be more widely or more narrowly construed, depending on how the word 'use' is interpreted.⁷

A narrower construction would revolve around direct and active instrumentalisation⁸ of children in the commission of offences, such as where they are recruited to climb through small windows to commit housebreaking. A wider interpretation of the word 'use' would include a wider array of indirect forms of adult involvement. Thus, various forms of facilitation of criminal activity could be drawn in, depending on how widely one is prepared to consider the use of children by adults or older children.

The above notional difficulties determined at the outset of this study have found support in the findings of the child consultative research study. Frank and Muntingh's report contains the following conclusion:

'The research also demonstrated the need to be significantly cautious about the use of the idea of 'children being used by adults or older children to commit crime.' This was found to be a vastly complex phenomenon, balancing coercion and choice in subtle ways, and having only very limited existence as a 'clean' concept where adults assert their will over children. This kind of nuance placed enormous demands on the construction of the research instruments and on the process of the focus group discussions that were undertaken.⁹

A second notional difficulty raised by some respondents concerned the use by adults of infants and young children in begging, as begging frequently constitutes an infringement of municipal by laws and local authority delegated legislation. However, in the conceptualisation of the link between the worst forms of exploitative child labour and criminal activity, the inclusion of this category of children does not appear to be what ILO Convention 182 intends, exploitative though such use of children may be.¹⁰ This is evident, first, from the additional words 'procuring or offering' which follow the word 'use' in article 3 of the ILO Convention, as a child or infant displayed as inducement to the solicitation of alms cannot be regarded as being 'procured or offered' for illicit activities. Second, a narrower intention is evident in the qualifying phrase that follows insofar as it refers to production and trafficking of drugs, and these appear to indicate that the Convention contemplated that child's involvement in illicit activities would be action-orientated, rather than the child being merely a passive aide to maternal or paternal income generation, for example.

In the course of the conduct of the research towards the Baseline Study, it was decided that the preferable approach would be to adopt a wider rather than a narrower definition of 'use' by adults, and to view the ultimate benefit obtained by adults through children's offending as the determining factor. However, in view of the possibility of unwarranted extensions, the other determining factor would be that the child has committed a 'mainstream' offence such as possession of arms and ammunition, conveying illicit drugs, theft, housebreaking or robbery. This approach informed the remainder of the research undertaken during the Baseline Study as well as the ultimate pilot project design.

6 The actual wording of ILO Convention No. 182 is slightly different, in that it refers to 'the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs'. One of the few published papers on ILO Convention 182 that was consulted (Noguchi Y 'ILO Convention 182 on the worst forms of child labour' 2002(1) International Journal on Children's Rights, p. 355 - 369) does not explore the definitional issues discussed here in detail.

7 Chambers 20th Century dictionary provides the following definition of the word use: 'state or fact of being used; advantageous purpose to which a thing can be applied; employment causing wear; the fact of serving a purpose...'

8 The word 'instrumentalise' is used in the UN General Assembly Resolution 45/115 (1990), as described further in Chapter 2 below. The word appears to entail the use of a child as an instrument or agent acting on behalf of the adult.

9 Frank, C and Muntingh, L. 2005. Children Used by Adults to Commit Crime (CUBAC): Children's Perceptions. Pretoria: International Labour Organisation.

10 Begging as a phenomenon in South Africa, whether undertaken by children living on the street or by parents or adults who display their children to entice money from people, is more of a welfare issue as opposed to a labour or criminal justice issue (despite begging being an infringement of municipal by-laws). Mechanisms to address this problem are adequately provided for in the present Child Care Act 74 of 1983 and the forthcoming Children's Act, through their provisions relating to children in need of care.

1.5 This publication

Taken together, the Situation Analysis, Baseline Study, Child Consultation Research and pilot project design constitute extremely weighty, lengthy and detailed documents. Because there was great enthusiasm and interest in the research expressed by all who participated and were informed of the project, it was decided to make the research process and findings accessible through printed summaries that could be easily distributed. In addition, due to the enlightening information on the causes, extent and nature of CUBAC that emerged as a result of the child consultation study, it was decided to retain the cohesiveness of that report by producing a separate publication dedicated to the research conducted with children. What follows in this document is the main content of the Situation Analysis phase, the Baseline Study phase and the pilot project design.

Chapter 2

Literature review

2.1 Introduction

Both the Situation Analysis report and the Baseline Study contained a literature survey, the first focusing on providing a comprehensive South African literature review to contextualise CUBAC within the South African legislative and policy framework, and the second focusing more broadly on international literature. While there is a dearth of literature available on CUBAC, the review has attempted to be as comprehensive as possible.

2.2 International literature

2.2.1 Child labour and international law

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 International Labour Organisation (ILO) conventions, the United Nations Convention on the Rights of the Child 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, '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'.¹¹ Further, certain types of work are deemed patently 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. To date, 151 countries have ratified ILO Convention 182, making it the treaty which has been most quickly ratified by member states of the ILO.

2.2.2 United Nations General Assembly Resolutions

The first reference to children being used to commit crime 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 on the rehabilitation of drug addicted minors.¹² This followed two previous General Assembly Resolutions on the international campaign against drug abuse and the illicit traffic in drugs.¹³ Resolution 43/121 recognised that drug dealing organisations 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 as calling on States to protect them from using drugs. It also called on States to promote the adoption of laws to provide for suitably severe punishment for drug trafficking crimes that involve children.

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

12 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.'

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

This resolution 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 future.¹⁴

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 including 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 formulate programmes to deal with the problem and to take effective action 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 Council.¹⁵ 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 issue.

2.2.3 International Guidelines

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*.¹⁷ 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 emphasises 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 CUBAC.¹⁸ This document contains good practice guidelines based on relevant international and regional norms, standards and principles. It provides a practical framework to assist in the review of national law and policy, design and implementation of law and policy, and in providing guidance to professionals working with child victims and witnesses.

2.2.4 International Research

There have been very few attempts internationally to ascertain the extent and nature of CUBAC. Seemingly the only research undertaken in this regard is a study in the Philippines commissioned by the ILO,¹⁹ which undertook a situation analysis of children's involvement in the production and trafficking of illegal drugs in Cebu City, Philippines.²⁰ This situation analysis concentrates far more on a situational analysis of children in the drug trade as opposed to a baseline survey of the problem and design of interventions.

14 Paragraph 7 of the Preamble.

15 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).

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

17 Copy on file with Community Law Centre.

18 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.

19 Magdalena Lepiten, *Philippine Children's Involvement in the Production, Sale and Trafficking of Drugs in Cebu City: A Situation Analysis*, ILO, Geneva, 2002.

20 Other relevant literature included a study which examined the issue of children living on the street in Egypt, and the risk to their becoming involved in the illegal drug trade (Rapid Situation Assessment of Street Children in Cairo and Alexandria, UN Office on Drug Control and Crime Prevention (date unknown), and one undertaken by Defence for Children International in Costa Rica (Contributions to Thoughts on Child and Adolescent Labour, Defence for Children International, Geneva, 2004.)

The study makes various recommendations, including the need for a systematic identification of children falling into the high risk group and the need for a range of interventions, including primary prevention programmes, family-focussed and community based programmes and local government involvement to improve socio-economic conditions.

It is noteworthy that despite the importance placed on this WFCL (worst form of child labour) by the UN General Assembly, the research undertaken in the 17 years since GA Resolution 43/121 has been minimal and has not taken the fight to combat CUBAC much further at an international level.

2.2.5 Other research

As with other literature, academic research and writings are also lacking when it comes to acknowledging and analyzing CUBAC. In this review, only one article was located that dealt with children used by adults to commit crime; however, the study that was described was managed within a specific criminological context and did not examine the issue of children being used by adults to commit crime as a WFCL.²¹

2.3 Crime Prevention

There has been a significant increase in the amount of literature concerning successful prevention programmes has emerged in recent years. In the South African context, two useful resources are recent publications commissioned by the Open Society Foundation of South Africa, namely *Lessons from Local Crime Prevention* (2003) and *Lessons from Crime and Violence Prevention in Schools* (2002 review and 2005 review update) both undertaken by Dr R Griggs. These studies review comprehensively the international literature on prevention, and use these sources as a basis for examining South African initiatives. The study of local crime prevention strategies focuses on six pilot programmes which target specific geographical areas, adopting respectively a public policy perspective, a development perspective and a public health framework. The reviewer noted that all the programmes suffered because they were introduced at a time of shifting policy (notably the move away from the National Crime Prevention Strategy with its broad focus on the social causes of crime, to the stepped up, hard-hitting National Crime Combating Strategy developed in 2000).²² However, he emphasized that prevention of criminality is best understood in a social or public health perspective.²³ This supports the findings of the Baseline Study that focuses on pilot sites which have been identified as urban renewal areas, and as recipients of other social regeneration services. He states further:

'International experience suggests that nationwide co-ordination of crime prevention is not desirable. National coordination has largely failed, whereas a variety of efforts that take the local social, economic, political and cultural issues into account do succeed ... This means that local government leads. It is counterproductive to try and replicate and roll out any preconceived idea as to how crime prevention should work, it undermines local initiative and crime prevention work must advance incrementally on a place by place basis ...'²⁴

The recently published National Youth Development Framework,²⁵ refocuses the definition of youth in South Africa as constituting young men and women aged between 15 and 28 years. Relevant proposed areas of intervention include expansion of preventative drug awareness programmes aimed at young audiences, increased access for youth to developmental rehabilitation services, and support and expansion of programmes 'to enhance resilience of young people to social pressures and life challenges to enhance psychological well being'.²⁶ The document further places considerable emphasis on the need to address youth criminality, noting that this is a responsibility of schools, communities and municipalities, and that efforts should be focused on preventative initiatives.²⁷

21 Cornell, DG, 'Juvenile Homicide: A Growing National Problem', *Behavioural Sciences and the Law*, Vol. 11, 1993, pp. 389-396.

22 See Sloth-Nielsen, J and Ehlers, L 'A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa' Occasional Paper, Institute of Security Studies occasional paper 111 (2005). The authors note that the upcoming 10 year Criminal Justice Sector review announced by Cabinet is likely to herald a return to social crime prevention strategies.

23 *Lessons from Local Crime Prevention* (2003) at p 131.

24 *Ibid* at p 139.

25 The Presidency, Government of the Republic of South Africa, 2004.

26 *Ibid* at p 14.

27 *Ibid* at p 16.

2.4 Relevant South African legislation and policy

2.4.1 South African labour law in relation to children

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.²⁸ This constitutional principle, which is also in line with South Africa's international obligations, has been given effect 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 work.²⁹ South African labour law appears, on the face of it, to be fully compliant with the ILO requirements as set out by the Minimum Age Convention (1973).

2.4.2 Child Justice Bill 49 of 2002³⁰

In 1996 the Minister of Justice appointed a project committee on juvenile justice, tasked with investigating proposals for law reform. On 8 August 2000 the South African Law Commission (SALC)³¹ released the Report on Juvenile Justice and the draft Child Justice Bill.³²

The process had begun with the preparation and publication of an Issue Paper and then a Discussion Paper, released in December 1998. The latter provided a comprehensive motivation for the content of the draft legislation. The Discussion Paper was thereafter the subject of intensive public consultation. A consultation process with children (mainly those who had had some contact with the criminal justice system) was commissioned.³³ Finally, a large number of written comments on the Discussion Paper were received. These were all synthesised in the Report and draft Child Justice Bill, which marked the end of the SALC's formal involvement in the law reform process. The Child Justice Bill was introduced in Parliament in August 2002. The version that was tabled was not in all respects the same as the draft bill proposed by the SALC, as changes were effected by the State Law Advisers prior to the tabling in Parliament. The version tabled in Parliament has been subjected to intense scrutiny by the relevant Portfolio Committee, and has now been through several redrafts, which are not publicly available. During 2004, South Africa had a general election since which the Bill, as at the date of writing, has not been placed back on the parliamentary agenda.

Skelton³⁴ notes that the Portfolio Committee, in its examination of the Bill, was inclined towards regulation as opposed to discretion, with Parliament looking to curtail much of the discretion currently left to presiding officers. The original drafters had focused on individualised decision-making in the best interests of the child. She concludes that there needs to be an awareness that societies do not remain static and new developments can influence parliamentary debates.³⁵ This may explain why, while the original drafters of the Bill included a specific offence of using children to commit crimes, this provision has been removed during the parliamentary process. However, Skelton's conclusion also raises the possibility that once this study is complete, its results may change perceptions to such an extent that the law is adapted once more to include such an offence.

28 The constitutional and other courts have not yet given an interpretation of this section.

29 Subject to exceptions for children in advertising and performances, as further discussed in Bosch D in Padayachee S (ed) *Children and The Law* (2nd Ed) Lawyers for Human Rights, Pietermaritzburg, 2005.

30 For more information, see in general, Koch, R and Wood, C: A new Child Justice System: Two decades of Research (an annotated bibliography collating documents used to inform the process of child justice reform in South Africa) Institute of Criminology, University of Cape Town, October 2001; Article 40 (a dedicated journal on juvenile justice published quarterly since 1999); www.childjustice.org.za (a website of materials set up and maintained by the Children's Rights Project of the Community Law Centre, University of the Western Cape), and www.childjustice.gov.za (a website set up and maintained by the Department of Social Development). See also, Sloth-Nielsen, J *The role of international law in South Africa's Juvenile Justice Reform Process* Unpublished LLD thesis, University of the Western Cape 2001 and also Sloth Nielsen, J 'Child Justice and Law Reform' in Davel, C (ed) *Introduction to Child Law in South Africa*, Juta and Company (2000).

31 The Commission is a statutory body chaired by a judge of the High Court, with six other members (representing the legal profession) serving in a part-time capacity.

32 The Report proposed that the new legislation refer to 'child justice' rather than 'juvenile justice', as the term 'juvenile' can be stigmatising, and the reference to a child is more congruent with a children's rights approach.

33 Subsequently published in book form as *What The Children Said*, Community Law Centre (1999).

34 Skelton, A, 'The South African Child Justice Bill: Transition as Opportunity', 2004, unpublished forthcoming Chapter, copy on file with researchers).

35 *Ibid*, p. 16.

2.4.3 The Criminal Procedure Act 51 of 1977³⁶

In the absence of dedicated child justice legislation this Act continues to regulate the criminal process as it relates to accused and arrested persons. Section 50(4) provides that upon the arrest of any person under 18 years old, the police official must within 24 hours notify a probation officer of the arrest of such person. Section 50(5) requires the police official to notify the parents or guardian of the child concerned. Children are to be assisted in court by parents or legal guardians, unless this is dispensed with (section 73(3)), and trials of persons under 18 years must be held *in camera* (section 152). A criminal trial may be converted to a children's court inquiry where the presiding officer is of the opinion that the child before the court is one in need of care (section 254), and different sentencing options may be adduced where a child was less than 18 years old at the time of the commission of the offence (section 290, for example).

The above legal framework does not, however, reflect the current situation in practice, which may include diversion from court, pre-trial assessment and so forth.

2.4.4 Children's Bill 70D of 2003³⁷

This Bill, once enacted into law, will form the primary piece of legislation dealing with child protection and the protection of children's rights in South Africa. The original draft legislation developed by the SALC project committee on the review of the Child Care Act was ultimately split into two parts, in view of the fact that two different parliamentary procedures were required to be followed in respect of matters falling exclusively within the competency of national government (section 75 Bill),³⁸ and those involving matters of concurrent provincial and national legislative competence (section 76 Bill). Only the first Bill has been debated in parliament and although not yet enacted has been passed by the National Assembly³⁹ and the National Council of Provinces. What remains is the second process involving the section 76 Bill. The finalisation of the entire process is expected to occur in 2007.

Relevant at this point are those provisions which have already undergone Parliamentary scrutiny, and passed the first hurdle. In the interpretation clause,⁴⁰ 'abuse' is defined, amongst other things, as:

'(d) a labour practice that exploits the child; or

(e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally'

both of which may be of use in the CUBAC context. Another pertinent definition in the interpretation clause is the concept 'care' (previously known as custody), mirrored by that of 'care-giver'. Care includes many aspects related to the maintenance and raising of children, but also 'safeguarding the well-being of the child', 'protecting the child from maltreatment, abuse, neglect and degradation, discrimination, exploitation and other physical, emotional or moral harm or hazards' and 'respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights as set out in the Bill of Rights and the principles set out in Chapter 2 of this Act.' Child labour is also defined in the interpretation clause,⁴¹ as is 'exploitation'.⁴² A further relevant provision contained in the interpretation clause is arguably the definition of street child, insofar as it includes children working or begging on the streets (amongst other indicators).

36 For more information, see in general, Skelton A 'Children Young Persons and the Criminal Procedure' in Robinson J (ed) Children, Young Persons and the Law (Butterworth Publishers 1997).

37 This version of the Bill was passed by the National Assembly on 14 December 2005.

38 The distinction between a section 75 and 76 Bill arises from provisions in the Constitution relating to legislation which impacts on national or provincial competencies.

39 On 14 December 2005.

40 Clause 1.

41 As any work by a child which

(a) is exploitative, hazardous or otherwise inappropriate for a person of that age; and

(b) places at risk the child's well-being, education, physical or mental health, or spiritual, moral, emotional or social development.'

42 Exploitation includes all forms of slavery or practices similar to slavery, including debt bondage or forced marriage, sexual exploitation, servitude, forced labour or services, child labour, and the removal of body parts.

Chapter 9 deals with children in need of care and protection. A child who is the victim of exploitation, or who lives in circumstances which expose him/her to exploitation, may be found to be a child in need of care and protection, as may a child who lives in, or is exposed to circumstances which may seriously harm the child's physical, mental or social well-being (clauses 150(1)(e) and (f)).⁴³ Further to the above, clause 150(2) provides an indication of specific categories of children who may be in need of care and protection, including a child who is a victim of child labour (clause 150(2)(a)). Nevertheless, whilst removal of the child remains possible, there is a range of other interventions provided for in the new legislation, which includes referral for counselling, referral to drug treatment centres, and an array of orders aimed at stabilising a child's life. Further, placement in an institution is limited only to those situations where another option is not appropriate (clause 158(1)).

As regards new provisions aimed at the establishment and maintenance of a national child protection register, it must be noted that a criminal conviction of an adult for using children for the commission of crime generally would not render that person liable to have his or her name included in the proposed register.

The remaining child protection provisions will appear only in the second Bill to be tabled in Parliament. Similarly, all provisions directly relating to vulnerable groups of children - e.g. children living on the street and child victims of exploitative labour - will be included in the second Bill. At present there is little in the Children's Bill besides the non-substantive interpretation sections that is relevant to CUBAC. Obviously though, since the bulk of child protection provisions are still awaited, it is important to monitor further proceedings in Parliament in this regard.

2.4.5 The Child Care Act 74 of 1983

This Act continues to regulate various issues concerning children in need of care, including children's court inquiries and the removal of abused, neglected and other vulnerable children from their care-givers. This legislation also regulates the placement of children in alternative care - i.e. foster care, children's homes and other forms of residential care that are governed by the Act.⁴⁴

Shortcomings have been identified both in law and in practice in the administration of this welfare-driven legislation. The children's courts are understaffed and they lack resources and expertise. Most presiding officers have little knowledge of child psychology and of this legislation itself, as they are drawn from the ranks of criminal court personnel on an *ad hoc* basis. Social work services, too, are under-resourced, with social workers carrying heavy case loads. These factors, amongst others, prompted the development of new, better resourced legislation in the form of the Children's Bill.

2.4.6 The Correctional Services Act 111 of 1998

The Correctional Services Act 111 of 1998⁴⁵ was enacted to give effect to the provisions of the Constitution applicable to detained and sentenced persons in prison. Some provisions apply especially to children including the definition of a child as being a prisoner aged below 18 years,⁴⁶ with the requirement that children be detained separately from adults. Children are accorded separate nutritional requirements,⁴⁷ and the Commissioner (or his/her nominee) must notify the child's family upon such child's admission to prison in order to ensure that continued contact between the child and his or her family is maintained.⁴⁸ Section 19 requires that every prisoner who is a child and subject to compulsory education must have access to and attend educational programmes. This covers, in particular, children aged up to the age of 15 who are liable to attend school in terms of the Schools Act (1996).⁴⁹

43 It is perhaps noteworthy that this section does not refer to impairment of the child's morals, which would be a more likely formulation of the risk to a child used by an adult to commit an offence. However, it could conceivably be argued that being used to commit crime constitutes a threat to the social well-being of a child, who is then at risk of prosecution, conviction and the stigmatisation of a criminal record.

44 The most recent comprehensive analysis of the current Child Care Act and its shortcomings and limitations is to be found in the South African Law Reform Commission's Report on the Review of the Child Care Act (2002).

45 In operation since July 2004.

46 Previously, the definition of juvenile applied to a persons aged below 21 years.

47 Section 8(2).

48 Section 13(6) (1) (c) (i).

49 This provision appears to apply to both awaiting trial and sentenced prisoners.

Regarding children aged 15 years but under 18 years old, section 19(1)(b) provides that where practicable, this category of prisoners must be provided with access to educational programmes.⁵⁰ The Act spells out that children may be required to attend educational programmes. Section 19(2) provides that the Commissioner 'must provide every prisoner who is a child with social work services, religious care, recreational programmes and psychological services.'⁵¹

All sentenced prisoners must be assessed as soon as possible after admission to determine not only a security classification, but also the detained person's social and psychological needs, level of education, specific development programme and religious needs.⁵² This could provide a platform for prison-based interventions to identify and provide services to children used by adults in the commission of offences as far as sentenced children in prison are concerned. However, it must be noted that the Department suffers from a severe shortage of social work and psychological staff whose services would be required in the preparation of a sentence plan and development programme. As regards children in prison more generally, the policy position outlined in the Correctional Services White Paper (2005) is that as far as possible, no children should be held in correctional facilities, and that they should as far as possible be diverted from the criminal justice system.⁵³ Where children are in correctional centres, they should be separated from other prisoners, and there should be trained staff utilising facilities designed specifically for children in place. Further, the Department is of the view that children under the age of 14 years have no place in correctional centres.⁵⁴ Diversion and alternative sentences should be employed by courts where children of this age group are concerned.

2.4.7 General criminal law provisions

The minimum age of criminal capacity in South Africa is low (7 years). A child over the minimum age of criminal capacity (7) but aged younger than 14 is presumed to lack criminal capacity unless the contrary is proved. Within this rule, it is widely accepted that the closer a child is to the age of 14, the less rebuttal evidence has to be provided to overturn the presumption; while the closer a child is to the age of 7 the more weighty such evidence will have to be. The Child Justice Bill 49 of 2002 proposes raising the minimum age from 7 to 10 years, but retaining the protective mantle of the presumption for children aged between 10 and 14 years.

Incitement and conspiracy are common law offences which are now punishable in terms of s 18(2) of the Riotous Assemblies Act 17 of 1956.⁵⁵ In essence, a prosecution for conspiracy can only succeed if 'there is a definite agreement between two persons to commit a crime'.⁵⁶ 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 recruited.⁵⁷

Incitement to commit a crime is also punishable under the Riotous Assemblies Act.⁵⁸ The inciter would be convicted either as co-perpetrator or as an accomplice to the crime. 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.

As indicated in the CLPA document, the prevalence, nature and extent of CUBAC cannot be divorced from the phenomenon of gangs. The early history of gangs on the Cape Flats has been well-documented,⁵⁹ and some ethnographic studies illustrate the pervasive nature of the gang presence in certain areas of Cape Town. However, as recently documented, the shape and face of the street gangs has undergone dramatic changes since the advent of democracy in 1994 in two main ways. First, the smaller street gangs were subsumed and became the front for increasingly centralised and powerful organised syndicates, with tentacles in all areas of criminal activity, from drugs and prostitution, collection of protection monies and racketeering, to housebreaking and receiving of stolen goods.

50 Section 41(2).

51 Sloth- Nielsen J 'What does the new Correctional Services Act say about children in prison?' Vol. 6 (3) Article 40 p 1-3.

52 Amongst other things (section 38).

53 Par 12.2.2.

54 Par 12.2.3.

55 Snyman, C 'Criminal Law' (4th ed) Butterworths publishers, Durban at p 292.

56 Snyman, C 'Criminal Law' (4th ed) Butterworths publishers, Durban at p 292.

57 Ibid.

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

59 See, for instance, Pinnock, D 'The Brotherhood' Cape Town 1982.

Second, the opening of South Africa's borders after 1994 allowed the entry into South Africa of the international underclass, and it is said that Nigerians, Russians, Moroccans, Peruvians, Chinese and other foreign criminal elements control much of the criminal economy.⁶⁰ That these gangs use children in prostitution and trafficking is regarded as more or less established fact, but the extent to which other criminal activities that they are concerned with involves the use of children as instruments is not at this stage clear. Redpath's research⁶¹ identified one specific offence area where children were involved in organised criminal activity, namely involvement in shoplifting.

The Prevention of Organised Crime Act (121 of 1998) was enacted to give greater powers to law enforcement agencies to curb organised crime, which from the outset included addressing the criminal activities of gangs. The first relevant innovation was provision for civil asset forfeiture of property tainted by criminal activity by way of a civil action, in the absence of a criminal conviction. The Act also provides for a little-known offence of being a member of a gang.⁶² The definitions of 'criminal gang'⁶³ and 'pattern of criminal gang activity' are relevant to the offences created by the Act. Section 9(2) makes it an offence to 'perform any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal activity.'

According to a recent report in the *Saturday Argus*,⁶⁴ a pilot project to 'test drive' the efficacy (and legality) of these statutory offences has recently been launched by law enforcement authorities in the Western Cape. If successful, the pilot project will be extended to other areas of the country. Three landmark convictions have already been secured, the first in December 2004.

2.5 Other child justice developments

Parliament had in 1994 passed legislation giving effect to the commitment of many Parliamentarians towards improving the situation of children in trouble with the law. This amending legislation was implemented without warning to role-players within the criminal justice system on 8 May 1995, and resulted in the instantaneous release of all awaiting trial children from prisons throughout the country, resulting in chaos. The public outcry caused a political crisis, leading to the formation of the Inter-ministerial Committee for Youth at Risk.⁶⁵

The IMC produced draft proposals for the transformation of the child and youth care system, which still represent the policy orientation of both child welfare and child justice from a governmental perspective.⁶⁶ The IMC promoted and advocated increased specialisation in pre-trial assessment services, with the result that today pre-trial assessment is an integral part of the delivery of services in the child justice system.⁶⁷ Clearly, assessment provides an ideal point of intervention to detect and identify CUBAC,⁶⁸ and thereafter to institute follow up procedures relating to both child victims and adult perpetrators. Diversion away from criminal proceedings has also developed apace since 1992, and the IMC process certainly provided some impetus in this regard. Diversion has formed a central aspect of the findings of the Baseline Study.⁶⁹

60 See for instance, Redpath, J 'The Hydra phenomenon, rural sitting ducks, and other recent trends around organised crime in the Western Cape' (unpublished research study commissioned by the Western Cape Office of the Investigating Directorate: Organised Crime and Public Safety (IDOC) of the National Directorate of Public Prosecutions (NDPP), 2001.

61 Redpath, J 'The Hydra phenomenon, rural sitting ducks, and other recent trends around organised crime in the Western Cape' note 60 above.

62 S 9(1). The offence carries a penalty of a fine or six years imprisonment, but if convicted of being a gang member on school or other educational premises, the penalty increases to up to 8 years imprisonment. See in general, Snyman, CR 'Criminal Law' at p 417.

63 Criminal gang is defined as 'any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal behaviour, note 55 above.

64 'Courts poised to wipe out gangs' *Saturday Argus* 5 February 2005.

65 Further amending legislation to once again allow courts to detain certain categories of children in prisons whilst awaiting trial was also adopted.

66 IMC Interim Recommendations on the Transformation of the Child and Youth Care System, Department of Welfare and Population Development 1996.

67 The Probation Services Act 16 of 1991 was amended in 2003 to provide for definitions of assessment as well as conferring the obligation to render this service upon probation officers.

68 For example, the assessment forms could be modified to include a question or questions relating to whether CUBAC is suspected or discovered.

69 Wood C 'Diversion in South Africa: A review of Policy and Practice' ISS Occasional Paper 79 (October 2003) is a comprehensive analysis of the development of diversion in South Africa. See, too, the recent HSRC study (A Dawes and A Van der Merwe, 2005), which undertook a literature review on diversion to form the basis for the drafting of minimum standards for diversion. This literature review is international as well as local, and provides concrete evidence of 'what works' based on available studies.

2.5.1 The Interim National Protocol for the Management of Children Awaiting Trial

It is unsurprising that at a policy level, several attempts have been made to limit, control and manage the unsentenced child prisoner population. The key policy document in this regard is the *Interim National Protocol for the Management of Children Awaiting Trial*.⁷⁰ This document sets out clearly the existing responsibilities of each role player upon the arrest of the child. So, for instance, the police must, upon the arrest of a child, make every effort to notify the parents or guardians of that child about the arrest and about any court appearance, consider the release of the child into the care of parents or guardians on so-called police bail, consider releasing the child after issuing of a written notice to appear in court to the person in whose care he or she is, and take a child directly to a probation officer for assessment. The Department of Social Development undertook to ensure the availability of probation services, and probation officers conducting assessment complete assessment forms covering such matters as the child's personal details, relevant background information, and recommendations for diversion. The obligations agreed to by the Department of Justice and Constitutional Development included ensuring that probation officers have easy access to children appearing in criminal courts, designating as far as possible one court only within a district to deal with all child justice matters, allowing adequate time for assessments to take place on the morning of the child's first appearance, and notifying probation services of the appearance of a child in court where such child has not been assessed. This protocol guides government role-players in the absence of specific child justice legislation.

Whilst little information of direct importance emerged in the literature review this chapter has nevertheless explained at some length the applicable international norms and standards, and highlighted relevant South African legal and policy documents.

⁷⁰ Department of Justice and Constitutional Development 2001.

Chapter 3

Situation Analysis

3.1 Introduction

The Situation Analysis phase was initiated by the identification of national, provincial and other relevant stakeholders for the purposes of consultation as well as the drafting of a semi-structured questionnaire for administration to the identified role-players.

It was decided that before the consultation process with government role-players was undertaken, it was necessary to inform and get support for this project from the national departments within the criminal justice cluster for this project.⁷¹ Accordingly, while a stakeholder list was being compiled, permission was sought and granted for the researchers to address the Inter-sectoral Committee on Child Justice⁷² that exists at a national level. This meeting occurred in January 2005 and the relevant support and approval was obtained for this research to proceed within the various departments. The Situation Analysis phase was utilised to consult with national stakeholders on issues such as the existence of policy and statistics relating to CUBAC, to attempt to determine the prevalence, location and nature of CUBAC, and had the ultimate aim of identifying eight potential pilot sites. A further goal at this stage was to disseminate information on the CLPA and TECL programmes, particularly within the child and criminal justice sector in relation to CUBAC.

The consultation phase of the Situation Analysis took place during January and February 2005 and involved the following:

- Distributing the questionnaire to relevant stakeholders within government and civil society by electronic mail or fax;
- Contacting relevant stakeholders telephonically and requesting their assistance in completing the questionnaire;
- Following up with the members of the Inter-sectoral Committee on Child Justice to ensure they completed the questionnaire;
- Telephonic and face-to-face administration of questionnaires to certain respondents. Some respondents, however, completed the questionnaire themselves;
- More extensive one-on-one interviews with certain participants in the study, using the questionnaire as a basis, but examining issues extending beyond its scope.

At the conclusion of the Situation Analysis, 15 people had been interviewed. 35 questionnaires of a total of 78 distributed were returned.

The profile of respondents varied from staff of NGOs working directly with affected youth, to government officials. The government officials included persons employed at provincial level in both rural and urban areas, and particularly from various provincial social development departments. The places where they were based included Port Elizabeth, Cape Town, Bellville, Pretoria, Johannesburg, Mpumalanga, Beaufort West, Pietermaritzburg, Durban, Ulundi, Kimberley, Port Nolloth, George, Bloemfontein, Benoni, Mmabatho, Victoria West, Calvinia, and Hanover.

While this initial phase of the study was constrained to a certain extent due to the large number of questionnaires that were not returned timeously, the breakdown of responses indicated a broad spread of information from different levels of government and civil society across a number of areas in South Africa.

71 These are the departments of Justice and Constitutional Development, Safety and Security, Correctional Services, Social Development and the National Prosecuting Authority.

72 The ISCCJ is a committee comprising of representatives of national government departments that have a responsibility for the administration of criminal justice as it relates to children. The ISCCJ meets on a regular basis to discuss issues relating to children in trouble with the law, such as the numbers of children in prison and the availability of places of safety and secure care centres.

3.2 Available information on CUBAC

The majority of the respondents noted that there were no statistical databases available that provided information on CUBAC (other than those already contained in Muntingh's compendium of statistics).⁷³ Numerous respondents said that while each department collects and collates statistics relating to the specific areas of their work, including statistics on children in trouble with the law - arrested, convicted and sentenced - these are not broken down to reflect any category that would indicate the CUBAC phenomenon. To this extent, national statistics are not even available on children who are charged together with adults for a particular offence - data that could have given some indication of the prevalence of CUBAC.⁷⁴ It was concluded, therefore, that at all levels - national, provincial and local - no statistical or biographical information⁷⁵ on the prevalence of CUBAC exists.

Based on 2002 figures and projections it appears that approximately 170 000 children are arrested annually in South Africa.⁷⁶ The majority of arrests take place in the Western Cape (24%), followed quite closely by Gauteng province (22%). KwaZulu-Natal is third at 20%. The provinces with the lowest child arrest numbers appear to be the Northern Cape and Limpopo (4% each).

In the costing of the Child Justice Bill it has been projected that the breakdown of child cases by crime category will be: economic crimes 62%; aggressive crimes 32%; sexual crimes 2.5%; and narcotic-related crimes 2%. Note that this information pertains to arrests, and it is estimated that theft and housebreaking account for more than 60% of all arrests.⁷⁷ The number of children (sentenced and unsentenced) in prison on 31 May 2004 was 3 594, down from 4 111 on 31 March 2002.⁷⁸ The division between sentenced and unsentenced children is reflected in the graphs on the next page.

73 Muntingh, L (ed) *Children in conflict with the law: A compendium of child justice statistics 1995-2001* (study commissioned by the Community Law Centre, University of the Western Cape, 2003).

74 Muntingh, L *Compendium* at p 27. The issue as to how many children are co-accused with adults could be regarded as a possible indicator that the adults were using children in the commission of crime. This question formed one of the research questions tackled by Muntingh, L. Only data from one site was available, namely from the Stepping Stones one stop child justice centre in Port Elizabeth. This data indicated that over the period January to March 2002, 983 arrested children appeared at the centre, and of these, 109 were co-accused with adults. It was concluded that between 9 and 13% of the children in this district are co-accused with adults. The co-accused children tend to be involved in more serious offences (61% were co-accused for property offences, 33% for offences against the person, and the remainder for victimless offences). The age profile recorded showed that older children (aged 17) tend to be co-accused with adults rather more than younger children.

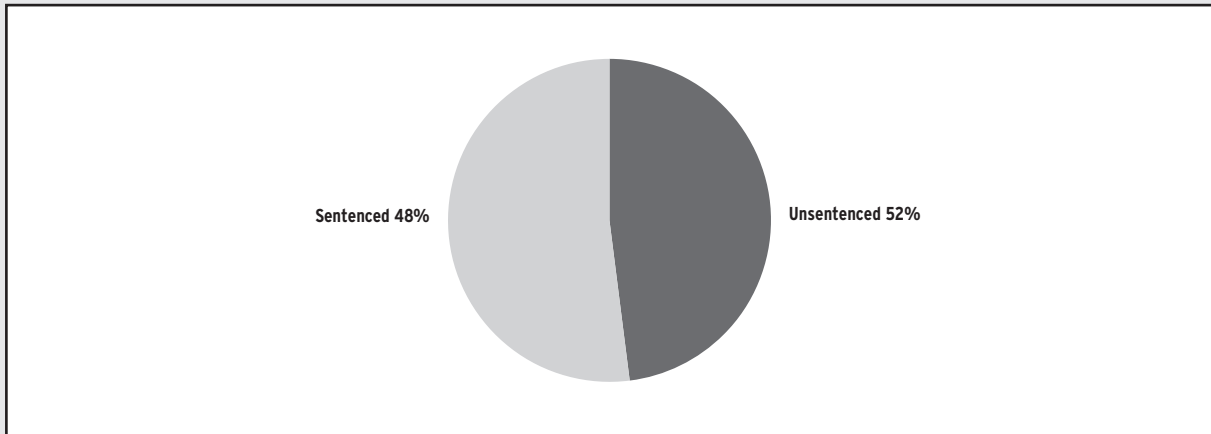
75 For instance, from social background information contained in pre-trial assessment or pre-sentence reports.

76 Muntingh, L *Compendium* at p 27. The issue as to how many children are co-accused with adults could be regarded as a possible indicator that the adults were using children in the commission of crime. This question formed one of the research questions tackled by Muntingh, L. Only data from one site was available, namely from the Stepping Stones one stop child justice centre in Port Elizabeth. This data indicated that over the period January to March 2002, 983 arrested children appeared at the centre, and of these, 109 were co-accused with adults. It was concluded that between 9 and 13% of the children arrested in this district are co-accused with adults. The co-accused children tend to be involved in more serious offences (61% were co-accused for property offences, 33% for offence against the person, and the remainder for victimless offences). The age profile recorded showed that older children (aged 17) tend to be co-accused with adults rather more than younger children.

77 Muntingh, L, *Compendium* at p 30. As the graphs below illustrate, a greater proportion of children in prison are held for offences involving aggression. This may well be due to different sentencing policies applicable to property and to violent offences.

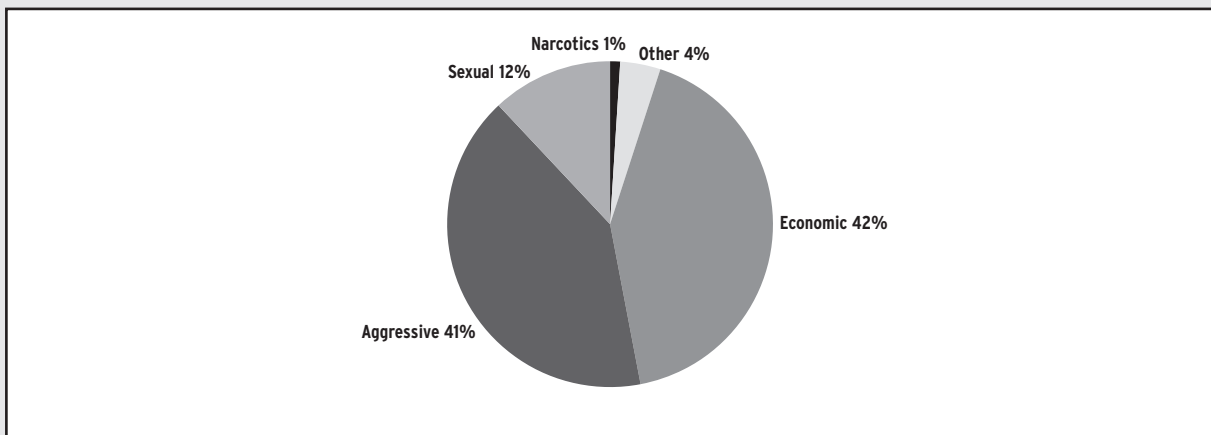
78 This may be due to the increased bed space available outside prison for awaiting trial children through the expansion of the secure care programme.

Sentenced and unsentenced children in prison, 31/5/2004

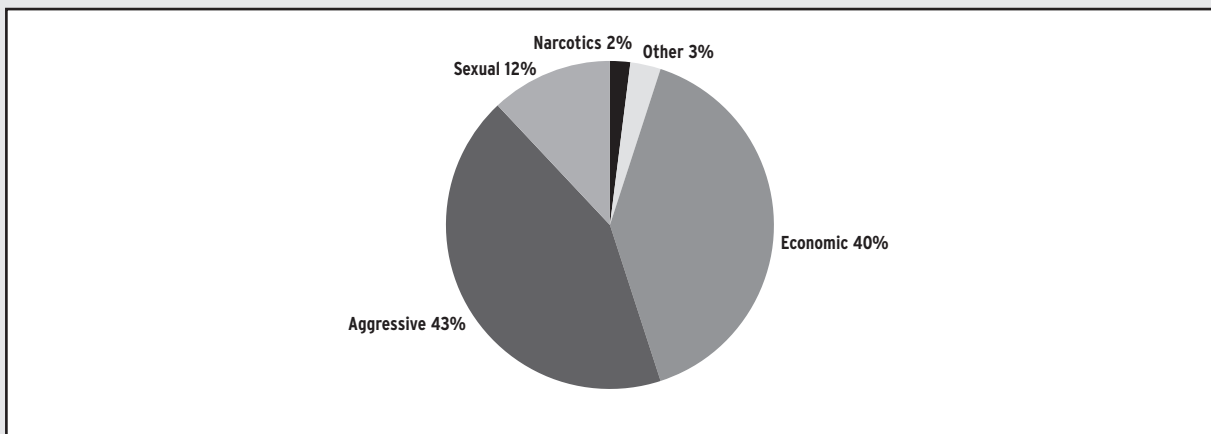


The crime categories for unsentenced and sentenced children are reflected in the two graphs below.

Sentenced children in prison in percentage per crime category, N = 1737



Unsentenced children in prison in percentage per crime category, 31/5/2004, N = 1857



The second graph on the previous page shows that a large number of children are arrested for economic offences, as was the case in the past. Further, despite prominence given in the media to children using drugs, very few children are imprisoned for drug offences. More than 50% of the children in prison are aged 17. The numbers decrease by virtually half for each descending year, and very few children aged below 14 years are held in prisons.

The Situation Analysis also explored the availability of information on diversion, but found that qualitative diversion information is also not uniformly available. Most data that do exist are derived from service providers. There is therefore no single diversion database available and the diversion workers that were respondents in this study indicated that there were no statistics in their files that relating directly to CUBAC.

3.3 Existing policy

In relation to policies pertaining to CUBAC, all of the respondents in the study noted that there was no specific policy that they were applying that related directly to CUBAC. However, the completed questionnaires received revealed that only one respondent in the course of his or her work had not encountered children used by adults or other children to commit crimes. The remaining responses all indicated that this is a real phenomenon that occurs among 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.

3.4 Participant responses on the extent of CUBAC

It was apparent that the majority of offences identified by respondents in relation to CUBAC are property offences. 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 is not taken against the adults involved, and that children testifying against the adult perpetrator appears to be uncommon. It was concluded that there are inadequate follow up mechanisms to ensure that adults involved in using children are detected, investigated and punished.

The Situation Analysis phase was also utilised to obtain information on interventions that could inform the design of the pilot projects. Some suggestions were:

- Short-term counselling
- Referral to a children's court inquiry⁷⁹
- Home-based supervision⁸⁰
- Better investigation procedures on the part of the police and the arrest of perpetrators
- Community service, currently a diversion and a sentencing option available through NICRO and state services, but severely under-utilised
- Psycho-social educational group attendance
- Diversion programme attendance (although it was noted that current programmes are generally generic and not targeted at CUBAC)
- Prevention of further contact between the child and the adult⁸¹
- Engaging parents in educational programmes and recruiting young people and engaging them in life-skills programmes and mentoring (it was noted that a variety of diversion programmes do incorporate both a life skills and a mentoring element).

79 However, from all the responses received, it appears that a children's court inquiry was only used in one matter, the details of which were not provided.

80 A specific programme developed by the provincial Department of Social Services in the Western Cape and currently being rolled out to other provinces.

81 Obviously this will depend on the relationship between the child and adult (or older child) perpetrator.

3.5 Pilot sites

In relation to the selection of pilot sites, a number of factors played a role, including the level of intersectoral co-operation at both provincial and local level, the availability of pre-trial assessment services, the need to involve NGOs in the CUBAC pilot design and implementation, and the presence of community organisations or national NGOs such as NICRO at the possible sites. Further, it was desirable that the sites should include one where gangs are prevalent, and that the concentration would have to be on large urban areas where sufficient numbers of children can be reached through the pilot projects. Areas where a high crime rate prevails were also targeted, according to recent identification of crime 'hotspots'. A related consideration was to examine areas where government is already channelling resources into urban renewal programmes, and where additional resources are therefore available. After considering 29 different locations spread throughout the country, the Situation Analysis provided a comprehensive analysis of the strengths and weaknesses of each, and motivated for narrowing the selection to two sites in the Western Cape, and two in Gauteng. These then formed the subjects of the Baseline Study, described in the next section.

The four sites proposed in the Situation Analysis report were Pretoria and Westbury in Gauteng, and Mitchell's Plain and Khayelitsha in the Western Cape. In the final choice of the two pilot sites from those four, the criteria explored were, for example, the prevalence of the problem, the likely reach of the pilot project to specified numbers of children over the designated period, and the need to focus on areas where some resources are already exist (as the pilot projects have limited funding available). However, the most critical factor that was mentioned in the Situation Analysis report was going to be the willingness of state officials at local level to work together to make the intervention a success. Thus, a key aspect of the Baseline Study was to be the exploration of service delivery levels, the extent of co-operation between various role players in the juvenile justice system, to examine where weak links exist and how these could be strengthened, and to investigate what strategies and mechanisms should be built into the design of the pilot projects.

A primary objective of the research undertaken during the Baseline Study was an in-depth study of all four sites proposed at the conclusion of the Situation Analysis phase, in order to arrive at motivated recommendations for the final selection of two of them.

Chapter 4

Baseline Study

4.1 Introduction

This constituted the second phase of the first stage of the CUBAC programme as initiated by TECL. It 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. This chapter will outline the process and findings of the Baseline Study that resulted in the selection of two final pilot sites, namely Mitchell's Plain in the Western Cape and Mamelodi (an area within Pretoria) in Gauteng.

4.2 Methodology

The study commenced in April 2005 and was completed on 15 August 2005. A variety of methodologies were used in order to facilitate the data collection for the study. These included:

- Drafting and administering of semi-structured questionnaires. The informants who would receive the questionnaires were identified as being officials and individuals at each site who have the potential to provide information regarding CUBAC and the design of pilot projects at those sites. They included NGOs, police officials, magistrates, prosecutors, and probation officers. The questionnaires were intended to obtain general information from them in relation to the nature, extent and consequences of CUBAC as well as to determine levels of co-operation between the various informants in each site. In addition, the questionnaires were adapted according to the particular informant. For example, the police were questioned about investigative techniques used and their questioning of and taking of statements from children.
- One-on-one interviews were conducted. These did not utilise a pre-set, standardised research tool, such as a questionnaire, as they targeted different stakeholders from different disciplines who have differing knowledge relating to CUBAC. These interviews were aimed at obtaining information relevant to provincial and national policy and in particular at securing co-operation and information for the implementation phase. The stakeholders interviewed included officials from the Western Cape Department of Community Safety, the Gauteng Department of Safety and Liaison, officials from the Western Cape and Gauteng Departments of Social Development, officials from the Western Cape Department of Education, an official from the UN Office on Drugs and Crime and an official from SAPS legal office on a national level.
- Design and administration of quantitative research templates. These included a template for assessment records, one for charge sheets, one for dockets, and one for direct observation of juvenile court proceedings. These templates were designed to obtain information from existing records that might disclose the prevalence of CUBAC in the various sites. In addition, they were designed to obtain information regarding the profile of children and the nature of the offence where there were older co-accused involved, as this has been the one factor that seems most indicative of CUBAC.

In total, 33 persons were interviewed and 70 questionnaires were administered to officials and role-players at the four sites. In addition, across the four sites, 143 charge sheets were examined, 136 assessment forms examined and court and assessment proceedings were observed in 46 cases.

All of the interviews and questionnaires were administered face-to-face by the researchers at the four potential pilot sites. In order to interview stakeholders, administer the questionnaires and administer the research templates, permission had to be obtained from the various governmental departments and this was duly sought and granted.

Child consultative research study

At the same time as the Baseline Study was being conducted, a child consultative research study was undertaken. This involved research with children on the nature, extent and cause of CUBAC. The research was also expected to identify factors that would place children at risk of CUBAC as well as provide information relevant to the design of programmatic interventions aimed at children and adults. The children were sourced from those who already found themselves in trouble with the law and who were awaiting trial or sentences in certain awaiting trial facilities and in a school. Originally, only children who came from the four pilot site areas were going to be targeted, but this was changed during the course of the study in order to include all children at the various facilities, so as to extend the scope of the study. The methodology used for this research involved the use of general guiding questions as opposed to structured questionnaires in focus group discussions.

From 18 to 29 July 2005 a total of 41 focus group discussions (FGD) involving 542 young people in five Secure Care Facilities and one government school were conducted. Two of the Secure Care Facilities were in the Western Cape and three were situated in Gauteng Province. The school used in the research was situated in Gauteng, south of Johannesburg.

The focus group discussions included between six and 16 participants, with an average of 14 participants. The duration of the focus group discussions was on average 55 minutes.

The research explored several key themes relating to children being used by adults or older children to commit crime. These included:

- How children first become involved in crime
- How adults are involved when children commit crime
- Who the adults are
- What should be done

Overall the study demonstrated that the phenomenon of adults and older children using children to commit crime is widespread and commonplace in the life experiences of children, especially those who are in conflict with the law. This was illustrated in many ways through the study, and the fact that 46.7% of the children in secure care facilities who took part in the study stated that they were co-accused with an adult in the current charges they were currently facing. This is of great concern, as an adult co-accused is a major indicator of the existence of CUBAC in a case.

A separate publication summarising the child consultative research study has been produced.

All the data obtained from the methodologies outlined above was analysed and the information obtained provided results and conclusions relating to the following general themes:

- A national and provincial stakeholder analysis with reference to policy, priorities and co-operation
- Analysis of assessment procedures, police and prosecution practice, prosecutorial and magisterial priorities in order to make proposals for interventions and stakeholder participation during the pilots
- A local stakeholder analysis and results of the quantitative studies with motivated recommendations as to the selection of the final pilot sites and proposed programme partners

4.3 Findings from the Baseline Study at the four sites

4.3.1 National and Provincial Stakeholder Analysis

Following on from briefings conducted during the Situation Analysis phase, follow-up consultations and briefings were conducted with previous study respondents at national level as well as new ones. These included:

- A briefing on the CUBAC project to the national Inter-sectoral Committee on Child Justice (ISCCJ) was held on 27th July 2005. At this briefing, the the recommendations for the final two pilot sites and the recommendations regarding the tools, structures and guidelines needed for implementing the pilot programmes were presented and input was obtained that further informed the design of the pilot prjects as will be discussed in Chapter 5.
- A detailed discussion was held with the legal adviser to the SAPS, who has national responsibility for legal issues in relation to children and child justice

Also very important during the Baseline Study phase were consultations at provincial level. In particular, provincial stakeholders in the two provinces in which the sites were located were involved in a series of briefings, meetings, and more focused discussions. Some of the provincial stakeholders consulted included the following:

- In the Western Cape, contact was initially made with the Department of Community Safety, a provincial government department, established in 1996, whose function is to provide civilian oversight to ensure the improvement of service delivery in the SAPS and to determine the province's policing needs and priorities⁸². Following from this it was suggested that an arrangement be made for a briefing on CUBAC to the Multi-agency Delivery Action Mechanism (MADAM). MADAM is a provincial inter-departmental co-ordinating forum for improved service delivery in a range of areas of concern, including housing, education, community safety, transport, disaster management, poverty alleviation and social services.⁸³ The delegates who serve on MADAM are very senior officials or heads of their respective departments⁸⁴. Social crime prevention⁸⁵ is one of its key objectives and it was approached specifically with a view to gaining overall provincial support for the pilot process.
- In Gauteng, contact was made with the Gauteng Department of Safety and Liaison. Key roles of this department include the monitoring and evaluating of the performance of police services to ensure optimum service delivery by SAPS and initiating and co-ordinating social crime prevention activities. The Department of Safety and Liaison expressed an interest in taking a central role in the CUBAC pilot programme. The Department explained that it served a co-ordination function in the province, and mentioned the fact that within Pretoria, Mamelodi was a suitable site for implementation of the pilot project due to the fact that it has been identified as a presidential site for urban renewal. From the Department's policy and priority stance, Mamelodi was an important locus of future activity.⁸⁶
- Contact was also made with key role players from the provincial departments of Social Services in Gauteng and the Western Cape who expressed great interest in CUBAC. The Gauteng Department of Social Services provided good suggestions on how assessments by probation officers could be improved without having to revise the assessment forms. One such suggestion was to issue a directive/national instruction to all probation officers instructing them to be aware of CUBAC issues and providing them with a list of indicators in order to identify CUBAC. The department was willing to do this for the pilot project. A further suggestion was made on how records on CUBAC could be kept during the pilot project. On the issue of levels of co-operation between stake-

82 Department of Community Safety, Provincial Government Western Cape, Strategic Planning Report, 2003/04 – 2005/06, pg 3, accessed at www.finance.gov.za/documents/budgets/2003.

83 This forum appears to be regarded as a best practice model, and may be emulated in other provinces.

84 Including representation from the Provincial Department of Culture and Sport, the National Prosecuting Authority, the Department of Correctional Services, the Department of Labour, the Department of Health (provincial), the Department of Justice and Constitutional Development, the Provincial Department of Economic Development and Tourism, the South African National Defence Force, the City of Cape Town manager, the Manager of the Cape Town City Police, and the National Intelligence Agency.

85 Social crime prevention is defined as an array of measures aimed to reduce the social, economic and environmental factors which generate crime. Targeted social crime prevention strategies focus on the individual offender or victim, and the community or environment in which they live. See, for example, Social Crime Prevention Initiatives in the Western Cape Province (undated, Government of the Western Cape Province, copy on file with the authors), and Griggs, R 'Lessons from local crime prevention', Open Society Foundation for South Africa, 2003.

86 Reference was made to the forthcoming anti-rape strategy which will be rolled out by the South African Police Services in 'hotspots' where this offence is prevalent. Mamelodi has been identified as the locus of one such project.

holders, they were of the opinion that there was better co-operation in Pretoria than Johannesburg and that there were many more NGOs operating in Pretoria than in Johannesburg.

Great interest was also expressed by the Western Cape Provincial Department of Social Development in being part of the pilot project and serving on any steering committee, and attention was drawn to the overlap between some CUBAC-related issues, and the pending national drug strategy that is being prepared. It was noted that involvement with the CUBAC pilot project would also fit in with the social capital formation strategy of the province which was recently launched.

- A meeting was also held with the Safe Schools Division of the Western Cape Education Department during which its background, aims, strategy and programmes (many of which are crime prevention programmes and awareness raising programmes aimed at alerting communities to crime-related issues) were discussed. They also expressed interest at being part of the pilot.

In order to consolidate the information obtained at a provincial level (as well as from the four sites themselves) two workshops were held in Gauteng and the Western Cape on 28th July and 2nd August 2005 respectively. All those who were interviewed, consulted or briefed on CUBAC during the Baseline Study were invited to these workshops. The aim of these workshops was to present the findings of the Baseline Study and to gain feedback from the respective participants on the research team's recommendations for the final two sites. The input and feedback received at these workshops was incorporated into the pilot project design discussed in Chapter 5.

In summary, at the provincial level in particular there was interest expressed by all stakeholders contacted in being part of the CUBAC pilot project and in linking the CUBAC pilots to other crime prevention initiatives in the two sites that would be finally selected. The initial selection of the four sites appeared to fit well with existing provincial priorities and strategies, with the exception of Westbury, which appeared not to enjoy provincial support as a potential pilot site.

During the consultation process with the national and provincial stakeholders a number of recommendations and suggestions were put forward for the implementation of the pilot project and they included the following:

- **Site** - In the Gauteng area, most participants concurred that Pretoria would be the more suitable pilot site and a recommendation was that Mamelodi be the particular site within Pretoria for the implementation of the pilot.
- **Probation practice** - In order to identify children who are used by adults or older children to commit crime, it was recommended that an instruction/directive be devised to make probation officers aware of CUBAC-related issues and also during the implementation of the pilot project to provide them with a list of indicators or triggers.
- **Record keeping and statistics on CUBAC** - The Gauteng Provincial Department of Social Services recommended that one way to gather statistics on the number of children used by adults or older children to commit crime was to include a column in their assessment register referring to CUBAC as a specific category.

4.3.2 Analysis of assessment procedures, police and probation practice, prosecutorial and magisterial priorities

In order to design pilot interventions for the implementation phase that would incorporate the obligations contained in the CLPA for the various Departments, it was important to consult the child justice role-players at each of the four sites. The purpose of these consultations with police, probation officers, prosecutors and magistrates was to gather their views and opinions on the suitability of their site according to criteria such as extent of the problem and inter-departmental co-operation and what procedures or interventions they could recommend to assist with the management of CUBAC.

4.3.2.1 Police

During the Baseline Study, discussions were held with SAPS Legal Services: Legislation with a particular focus on matters in its remit pertaining to children. These discussions involved a wide range of possibilities on how the SAPS could intervene in CUBAC matters. It was finally decided that it was most feasible to develop guidelines for police conduct at a local rather than national level during the course of the proposed pilot process, as a basis from which work towards drafting a national circular for use during the implementation of the CUBAC programme after the completion of the pilot projects.

Interviews were held with four SAPS detectives based at Sophiatown police station, the station which services the Westbury area. All of them acknowledged that they had encountered children being used by adults or older children in the area to commit offences and that these were mainly economic offences (such as theft, robbery and housebreaking) and drug-related offences. However, the respondents emphasised that the children very seldom disclose the fact that adults or older children are involved in the commission of the offence, for fear for their own or their families' safety. In discussions on children in conflict with the law in general, it was noted that the officers have difficulty in regarding child offenders as having rights separate from those of adult offenders and they are not viewed as a category of vulnerable offenders on account of their status as children. This is highly problematic because contact with the police is usually a child's first experience of the criminal justice system and if police are not sensitised to the specific issues pertaining to children in trouble with the law, this will have a negative impact on the journey of a child through the criminal justice process.⁸⁷ Therefore, in relation to CUBAC such an attitude would be detrimental to efforts to protect such children and combat the phenomenon.

In Mitchell's Plain, six SAPS detectives were interviewed in relation to CUBAC. They are not specifically assigned to matters involving juveniles but are rather responsible for all detective work in the area. At the outset, it is necessary to note that the Mitchell's Plain detectives showed far greater insight into the vulnerability of children in conflict with the law than the Westbury detectives. These officers were acutely aware of the negative influence that encounters with the criminal justice system can have on children. They noted that children who are sentenced to imprisonment could often be regarded as 'lost' to law-abiding society and as one detective put it, one should try by all means possible 'to keep children out of jail'. As far as CUBAC are concerned all of the detectives acknowledged that the use of children by adults and older children to commit crime is a problem in the Mitchell's Plain area. The relationship of these adults and older children to the children concerned is largely gang related. Their suggestions on how to manage CUBAC included police communicating their suspicions to probation officers and making a note in the docket of a child being a potential CUBAC. In addition, they would like to see adult co-accused being prosecuted fully even if the child enters a guilty plea and 'takes the rap'.

A briefing was held with the Khayelitsha Zone Director and the station commanders of the three police stations for the Khayelitsha area. This was followed by a consultation with 19 detectives from the same area. The information elicited from the interviewees was that, in their experience, CUBAC does happen - but not that regularly in the Khayelitsha area. The interviewees were not particularly forthcoming or engaging on the issue of CUBAC and the impression gained was that their understanding of children accused is akin to that displayed by the Westbury detectives - that children accused of crimes do not have any more rights because of their vulnerability than adult accused. Regarding questions on how police investigation could help combat CUBAC, the interviewees noted that if there is information on CUBAC there are two possibilities:

- making the child a section 204 witness⁸⁸
- using the child as a bait to trap the adult⁸⁹

At the provincial workshop held in the Western Cape to discuss the Baseline Study, several children's rights activists objected to the notion of using children as traps. First, they said that it would place those children at risk of victimisation within their communities. Second, they argued that this itself was instrumentalising children. A representative of the Office of the National Prosecuting Authority also expressed misgivings at the notion of using children as traps.

In addition, the Khayelitsha detectives agreed with the Mitchell's Plain police on the issue of children co-accused with adults. They note that prosecutors routinely withdraw charges against adult co-accused if the children admit guilt and that the police are not consulted on whether such withdrawal should take place or not. They suggest that in such instances the adults should be prosecuted and the cases not withdrawn.

Two SAPS members from the Pretoria central Police Station were consulted. It was intimated that the greatest proportion of children

87 The police set the tone for a child's experience of the criminal justice system. Any prejudicial or harsh treatment by the police will have a trickle-down effect on the child and/or public perception of the officials in the system and might well affect issues such as their trust in others such as probation officers.

88 This is a state witness, where an accused person gives implicating evidence against a co-accused or other person in exchange for the withdrawal of charges against him or her. However, the test is whether the evidence given is reliable and credible for the section 204 benefit to accrue.

89 Police traps are recognized operational methods that are used for evidence in criminal matters. Holmes, JA in *S v Malinga* 1963 (1) SA 692 (A) at 693 G states that 'A trap is a person who, with a view to securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein. In other words, he creates the occasion for someone else to commit the offence'. However, such evidence must be treated with caution when traps are paid to procure evidence for the police and therefore have a motive for favouring the prosecution or when the motive may include the desire to please an employer by securing a conviction - *S v Chesane* 1975 (3) SA 172 (T) at 173. Hoffmann, L and Zeffert, D in 'The South African Law of Evidence', 4th Edition, Butterworths, 1988, note that an inherent danger lies in the type of trap where a person sets up a trap but neither actively procures the commission of an offence nor entices an accused to commit it. However, the latter type of trap would not be relevant to CUBAC as a child would necessarily have to actively participate in such offence.

in conflict with the law in Pretoria central were arrested for petty shoplifting. Many children from outside the central area attend independent schools which have established themselves in empty office blocks in the central business district, and there is therefore a large presence of school-going children in that area, particularly when school ends at 14:30, and children emerge from the schools to await public transport to outlying areas. The informants said that a large number of children coming to school in the central district (and getting involved with committing petty crime) actually came from the Mamelodi area. The central business area, which fell within their area of jurisdiction, is by and large non-residential, they said. They confirmed the existence of 28 different police stations within the greater Pretoria area, and suggested that a more fruitful route might be to concentrate efforts on the Mamelodi.

In conclusion, it was apparent that the development of CUBAC-specific police material could only be effected through departmental channels. The pilot project design as discussed in Chapter 5 also recommends that station-specific personnel receive training on the identification of CUBAC and follow-up actions. Further, direct linkages between probation officers and police at grassroots level would have to be fostered to enable two-way communication concerning follow up of CUBAC to occur. The Social Crime Prevention officers at the local police stations at the designated sites could also get involved by delivering CUBAC prevention programmes and these could be added to their existing crime prevention and crime awareness initiatives. Some of the more concrete recommendations elicited during the consultation with police included:

- The establishment of a local steering committee for each site, or link with existing structures
- The continued prosecution of adult co-accused when a child co-accused admits guilt

4.3.2.2 Probation practice

Assessment is an evaluation process occurring after the arrest of a child. It involves an evaluation of the child, investigation of his or her home circumstances and the circumstances surrounding the commission of the alleged offence with a view to making appropriate recommendations. These recommendations can include diverting, releasing, placing the child in the care of his or her parents or in a relevant facility and would also include suggestions as to whether the matter should proceed to trial. The assessment is carried out by a probation officer who is a trained social worker.

In establishing the prospects for diversion during the assessment process, it becomes evident that the assessment process can play a key role in identifying CUBAC during the pilot project, as the process involves exploring with the child the background circumstances to the commission of the offence. Thus assessment procedures can both identify instances of CUBAC, and serve as a mechanism for appropriate referrals to the pilot programmes.

The assessment process at each of the four sites is well established and involves a one-on-one interview between the child and the probation officer. The probation officer will also interview the parents, caregivers or guardian of the child in order to obtain information on the child's behavioural patterns, developmental strengths, skills, sense of independence and sense of generosity or caring for others. All the information gathered is recorded on the assessment form together with a recommendation as to whether the child should be placed in a diversion programme, and whether the child should be placed in a residential institution or be released into the care of his or her parents. This information is communicated to the court and the appropriate plan of action is taken.

The probation officers in Khayelitsha indicated that the disclosure of CUBAC happens either during the assessment process or when the child is attending a diversion programme or while on home-based supervision. They indicated that such disclosure does not happen frequently, since questioning a child on whether he or she was used by an adult or an older child is not a specified question on their assessment form. However, this type of information is revealed when the child is asked open-ended questions about how and why he or she committed the crime and given a chance to relate his or her 'story'.

Suggestions for indicators to assist probation officers in identifying CUBAC included whether there was a co-accused involved in the commission of the offence, particularly an older co-accused, and asking open-ended questions about the circumstances of the commission of the offence. Should there be any indication of CUBAC, then the probation officer should probe the matter further. The suggestion to devise a directive/national instruction was also made by persons interviewed at the Gauteng Department of Social Development. In addition to the indicators mentioned above, the Department suggested further indicators to identify CUBAC including the likely involvement of the child in a gang, whether the child is a street child and whether the child was caught for specific offences

such as selling or dealing in drugs.

The probation officers interviewed in Mitchell's Plain indicated that in their experience, they had not encountered instances of CUBAC. They reported that in their experience, most of the children committed offences as a result of peer pressure or for their own account for various reasons. These offences are generally economic ones and most are committed to support the child's drug habits. They expressed the view that all criminal offending in Mitchell's Plain was in one way or another linked to drugs. Even though they had not encountered CUBAC cases, they were of the opinion that it should be a focus of the assessment either by way of amendments to the assessment form or by devising a national instruction to all probation officers. They also agreed that CUBAC-specific diversion programmes are needed but suggested that instead of having a stand-alone programme, CUBAC-specific content should be added to existing diversion programmes.

In Pretoria, the probation officers render full time services to the juvenile court. They detailed recent instances of CUBAC that they had encountered, noting that children being used to sell drugs by foreigners was a frequent issue in this area. However, both due to fear of reprisals and the need to secure continued access to their own drug supply, children would never reveal the names of the drug dealers involved. It was noted that girls were especially vulnerable, and a key problem was the absence of state-funded rehabilitation facilities to break the cycle of drug dependency.⁹⁰

The interview revealed that a great majority of cases coming to Pretoria Central Court involved children who actually live in Mamelodi. The types of cases involved in this regard were shoplifting and theft, and if such instances are CUBAC, the names of the principals for whom the offence is committed are never mentioned by the children. As Mamelodi is a very poor area, and situated some distance from the central Pretoria area, children from Mamelodi who are diverted are referred to Youth Development Outreach (YDO), an NGO which has offices close to Mamelodi, and which renders services to that community.

The results of this and other interviews lead the research team to focus their efforts on Mamelodi within the greater Pretoria area, as it appeared that there was an emerging consensus that the CUBAC pilot would be suitably located there. At Mamelodi, the probation officer indicated that she had encountered CUBAC cases and that such disclosure happened either during the assessment or when the child is on a diversion programme. However, she stressed that while children would disclose that they were influenced by an adult or older child, or report that they had committed the crime at the request of an adult or older child, they generally refused to disclose the identity of such person on account of fear of reprisals against them or their families.

It became apparent that the current assessment forms are not structured in a way that would identify CUBAC cases appropriately. Instead, it would require the probation officer to probe further on his or her own initiative once the child relates his or her story and it transpires that the child was used by an adult. However, while some have suggested that the assessment form be amended to include CUBAC-specific questions, others were of the view that a directive or instruction to probation officers with indicators on how to identify CUBAC during the pilot project was much more desirable.

Some of the indicators suggested that may identify CUBAC include:

- The fact that an older co-accused is involved
- The child is a member of any gang
- The involvement of the child in any gang-related activities
- The fact that the child is a street child
- The type of offence that the child is charged with for example, the sale or possession of drugs, housebreaking and theft out of motor vehicles
- Whether the child had avenues for disposal of stolen goods
- Whether the child could give any further information (e.g. addresses) relative to the acquisition of drugs.

⁹⁰ There are no state-funded rehabilitation facilities for girls in the Gauteng Province, according to these respondents.

4.3.2.3 Judicial and prosecutorial practice

In Gauteng the Newlands Magistrate's Court is located in Westbury. However, this court does not have a special juvenile court. Most of the children from Westbury are referred to the Johannesburg Central Magistrate's Court since it has a juvenile court.⁹¹

There is a dedicated juvenile court at Pretoria Central Magistrate's Court and also at the Mamelodi Magistrate's Court.⁹² Many of the children from Mamelodi also appear at Pretoria Central and at the Pretoria North Magistrate's Court where they are charged with crimes committed outside the Mamelodi area.⁹³

In the Western Cape a special juvenile court operates at the Mitchell's Plain Magistrate's Court. At Khayelitsha Magistrate's Court, there is a court designated to hear juvenile matters it also deals with adult criminal trials.

The magistrate at the Mitchell's Plain Magistrate's Court indicated that he has indeed encountered cases where he thought that the child might have been used by an adult or older child to commit the offence. Apart from the drug-related matters mentioned above, he had also encountered many cases where children were co-accused with adults for offences such as theft, housebreaking, assault and robbery. In these matters, although the child did not disclose that he or she was used by the adult to commit the offence, he often assumed that the child might have been influenced by the adult in the commission of the offence. Despite this assumption, the magistrate indicated that he has never asked a child whether he or she was influenced by the adult or by older children, or used by the adult or older children, to commit the offence.

The juvenile court prosecutor at Mitchell's Plain Magistrate's Court indicated that she had encountered cases where children were used by adults to commit crime. The disclosure that the child was influenced or used by an adult to commit the offence often occurred at the child's first appearance. The guardian or parent of the child appearing in court at the first appearance would tell the child to inform the court what happened when the offence was committed, and it was often during this process that the child would reveal that he was asked or influenced by an older person or adult to commit the offence. Most of these offences were house-breaking, possession of drugs or robbery. The children were generally between the ages of 14 and 16 and were either placed in diversion programmes, or were given suspended or postponed sentences. The prosecutor also stated that she had encountered cases where children were co-accused with adults, in, for example, shoplifting and housebreaking cases. However, in her experience, she recalled that the charges were often withdrawn against the adult due both to a lack of evidence against him or her, and the fact that it was the child who was caught in possession of the stolen property.

The interview with the magistrate responsible for the juvenile court at Khayelitsha yielded little useful information. The magistrate advised that his daily roll of juvenile cases is not full enough for him to sit as a juvenile magistrate for the whole day, and so after his juvenile roll is complete he hears other matters with adult accused. When questioned about CUBAC (after explaining the phenomenon to him) he said that he had never encountered such a case and that neither the prosecution nor the probation officers had ever brought such a case to his attention. The two prosecutors at Khayelitsha Magistrate's Court indicated that although Khayelitsha does not have a special juvenile court, most of the accused juveniles appear in one designated court. They stated that they had not encountered many CUBAC cases.

At Johannesburg Central Magistrate's Court, both the juvenile court magistrate and the chief magistrate were interviewed. Both of them confirmed that they were aware of, and had also encountered, children being used by adults to commit offences. The most common CUBAC-related offences included drug-related offences, housebreaking, assault with intent to commit grievous bodily harm and robbery. The juvenile court magistrate also stated that children from the Westbury area frequently appeared in her court.

The magistrate serving in the juvenile court at the Pretoria Magistrate's Court confirmed that he had no records or data concerning CUBAC, but that instances had come up in his court. At Pretoria Central Magistrate's Court, the control prosecutor (who had previous experience in the juvenile court) and the designated prosecutor of the juvenile court were interviewed. Both of them indicated that they had encountered a few cases where children were used by adults to commit crime. The offences generally included theft, robbery,

91 The Newlands Magistrate's court is a branch court of Johannesburg Central.

92 During the course of the Baseline Study in Gauteng, most interviewees suggested Mamelodi to be a more suitable site for the implementation of the pilot which resulted in the research team concentrating on the Mamelodi area as well.

93 The Mamelodi Magistrate's court is a branch court of Pretoria North Magistrate's court.

housebreaking and possession of drugs. The control prosecutor indicated that where the child was used by an adult to commit the offence, this fact was often disclosed by the parent of the child at the child's first or second appearance in court. She had never encountered an instance where the child him/herself disclosed this fact. In most instances the children were placed in diversion programmes. However, she was not aware of any particular follow-up steps being taken against the adult following a disclosure that the offence was CUBAC-related.

Some useful suggestions were made by prosecutors and magistrates that either go to the core of the activities that should be undertaken at the pilot sites or that would be useful to supplement the main activities. Some of these include:

- Magistrates and prosecutors should consider whether CUBAC is a mitigating factor once children are convicted and are to be sentenced
- Prosecutors need training on prosecuting the offence of incitement as a means of prosecuting adults or older children who use children to commit offences

4.3.3 Results of the quantitative studies

Charge sheets and assessment forms, were limited in number, but analysis of the material obtained from them produced the following information:

- Boys are by far the most frequent perpetrators of child crime and this confirms available statistical data on the child justice system as a whole
- The largest concentration of children in conflict with the law are aged between 15 and 18
- As was evidenced in the Situation Analysis report, there is a wide range of offences that children are accused of committing. Again, the information obtained from this quantitative analysis of probation records and charge sheets coincides with previously available information on the nature of crimes committed by children, namely that economic offences are the most prevalent type.

As expected, very little of benefit to the Baseline Study was obtained from the quantitative aspects of this research. Previous endeavours to obtain nuanced data concerning children in the criminal justice system have run up against the same problems - inconsistent methods of data collection, data being held sectorally and not adequately disseminated across departments and the child justice system generally, as well as insufficient attention to capturing more detailed information. This study was further hampered by the fact that most role players had not given attention to the existence of CUBAC as a separate phenomenon, and had therefore not recorded any details even where it may have been an issue.

Further, the quantitative study focused on government-generated data, whereas interviews and field work suggested that the officials concerned would not be the people to whom children would generally disclose that they had been used by adults in the commission of the offence. This was more likely to occur during diversion interventions, which are generally done by non-government persons. Probation officers indicated that their interviews with children were not intensive and detailed enough, and they had insufficient time to build a relationship with the child being assessed to obtain the requisite information.

In the light of the above, one of the recommendations for project design is that data collection at the pilot sites be undertaken.

Further, it should be noted that considerably more meaningful quantitative data was obtained from the child consultation research process, and this is reflected fully in the report of Frank and Muntingh as well as a separate publication on the child consultation research.

4.4 Local stakeholder and site analysis

The Baseline Study concentrated on four sites selected during the Situation Analysis process, namely, Khayelitsha, Mitchell's Plain, Westbury and Pretoria. One of the principal aims of the Baseline Study was to recommend two of these places as the sites for the

actual implementation of the pilot projects. Therefore, while the data elicited during the Baseline Study contained information on what the pilot interventions should consist of, the research also needed to determine the suitability of each site for such interventions. The factors used to determine their suitability included levels of inter-sectoral co-operation and availability of services at each of the four sites. The Baseline Study proceeded to undertake the following analysis of the four sites:

4.4.1 Mitchell's Plain

Mitchell's Plain has been identified as a site for concerted government intervention. Not only is the area now an Urban Renewal area, but crime prevention efforts are being focused on reducing the negative impact of criminal activities, especially upon women and youth.

Steps have been taken to strengthen the capacity of the local community to assist in crime prevention efforts. These include, but are not limited to:-

- The revitalization of community police fora to provide a link between the police and the community
- The establishment of community safety fora, to bring together government departments, including education, justice and social services, as well as members of the local community, to further the goals of local and neighbourhood crime prevention and to undertake activities in support of this goal
- The appointment of a person to facilitate and co-ordinate crime prevention efforts
- The development (by the Department of Community Safety) of substructure clusters focusing on specific themes (art, culture, sport, infrastructure development, youth development, economic development were all mentioned) to provide visible actions in the urban renewal strategy
- The formation of neighbourhood watches, again as part of crime prevention efforts
- Efforts that have been made by SAPS in particularly problematic areas to draw up data bases of known gangs and their members
- Efforts by the Department of Community Safety spanning the last two years to involve communities in anti-gang initiatives, such as eliminating negative gang insignia and graffiti, and replacing these with positive and wholesome painted messages on public surfaces.

Confirmation of all of the above was obtained from the participants at the workshop on the draft Baseline Study held in the Western Cape. Participants agreed that considerable energy and resources are being directed at Mitchell's Plain, and the crime prevention initiative was an important one in this regard. In addition it was evident that there have been enormous gains in bringing different sectors together at local level, and excellent co-operation between stakeholders currently exists.

The Mitchell's Plain justice sector appears to be well established under the chairmanship of the Chief Magistrate. Inter-sectoral committees exist and meet regularly. Service providers surrounding the court services (e.g. diversion through NICRO, victim support services) are all well known to each other, and good co-operation exists. This tends to support the selection of Mitchell's Plain as a pilot site.

Interviews with stakeholders at the local level indicated an interest in, and willingness to be part of, the proposed pilot project.⁹⁴ When Mitchell's Plain was proposed as a site at the provincial workshop, not a single dissenting voice was noted, and stakeholders from both local and provincial levels concurred fully with this recommendation.

4.4.2 Pretoria - Mamelodi

Although excellent co-operation from individuals was noted in regard to activities centred around the Pretoria Magistrate's court, and although diversion and other service provision (e.g. regarding street children) appear co-ordinated and sufficient, a central concern of

⁹⁴ Particularly the juvenile court magistrate and prosecutor. Nicro are willing to be involved provided that this does not further impact on their capacity problems. In view of the fact that no stand alone diversion intervention is proposed, but rather that Nicro would be assisted to include CUBAC specific material in their existing work, it is not foreseen that this would provide any impediment to their involvement. After the conclusion of the draft Baseline Study, Nicro were again contacted with a view to preparatory discussions regarding their involvement, and a positive response was received, provided that they did not have to assume any management or co-ordination tasks.

those interviewed was that the area served by the central magistrate's court did not experience the phenomenon of children committing crime to any great extent. The metropole is not really a residential area, although children do attend independent schools in the inner city. Whilst isolated instances of drug offending were noted, these do not appear to involve very large numbers of children. In fact, the preponderance of crimes for which children are charged in the juvenile court in Pretoria Central relate to petty shoplifting of personal items or consumables .

At the time that the Baseline Study was conducted, the researchers were directed to examine more closely a sub-site in the greater Pretoria region, namely the dormitory suburb of Mamelodi, as many children who commit offences and appear in Pretoria Central, as well as other Pretoria courts, seem to come from Mamelodi . In addition, one of the NGOs, namely Youth Development Outreach, that had been identified as a potential service provider of diversion and/or prevention services, was familiar with and located near Mamelodi.

The area's NGO services relevant to CUBAC appear to be excellent: both Youth Development Outreach and the Restorative Justice Centre are established organizations with excellent community links and a good track record as regards their programmes. Both NGOs are extremely keen to be involved in the CUBAC pilot projects.

The Gauteng Department of Safety and Liaison confirmed that Mamelodi is a Presidential Priority Site. They strongly supported the choice of Mamelodi, and were completely against the selection of Westbury.

4.4.3 Khayelitsha

Khayelitsha is a Presidential Priority Site and is part of the Urban Renewal Area strategy. It is situated quite close to Mitchell's Plain, but they differ socially and culturally in that Khayelitsha is inhabited mainly by africans and Mitchell's Plain by coloured people. Khayelitsha is home to various satellite offices of government departments such as Home Affairs, City of Cape Town Housing Department and Provincial Social Services. It also has a dedicated District and Regional Magistrate's Court and three police stations covering the area.

It has a large number of NGOs and CBOs operating in the area. For purposes of CUBAC, the sole diversion service provider in the area is NICRO. However, there are a range of other organizations that concentrate on welfare and children's issues, such as Childline, Safeline, Life-line and the Cape Town Child Welfare Society. In addition, the Safe Schools division of the Western Cape Department of Education is also active in the area, as well as a number of social crime prevention initiatives run by the provincial Department of Community Safety.

During the Baseline Study, a number of the stakeholders interviewed indicated a willingness to participate in the pilot project. However, while the police were willing to be briefed on the issue and make themselves available for interviews, they did not indicate a particular enthusiasm or willingness to participate in a pilot project. This confirms the perception that there was a lack of co-operation on the part of the police with the justice officials at the court, as indicated by the latter. Likewise, the magistrate at the Khayelitsha court, while confirming a CUBAC pilot project would be beneficial for Khayelitsha, recommended Mitchell's Plain, as he was of the opinion that more children are in trouble with the law in that area.

At the Western Cape workshop on the Baseline Study, all participants agreed that Mitchell's Plain was perhaps the more suitable place for a pilot project.

4.4.4 Westbury

There is only one diversion service provider in Westbury, namely Conquest for Life. There are a few other organizations operating in the area, such as Together Action Group, Women with a Vision and SANCA. However, there is poor co-operation between role-players in the criminal justice sphere in Westbury and the larger Johannesburg business district area. While people and organisations expressed some willingness to participate in the pilot project, they believed that for it to be effective, good co-operation was a critical and integral component, and this was clearly lacking. For example, both the magistrates at Johannesburg Central Magistrate's Court noted that

there was not very good co-operation among the local justice cluster role-players and stated that they had no contact with any NGOs in the Westbury area. In fact the magistrates noted that co-operation had broken down to such a degree that they have had, on occasion, subpoenaed police or probation officers to come to court on account of non-attendance, and that they have even issued contempt of court orders against them. Accordingly they did not think that Westbury was a suitable site for implementing a pilot project, as they also viewed good inter-departmental co-operation as crucial for the success of such a programme.

When all the apparent problems with Westbury had been explained to the participants at the ISCCJ briefing, they agreed that Mamelodi would be a more suitable pilot site. Consensus in this regard was also obtained from the participants at the Gauteng workshop on the Baseline Study. All the participants were briefed on the positive and negative aspects of each site and concluded that the poor levels of co-operation in Westbury were a good indicator that it was not suitable as a pilot site .

Therefore the Baseline Study concluded by recommending Mitchell's Plain and Mamelodi as the two sites for the pilot projects.

Chapter 5

Recommendations and pilot design

5.1 Introduction

At the conclusion of the Situation Analysis process certain initial recommendations that were considered essential to the implementation phase were formulated. They were formulated as follows, and proposed as things that required further investigation during the Baseline Study phase:

- Prevention interventions for adults and children: primary prevention seeks to ensure that children do not come into the criminal justice system in the first place. The development of crime prevention programmes is regarded in the criminal justice sector as a relatively new field, but it is one that is apparently gaining momentum. At the Situation Analysis stage it was envisaged that during the Baseline Study, an audit of available prevention programmes in relation to the potential sites would be undertaken, coupled with an assessment of their effectiveness and relevance to CUBAC. It was also envisaged that prevention programmes could be applied in a range of child-related settings, such as schools, places of safety or secure care facilities, or prisons which accommodate young offenders aged below 18 years. In addition, the sites which are potential candidates for the pilot programmes would be assessed to identify entry level points of intervention for prevention programmes aimed at adults.⁹⁵
- Assessment: a key identified intervention in child justice practice was the expert assessment of children in conflict with the law. The reasons for this are clear: assessment provides an opportunity to investigate the child's background circumstances and the motivation for the commission of the offence. It enables an individualised response to each child, and determines the further processes (diversion, trial, placement or detention) that must occur. It appeared from the Situation Analysis study that no uniform approach is taken when a probation officer encounters an instance of CUBAC, nor do the applicable assessment forms allow for specific recording of this information, or suggest any specific steps to be followed. Therefore, one of the proposed recommendations for the pilot project designs would be the establishment of assessment procedures to determine whether CUBAC is involved, as well as steps to ensure appropriate recommendations are made for the individual child in the child justice process. The key role-players on whom the pilot project must focus in this intervention would be probation officers.⁹⁶
- Diversion: diversion is a cornerstone of the present child justice system and the Child Justice Bill will provide a legal framework for it once enacted. Diversion programmes currently tend to be generic and focused on life-skills or more intensive interventions for more serious offenders. Specialised programmed interventions are few and far between. The Situation Analysis study therefore discussed the development of CUBAC-specific programme content. The Baseline Study was intended to be used to determine whether this diversion intervention should be a stand-alone programme or used in conjunction with, and to supplement, existing diversion interventions (so as not to replicate existing initiatives).⁹⁷
- Criminal justice interventions: it was envisaged that the Baseline Study would investigate the development of a protocol aimed at the management of CUBAC within the criminal justice system. In similar vein to the Interim Protocol for the Management of Children Awaiting Trial, such a protocol would explain the responsibilities of each department, as well as action to be taken by role-players, including the SAPS, probation services, the prosecuting authority, the magistracy and other court officials.⁹⁸

⁹⁵ Paragraph 6.2.1 of the Situation Analysis report.

⁹⁶ Paragraph 6.2.2 of the Situation Analysis report.

⁹⁷ Paragraph 6.2.3 of the Situation Analysis report.

⁹⁸ Paragraph 6.2.4 of the Situation Analysis report.

5.2 Final Recommendations

During the Baseline Study these recommendations were explored with the study participants and were expanded to include various others. What follows below are the responses received during the Baseline Study to the suggested recommendations of the Situation Analysis. In addition, the section includes further recommendations made by study respondents at all four sites, as well as by the workshop participants from the two provincial workshops and the ISCCJ.⁹⁹

5.2.1 Programmed interventions

Everyone agreed that the proposed recommendations for programmed responses as outlined in the Situation Analysis report were necessary and desirable.

As far as diversion interventions were concerned, the participants in the study, while completely endorsing the concept of diversion content aimed at addressing CUBAC, leaned towards an 'add-on' component to existing programmes, as opposed to a CUBAC-specific stand-alone programme. The main reason for this (as was evident from the quantitative and qualitative data collected) was that not many children disclose CUBAC before being referred to a diversion programme. It would therefore be very difficult to identify children with CUBAC status before any diversion referral is made. It was thought that if there is an 'add-on' to existing diversion programmes, children who are referred to a programme with a CUBAC component will benefit if they are CUBACs whether they have disclosed that fact or not, and if they are not CUBAC, they will in any event benefit from the content in a preventive way. Hopefully, if a CUBAC in such a programme then discloses his or her status, further interventions can be recommended – such as counselling or family-group conferencing (if the use occurred within the family).

The more detailed recommendations flowing from the Baseline Study in respect of programmed interventions are as follows:

- Mentors for children identified as CUBAC should be recommended where appropriate.
- Parent workshops to raise awareness on the phenomenon are an important add-on to any CUBAC-related intervention.
- Targeted, community- based awareness raising campaign could be an element of the pilot projects, supported by CUBAC-specific posters.
- A prevention training initiative at local level involving the multitude of stakeholders involved in crime prevention and community development projects should be held close to the inception of each pilot project.

5.2.2 Assessments and probation officers

During the Baseline Study everyone was in agreement that in order to identify CUBAC, CUBAC needs to be considered in the assessment procedure. Some participants in 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.

More detailed recommendations suggested are as follows:

- For the implementation of the pilot projects, an instruction, directive or guiding tool should be developed to assist probation officers to identify CUBAC and to refer such children appropriately. This needs to be accompanied by training at local level.
- Such an instruction should inform probation officers of the fact that children might be being used by adults to commit offences and that they should be mindful of this fact.

⁹⁹ The workshop participants were briefed on the Baseline Study and the recommendations from the study respondents. They were then requested to answer certain key questions relating to the implementation of the pilot programme.

- It should also inform probation officers that instead of asking leading and direct questions regarding CUBAC, they should ask open-ended questions where the child is allowed to relate his or her story.
- Once there is an indication of CUBAC, then the probation officer should probe further.
- Probation officers should, if such a child is convicted following a trial or a guilty plea, suggest in pre-sentence reports that this factor should be considered in mitigation of sentence.
- Indicators or triggers to identify CUBAC should be provided as guidelines. For example, the fact that an older co-accused is involved, that the child is a member of a gang, the involvement of the child in any gang-related activities, the fact that the child is a street child, the type of offence that the child is charged with (for example, the sale or possession of drugs, housebreaking and theft out of motor vehicles), and whether the child had avenues for disposal of stolen goods, or whether the child could give any further information (e.g. addresses) relating to the acquisition of drugs.

5.2.3 Instructions to police and prosecutors¹⁰⁰

During the Baseline Study it became apparent that there was a need for instructions for police and prosecutors relating to the investigation and prosecution of CUBAC cases. These would be official departmental instructions mandated by the national and regional offices of the SAPS and the NPA.

In relation to the police, much discussion regarding the manner in which this could be achieved took place. Ultimately, the national legal services office of the SAPS was of the opinion that a national instruction or standing order was at this stage premature, but that a circular from SAPS to the local pilot sites was possible.

This was discussed at the ISCCJ briefing in July 2005 and all the representatives of the national departments present advised that such instructions to the police, prosecutors and even probation officers (as envisaged above) should be drafted at local level and then forwarded to national departments for endorsement and release.¹⁰¹ This was endorsed at the provincial workshops and, in addition, everyone suggested that there should be local training for the police and prosecutors operating at station or court level.

5.2.4 Local co-ordination

It also became evident through the Baseline Study that the efforts around CUBAC at the pilot sites will involve a variety of different role-players. In order for there to be a co-ordinated and holistic approach to the management of CUBAC at the pilot sites, inter-departmental and service delivery co-operation will be necessary.

Accordingly it was recommended that there should be a local steering committee that would prioritise CUBAC, but within the wider arena of child justice. All the participants to the study, and those attending the three workshops supported such a recommendation. Discussion centered around whether a new structure should be developed or whether this initiative should tap into existing structures. While it was evident that there was no local level child justice structure at any of the four sites, for the two recommended sites there are other structures that can quite easily accommodate CUBAC and child justice issues.

The study participants and workshop attendees recommended that one of the activities of the pilot programme would be to investigate how to establish this local steering committee within the appropriate structure and to co-ordinate its efforts.

5.2.5 Management protocol or guidelines for CUBAC

An initial recommendation of the Situation Analysis phase was the development of a protocol aimed at the management of CUBAC within the criminal justice system. As mentioned earlier, this was to be similar to the Interim Protocol for the Management of Children Awaiting Trial (IPMCAT). The intended content of such a protocol would be to explain the responsibilities of each department as well as

¹⁰⁰ The correct terminology for this 'instruction' still has to be determined as different departments use different terminology – for example, 'circular' or 'unofficial prosecutorial strategy'.

¹⁰¹ This would be to ensure local level buy-in.

action to be taken by role-players, including the SAPS, the probation services, the prosecuting authority, the magistracy and other court officials.

When this was canvassed with the SAPS Legal Services Department, they advised that they did not concur with the recommendation. They noted that while the IPMCAT was agreed to and signed by all the relevant ministers, it had not been properly authorised in the relevant Departments and therefore carried little weight. They therefore cautioned against the development of a Protocol that was designed along the lines of IPMCAT and intended to have the same effect.

Following on from this, the researchers were still of the view that a document setting out all basic actions 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, but would also 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 (government and non-government) what their colleagues' duties were with respect to CUBAC.

Accordingly a booklet entitled Guidelines for Roleplayers in the Criminal Justice System was drafted and presented to all the participants at the three workshops held in July and August 2005. All participants agreed that, while such a booklet would have no official/formal force or effect, it would definitely serve a practical and useful purpose. In addition, everyone felt that the information relating to international and South African law and policy formed an integral part of the booklet and would educate all the role-players on the legal and policy issues relating to CUBAC.

5.2.6 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 extension of this programme to other provinces.

5.2.7 Awareness raising

What became evident during the course of both the Situation Analysis and Baseline Study 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 for extensive dissemination of information 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 there is sufficient awareness of the victimization and abuse of CUBAC children. Suggested mechanisms for this include:

- Communication: this would involve the publication of articles in appropriate journals focusing on children's rights, which would seek to publicise the CUBAC research and ongoing developments during the pilot phase. Likewise, links to relevant web-sites would be explored and made.
- Engagement with policy making and law reform: while the pilot programme is proceeding at the local sites, the need to engage with provincial and national structures was also identified by study respondents and workshop participants.

5.3 Pilot Programmes

Following these recommendations, a detailed project design was drafted that consists of a specific goal, immediate objectives, outputs and activities. The pilot programme will run simultaneously in the two pilot sites - Mamelodi and Mitchell's Plain - from January 2006 to December 2006, with an additional period running from January to February 2007 that will involve a follow-up study on the impact of the intervention programme with children.

The overall goal of the pilot programme is to contribute to the elimination of child labour in the form of the instrumental use of children in illicit activities in South Africa.

This goal includes a number of objectives, which are as follows:

- At the end of the project, 1 500 children will have received services through CUBAC-specific diversion and prevention programmes and 600 children will have been removed from involvement in CUBAC
- At the end of the project, key institutions (departments of Justice and Constitutional Development, Social Development and Education and the police, prosecutors and probation officers, non-governmental organisations) will have been better enabled to plan and deliver services and programmed interventions for CUBAC
- At the end of the project CUBAC will be placed on the agenda of national, provincial and local child justice co-ordinating committees
- At the end of the project, awareness on the CUBAC phenomenon will have been created amongst child justice role-players and in the wider community
- At the end of the project, knowledge about the nature, extent and causes of CUBAC will have increased

A threefold strategy relating to CUBAC as a worst form of child labour will be followed in the pilot projects during 2006:

- **Prevention:** The Baseline Study has produced content for prevention and diversion programmes for children. In addition, a separate awareness-raising session for adults to be delivered in community settings has been developed. These direct responses are aimed at social crime prevention with a focus on children, parents and communities.

A primary prevention programme has been developed for children in schools, places of safety and prisons. This programme is therefore aimed at schoolchildren and also children not attending school. The training of the facilitators running the prevention programme will include a component requiring them to feed information on children who are involved in, or at risk of becoming involved in, CUBAC to a social worker employed for the pilot project who will then do the appropriate follow up on the child in question i.e. refer the child to children's court or try to facilitate referral to a drug rehabilitation programme. Therefore there will be a dedicated link between the management of the pilot projects (the social worker) and the facilitators of the prevention programme, to identify CUBACs or children at risk of involvement in CUBAC and who need further intervention.

- **Withdrawal:** The diversion programme content that has been developed is aimed at intervening with children who have entered the criminal justice system. The child consultative research study revealed that many of the children consulted who were already in the criminal justice system, had been 'used' in one way or another, regardless of the offence with which they were charged at the time of the research.

It is envisaged that the diversion content offered to the children at the pilot sites will provide them with sufficient knowledge and skills to help them reintegrate into the community, and withdraw from the justice system because of their not committing further offences. In addition, if during the diversion a child is identified as a CUBAC child or one at risk of becoming involved and they are not attending school, the diversion facilitators will be required to pass the information on to the pilot project's programme officer (employed by the implementing agency) so that he or she can either refer the child to another intervention (e.g. drug rehabilitation programme) or try to facilitate the child's return to school through community workers contracted to the project in order to try ensure a withdrawal from this worst form of child labour.

A follow-up evaluation study will be conducted in 2007 to determine the extent of removal from CUBAC that has occurred with children who have followed the diversion programme during the pilot projects in 2006. This is a limited evaluation, and cannot rely on objective factors for confirmation of removal - it will be based on what the child says and on information from families and other persons in contact with the child. The baseline information for this study will be obtained from the information collected on each child by the service providers during the running of the diversion programmes over the 12-month period.

- **Rehabilitation:** This is somewhat more difficult, as South Africa has minimal rehabilitative and re-integrative services. However, the Baseline Study has recommended that guidelines and instruction be drawn up for follow-up with children who have CUBAC sta-

tus, and for their referral , where appropriate, to further interventions such as counselling or family group conferences and whether they have returned to school or entered skills training. In addition, many of the services aimed at removal also incorporate elements of rehabilitation.

The interventions that follow on from the overall goal and objectives are largely based on the recommendations listed above and therefore will involve outputs and activities as follows:

- Direct action with children that involves the presentation of diversion and prevention programmes involving programmed responses to CUBAC
- Institutional development with government that involves, among other things, training, setting up internal procedures to manage CUBAC within the criminal justice system as well as inter-sectoral liaison and co-ordination
- Awareness-raising and advocacy
- Research
- Planning to ensure sustainability of government initiatives regarding CUBAC

The pilot programme design is therefore multi-faceted in order to achieve the various objectives set out. These various objectives have been designed mindful of the relevant actions contained in the CLPA that require government to intervene on different levels - either through the provision of services to children such as intervention programmes and education or through action aimed at investigation and prosecuting the adults who use children to commit crime. In addition, the question of sustainability is crucial to the success of whatever further programme of action follows the pilot projects and therefore information regarding their progress will be communicated to the relevant departments as part of an ongoing process aimed at institutionalizing the management of CUBAC within the child justice system, child labour and general child protection policy.

Chapter 6

Conclusion

This publication has sought to summarise the various phases of the research and activities undertaken during the initial stage of the programme working towards eliminating the worst forms of child labour. The ultimate aim of this stage was to establish the nature, extent and causes of CUBAC and then design and develop specific interventions for children who are used by adults to commit crime. This process determines the next stage of the programme, which involves the actual implementation of the developed interventions at the two selected sites.

The literature review undertaken during both the Situation Analysis and Baseline Study indicated that there are some (although limited) indications of CUBAC in international instruments and policy documents. These provisions are crucial in advocating that children used by adults to commit crime should be seen as victims rather than as perpetrators, and therefore there should be specific interventions to address CUBAC. Further, the international guidelines referred to in Chapter 2 provide guidance to professionals working with children, and stresses that they should be sensitive to the social risks that cause children to be used by adults to commit crime, and that appropriate sanctions should be applied against those adults.

With regard to South African law and policy, the literature review revealed that even though there was limited reference to CUBAC, there exists a legal framework within which it can be addressed. It further highlighted that there are criminal law offences that adults could be charged with for using children to commit crime, for example incitement. While it would be feasible to include a specific CUBAC offence in the new child justice legislation in order to aid in the prosecution of adults, failing this, prosecutions of adults could still take place within the current criminal law framework.

The Situation Analysis phase sought to establish the prevalence, causes and extent of CUBAC. This study, involving mainly national stakeholders, clearly indicated that even though CUBAC was not a specific focus area of any of the justice role-players, it was a phenomenon that certainly existed. The aim of this phase was also to provide information that would assist in recommending the four sites at which the Baseline Study was to be undertaken. The information gathered provided information relating to the age and gender of the children who were more frequently used by adults to commit crime, the nature of the offences committed, the interventions that these children were referred to and also the levels of inter-sectoral co-operation at the sites recommended by respondents. The Situation Analysis concluded that while CUBAC was definitely an existing phenomenon, there were no specific interventions for children nor were there any recorded cases of adults being prosecuted for using children to commit crime. What was also evident from this study was that for any pilot programme to be implemented, it was crucial that there should be services and good co-operation at the sites. The four sites thus recommended for the Baseline Study were Pretoria, Westbury, Mitchell's Plain and Khayelitsha.

The Baseline Study at each of the four recommended sites involved detailed qualitative research to examine the extent, nature and causes of CUBAC in order to determine the design of the pilot projects, as well as to finalise the selection of two suitable sites. To this end, interviews were held with various role-players working with children in conflict with the law at each of these sites. The information gathered during this process provided valuable information regarding the way in which children are managed when they come into conflict with the law, the way in which assessments by probation officers are conducted, the extent to which investigations and prosecutions against the involved adults are undertaken, and the circumstances in which children actually disclose that they are involved in CUBAC. This information was fundamental as it resulted in recommendations which finally formed part of the project design for the implementation of the pilot as discussed in Chapter 5. In an effort to gather actual statistics on CUBAC, quantitative research was also undertaken which involved a review of police charge sheets and probation records. However, minimal information was obtained through this process, given that there is limited recognition of the phenomenon. This fact highlighted that record-keeping of CUBAC cases during the pilot was essential to establish both the extent of CUBAC and to monitor exactly how many of these cases result in the adults being investigated and prosecuted.

The child consultation research study that was undertaken during the Baseline Study not only informed the design and development of the content of the pilot programme but also highlighted various factors to identify children at risk in general. These are important for persons working with children in order to identify children at risk so that they can accordingly be referred to prevention programmes so that some intervention is made even before the child comes into conflict with the law.

After taking into account the levels of inter-sectoral co-operation, the availability of services and also the prevalence of CUBAC, the Baseline Study concluded that Mitchell's Plain and Mamelodi were the most suitable sites for the pilot projects.

The project design, which was largely determined by the Baseline Study, involves the delivery of programmed interventions for children, developed in the form of diversion and prevention programmes. In addition, given that CUBAC was not a specific focus for officials working with children, it was deemed necessary to develop specific instructions for the police, prosecutors and probation officers situated at the pilot sites to assist them to identify CUBAC and to take the necessary steps for the management of CUBAC within the criminal justice system. The assessment process was identified as the initial stage at which a child might disclose that he or she was involved in CUBAC, and for this reason indicators were identified to assist probation officers in identifying CUBAC. A further component of the project design is the development of a guidelines booklet on how best to deal with the children involved. The purpose of this booklet is to provide information and raise awareness on the issue of CUBAC and to convey the idea that children who are used by adults to commit crime should be seen as victims rather than as perpetrators. It was also considered important that a local co-ordinating structure comprising child justice role-players be established to address CUBAC and child justice issues in general to ensure a holistic approach to CUBAC at the pilot sites.

All the research and activities undertaken during this stage have been necessary forerunners of the pilot projects, providing a cohesive snapshot of the CUBAC phenomenon and stating core requirements for any interventions designed to combat and ultimately eliminate it.

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