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SUBMISSION ON THE CHILD JUSTICE BILL 49 of 2002

TO: THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT

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PLEASE NOTE THAT THE COMMUNITY LAW CENTRE WISHES TO ADDRESS THE PORTFOLIO COMMITTEE AT THE PUBLIC HEARINGS ON THE 5TH OF FEBRUARY 2008 AND ACCORDINGLY REQUESTS AN OPPORTUNITY TO DO SO.

The Children's Rights project forms part of the Community Law Centre, a human rights research institute based at the campus of the University of the Western Cape. The Centre aims to promote the realisation of the democratic values and human rights enshrined in South Africa's Constitution.

The Community Law Centre has been involved in number of influential activities relating to children in conflict with the law within and out of South Africa. The Children's Rights Project is one of four projects housed at the Centre. The Centre was founded in 1990 by the late Advocate Dullah Omar.

The Children's Rights Project has been involved in a range of activities over the years. A former project member served on the South African Law Reform Commission's Project Committee that investigated juvenile justice and produced the draft Child Justice Bill currently before the South African Parliament.

The Project has since 1999 produced a lay journal entitled *Article 40* on a quarterly basis dedicated to child justice issues. Its contents address legal development, case law and innovations in child justice development in South Africa and some articles have also had a regional focus on particular

African countries. The publication is now widely distributed both to South African and international audiences.

The Project also co-ordinates the South African Child Justice Alliance aimed at lobbying for support of the civil society to ensure the successful enactment of the South African Child Justice Bill. The Project has published *Child Justice in Africa: A Guide to Good Practice,* documenting some examples of best practices from diverse African countries on a number of themes in the sphere of juvenile justice for practical use by stakeholders not only in South Africa but as widely as possible across the continent.

The Project has been invited to comment on the juvenile justice law reform initiatives in Namibia, Lesotho and Nigeria. Further, in 2003-4 the Project undertook a UNICEF-commissioned consultancy in Mozambique aimed at proposals for a comprehensive law reform in line with the country's international law obligations. A similar initiative in Swaziland under the auspices of Save the Children Sweden and Save the Children Swaziland, was undertaken in September 2004 and co-operation on the new law is still ongoing.

The Project has also recently completed groundbreaking research on the instrumental use of children in committing crime as a worst form of child labour. This research looks at designing programmes that will assist South Africa in fulfilling the action envisaged in the South African Child Labour Programme of Action

The Community Law Centre wishes to address two separate issues in this submission. Firstly the detention of children under 14 in prison whether awaiting trial or as part of a sentence. Secondly, the use of children in the commission of crime and how the Child Justice Bill should address the issue, either directly or indirectly.

The Community Law Centre will make reference to the 2002 version of the Child Justice Bill 49 of 2002 as introduced to parliament in 2002 and the 2007 Cabinet version of the Child justice Bill 49 of 2002 as noted in Cabinet in 2007.

THE DETENTION OF CHILDREN YOUNGER THAN 14 YEARS IN PRISON AWAITING TRIAL OR AS A SENTENCE

A. Introduction

The 2002 version of the Child Justice Bill 49 of 2002 provided a total ban on the detention of children under 14 years in prison awaiting trial or as a sentence. The reason is that the South African prison system is not suited to accommodate such children and that such children will not benefit from such detention at all – there is no rehabilitative value in such detention.

The 2007 version of the Bill however changes this earlier position and allows for the detention of children awaiting trial in prison under the age of 14 years for certain scheduled offences and does not restrict the imposition of imprisonment on such children as a sentence.

We wish to address each issue in turn.

However, first we wish to sketch the international law and constitutional framework regarding the detention of children.

International law is replete with normative standards applying to the detention and treatment of children in prison. In the first instance, a number of general standards apply as contained in a host of international and regional human rights treaties. In relation to children two such human rights treaties are the *UN Convention on the Rights of the Child* (CRC), adopted in 1989 and the *OAU African Charter on the Rights of the Welfare of the Child* (1990), both of which are binding on South Africa by virtue of its having ratified them in 1995 and 2000 respectively.

The broad principles contained in the above-mentioned human rights treaties are given more detail through a number of principles, minimum rules and standards which specifically deal with prisoners and conditions of detention. Prominent in this regard are the *Standard Minimum Rules on the Treatment of Prisoners* (UNSMR) adopted in 1957 and the *UN Beijing Rules on the Administration of Juvenile Justice* (Beijing Rules) adopted in 1985. Of further specific reference to the treatment of children deprived of their liberty in prisons or other places of detention is the *UN Rules on Juveniles Deprived of their Liberty* (UN JDL Rules), adopted in 1990.

A number of standards and principles contained in the array of international instruments listed above have been domesticated in South Africa through legislation and policy provisions. The South African Constitution (1996), particularly in section 28 which describes the rights of the child and section 35 which describes the rights of arrested, detained and convicted persons. Specifically, we wish to draw the Committee's attention to section 28(1)(g) which provides that the detention of children should only be as a measure of last resort and for the shortest appropriate period of time. Together these constitutional imperatives provide the overall framework within which to consider the detention of children, specifically in prison.

Further, the Correctional Services Act of 1998 is an important legal framework in the administration of prisons and the treatment of all prisoners, including children[1]. The White Paper on Corrections, released in March 2005 by the Department of Correctional Services, constitutes a comprehensive blue-print augmenting the legal framework in the Act. The White Paper goes to considerable lengths in providing a policy framework to bring the treatment of prisoners into line with the relevant human rights standards, and in Section 11.3.2 states the UN Rules for the Protection of Juveniles Deprived of their Liberty should be adopted as the minimum standards.

[1] It should be noted that the Correctional Services Act was promulgated in parts in 1999, 2000, and 2004.

1. Children under 14 years detained in prison awaiting trial

Presently, section 29 of the Correctional Services Act Amendment Act 14 of 1996 applies (having not been repealed by the new Correctional Services Act 111 of 1998)[2], which prohibits the detention of children awaiting trial in prison who are under the age of 14 years.

The first amendment to section 29 of the Correctional Services Act had put a blanket ban on pre-trial detention in prison of any person under 18.[3] Apart from a few limited concessions, this first amendment was intended to prohibit pre-trial detention in prison of all children under the age of eighteen years, irrespective of the offence with which the child had been charged or prior criminal history. More humane welfare institutions such as places of safety were therefore envisaged for children who required secure care whilst awaiting trial. Subsequent chaos ensued due to the sudden promulgation of this amendment coupled with lack of planning and provisioning. A huge number of children were released into the society for a lack of adequate places of safety and other alternatives and because of the unpreparedness of staff at welfare institutions. A few children who had committed serious and violent crimes took advantage of this chaotic situation and there ensued a cycle of arrests (second and further arrests) and release without the completion of the resulting criminal proceedings.[4] The government was forced to backtrack in light of these developments against a fervent public backlash. This was backed by a media campaign against the amendment.[5]

The above developments led to the second amendment to the Correctional Services Act (1996). This took effect in May 1996 and remains applicable to this day having been left untouched by the new Correctional Services Act (1998). This second amendment provides for limited circumstances when children over 14 years of age, but under 18 years can be detained in prisons while awaiting trial. The section further provides that if a child is so detained in prison, he or she must be brought before the court every 14 days for the court to reconsider the order detaining the child in prison awaiting trial.[6]

The second amendment has resulted in the gradual diminishing of numbers of children awaiting trial detained in places of safety in South Africa and a considerable increase in the number of these children detained in prisons.[7] In 1999 it was recorded that in the intervening two years since the promulgation of this amendment, the average number of children in prison had slowly increased.[8] However, the overall trend of large numbers of children awaiting trial in prison continues to date on account of the law remaining in force.

The continued application of this second amendment negates the principle of detention as a last resort enacted in the South African Constitution and contained in international standards in that the

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[2] The sections in the 1998 Correctional Services Act applying to children only came into force in July 2004.

[3] Correctional Services Amendment Act 17 of 1994.

[4] See Sloth-Nielsen, J "The juvenile justice law reform process in South Africa: Can a Children's rights approach carry the day?" (1999) 18 (3) *Quinnipiac Law Review* 473-476.

[5] Sloth-Nielsen (as above) at p 475.

[6] Section 5(a).

[7] Inter Ministerial Committee on Young People at Risk (1996) *In whose best interests? Report on Places of safety, Schools of industry and reform schools* at pp 6-7.

[8] Sloth-Nielsen (n 8 above) at p 476.

wording of section 29 gives a presiding officer a very wide discretion to allow a child to be held in prison awaiting trial, instead of prescribing limited situations when detention in prison should be a last resort.

Specific provisions in the 2002 version of the Child Justice Bill (B 49 of 2002) were intended to replace the application of section 29 of the Correctional Services Act. This version of the Bill aimed to introduce a comprehensive application of the principle of detention as a last resort from the moment of arrest and in the pre-trial, on trial and post trial phases for children who could be detained in prison awaiting trial i.e. those above 14 years of age.

The explicit enactment in the 2002 version of the Child Justice Bill of a rule that outlaws the (prison) detention of children under the age of 14 years is another specific example of the attempt at reflecting the principle of detention as a measure of last resort in domestic law. This is also in line with the Department of Correctional Services' recently unveiled *White Paper* (2005) in which the Department contends that "Children under the age of 14 have no place in correctional centres. Diversion, alternative sentences, and alternative detention centres run by the Department of Social Development and the Department of Education should be utilised for the correction of such children".[9] In fact research has shown that although the majority of awaiting trial children are now held in secure care centres rather than in prisons, the statistics indicate that the former facilities are not fully utilised.[10] The research states that according to the DSD only 71% of the 2 199 secure care beds available were in use on the 28th of February 2006.[11] This indicates that potentially another 643 children could have been accommodated in secure care facilities rather than in prison. In addition, the research shows that , for example, the capacity and occupancy of secure care beds varies from region to region, with only the Western Cape close to having used its full capacity of 572 secure care beds (95% occupancy). Interestingly, it was noted that the Eastern Cape, despite having a shorter average awaiting trial period, had a small number of secure care beds and was only using 34% of these due to staffing problems resulting in the non-utilisation of one space.

It is submitted that secure care facilities and places of safety are the best options for detaining children under 14 years awaiting trial and that they have the capacity to do so.

A further issue that needs to be highlighted is that according to statistics obtained by the Civil Society Prison Reform Initiative from the Office of the Inspecting Judge of Prisons dated 31 July 2007, 4 children under the age of 14 years were being **illegally** detained in prisons awaiting trial. This is in direct contravention of section 29 of the Correctional Services Amendment Act of 1996. The details available for these 4 children are as follows:

- All were boys
- One was charged with a sexual offence
- One was charged with an economic offence
- Two were charged with 'other' offences i.e not economic, sexual, aggressive or narcotic

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[9]Department of Correctional Services (March 2005) *White Paper on Correctional Services* Para 11.2.3.

[10] Dissel A, 'Children in detention pending trial and sentence', in Gallinetti J, Kassan D and Ehlers L (eds), *Child Justice in South Africa: Children's Rights under Construction Conference Report*, Open Society Foundation for South Africa and the Child Justice Alliance, 2006.

[11] Department of Social Services (2006) *Secure Care Status Report, 2006*.

It is submitted that if children are being detained in prison awaiting trial when there exists a blanket ban on such detention at present, how much more are they at risk of being detained incorrectly and illegally awaiting trial in prison when certain categories of under 14 years olds would be allowed to be detained in prison awaiting trial as proposed in the 2007 version of the Bill.

It is of great concern that the 2007 version of the Child Justice Bill now allows for the detention of children under the age of 14 years in prison either awaiting trial or as a sentence. This is in conflict with the international and constitutional principles that every decision taken in respect of a child should be based on the best interests of that child. **It is submitted that it is NOT in the best interests of children under 14 years to be held in prison awaiting trial given**:

- the young age of children under the age of 14 years;
- the fact that they are rebuttably presumed to lack criminal capacity;
- the prevailing policy to exclude such children from detention in prison awaiting trial – to allow such detention would be a retrogressive step
- the conditions of South African prisons and the telling statement by the Department of Correctional Services that prison is not suitable for children under 14 years;
- the fact that the Department of Correctional Services does not offer educational services to children awaiting trial and under 14 year olds are still subject to mandatory schooling in terms of the Schools Act; and
- the availability of secure care centres and places of safety tailored to offer services to such children

Therefore we submit that clause 30 (2) should be removed from the Bill and clause 30 (1) be redrafted to read as follows:

30. (1) Subject to section 31(5), a presiding officer may only order the detention of a child referred to in section 29 in a specified prison, if—
(a) an application for bail has been postponed or refused or bail has been granted but one or more conditions relating thereto have not been complied with;
(b) such child is accused of having committed an offence referred to in Part I or II of Schedule 3;
(c) such detention is necessary in the interests of the administration of justice or the safety or protection of the public or such child or another child in detention;
(d) there is a likelihood that the child, upon conviction, could be sentenced to imprisonment; and
(e) the child is 14 years or older.

2. The sentencing of children under 14 years of age to imprisonment

In the 2002 version of the Bill clause 69(1)(a) recognised the vulnerability of young children and that imprisonment is not an appropriate sentence for children below 14 years, thereby prohibiting imprisonment as a sentence for such children.

This approach is supported by a range of different research, policy and international trends. For instance, the findings of the Jali Commission of Inquiry, for instance, have highlighted serious and deep rooted problems in our correctional system and although this is not a principled reason to not imprison children under 14 years, it must be an important consideration.

In addition, the fact of the matter is that children under 14 are generally not sentenced to imprisonment even under our present system. For example, a study was undertaken during the period 1995-1999 to analyse the perceptions amongst criminal magistrates regarding juvenile offending in the context of developments in law and practice and this had some interesting observations in relation to children under 14 years of age, sentencing generally and imprisonment.[12] These observations included:

- Children under the age of 14 rarely appear in criminal courts and the courts employ various procedures and strategies to keep them out of the criminal justice system
- Matters where a prosecution of a child aged below 14 occurs are extremely rare and were described as “ hard cases”, “exceptions” or unavoidable matters”
- The general approach of magistrates appears to be to try keep juveniles out of prison
- All magistrates complained that their options were limited with regard to the sentencing of juveniles
- Some magistrates were of the opinion that imprisonment for juveniles (in general and not necessarily for children under 14 years) was only appropriate for a “sociopath” or in cases of “extreme violence” or “very serious offences”.

Furthermore, recent statistics, dated 31 July 2007, furnished by the Office of the Inspecting Judge of Prisons to the Civil Society Prison Reform Initiative indicate as follows:

- 3 children under 14 years were serving prison sentences at 31 July 2007
- all 3 were male
- 2 of these children were serving sentences for economic offences
- 1 child was serving a sentence for a sexual offence

Though the above indicates that imprisonment of children under the age of 14 years occurs rarely, this does not imply it is not problematic. The principle should be that imprisonment is a last resort, according to the Constitution, and children aged under 14 years should be provided extra protection to ensure that this constitutional imperative is met.

In fact, at present South Africa is lagging behind other countries who do not allow children under 14 years to be sentenced to prison. What follows below is an overview of sentencing practices in various countries that indicate that in countries where the minimum age of criminal capacity is above 14 this automatically means that there is no imprisonment for children below that age. Where the age of criminal capacity is younger than 14, most of the jurisdictions examined provide for alternative residential care other than imprisonment.

[12] Sloth-Nielsen, J and Mayer, V. *Children and criminal accountability: An analysis of judicial perceptions*, 2001.

- Austria

  The minimum age for criminal capacity is 14 years while the upper age is 19 years. This means that no child under the age of 14 years can be prosecuted. In addition, for children under the age of 16 years, sentences that can be imposed on them range between periods of 1 – 10 years. Where children are older than 16 years of age, sentences that are imposed on them range between 1- 15 years. This means that children under 16 cannot be sentenced to imprisonment.

- Germany

  The minimum age of criminal capacity is 14 years. For children between the ages of 14 and 18, the youth court law allows for youth imprisonment. A minimum period for youth imprisonment is 6 months while the maximum is five years. If the crime involved in terms of the criminal code carries a sentence of more than 10 years, then only ten years may be imposed on a juvenile/child.

- Hungary

  A juvenile is defined as a person of 14 years of age but not yet 18 years. The longest term of imprisonment for a person over the age of 16 years, in similar cases that could involve life imprisonment for adults, is 15 years. In cases where imprisonment for adults is longer than 10 years, the longest term of imprisonment for a person over the age of 16 years in a similar case is 10 years. This means that no child under 16 years may be sentenced to imprisonment.

- Italy

  The minimum age for criminal capacity is 14 years while the upper age is 18 years. Children between the ages of 14 and 18 can be given a custodial sentence but the period of such a sentence is reduced to two-thirds of the sentence imposed on an adult offender for the same crime.

- South Korea

  The minimum age for criminal capacity is 14 years while the upper age is 20 years. Provision is made for minimum and maximum time periods for imprisonment of children over the age of 14 years.

- Uganda

  The minimum age for criminal capacity is 12 years while the upper age is 18 years. Where a person is under the age of 16 years, the Family and Children's Court can make an order for the detention of such person in a detention center for a period not exceeding 3 months. Where a person is over the age of 16 years, such detention should not exceed a period of

12 months. If a person over the age of 16 years commits an offence punishable by death, then the detention order should not exceed a period of 3 years.

The 2007 version of the Bill has changed the approach contained in the 2002 version by allowing children under 14 years to be sentenced to prison. **It is submitted that this is neither in the best interests of children under 14 years nor does it uphold the principle that imprisonment is a measure of last resort. It is submitted that children under 14 years should not be sentenced to prison.**

We submit that clause 78(1) of the Bill be amended a s follows:

78. (1) **(a)** A child justice court, when sentencing a child to imprisonment, must only do so as a measure of last resort.
(b) A sentence of imprisonment may not be imposed unless –
(i) the child was over the age of 14 years at the time of commission of the offence; and
(ii) substantial and compelling reasons exist for imposing a sentence of imprisonment.

CHILDREN USED BY ADULTS IN THE COMMISSION OF CRIME

A. Introduction

The Child Justice Bill 49 of 2002 in clause 94 states as follows:

94. Any court convicting a person who is 18 years or older of inciting, conspiring with or being an accomplice of a child in the commission of an offence, must regard the fact of the child's involvement as an aggravating factor in sentencing that person.

This highlights the fact that the use of children in the commission of crime is a concern of the criminal justice system. To use a child in the commission of an offence is a serious form of exploitation and has been recognised by the international community and South Africa as a worst form of child labour.

On 17 June 1999, the International Labour Organisation 's Convention 182 on the worst forms of child labour was unanimously adopted by the ILO member States at the 87th International Labour Conference together with its supplementing Recommendation (No. 190) and it came into force on 19 November 2000. In Article 3, Convention 182 deals with worst forms of child labour and defines the term as comprising 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 labour including the forced or compulsory recruitment of children for use in armed conflict; the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; **the use, procuring or offering of a child for illicit activities, in particular for the production and**

trafficking of drugs; and work which by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Convention 182, has been distinguished from preceding treaties such as the United Nations Convention on the Rights of the Child by certain unique features. These features include its call for 'immediate and effective measures' to combat and eliminate the worst forms of child labour, the requirement placed on states to design and implement programmes of action as well as the requirement for the establishment of monitoring mechanisms.[13] In particular, the obligation to design and implement programmes of action to eliminate the worst forms of child labour together with effective and time-bound measures has been argued to take states' obligations beyond simple prohibitions.[14] What makes Convention 182 stand out against other ILO Conventions, and perhaps the UNCRC, that merely require their provisions to be applied in law and practice, is the fact that the Convention sets out the requirements for positive action in substantive provisions, thereby allowing for inaction by governments to be highlighted and for consequent pressure to be placed on them to comply with their undertakings.[15]

South Africa ratified Convention 182 in 2000 and is therefore obligated to comply with its provisions. South Africa has drafted a National Child Labour Programme Action, adopted by almost all government departments including those involved in criminal justice, and has criminalized the use of children in the commission of crime in the Children's Act 38 of 2005.

However, South Africa's obligations do not stop at mere criminalisation of worst forms of child labour. Convention 182 requires positive measures to eliminate worst forms of child labour which includes prevention, rehabilitation and direct assistance tow children who are victims of worst forms of child labour. The Child Justice Bill 49 of 2002 in its 2002 version was the ideal mechanism whereby these obligations could be achieved. However as will appear in the submission, the 2007 version -if it excludes certain children from assessment, the preliminary inquiry and diversion – will not ensure such compliance.

B. The Children's Amendment Bill 19F of 2006 and a criminal prohibition on the use of children in the commission of offences

On 22 November 2007, the South African parliament passed the Children's Amendment Act Bill 19F of 2007 (the 6th version and final version of the tabled Bill). The clause closely resembles Article 3 of Convention 182. Reference is made to slavery, forced labour, debt bondage, serfdom and trafficking, as well as commercial sexual exploitation and the use of children to commit crime.

Clause 141 of the final version reads: '(1)No person may— (a) use, procure or offer a child for slavery or practices similar to slavery, including but not limited to debt bondage, servitude and serfdom, or forced or compulsory labour or provision of services; (b) use, procure, offer or employ a child for purposes of commercial sexual exploitation; (c) use, procure, offer or employ a child for

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[13] Noguchi Y, 'ILO Convention No. 182 on the worst forms of child labour and the Convention on the Rights of the Child', *The International Journal of Children's Rights*, Vol. 10, 2002, p. 355-6. See also the discussion in section 4.4 of Chapter 4.

[14] Noguchi, p. 360.

[15] Noguchi, p 360-361.

trafficking; (d) use, procure or offer a child or attempt to do so for the commission of any offence listed in Schedule 1 or Schedule 2 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977); or (e) use, procure, offer or employ a child for child labour. (2) A social worker or social service professional who becomes aware of— (a) any instance of a contravention of sub-section(1)(a), (b), (c) or (d) must report it to a police official; and (b)any instance of child labour or a contravention of the provisions of the Basic Conditions of Employment Act, 1997(Act No. 75 of 1997) must report it to the Department of Labour.'

It is now an offence in terms of clause 305 of the Children's Act to use a child in the commission of crime.[16] Clause 141(1)(d) limits the scope of the use of a children in the commission of crime, as a worst form of child labour, to conduct specified as offences in Schedule 1 and 2 of the Criminal Procedure Act 51 of 1977 instead of requiring that use of a child in all illegal activities constitutes a worst form of child labour.[17]

C. Children used by adults to commit crime and the Child Justice Bill

Children used in the commission of crime are not simply perpetrators. They are also victims of exploitation, and therefore are entitled to specific interventions beyond those ordinarily designed for children in conflict with the law. By virtue of the recognition of this dual status, Convention 182 requires measures to be taken in relation to children who are victim of this worst form of child labour. The questions that then arise are whether these special measures are already present in the child justice system that will inevitably deal with these children or whether they still need to be incorporated therein?

There were a number of provisions in the 2002 version of the Child Justice Bill that significantly changed the present state of South African child justice law and these related to, amongst others, the proposed preliminary inquiry, assessment, diversion, separation and joinder of trials and sentencing. It is these aspects of the Bill that would be of significance for children used in the commission of crime as they constituted mechanisms which would assist South Africa in complying with some of the obligations on states set in Article 7 of Convention 182. However, there are provisions in the 2007 Cabinet version of the Bill that do not reflect the approach as set out in the 2002 version, and these changes are of concern as they do not benefit all children accused of committing crime.

1. Separation and joinder of trials

Clause 57 (1) of Bill 49 of 2002 (2002 version) provided that where a child and a person other than a child are alleged to have committed the same offence, they are to be tried separately unless it is in the interest of justice to join the trials. The question of whether to separate or join the trials of a child and adult co-accused was discussed in some detail in the South African Law Reform Commission's Issue Paper on Juvenile Justice, where it was noted that estimates have shown that

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[16] Section 305 was amended by the Children's Amendment Bill 19F of 2006 to criminalise clause 141(1).

[17] This includes most common law and statutory offences such as theft, murder, armed robbery but excludes, for example, driving offences, for instance driving under the influence of alcohol. It is still much more limited than what was intended by Article 3 of Convention 182 as it does not cover the full range of illegal activities, and indeed not 'illicit' activities as specified in the Convention.

as many as 30% of all juvenile cases involve co-accused, many of whom are adults.[18] The South African Law Reform Commission's Discussion Paper on Juvenile Justice makes reference to the fact that it may not have been advisable to make a blanket provision to separate trials, as the evidentiary risks may result in the adult accused being able to divert responsibility onto the child and this may increase the risk of instrumentalisation of children to commit crimes with or on behalf of adults.[19] The SALRC recommended that a separation of trials should occur in all cases involving children who are co-accused with adults, creating a presumption of seperation. However, it was proposed that any person (child, adult or prosecution) may bring an application for joinder of the trials, which application should be argued before the court in which the adult is to be tried prior to the commencement of the trial. It was further proposed that a court may order a joinder of trials where it is shown by the applicant (i.e. a prosecutor or accused's legal representative) on a balance of probabilities that a separation of trials will not be in the interests of justice. This was the approach ultimately adopted in the Report on Juvenile Justice[20] and the SALRC draft Bill and resulted in clause 57 of Bill 49 of 2002. Its benefit for children used in the commission of crime is that they can be tried in a forum separate to that of a co-accused who used them, possibly allowing them the freedom to disclose to the court that they were used in the commission of crime. Research as has shown that that children are often scared or intimated and therefore do not reveal they were used or influenced to commit an offence.[21]
The 2007 version of the Child Justice Bill does not allow for such separation and joinder and **therefore we submit that the provisions of clause 57(1) of the 2002 version be re-inserted into the Bill**.

2. Assessment

This procedure will play a vital role in ensuring that children in the commission of crime as a worst form of child labour benefit from the direct assistance and services that are envisaged in Article 7 of Convention 182. While Convention 182 has had no impact on the drafting of the Child Justice Bill nor upon the assimilation of assessment services into South African child justice practice, the outcomes of assessment mirror the outcomes intended by Article 7. This, however, is no chance result. The measures intended by Article 7 are general in nature and apply to all situations of children in special need and at risk; likewise, the provisions in the Child Justice Bill apropos children in conflict with the law generally in order to ensure that it is as comprehensive as possible.

However, whereas assessment applied to all children in terms of the 2002 version of the Child Justice Bill, it is great concern that assessment services will not be available to all children based on offence category in terms of the 2007 version of the Bill. Victims of exploitation at the hands of

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[18] Paragraph 8.15 of the Issue Paper. The SALRC observed that in Canada, the juvenile justice system does not try adults, who are tried in convention criminal courts, thus creating an obligatory separation of trials. The SALRC noted that the difficulty with this approach was that trials have to be duplicated, and successful prosecution becomes more difficult due to evidentiary problems (one accused can shift blame to the other, who is being tried in another forum). However, the advantage was the maintenance of a completely separate juvenile justice system, and avoidance of "criminal contamination" by adults.
[19] Paragraph 10.39 of the Discussion Paper.
[20] Paragraph 9.10 of the Juvenile Justice Report.
[21] Children's Rights Project, Community Law Centre, University of the Western Cape, *Children Used by Adults to Commit Crime (CUBAC): Final Report on Pilot Programme Implementation*, ILO, 2007 and Frank C and Muntingh L, *Children Used by Adults to Commit Crime (CUBAC): Children's Perceptions*, ILO, 2005.

adults in the commission of offences are not limited to certain offences. Adults use children to commit all types of crimes. Therefore in order to firstly, identify whether a child is a victim as well as a perpetrator requires an assessment procedure and secondly, the assessment will then not only answer questions necessary for the criminal justice system but also be able to identify the best possible intervention for the child used by an adult to commit crime.

We therefore submit assessment services should be available for all children accused of committing crime.

3. Preliminary inquiry

While benefiting children in conflict with the law generally, this procedure would be an ideal mechanism through which the use of a child in the commission of crime can be discussed and decisions made regarding further action for a child victim of such exploitation. This criminal justice process was designed as a result of the provisions in Article 40 of the UNCRC requiring states to design separate laws and procedures for children in conflict with the law. It is submitted that this is another example of how the broad measures envisaged by Convention 182 to provide direct assistance to victims of worst forms of child labour can find resonance in specific and targeted measures devised by child justice practitioners and policy-makers to give effect to the need to adopt an individualised approach to child offenders.

The fact that certain children are excluded from the preliminary inquiry based on their age and offence category in the 2007 version of the Bill is of great concern as adults use all children to commit crime regardless of their age and such use extends to all types of offences. **Therefore for the victims of such exploitation to benefit from these interventions, restrictions on the application of this procedure must be removed.**

4. Diversion

Diversion involves the referral of cases, where there exists a suitable amount of evidence to prosecute, away from the formal criminal court procedures and it can be closely linked to the concept of restorative justice, which involves a balancing of rights and responsibilities and the purpose of which is to identify responsibilities, meet needs and promote healing.[22]
One can clearly see the benefits of diversion for children who have been used in the commission of crime. The crucial function played by diversion services for children used in the commission of crime has been acknowledged by the National Child Labour Programme of Action through the

[22] On diversion in South Africa, see generally Shapiro R, 'Diversion from the criminal justice system and appropriate sentencing for the youth', in Glanz L (ed), Preventing Juvenile Offending in South Africa: Workshop proceedings, Human Sciences Research Council: Pretoria, 1994, p 89-95; Muntingh L, (ed) *Perspectives on Diversion*, NICRO National Office, Cape Town, 1995; Skelton A, 'Juvenile Justice Reform: Children's Rights and Responsibilities versus Crime Control', in Davel CJ (ed), *Children's Rights in Transitional Society,* Protea Book House: Menlopark, 1999, p 88 - 106. On restorative justice in South Africa, see Skelton A and Batley M, *Charting progress, mapping the future: restorative justice in South Africa*, Restorative Justice Centre and Institute for Security Studies, 2006; Gallinetti J, Redpath J and Sloth-Nielsen J, 'Race, Class and Restorative Justice in South Africa: Achilles Heel, Glass Ceiling or Crowning Glory', *South African Journal of Criminal Justice,* Vol. 17, No. 1, 2004, p 17 – 42 and Tshehla B, 'The restorative justice bug bites the South African criminal justice system', *South African Journal of Criminal Justice,* Vol. 17, No. 1, 2004, p 1 – 16.

inclusion of an 'action step' requiring that the diversion of children used in the commission of crime must be considered where appropriate. This requirement in the Programme of Action was not limited to certain children based on age or offence category, but open to all children as it was recognised that certain circumstances may exist where diversion is the most appropriate intervention for a child, even if it is a serious offence involved. This approach was approved by all relevant criminal justice departments including the Department of Justice and Constitutional Development.

It is of great concern again, that the 2007 version of the Child Justice Bill seeks to limit the possibility of diversion based on age or offence category. **It is our submission that diversion be possible for all children and that the prosecutor make a decision on whether diversion is appropriate for a particular child based on the child's individual needs and the circumstances of the case.**

D. Conclusion

1. The content of clause 57(1) of the 2002 version of the Child Justice Bill on separation and joinder of trials must be re-inserted into the Bill

2. The processes and procedures contained in the Bill, namely assessment, the preliminary inquiry and diversion, should be accessible by all children who are covered by the scope of the legislation and should not exclude certain children based on their age of offence category. The approach contained in the 2007 version of the Bill which links scheduled offences to whether a child is either assessed, appears before the preliminary inquiry or is considered for diversion should be discarded and the approach as contained in the 2002 version of the Bill, namely, to allow all children access to the abovementioned procedures.