

3 September 2002

Mrs Constance Li
Clerk to the Bills Committee
The Legislative Council of the Hong Kong Special Administrative Region
Legislative Council Building
8 Jackson Road
Central Hong Kong

Dear Mrs Li,

Bills Committee on Juvenile Offenders (Amendment) Bill 2001

Thank you for your letter dated 7th August, 2002 inviting submissions.

Some time ago, I wrote a brief note concerning a proposal for an amendment to the Juvenile Offenders Ordinance to raise the minimum age of criminal responsibility from 7 years of age to 10 years of age which was considered by the Law Reform Commission. I am not quite sure how it could be elevated to the status of a submission.

The basis of my support for the proposals (both then and now) is to be found in a combination of my experience as a lawyer in the field of criminal law and also my own experience as a parent. However, it is my view that persons under the age of 10 are unlikely to be able to form the criminal intent of many, if not most, crimes. I also believe that the application of the criminal law to children under 10 is not appropriate. Even if they may be able to form the criminal intent of a crime where all that is required is an intention to do the prohibited act, there will be many cases where a child under the age of 10 would not appreciate that such conduct was wrong in anything other than a general way.

I accept that many children under 10, perhaps especially children who have been brought up properly, will already appreciate that it is wrong, for example, to steal or to assault others. Children (again, especially children who had been brought up properly) will appreciate that certain bad acts should be punished. However, I have difficulty in accepting that even well brought up children under the age of 10 who did an act which caused, for example, serious injury to another would be likely to appreciate that what they did was seriously wrong except in the most general way.

Mixed up in this concern is that, for the most part, the kinds of conduct which children under the age of 10 which might, on a strict view, be criminal should not be dealt with by the procedures of the criminal law. Children steal. Unless completely by accident, what they take is usually of small value. Such conduct should be dealt with entirely within the home or the school. Children also hit other people. Such conduct might be characterised as an assault. Even an assault which has the effect of causing serious injury is usually either unintended or unappreciated by the child. I do not believe that the processes of the criminal can assist very much. Again, my view is that it is essentially a family or school matter. This is the time when such children are expected to start to learn that their acts have possibly serious consequences. I think the rigorous application of the criminal law is not appropriate in that educational process.

I believe that the criminal law has very little deterrent effect on children under 10 and thus one of the great benefits of the criminal law - that is the capacity of the law to deter criminal conduct - is lost on such children.

I also believe that there are very few children under the age of 10 who would be able to make full answer and defence to a criminal charge. Such children would most likely be unable to properly instruct counsel and appreciate legal advice. The fact that during the receipt of legal advice the child was accompanied or advised or even controlled by a parent or guardian does not really assist the matter very greatly because I am not sure that it is appropriate that the parent or guardian should necessarily be making the decision as to how to conduct his defence on behalf of the child.

It may be that there are some quite exceptional children under the age of 10 who, for one reason or another, do have the ability to appreciate something of the nature of their conduct which may be characterised as a crime. Indeed, it may be that there are a very few quite evil children in the world. However, I would be very reluctant to keep a law just for the purpose of dealing with that exceptional case. There may also be cases of adults or older children procuring children 10 years and under to undertake criminal conduct. The answer to this problem seems to me to be to detect and punish the exploiters and not the exploited.

To endorse this change in the law is not to leave our community powerless in relation to children under the age of 10 who do acts which are criminal. The community remains possessed of legal powers to intervene in cases where children are in real danger.

In the end, the proposal is a matter of judgment on the part of the community and, as the community's lawmakers represent the community, it is matter of judgment for lawmakers. I am not aware on any scientific material which renders my views inherently correct or renders my views more likely to be correct.

I would venture to suggest that there are number of matters which are irrelevant to the issue. These include:

- that Asian children are brought up differently to Western children
- by enacting this amendment we are somehow sending a signal that we are 'soft' on crime (there are few 10 year old villains who follow the deliberations of LegCo or the Law Reform Commission.
- by enacting this amendment we will leave ourselves exposed to the extreme case either in terms of the evilness of the act or the consequences of the act or there may be older persons who exploit those 10 years or under to commit crimes.

I also support the concept of retaining the rebuttable common law presumption with the unfortunate name of *doli incapax*. It has a moderating influence.

I would be happy to appear before the panel if the panel considers it of assistance but I do not propose to impose myself or my views on the panel. In short, if I am invited then I would be happy to attend.

Yours faithfully,

(Andrew Bruce, SC)