

The Age of Criminal Responsibility in Hong Kong

The Legal Issues

I. Introduction

A The Current Age of Criminal Responsibility

1. At present the age of criminal responsibility is 7 - s.3 Juvenile Offenders Ordinance, Cap 226 (J.O.O.)
2. Children aged between 7 and 14 are presumed incapable of being criminally responsible unless the prosecution prove beyond reasonable doubt that the child was well aware that his or her act was seriously wrong, and not merely naughty or mischievous - the rebuttable presumption of *doli incapax*.
3. If the presumption is rebutted, full criminal responsibility will be imposed on the child aged 7 to 14, who may then be charged, prosecuted, convicted and punished for any offence committed.

B The Criticism

4. The minimum age of 7 has been criticised as too low.
5. Where there has been reform, the international trend has been to increase the minimum age.
6. Hong Kong compares unfavourably with other jurisdictions (see: Appendix 1, reproduced from the Law Reform Commission Report, at page 90).
7. A survey carried out by the Law Reform Commission indicated that only 0.9% of the population in Hong Kong preferred to have criminal responsibility beginning at under 7. More than half of the Hong Kong population (52.1%) clearly suggested their preferred minimum age to be 14 or above. (page 111, LRC).
8. The HKCCR agrees with the majority view - 14 should be the preferred minimum.
9. The *doli incapax* presumption has been criticised as being perverse and divisive: the more “warped” a child is, the less likely is he to be found criminally responsible so as to be offered assistance by “rehabilitative” measures upon conviction; the more enlightened a child’s upbringing, the more likelihood is there that he will stand to be punished for the same conduct.

10. The operation of the presumption is open to different interpretations: by the police and by the court.
11. Moreover, the presumption does not guarantee that a young child aged 7 to 14 will not have to face trial because, if the police elect to prosecute, the determination of the child's criminal capacity is by the court, in the course of the trial.

C The Call for Reform

12. The United Nations Convention on the Rights of the Child provides:

“State parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

- (a) the establishment of a minimum age of below which the children shall be presumed not to have the capacity to infringe the penal law;
- (b) whenever appropriate and desirable, methods for dealing with such children without resorting to judicial proceedings, providing human rights and legal safeguards are fully respected.” (Article 40(3))

“In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low a level, bearing in mind the fact of emotional, mental and intellectual maturity.”

(Article 4)

13. In November 1999, the Human Rights Committee of the United Nations observed, in relation to Hong Kong:

“The Committee is concerned that the age of criminal responsibility is 7 years and takes note of the statement made 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 right of children under Article 24.”

14. The Law Reform Commission has recommended that the age be raised to 10 and the *doli incapax* presumption remain in respect of children aged 10 to 14.

15. HKCCR believes that this is not sufficient and the age of criminal responsibility should be 14.

II. Existing Relevant Legal Provisions

A. Legislation Protecting Children and Young Persons

<u>Age</u>		<u>Legislation</u>
21	Parental Consent required for person aged 16-21 to marry	Marriage Ordinance, Cap. 181
21	Minimum age of consent for sexual acts of a homosexual nature	Crimes Ordinance, Cap. 200
21	Permitting young person to resort to or be on premises or vessel for buggery or gross indecency -14 years imprisonment; not a defence that the person consented	Crimes Ordinance, Cap. 200
18	Age of majority	The Age of Majority (Related Provisions) Ordinance, Cap. 410
18	Capacity to sue or be sued; time for Limitation of Actions does not run until the child is 18	Rules of Supreme Court
17	Special procedures for witnesses in relation to sexual abuse, e.g. evidence by video link or video recording	Criminal Procedure Ordinance, Cap. 221
16	Minimum age at which a person may marry but parental consent required	Marriage Ordinance, Cap. 181
16	Minimum age of consent for sexual acts of a heterosexual nature	Crimes Ordinance, Cap. 200

16	Permitting a girl under the age of 16 to resort to or be on premises or vessel for intercourse or for prostitution - 14 years imprisonment; not a defence that the child consented	Crimes Ordinance, Cap. 200
16	Causing or encouraging prostitution of, intercourse with, indecent assault upon girl or boy under 16 - 10 years imprisonment; not a defence that the child consented	Crimes Ordinance, Cap. 200
16	Indecent conduct with or towards a child under 16 or inciting a child under 16 to commit such act - 10 years imprisonment maximum; not a defence that the child consented	Crimes Ordinance, Cap. 200
16	Unlawful sexual intercourse with a girl under the age of 16 - 5 years imprisonment; not a defence that the child consented	Crimes Ordinance, Cap. 200
15	Compulsory school for children aged 6 to 15	
14	Witnesses under 14 shall give unsworn evidence - presumed incapable of giving evidence on oath or affirmation	Evidence Ordinance, Cap. 8
14	Special procedures for witnesses under 14 giving evidence in court, (but not for child Defendants under 14), e.g. video link and/or video recorded evidence	Criminal Procedure Ordinance, Cap. 221
13	Unlawful sexual intercourse with a girl under 13 - life imprisonment; not a defence that the child consented	Crimes Ordinance, Cap. 200

- 13 Permitting girl or boy under 13 to resort to or be on premises or vessel for intercourse - life imprisonment; not a defence that the child consented Crimes Ordinance, Cap. 200

Comment:

Although the law recognises the civil incapacity of a child under 18, it imposes potential criminal responsibility on the same child.

B. Measures currently available for dealing with unruly children

(i) Care and Protection Order:

16. The C & P Order may be made by a juvenile court in relation to a child under 18 who is:

- (a) assaulted, ill-treated, neglected or sexually abused;
- (b) whose health, development or welfare has been or is being neglected or avoidably impaired; or
- (c) whose health, development or welfare appears likely to be neglected or avoidably impaired; or
- (d) who is beyond control, to the extent that harm may be caused to him or to others,

and who requires care or protection.” (section 34(1) of the Protection of Child and Juvenile Ordinance, Cap. 213)

17. The C & P Order may be made by the juvenile court on its own motion or on the application of the Director of Social Welfare/person authorized by the Director or a police officer.

18. The C & P Order may:

- “(a) appoint the Director of Social Welfare to be the legal guardian;
- (b) commit him to the care of another person/institution willing to take care of him;

- (c) order his parent or guardian to enter into recognizance to exercise proper care and guardianship; or
- (d) without such order or in addition to (b) and (c) make an order for a specified period, not exceeding 3 years under the supervision of a person appointed by the court.”

Comment:

These are wide powers for coping with a child in need of help, correction and/or rehabilitation, including the sending of the child to an institution for up to 3 years, and are available without reliance on criminal conviction.

(ii) Power to Arrest and Detain

19. The power of arrest is not limited to children of 7 or above.

Comment:

The number of arrests of children between the ages of 7 and 14 is low (3,823 in 1999) and the rate appears to be dropping.

(see Appendix 2b at page 44, and Appendix 3 at page 103, 104, reproduced from Law Reform Commission Report):

(iii) Police Superintendents’ Discretion Scheme (PSDS)

20. The PSDS is a formal caution or warning as to a child’s conduct, given by a police superintendent to a child below the age of 18.

21. The PSDS is only available where the following criteria are met:

- (a) the child is under 18 years old but over 7 when the caution is administered;
- (b) the child has no previous criminal record;
- (c) there is evidence sufficient to support a prosecution;
- (d) the offender voluntarily and unequivocally admits the offence;

and the offender and his parents/guardian have agreed to the caution.

22. The parents may not be cooperative. The child may not unequivocally admit the police version of the facts. Furthermore, there may be a substantial disparity in the way young children are handled by the police.

23. Of the 8,810 persons below 18 arrested in 1997, only half (4,802, i.e. 54.5%) were eligible for the PSDS. Of these, 3,265 were cautioned under the PSDS (i.e. 68% of those eligible for PSDS and 37% of those arrested).

(see also Appendix 4 reproduced from LRC at page 97)

(iv) Prosecution Leading to a Conviction for a Criminal Offence

24. The child may be prosecuted and have to stand trial, normally in the Juvenile Court which has jurisdiction to hear cases involving a child/young person under the age of 16, except in relation to homicide.
25. If the Prosecution can establish that the child knew that his conduct was seriously wrong and not merely naughty, the child can be found guilty of a criminal offence.
26. The Court may dismiss the charge even if the offence is proved (section 15 (1) (a) of the Juvenile Offenders Ordinance, Cap. 226).
27. On the other hand, a conviction may be recorded.

Comment:

The need to retain this alternative is questioned as the number of prosecutions and convictions of children, particularly between the ages of 7 and 11 is low, (21 were prosecuted in 1999 of whom only 3 were convicted)
(see Appendix 2a, reproduced from LRC at page 44):

(v) Sentencing Power over Children/Young Persons

- (i) Range of rehabilitative alternatives to imprisonment:
- (a) Discharge;
 - (b) Fines, damages, costs;
 - (c) Binding Over Order to prevent a future breach of the peace;
 - (d) C &P Order;
 - (e) Probation Order;
 - (f) Reformatory School Order (Reformatory School Ordinance, Cap. 225);
 - (g) Community Support Services Scheme;
- (ii) Custodial rehabilitative sentences such as Detention Centre and Training Centre;

- (iii) Custody in a place of detention;
- (iv) A young person (14-16 years old) shall only be sentenced to prison if he cannot be suitably dealt with in any other way. A child sentenced to prison shall not be allowed to associate with adult prisoners.

Comment:

As the powers under a C & P Order (including effectively custodial orders for up to 3 years) are sufficiently wide to deal with the correction and rehabilitation of unruly children under 14, what point is there in additionally labelling the unruly behaviour “criminal”, with the stigma that this label attracts?

III. The Legal Arguments in Favour of Raising the Minimum Age

1. No significant crime committed by young children, and no significant convictions secured in relation to children;
2. Adequate alternatives to criminal prosecution are already available to correct and/or rehabilitate unruly children;
3. Unfair to require a 7 year old to stand trial/young children should in principle be exempt from prosecution;
4. Undesirable and unnecessary to impose the stigma of a conviction on a child;
5. The international trend has been for the minimum age to be raised where reform has been introduced;
6. Other jurisdictions, including China (14), Taiwan (14), Japan (16) and Macau (16) have higher minimum ages of criminal responsibility and Hong Kong is now out of step with the international community. (see: Appendix 4, reproduced from LRC at page 90)

IV. Conclusion

1. The HKCCR has considered the issue of the minimum age of criminal responsibility from a number of angles, including the legal perspective, set out above.
2. The HKCCR has recommended that the appropriate age at which children should be held criminally responsible is 14 and that if the minimum age is raised to 14, the *doli incapax* presumption can be dispensed with.
3. Alternatively, if 14 is not adopted, the *doli incapax* presumption must remain to protect immature children between the newly decreed age of criminal responsibility and the age of 14.
4. Having carefully studied the Law Reform Commission Report, the position of the HKCCR nevertheless remains as above.

Dated 10.10.00

Corinne Remedios

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
Maita	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

Appendix 1

<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

Appendix 2

Age	No. of Juvenile Defendants at Age 11 or Below being Prosecuted			
	In 1998		In 1999	
	No. of Defts. Prosecuted	No. of Defts. Convicted	No. of Defts. Prosecuted	No. of Defts. Convicted
Age 7 or below	0	0	0	0
Age 8	2	1	0	0
Age 9	7	0	1	1
Age 10	12	4	3	0
Age 11	17	2	17	2
Total :	38	7	21	3

Note:

Charges dismissed under section 15(1)(a) of the Juvenile Offenders Ordinance (Cap.226) were not treated as convictions.

No significant crime committed by young children

3.48 Those who favour a raising of the minimum age of criminal responsibility argue that there is little criminal conduct by young children. Figures provided by the police show the number of children between the ages of seven and 14 arrested in the years 1993 to 1999.

***Persons aged 7 - 14 arrested for crime from 1993 to 1999
(by age at arrest)***

Age Year	No. of persons arrested (%)								Total (7-14)
	7	8	9	10	11	12	13	14	
1993 (%)	26 (0.56)	51 (1.09)	101 (2.17)	198 (4.25)	358 (7.68)	664 (14.24)	1,368 (29.34)	1,896 (40.67)	4,662 (100)
1994 (%)	27 (0.55)	67 (1.35)	107 (2.16)	187 (3.78)	386 (7.80)	674 (13.62)	1,508 (30.46)	1,994 (40.28)	4,950 (100)
1995 (%)	24 (0.50)	52 (1.09)	100 (2.09)	207 (4.33)	324 (6.78)	680 (14.23)	1,436 (30.04)	1,957 (40.94)	4,780 (100)
1996 (%)	29 (0.63)	46 (1.00)	101 (2.21)	183 (4.00)	327 (7.14)	655 (14.53)	1,345 (29.39)	1,881 (41.10)	4,577 (100)
1997 (%)	22 (0.52)	52 (1.22)	74 (1.74)	154 (3.60)	273 (6.40)	614 (14.40)	1,248 (29.26)	1,828 (42.86)	4,265 (100)
1998 (%)	28 (0.60)	38 (0.93)	93 (2.27)	160 (3.90)	310 (7.56)	609 (14.85)	1,161 (28.32)	1,701 (41.49)	4,100 (100)
1999 (%)	23 (0.60)	39 (1.02)	77 (2.01)	140 (3.66)	251 (6.57)	454 (11.88)	1,165 (30.47)	1,674 (43.79)	3,823 (100)
1993 - 1999 (%)	179 (0.57)	345 (1.11)	653 (2.10)	1,229 (3.94)	2,229 (7.15)	4,360 (13.99)	9,231 (29.63)	12,931 (41.50)	31,157 (100)

Table 4.6 - 1998

Type of offence	Age at arrest							
	7	8	9	10	11	12	13	14
Indecent assault	1	1	1	-	2	14	36	25
Wounding	-	-	-	1	2	7	17	35
Serious assault	1	1	1	5	8	38	106	232
Criminal intimidation	-	-	-	-	2	4	9	21
Other robberies (robberies with pistol like object excluded)	-	2	1	3	6	28	59	122
Blackmail	-	-	1	2	2	7	28	31
Burglary with breaking	-	-	-	-	6	7	33	32
Burglary without breaking	-	1	-	3	4	14	28	30
Theft (snatching)	-	-	1	1	1	6	4	10
Theft (pickpocketing)	-	-	-	1	2	2	3	-
Theft (shop theft)	23	30	62	105	210	304	456	517
Taking conveyance w/o authority	-	-	-	-	-	2	2	8
Handling stolen goods	-	-	-	1	-	4	7	7
Deception	-	-	-	-	1	-	5	11
Unlawful sexual intercourse	-	-	-	-	-	-	3	14
Trafficking in dangerous drugs (DD)	-	-	-	-	-	-	3	5
Possession of DD for trafficking	-	-	-	-	-	1	4	8
Criminal damage	2	-	3	6	7	15	33	58
Disorder/fighting in public place	-	-	-	-	-	5	18	53
Unlawful society offences	-	-	-	1	-	6	31	68
Other crimes	-	-	1	-	-	1	3	5
Possession of offensive weapon	-	-	-	-	-	7	18	39
Going equipped for stealing	-	-	-	-	-	4	8	15
Loitering	-	-	-	-	1	-	-	3

Table 4.7 - 1999

Type of offence	Age at arrest							
	7	8	9	10	11	12	13	14
Indecent assault	-	-	-	2	5	12	26	22
Wounding	-	-	-	1	-	3	19	43
Serious assault	1	1	3	5	6	32	116	233
Criminal intimidation	-	-	-	-	-	6	16	43
Other robberies (robberies with pistol like object excluded)	1	-	1	2	6	26	73	112
Blackmail	-	-	-	-	1	11	28	40
Burglary with breaking	-	-	-	2	6	6	16	29
Burglary without breaking	-	-	2	1	5	10	17	22
Theft (snatching)	-	-	1	2	2	6	16	14
Theft (pickpocketing)	-	-	-	-	1	1	5	1
Theft (shop theft)	18	28	51	89	147	198	382	438
Taking conveyance w/o authority	-	-	-	-	-	1	2	2
Handling stolen goods	-	-	-	1	-	1	10	19
Deception	-	-	-	-	-	1	6	6
Unlawful sexual intercourse	-	-	-	-	-	-	4	20
Trafficking in dangerous drugs (DD)	-	-	-	-	-	-	-	2
Possession of DD for trafficking	-	-	-	-	-	-	1	5
Criminal damage	-	4	3	7	8	15	43	62
Disorder/fighting in public place	-	-	-	-	1	3	12	34
Unlawful society offences	-	-	-	-	1	7	27	95
Other crimes	-	-	-	-	-	-	1	2
Possession of offensive weapon	-	-	-	-	1	6	7	30
Going equipped for stealing	-	-	-	-	1	5	15	15

Table 3.6 - 1998

Type of offence	Age of arrest															
	7		8		9		10		11		12		13		14	
	PSDS		PSDS		PSDS		PSDS		PSDS		PSDS		PSDS		PSDS	
	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes
Indecent assault	1	-	1	-	1	-	-	-	2	-	12	2	26	10	19	6
Wounding	-	-	-	-	-	-	1	-	-	2	6	1	17	-	32	3
Serious assault	1	-	1	-	-	1	4	1	3	5	23	15	67	39	162	70
Criminal intimidation	-	-	-	-	-	-	-	-	1	1	3	1	7	2	14	7
Other robberies	-	-	2	-	-	1	1	2	2	4	21	7	44	15	114	8
Blackmail	-	-	-	-	-	1	1	1	1	1	7	-	20	8	28	5
Arson	-	-	1	-	5	-	2	1	3	2	3	-	8	7	5	3
Burglary with breaking	-	-	-	-	-	-	-	-	4	2	3	4	26	7	23	9
Burglary without breaking	-	-	-	1	-	-	1	2	-	4	13	1	25	3	25	5
Theft (snatching)	-	-	-	-	1	-	1	-	1	-	5	1	3	1	7	3
Theft (pickpocketing)	-	-	-	-	-	-	-	1	-	2	-	2	2	1	-	-
Theft (shop theft)	12	11	5	25	14	48	21	84	36	174	62	242	100	356	158	361
Taking conveyance without authority	-	-	-	-	-	-	-	-	-	-	2	-	2	-	4	4
Handling stolen goods	-	-	-	-	-	-	1	-	-	-	3	1	6	1	-	7
Deception	-	-	-	-	-	-	-	-	-	1	-	-	4	1	9	2
Unlawful sexual intercourse	-	-	-	-	-	-	-	-	-	-	-	-	2	1	12	2
Trafficking in dangerous drugs (DD)	-	-	-	-	-	-	-	-	-	-	-	-	3	-	5	-
Possession of DD for trafficking	-	-	-	-	-	-	-	-	-	-	1	-	4	-	8	-
Criminal damage	2	-	-	-	1	2	3	3	1	6	5	10	16	17	35	23
Disorder/fighting in public place	-	-	-	-	-	-	-	-	-	-	2	3	12	8	44	9
Offences against public order	-	-	-	-	-	-	-	-	-	-	-	-	8	-	24	-
Unlawful society offences	-	-	-	-	-	-	1	-	-	-	5	1	28	3	62	6
Object dropped from height	-	-	-	1	1	1	-	5	-	2	-	3	2	3	1	3
Other crimes	-	-	-	-	1	-	-	-	-	-	1	-	2	1	5	-
Possession of offensive weapon	-	-	-	-	-	-	-	-	-	-	6	1	14	4	35	4
Going equipped for stealing	-	-	-	-	-	-	-	-	-	-	3	1	3	5	7	8
Loitering	-	-	-	-	-	-	-	-	-	1	-	-	-	-	3	-