In the December 2005 edition of Article 40 the issue of children used by adults to commit crime (CUBAC) was addressed. The issue of CUBAC has been given prominence recently in the area of child labour: the International Labour Organisation’s (ILO) Convention 182 on the worst forms of child labour lists “the use, procuring or offering of a child for illicit activities” as one of the worst forms of child labour.

Pilot projects in South Africa

AN UPDATE
Historically, there seems to be a general understanding that children accused of crimes are entitled to certain rights and procedural guarantees by the South African government. However, it appears that little thought has been given to the issue of child offenders also being victims of the worst form of child labour: being used by adults or older children to commit offences. It is only recently that this phenomenon has been officially recognised and action steps proposed to combat the problem.

Following on from South Africa’s Child Labour Programme of Action, a study focusing on children used by adults to commit crimes has been undertaken and pilot projects aimed at addressing the problem are under way in Mitchells’ Plain in the Western Cape and Mamelodi and Hatfield in Gauteng.

The pilot programmes

Following various recommendations made during initial research done on CUBAC during 2005, including the design of programmatic responses for children and direct interventions for government, a detailed project design was drafted. The pilot programmes are being run from April 2006 to March 2007. The overall goal of the pilot programmes is to help eliminate the instrumental use of children by adults as a worst form of child labour. The pilots comprise a range of activities and interventions, which include:

- **Programmatic intervention** – This involves the design of prevention and diversion programme content specific to CUBAC. A prevention programme and CUBAC diversion session are being offered at the pilot sites to complement ordinary criminal justice practice and mainstream CUBAC into programmatic interventions for children. The CUBAC diversion session was designed as a component that can be added on to existing diversion programmes. The diversion programme is being offered by Nicro in Mitchell’s Plain, and National Youth Development Outreach (YDO) and the Restorative Justice Centre in Mamelodi and Hatfield. YDO and Creative Education for Youth at Risk (Cred) are doing follow-up activities with children who have been referred to the diversion programmes in both sites.

- **Assessments and probation officers** – During the initial research everyone agreed that, in order to identify it, 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 would be 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. Subsequently the provincial departments of Social Development in the Western Cape and Gauteng have drafted the instruction and have issued it to probation officers at the pilot sites.

- **Instructions to police and prosecutors** – In addition, during the initial research it became apparent that there was a need for instructions for police and prosecutors relating to the investigation and prosecution of CUBAC cases. These instructions were drafted and issued by the provincial offices of both the SAPS and the National Prosecuting Authority (NPA) for the Western Cape and Gauteng. The instructions were directed at police and prosecutors at the pilot sites and cover the identification of CUBAC as well as the investigation and prosecution of adults.

- **Local co-ordination** – The research also showed that efforts concerning CUBAC at the pilot sites would involve an array of different role-players. Local co-ordination was necessary to ensure a co-ordinated and holistic approach to the management of CUBAC at the pilot sites, as well as inter-departmental and service delivery co-operation. Accordingly, CUBAC is now being addressed by the Case Review Management Task Team in Mitchells’ Plain and a local CUBAC steering committee has been formed in Mamelodi comprising the prosecution, police, service providers, the probation officer and the Department of Education.

- **Management protocol or guidelines for CUBAC** – Although unofficial, it was felt that a document should be developed, setting out the basic action steps as well as the responsibilities of each role-player for the management of CUBAC. Not only would such a document raise awareness about CUBAC and the legal basis for specific action in this regard, it would also serve as a reference tool for role-players to refer to when faced with a CUBAC case. Because of the identified need for inter-departmental co-operation, such a document would also inform all the relevant role-players (governmental and non-governmental) of their colleagues’ duties in respect to CUBAC. A copy of the guidelines can be accessed at www.communitylawcentre.org.za/children/publications.php#cubac.
Preliminary findings

The pilot programmes will run until the end of March 2007, but certain issues regarding the implementation of the CUBAC action steps – as contained in the Child Labour Programme of Action – have already arisen from two provincial seminars on the pilot projects:

- **Safety of the children** – This issue was identified as a risk factor right at the outset of the project. Children who are used by adults fear the consequences of disclosing the identity of the adults and possible reprisals from the adult perpetrators. Role-players in the pilot projects noted that they are aware of these risks and therefore have difficulty trying to ensure that the adults are prosecuted. However, the instructions issued to the officials make it quite clear that the safety of the children is of paramount importance and that the best interests of the child would precede any attempt to prosecute an adult.

- **Reluctance of the children to disclose their CUBAC status** – This was also identified as a risk factor at the outset of the project and is closely linked to the aforementioned issue. If children fear that their safety is at risk, they refuse to declare their CUBAC status (even in the face of information that indicates they have in fact been used) or disclose who the adult perpetrator is. Again linked to this is the reported distrust children have of police officials and their unwillingness to reveal anything to them or even believe that the police would assist them by apprehending the perpetrator.

- **Children appearing in court where the person claiming to be their guardian is the perpetrator** – Children appearing in criminal courts must be assisted by a parent or guardian. Probation officers who perform the assessments of the child often request the police to search for a parent or guardian if one is not accompanying the child. However, sometimes in the intervening period, an adult claiming to be a guardian arrives to assist the child. It is reported that frequently this turns out to be a local gangster or drug-lord that is using the child to commit crimes. On account of the pressures of dealing with matters concerning children, children appear in court with these perpetrators because the police or probation official has not had sufficient time or resources to establish the so-called guardian’s credibility.

- **Insufficient evidence to prosecute the adult** – The first premise is that both an adult and a child involved in the same offence would ordinarily be liable as co-perpetrators of that offence, and would theoretically be equally liable to prosecution and conviction, provided the child is over the minimum age of criminal responsibility (7 years). Adult influence would, however, serve as a factor to be considered in mitigation of the child’s sentence and could also serve to aggravate the sentence received by the adult offender. Unless the defence of duress could be successfully raised by the child concerned so as to vitiate dolus, voluntary participation in the act would usually be sufficient to ensure a conviction.

As far as an adult ‘instigator’ is concerned, a conviction on the grounds of the doctrine of common purpose, or as an accessory after the fact, is also possible where the actions of the accused adult do not indicate actual participation in the commission of the offence itself, but where such adult ‘commissioned’ the act in question, or has rendered assistance subsequently. Even though at common law, the person who conspires with or incites another to commit a crime would in any event be vested with criminal liability him-/herself on the basis that he or she meets the definitional requirement to be convicted either as a co-perpetrator or an accomplice, prevailing legal uncertainty regarding the liability of the inciter or conspirator who did not actually participate in the commission of the wrongful act has led to statutory intervention as early as 1914. The applicable statute has been redrafted several times, and conspiracy to commit a crime is now punishable in terms of section 18(2) of the Riotous Assemblies Act 17 of 1956.

However, despite the available substantive law, the prosecutors at both pilot sites have noted that often the available evidence is insufficient to secure a prosecution of the adult involved. This could be on account of the child not disclosing the identity of the adult, not knowing the identity of the adult, being a co-perpetrator, or being an unreliable witness.
• **Instances where the perpetrator is a family member or relative** – The pilot site role-players cited a number of examples of children being used by relatives and the difficulties that this causes for family relations, support structures, parental influence and so on. It was suggested that greater use be made of the welfare system in these instances and that proper investigations into the family circumstances of the child be undertaken to determine whether he or she is a child in need of care or not.

**Conclusion**

South Africa has committed itself to eliminating CUBAC as a worst form of child labour by adopting ILO Convention 182, and by including specific action steps to combat CUBAC in the Child Labour Programme of Action. The pilot projects at Mitchell’s Plain, Mamelodi and Hatfield are revolutionary in their attempt to concretely address the problem and seek solutions that involve child focused interventions and concentrating state action on investigating and prosecuting adults.

The pilot projects have highlighted certain difficulties regarding the way in which it was originally envisaged that CUBAC could be addressed in the criminal justice system.

However, these projects will nevertheless raise awareness of the issue and ensure that dedicated attention is given to children who are victims of this, a worst form of child labour.

"The overall goal of the pilot programmes is to help eliminate child labour in the form of using children as an instrument in illicit activities in South Africa."