

For discussion
on 18 September 2001

LegCo Panel on Administration of Justice and Legal Services

**Proposed Change in the
Minimum Age of Criminal Responsibility in Hong Kong**

PURPOSE

This paper invites Members' views on the Administration's proposal to raise the minimum age of criminal responsibility from seven to ten by amending the Juvenile Offenders Ordinance (Cap 226).

BACKGROUND

2. At present, under the Juvenile Offenders Ordinance (Cap 226), no child under the age of seven can be guilty of an offence. The relevant legislative provision is at Annex A. Between the ages of seven and 14, there is a legal presumption of *doli incapax*, i.e. a child is incapable of committing a crime. This presumption can be rebutted by the prosecution on proof beyond reasonable doubt that, at the time of the offence, the child is well aware that his act is seriously wrong, and not merely naughty or mischievous. If this presumption is rebutted, full criminal responsibility will be imposed on the child who can then be charged, prosecuted and convicted for any offence allegedly committed.

3. The Law Reform Commission (LRC) was asked in 1998 to review

the law regarding the minimum age of criminal responsibility and the presumption of doli incapax. Following a public consultation exercise on the subject in 1999 and a telephone survey conducted by the City University of Hong Kong (the City University) on behalf of LRC, LRC published its final Report on "the Age of Criminal Responsibility in Hong Kong" (the Report) in May 2000. The Report recommends, inter alia, that –

- (a) the minimum age of criminal responsibility (the minimum age) should be raised from seven to ten years of age; and
- (b) the rebuttable presumption of doli incapax should continue to apply to children of ten and below 14 years of age.

JUSTIFICATION

Raising the Minimum Age of Criminal Responsibility

4. During LRC's public consultation in 1999, the majority of respondents supported an increase in the minimum age, with 63 in favour and 24 against. The survey conducted by the City University also found that about 90% of the respondents were in favour of raising the minimum age. Supporting reasons are summarised in the following paragraphs.

5. The principal argument for raising the present minimum age is that a seven year old child, who will normally be at Primary 2, is too young to be able to appreciate the gravity and criminal nature of his actions. Developmental psychologists believe that cognitive understanding of the rules of society, perspective taking and empathic feelings are important

determinants of children's ability to distinguish right from wrong. These factors follow a development path. A child under the age of 10 is unlikely to have attained the necessary skills to judge right and wrong and to fully realize the serious consequence of his actions.

6. Another supporting reason mentioned by LRC is that subjecting a young child to the full panoply of the criminal justice system is neither fair nor in the interest of the child. Children below 10 are generally considered to be incapable of comprehending criminal proceedings. Their inability to appreciate legal advice given to them and to conduct their defence will put them in a disadvantaged position if they are required to undergo the trial process. The traumatic experience of being prosecuted and convicted at such a young age, which will result in a criminal record, will also stigmatise the child and the undesirable effect may last for a lifetime.

7. Although the existing laws provide that children aged between seven and 14 are liable to be prosecuted, the majority of the criminal cases involving children below 10 have been dealt with under the PSDS. This prosecution policy has therefore implicitly recognised that it is inappropriate to require young children to stand trial.

8. The LRC also pointed out that "the present application of criminal responsibility at the age of seven is inconsistent with the protection afforded to children by a wide range of other legal provisions, which recognise that children under 14 years do not have the capability to make decisions with serious consequence for themselves or others." To quote a few examples, these other legal provisions include -

- (a) the Age of Majority (Related Provisions) Ordinance (Cap

410) provides for a person generally to attain majority at the age of 18;

- (b) the Criminal Procedure Ordinance (Cap 221) provides for special procedures to be adopted for the giving of evidence in court by witnesses under 14 years of age;
- (c) the Evidence Ordinance (Cap 8) provides that the evidence of a child under 14 years of age shall be given unsworn; and
- (d) the Marriage Ordinance (Cap 181) provided that the minimum age at which persons may marry is 16.

9. Empirical statistics show that the number of children aged seven to nine arrested for crimes from 1993 to 2000 remain consistently low. The annual figures range from 139 (in 1999) to 201 (in 1994). This represents less than 0.4% of the total number of persons arrested in a year. Detailed statistics on number of children arrested for crimes are at Annex B. A significant majority of these arrested children committed minor offences such as shop theft. Other offences committed by a few of them (less than 10 per year) include assault, robberies, burglary and criminal damage. We consider that the limited number of crimes committed by children under 10 years old and the nature of offences committed do not support maintaining the existing age of criminal responsibility.

10. While overseas experience indicates considerable disparity among different jurisdictions as to the minimum ages of criminal responsibility, ranging from seven to 18 years (Annex C), Hong Kong's minimum age is found to be at the lowest end. In recent years, the United Nations

Committees established to monitor implementation of the United Nations Convention on the Rights of the Child, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights have all called for a review of our law on the minimum age (see relevant extracts from their concluding observations at [Annex D](#)).

11. Having considered the above arguments, we propose that the minimum age of criminal responsibility be raised from seven to ten years of age and amendments to the Juvenile Offenders Ordinance should be prepared accordingly.

Retaining the Rebuttable Presumption of Doli Incapax

12. In addition to the stipulation of a minimum age for criminal responsibility in the Juvenile Offenders Ordinance, there exists a common law presumption of doli incapax, i.e. incapable of committing a crime. This presumption applies to children who have attained seven but are under 14 years of age. It is rebuttable by the prosecution on proof that, at the time of the offence, the child knew that the particular act was not merely naughty or mischievous, but "seriously wrong".

13. Some people who responded to the LRC's consultation exercise argued that the rebuttable presumption should be abolished. They opined that the uncertainties as to what constitutes a "seriously wrong" act made the presumption conceptually obscure, and the presumption, if not rebutted, denied young delinquents the chance of early intervention and rehabilitation. Other respondents considered that children were already adequately protected from the full rigours of the law, e.g. trial by juvenile courts and other alternatives to imprisonment. Abolition of the presumption would

not unfairly expose children to adult justice. Some people further argued that the complexity of the modern world had enabled children to acquire the ability to distinguish right from wrong at an earlier age. Therefore the presumption should be reversed, i.e. children should be presumed to know right from wrong unless the contrary can be proven.

14. However, about two-thirds of the respondents who expressed a view on the presumption in the consultation exercise supported its retention. According to the survey conducted by the City University, about 63% of respondents who favoured raising the minimum age below the age of 14 supported applying the rebuttable presumption to children between the revised minimum age and 14.

15. The absence of scientific certainty regarding the age at which a child is mentally capable of determining right from wrong reflects the fact that the degree of maturity varies not only among children of different ages, but also among children of the same age. The rebuttable presumption of *doli incapax* allows discretion to take account of the individual child's level of maturity and provides adequate flexibility to take care of those children who have reached the minimum age but are insufficiently mature. Retaining the presumption also ensures that only mature children who are able to appreciate that their criminal acts are seriously wrong would be made criminally responsible. On the basis of these considerations, we propose retaining the rebuttable presumption of *doli incapax* for children aged between the revised minimum age of ten and below 14.

ADVICE SOUGHT

16. Members are invited to comment on the Administration's proposal

to raise the age of criminal responsibility from seven to ten years of age by amending the Juvenile Offenders Ordinance and to retain the rebuttable presumption of doli incapax for children aged 10 to below 14 years.

Security Bureau

August 2001

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Section of Enactment

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Chapter: 226 Title: JUVENILE OFFENDERS Gazette Number:
ORDINANCE
Section: 3 Heading: Age of criminal responsibility Version 30/06/1997
Date:

It shall be conclusively presumed that no child under the age of 7 years can be guilty of an offence.

(Replaced 15 of 1973 s. 4)
[cf. 1933 c. 12 c. 50 U.K.]

Number of Persons aged 7-14 arrested for crime from 1993 to 2000
(by age at arrest)

Yr\Age	No. of persons (aged 7 - 14) arrested										Total Persons arrested in the year	Percentage of Persons (aged 7-9) arrested to Total Persons Arrested
	7	8	9	10	11	12	13	14	Total (7-9)	Total (7-14)		
1993	26	51	101	198	358	664	1,368	1,896	178	4,662	45,042	0.40%
1994	27	67	107	187	386	674	1,508	1,994	201	4,950	49,784	0.40%
1995	24	52	100	207	324	680	1,436	1,957	176	4,780	53,098	0.33%
1996	29	46	101	183	327	665	1,345	1,881	176	4,577	47,157	0.37%
1997	22	52	74	154	273	614	1,248	1,828	148	4,265	41,714	0.35%
1998	28	38	93	160	310	609	1,161	1,701	159	4,100	40,422	0.39%
1999	23	39	77	140	251	454	1,165	1,674	139	3,823	40,745	0.34%
2000	16	64	88	148	277	588	1,338	1,914	168	4,433	40,930	0.41%
Total	195	409	741	1,377	2,506	4,948	10,569	14,845	1,345	35,590	358,892	0.37%

The age of criminal responsibility in other jurisdictions

<i>Jurisdiction</i>	<i>Age of criminal responsibility</i>
Belize	7
Cyprus	7
Ghana	7
India	7
Ireland	7
Liechtenstein	7
Malawi	7
Nigeria	7
Papua New Guinea	7
Singapore	7
South Africa	7
Switzerland	7
Tasmania (Australia)	7
Bermuda	8
Cayman Islands	8
Gibraltar	8
Kenya	8
Northern Ireland (UK)	8
Scotland (UK)	8
Sri Lanka	8
Western Samoa	8
Zambia	8
Malta	9
Australia (other than Tasmania)	10
England and Wales (UK)	10
Fiji	10
Guyana	10
Kiribati	10
Malaysia	10
New Zealand	10
Vanuatu	10
Canada	12
Greece	12
Jamaica	12
Netherlands	12
San Marino	12
Turkey	12
Uganda	12
France	13

<i>Jurisdiction</i>	<i>Age of criminal responsibility</i>
Austria	14
Bulgaria	14
Germany	14
Hungary	14
Italy	14
Latvia	14
Lithuania	14
The People's Republic of China	14
Mauritius	14
Romania	14
Slovenia	14
Taiwan	14
Connecticut (USA)	15
Czech Republic	15
Denmark	15
Estonia	15
Finland	15
Iceland	15
New York (USA)	15
Norway	15
Slovakia	15
South Carolina (USA)	15
Sweden	15
Andorra	16
Georgia (USA)	16
Illinois (USA)	16
Japan	16
Louisiana (USA)	16
Macau	16
Massachusetts (USA)	16
Michigan (USA)	16
Missouri (USA)	16
Poland	16
Portugal	16
South Carolina (USA)	16
Spain.	16
Texas (USA)	16
Belgium	18
Luxembourg	18
United States of America (most other states)	18

Source: LRC Report on the Age of Criminal Responsibility in Hong Kong

United Nations Convention on the Rights of the Child
Concluding Observations of the Committee on the Rights of the Child
(1997)

United Kingdom of Great Britain and Northern Ireland:
Dependent Territories (Hong Kong)

The Committee recommends that a review of legislation in relation to the issue of the age of criminal responsibility be undertaken with a view to raising this age in light of the principles and provisions of the Convention.

International Covenant on Civil and Political Rights
Concluding Observations of the Human Rights Committee
(November 1999)

Hong Kong Special Administrative Region

The Committee is concerned that the age of criminal responsibility is seven years and takes note of the statement by the Delegation that the Law Reform Commission is currently conducting a review of this matter.

The age of criminal responsibility should be raised so as to ensure the rights of children under article 24.

International Covenant on Economic, Social and Cultural Rights
Concluding Observations of the Committee on Economic, Social and Cultural Rights
(May 2001)

The Committee is concerned that the age of criminal responsibility is set at the young age of seven years.

The Committee calls upon the HKSAR to amend its laws to raise the age of criminal responsibility so as to ensure the rights of the child under article 10 of the Covenant.