



Children Used by Adults to Commit Crime

Guidelines for Role-players in the Criminal Justice System

Children Used by Adults to Commit Crime:
**Guidelines for Role-players
in the Criminal Justice System**

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For:

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

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Department of Social Development
Department of Education
Justice College
Legal Aid Board
Lower Court Management Committee / Magistrate's Commission
National Prosecuting Authority
Office of the Rights of the Child
South African Police Service

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

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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

One of the objects of the Child Justice Bill is to “promote co-operation between all government departments and other organisations and agencies involved in implementing an effective child justice system”. The Inter-Sectoral Committee on Child Justice (ISCCJ) is the embodiment of this objective. The ISCCJ seeks to manage child justice issues at a national level through inter-departmental co-operation and communication.

The ISCCJ has been involved with the CUBAC project since its inception at the beginning of 2005, recognising that children used by adults or older children to commit crime are a particularly vulnerable group of young offenders. All of the representatives on the ISCCJ have engaged with the various aspects of the CUBAC project and, in particular, are of the opinion that a set of guidelines for the various role-players would be of great benefit to the efficient management of children who have been used by adults to commit offences.

The guidelines and information contained in this publication will ensure a greater awareness not only of the CUBAC phenomenon in general, but also certainty regarding the responsibilities of the various role-players within the criminal justice sector and how these relate to this specific group of children in trouble with the law.

We encourage all actors within the child justice field to adopt these guidelines and work together to ensure a truly co-operative and common approach to managing the instrumental use of children in illicit activities.



Pat Moodley
Chairperson
Inter-Sectoral Committee on Child Justice

January 2006

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International instruments

UN Convention on the Rights of the Child

Article 40

1. State Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, State Parties shall, in particular, ensure that:
 - a) no child shall be alleged as, be accused of, or recognised as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
 - b) every child alleged or accused of having infringed the penal law has at least the following guarantees:
 - (i) to be presumed innocent until proven guilty according to the law;
 - (ii) to be informed promptly and directly of the charges against him or her, and if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
 - (iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interests of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
 - (iv) not to be compelled to give testimony or confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
 - (v) if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - (vi) to have the free assistance of an interpreter if the child cannot speak or understand the language used;
 - (vii) to have his or her privacy fully respected at all stages of the proceedings.
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular:
 - (a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - (b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.



4. A variety of dispositions such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 33

State Parties shall take all appropriate measures including legislative, administrative, social and educative 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.

International Labour Organisation: Convention 182

About the prohibition and immediate action for the elimination of the worst forms of child labour

Article 3 (worst forms of child labour):

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

Article 6 (Programmes of action):

Each member state shall design and implement programmes of action to eliminate, most importantly, the worst forms of child labour. Such programmes of action shall be designed and implemented in consultation with relevant government institutions and employers' and workers' organisations, taking into consideration the views of other concerned groups as appropriate.

Other International documents

United Nations General Assembly

GA Resolution 45/115 (1990) on the instrumental use of children in criminal activities

This recognised 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 prejudices their future.

The Resolution's preamble goes on to recognise that there are categories of children, such as those that are runaway, vagrant, wayward or 'street' children, who are targets for exploitation that includes seduction into drug trafficking and abuse, prostitution, pornography, theft, burglary, begging and homicide for reward.

The General Assembly accordingly requested States to take measures to formulate programmes to deal with the problem and to take effective action by:

- Undertaking research and a systematic analysis of the phenomenon
- Developing training and awareness raising activities in order to make law enforcement and other justice personnel, as well as policy makers, sensitive to those situations of social risk that cause children to be manipulated by adults into engaging in crime
- Taking measures to ensure appropriate sanctions are applied against adults who instigate the crimes, rather than against the children involved who themselves are victims of criminality by virtue of their being exposed to crime
- Develop comprehensive policies, programmes and effective preventative and remedial measures, in order to eliminate the involvement and exploitation of children by adults in criminal activities

South African Law

The Constitution

Section 28 (e):

Every child has the right to be protected from exploitative labour practices

Section 28 (1)(f):

Every child has the right not to be required or permitted to perform work or provide services that -

- (i) are inappropriate for a person of that child's age; or
- (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

Section 28 (2):

A child's best interests are of paramount importance in every matter concerning the child

The Children's Bill

(passed by the National Assembly on 14 December 2005)

Section 1:

"child labour" means 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;

"exploitation", in relation to a child, includes -

- (a) all forms of slavery or practices similar to slavery, including debt bondage or forced marriage;
- (b) sexual exploitation;
- (c) servitude;
- (d) forced labour or services;
- (e) child labour prohibited in terms of section 141; and
- (f) the removal of body parts

Child Labour Programme of Action

The Child Labour Programme of Action for South Africa (draft 4.10, October 2003)

Chapter 2

While statistical information is lacking, of the activities falling within the definition of the worst forms of child labour (WFCL), the following are the only automatic WFCL that appear to occur in South Africa in significant numbers:

- bonded labour;
- trafficking of children;
- commercial sexual exploitation, including the use, procuring or offering of a child for prostitution or the production of pornography;
- use, procuring or offering of a child by others for illegal activities.

Chapter 3

Work-related activities of children that constitute potentially serious crimes include drug trafficking and the use of children by house-breaking syndicates.

Most policy measures addressing illegal work-related activities form part of the Department of Justice and Constitutional Development's general strategy to deal with children involved in criminal activities. This includes distinguishing between activities where children are victims (such as most cases of prostitution) and activities where children are perpetrators needing rehabilitation. It also includes finding alternatives to jailing children.

It is considered a serious offence when children deal in drugs, or are found in possession of larger quantities of drugs and where dealing is suspected. These child suspects can be held in prison when awaiting trial and, if found guilty, can be sentenced to imprisonment. However, if the child is clearly a user rather than a dealer, the National Prosecution Authority's policy is to divert the child to drug counselling programmes rather than prosecution.



Chapter 5 - CLPA Proposed action for children used by adults to commit crime (CUBAC):

- Regarding the involvement of children in production and trafficking of drugs and other illegal activities, an important element of investigation and prosecution should be finding and prosecuting adults (or sometimes other children) using the children or benefiting from the children's illegal activities, if any. Lead institution: Department of Justice and Constitutional Development. Secondary institutions: National Prosecuting Authority (prosecution of those using children) and SAPS (identification of those using children who are in conflict with the law, and investigating cases against them)
- Where children commit crimes, the diversion of such child offenders away from prison should be the preferred option for children. Where appropriate, prosecution of a child should be converted to a children's court inquiry. Lead institution: Department of Justice and Constitutional Development. 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 them to work. Work is preferable to children being bored and feeling useless. However, policy should be formulated on when children deprived of their liberty may be required to work, and when such work should be remunerated. This policy should be in line with national and international protective laws on children. Lead institutions: Department of Correctional Services, Department of Education (reform schools). Secondary institution: Department of Social Development

Risk Indicators

What are the risk indicators or triggers for CUBAC?

- The fact that an older co-accused is involved in the commission of the offence
- The child is a member of any gang
- The involvement of the child in any gang-related activities
- The fact that the child is living on the street
- The type of offence for which the child is charged, for example, possession of or dealing in drugs, housebreaking and theft, dealing in liquor or firearms
- Whether the child had existing avenues open for disposing of stolen goods
- Whether the child could give any further information (for example, addresses of dealers) regarding the acquisition of drugs

What do you do?

Police

Mindful of the child's rights against self incrimination:

- Ask the child to describe the circumstances under which the offence was committed by asking open-ended questions
- Do not ask any leading questions that result in a 'yes' or 'no' answer
- Allow the child to relate his or her story
- Where there is any indication of CUBAC, use your skills to probe further to establish the extent thereof and note this in the docket
- If there is an adult co-accused, ensure the co-accused is investigated and referred for prosecution even if the child admits guilt

If the child discloses CUBAC but does not disclose adult perpetrator:

- Advise the relevant probation officer
- Inform crime intelligence

If the child discloses CUBAC and the adult perpetrator:

- Advise the relevant probation officer
- Consider making the child a section 204 witness
- Open a docket against the adult to prosecute for incitement
- Inform the Asset Forfeiture Unit if organised crime is involved

Always ensure the safety of the child

What do you do?

Probation Officer

Mindful of the child's rights against self incrimination:

- Ask the child to describe the circumstances under which the offence was committed by asking open-ended questions
- Do not ask any leading questions that result in a 'yes' or 'no' answer
- Allow the child to relate his or her story
- Where there is any indication of CUBAC, use your skills to probe further to establish the extent thereof and note this in the docket

If the child discloses CUBAC but does not disclose the adult perpetrator:

- Advise the police and relevant prosecutor
- Refer the child to an appropriate intervention, even if no diversion is applicable
- Disclose this in the assessment, pre-trial or pre-sentence report, acknowledging the fact that CUBAC is a mitigating factor

If the child discloses CUBAC and the adult perpetrator:

- Advise the police and relevant prosecutor
- Refer the child to an appropriate intervention, even if no diversion is applicable
- Disclose this in the assessment, pre-trial or pre-sentence report, acknowledging the fact that CUBAC is a mitigating factor

Always ensure the safety of the child

What do you do?

Prosecutor

Mindful of the child's rights against self incrimination:

- If there is an adult co-accused, ensure the co-accused is prosecuted even if the child admits guilt

If the child discloses CUBAC but does not disclose adult perpetrator:

- Advise the relevant probation officer
- Inform the police
- Consider diversion

If the child discloses CUBAC and the adult perpetrator:

- Advise the relevant probation officer and the police
- Consider making the child a section 204 witness
- Inform the Asset Forfeiture Unit if organised crime is involved
- Prosecute the adult for incitement
- Consider diversion

If the child is convicted: consider CUBAC in mitigation of sentence

Always ensure the safety of the child

What do you do? Magistrate

Mindful of the child's rights against self incrimination:

If the child discloses CUBAC but does not disclose adult perpetrator:

- Advise the prosecutor to inform police

If the child discloses CUBAC and the adult perpetrator:

- Advise the prosecutor to inform police

If the child is convicted:

- Consider CUBAC in mitigation of sentence
- Always bear in mind section 254 of the Criminal Procedure Act and refer the matter to a children's court inquiry if it appears that the child is a child in need of care

Always ensure the safety of the child

What do you do?

Diversion service providers and child care workers

If the child discloses CUBAC but does not disclose adult perpetrator:

- Advise the relevant probation officer and the police
- Refer the child to an appropriate intervention such as a family group conference or counselling

If the child discloses CUBAC and the adult perpetrator:

- Advise the relevant probation officer and the police
- Refer the child to an appropriate intervention such as a family group conference or counselling

Always ensure the safety of the child

What do you do?

Legal representative

Mindful of the child's rights against self incrimination:

- If there is an adult co-accused, advocate that the adult co-accused is prosecuted even if the child admits guilt

If the child discloses CUBAC but does not disclose adult perpetrator:

- Advise the relevant probation officer
- Inform the police
- Advocate for diversion

If the child discloses CUBAC and the adult perpetrator:

- Advise the relevant probation officer and the police
- Advocate for diversion

If the child is convicted: consider CUBAC in mitigation of sentence

Always ensure the safety of the child

What do you do?

Educators

If the child discloses CUBAC but does not disclose adult perpetrator:

- Advise a social worker from the Provincial Department of Social Development or a social worker from a registered social work service provider or consult your district's children's court
- Refer the child to an appropriate intervention such as a family group conference or counselling

If the child discloses CUBAC and the adult perpetrator:

- Advise a social worker from the Provincial Department of Social Development or a social worker from a registered social work service provider or consult your district's children's court
- Refer the child to an appropriate intervention such as a family group conference or counselling

Always ensure the safety of the child

