

Letterhead of The Hong Kong Committee on Children's Rights

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Mrs. Percy MA
Clerk to Panel
Legislative Council

Dear Mrs. MA

Age of Criminal Responsible Responsibility

I refer to your reply letter dated 12 November 1999 relating the subject of the Age of Criminal Responsibility.

As you may know that the Law Reform Commission published its final report on the subject in May 2000. We are very concerned about the subject and would like to know what follow up activities the Panel on Administration of Justice and Legal Services will conduct, e.g. when it will discuss the matter and when the subject will be debated in the Legislative Council.

Thanks for your assistance and looking forward to your reply.

Yours sincerely

John SO
Executive Secretary

香港兒童權利委員會

「應負刑事責任年齡」

立場書

香港兒童權利委員會強烈支持將應負刑事責任最低年齡由 7 歲提高至 14 歲。

根據聯合國兒童權利公約第 40 條第 3 項，締約國應制定法例：

1. 規定最低年齡，在此年齡以下的兒童應視為無觸犯刑法之行為能力；
2. 在適當和必要時，制定不對此類兒童訴諸司法程序的措施，但須充分尊重人權和法律保障。

相對於其他國家，香港的 7 歲年齡限制極為低。以 14 歲為限制的國家包括中國、日本、德國、義大利及美國部分地區。

研究顯示，兒童要到 12 或 13 歲才發展至擁有成熟的道德觀念。這樣，刑事責任便不應加諸於 13 歲以下的兒童。

7 歲的應負刑事責任年齡限制已經過時，而且與香港現行的法律相互矛盾，就是確認 14 歲以下的兒童是脆弱，需要受到保護。

對於是否起訴或拘捕 7 至 14 歲的兒童，當局現時的做法是交由警方根據個別的情況決定。但這並非理想而且亦會出現不一致的結果。透過立法，便有清晰的介定。

因此，香港兒童權利委員會強烈支持將應負刑事責任最低年齡提高至 14 歲，以履行聯合國兒童權利公約的精神，並且要求當局立即作出相應的立法措施。

一九九七年十二月十六日

香港兒童權利委員會

應負刑事責任年齡

補充資料

全世界只有很少國家或政府將應負刑事責任年齡定低於十四歲。在英國的殖民地統治下，香港的年齡限制是七歲。北愛爾蘭（八）、蘇格蘭（八）、英格蘭及威爾斯（十）同樣定出較低的年齡限制。正如香港一樣，他們的法律都是保障兒童直至十四歲，就是必須證明十四歲以下的兒童知道觸犯刑事罪行是嚴重錯誤。一些亞洲國家例如中國及日本則將年齡限制定於十四歲。

聯合國兒童權利公約於一九九四年的引入及中國收回香港主權，皆為特區政府檢討應負刑事責任年齡提供良好機會。聯合國兒童權利委員會亦曾指出香港的年齡限制偏低。香港家庭法律協會曾建議將年齡限制提高至十四歲。而其他關注團體亦支持將七歲的年齡限制提高。他們現正就此事再作研究。

若有人觸犯刑事罪行而被判有罪，其後果並不止於坐牢。被標籤為刑事罪犯，其實有更深遠的影響，包括日後尋找職業、申請借貸、移民、申請旅遊簽證等，總之生活上大小環節皆受影響。我們不禁會問，為何要在這樣早的階段將兒童定為刑事罪犯。不論法官、律師及警察皆沒有受過適當的訓練，實在有困難去評估兒童的身心發展狀況。

亦有人問，十三歲是否已經成熟？這年歲的兒童不能簽任何合約、不能放棄上學、不能同意接受性行為，甚至於多年後才有結婚的決定權。為何要將年齡限制定於七歲？為何不是五或六歲，甚至更低？是「行為」抑或「年齡」更重要？是理解能力嗎？是因為兒童會被利用犯罪嗎？要到甚麼年齡和擁有何等心智能力，方可將兒童定罪？

考慮到社會的利益及監管兒童的行為，香港兒童權利委員會相信這個問題必須考慮到兒童的道德觀發展及其對道德的判斷力。十四歲的兒童已經開始發育，而認知能力亦開始邁向成年階段。過早判定兒童為刑事罪犯，便等於剝奪他們享有孩童時期的權利。若我們都接受兒童要到十四歲才擁有足夠的認知能力，而其他法律的精神亦是如此，那麼社會人士便會擔心應如何對待觸犯嚴重罪行的兒童。即使五歲的兒童也能開槍打死或打傷另一名兒童。對於他們也要作出適當的處理或控制。香港現時的處理方法又是怎樣？

香港的應負刑事責任年齡為七歲。但七至十歲的兒童若觸犯罪行，一般都是受警誡而非檢控。除了謀殺，所有涉及十四歲以下（亦包括十四至十六歲）兒童的案件，都會在兒童法庭處理。

另外，當局會視乎犯事青少年的年齡及罪行的性質，而判他們入勞教中心、教導所等。他們的自由便因此受限制。這些中心的主要目的是要幫助犯事者學習尊重法律、自我尊重、培養工作習慣、預備重投社會等。

其他形式的懲罰或復康計劃包括感化令。在感化令下，兒童必須接受輔導，並在感化主任的督導下工作或讀書。十六歲以下的長期犯事者可能會被送到感化院，接受教育課程、職前訓練及社會服務。警司警誡的計劃只適用於十八歲以下的初犯者，而罪行不能涉及鴉片毒品。

根據保護兒童及青少年條例，法官可能會因為覺得兒童需要照顧和保護，而判他入兒童院。法庭頒佈的照顧或監管令只適用於十八歲以下的兒童。他們可能曾被虐待、疏忽照顧，或令自己及他人受害。為保護和監管兒童，條例可能會要求兒童入住兒童院或男女童院等。這些院舍皆是照顧那些情緒和行為有問題的兒童。這些院舍有嚴謹的守則，透過紀律訓練和群體活動，幫助兒童學習生活技巧，預備重投社會。

香港兒童權利委員會認為，若兒童犯了罪或對社會構成威脅，而還未達到能對自己道德行為負責的年齡，他是應該得到照顧和保護，或是指導、監管和接受訓練。過早將兒童標籤為刑事犯，只會令他們更抽離於社會，沒有人會真正得益。改用另外的方法反而會為雙方帶來好處，而所付出的資源也較少。

Hong Kong Committee on Children's Rights

The Age of Criminal Responsibility

The Hong Kong Committee on Children's Rights strongly supports the raising of the minimum age of criminal responsibility, currently 7 years, to 14 years.

By Article 40, paragraph 3, the United Nations Convention on the Rights of the Child: States Parties shall seek to promote laws:

- a) to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law; and
- 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.

A comparative study of the minimum age of criminal responsibility in other jurisdictions indicates that Hong Kong lags far behind with 7 as the minimum age. Countries with 14 as the relevant age include China, Japan, Germany, Italy and some US states.

Studies show that autonomous morality in an individual does not truly begin to develop until a child is 12 or 13. Hence criminal responsibility should not attach to a child until after the age of 13.

The continuation of 7 as the age of criminal responsibility is out-dated and inconsistent with recent legislation in Hong Kong tending to recognise the vulnerability of children up to the age of 14 and extending protection to them.

The current practice of leaving the decision whether to institute criminal proceedings against a child between the age of 7 and 14 to the discretion of the police and/or the prosecution, subject to the *doli incapax* presumption, is unsatisfactory, inconsistently applied and capable of producing inconsistent results. This is a classic case for legislative intervention, deliberation and legislation.

The Hong Kong Committee on Children Rights therefore firmly advocates the raising of the minimum age of responsibility to 14 as a necessary step to implementing the United Nations Convention on the Rights of the Child and invites urgent and necessary legislative intervention.

Dated this 16th day of December 1997

Hong Kong Committee on Children's Rights

Supplementary Information

on

AGE OF CRIMINAL RESPONSIBILITY

Few countries or governments have the Age of Criminal Responsibility for children under the age of 14. The age in Hong Kong is 7, a colonial legacy from Britain. Northern Ireland (8), Scotland (8) and England and Wales (10) have similarly young ages, and like Hong Kong there needs to be proof that a child under AGE 14 knows that the nature of the 'criminal' act is seriously wrong. Some Asian countries such as the People's Republic of China (P.R.C.) and Japan have 14 or above as the relevant age.

The extension of the Convention on the Rights of the Child to Hong Kong in 1994, and the assumption of sovereignty over Hong Kong by the PRC, provides good opportunity to review the Age of Criminal Responsibility in the S.A.R. The United Nations Committee on the Rights of the Child has expressed concern at the young age in Hong Kong. In the past the Hong Kong Family Law Association has proposed the age to be 14 and other associations have also supported a raising of the age from 7. The matter is being reconsidered by a number of these associations.

Being labelled or defined a criminal has serious implications for a person, in addition to any action taken as a consequence of being charged and found guilty of a criminal offence e.g. imprisonment. A 'criminal' will have problems in his future career, finding employment, getting credit, emigrating, possibly getting visas for travel, for adoption and in a whole range of life opportunities both minor and major. Why should we act to criminalise a child so early? Neither judges, lawyers, nor police officers are trained to assess a child's physical or mental development.

Is a 13 year old mature? He cannot sign any contract, he cannot give up school, he / she cannot give consent to sexual intercourse and cannot marry for several years. Why have 7 or 10 as the relevant age? Why not 5 or 6, or even younger? Is it the 'act' or the age which is important? Is it the capacity for understanding? Should it be whether the child can be used for crime by others more adult? At what age and with what mental capacity?

The Hong Kong Committee on Children's Rights believes that the issue should be the child's moral development and level of moral reasoning, while taking account of the need to protect society and manage children's behaviour. Society's concern, and adherence to the Convention, implies that the rights of children should be protected. By the age of 14 a child may be considered to have grown physically and in reasoning to begin the transition to adulthood. To criminalise a child earlier is to deny his rights to childhood. If it is accepted that a child does not have the necessary reasoning capacity until he is aged 14, and other laws seem to deny this capacity earlier, then society may be concerned at how to handle serious anti-social acts by such child. Even a child aged 5 may be able to shoot a gun or fatally injure another child. Treatment or / and control may be necessary for any child. How do we handle such situations at present ?

In Hong Kong the present age of criminal responsibility is 7. However usually children aged between 7 and 10 years who commit an offence are cautioned rather than prosecuted. Cases, other than homicide, involving a child up to 14 years of age (also age 14-16) are heard in a juvenile court.

These young people may be deprived of liberty by being sent to a Detention Centre, Training Centre etc. depending on their ages and nature of offence. These centres generally aim to instil respect for the law, develop self respect, develop work habits, prepare for return to community.

Other forms of punishment or rehabilitation, include Probation Orders under which the child receives counselling, and to work or study as directed by the Probation Social Worker. Long term offenders under 16 years of age may be sent to a reformatory school which offers academic, pre-vocational and community service programmes. The Police Superintendents Discretion Scheme (PSDS) covers first-time juvenile offenders, under 18 years of age, involved in non-opiate drug offences. However in the case of homicide the court has no option but to sentence a child or young person to life imprisonment.

A child may also be deprived of liberty if found to be in need of Care and Protection under the Protection of Children and Juveniles Ordinance e.g. he may be placed in a Children's Home. A Care or Supervision Order may be made by a Court in respect of a child age under 18 who has been abused, neglected or is beyond control to the extent that harm may be caused to him or to others. The Supervision Order may be similar to a Probation Order made in respect of an offender. Placement in residential care under the Ordinance, for reasons of protection or control, may result in the child being admitted to a Children's Home, a Boys and Girls Home or Hostel or Half-way House. All of these homes cater for children who may have emotional or behavioural problems. These homes have relatively structured routines, help the children through disciplined training, and group treatment and programmes, to develop life skills and to prepare them for rehabilitation.

Whether a child becomes a 'criminal' or a child in need of 'protection' can be circumstantial or good fortune. Until he reaches an age at which he can be assumed with confidence to be morally responsible the Hong Kong Committee on Children's Rights believes that he should be afforded 'care and protection' or 'guidance, control and treatment' for behaviour and actions which seriously offend or threaten society. Criminalising a school child continues an early process of alienation from society from which nobody truly gains. An alternative process can bring benefits to both, without any extra costs and with genuine savings.