

Submission from Ms Corinne Remedios

Bills Committee on Juvenile Offenders (Amendment)

Bill 2001 – 19.9.02

Re: The Age of Criminal Responsibility

1. Introduction

- 1.1 I support the proposal to raise the age of criminal responsibility from the age of 7.
- 1.2 I support the principle that children under the age of 14 should be presumed incapable of committing a crime.
- 1.3 In the event that the minimum age of criminal responsibility remains below 14, I support the retention of the doli incapax presumption, the burden of proof remaining with the prosecution to the standard beyond reasonable doubt.
- 1.4 However, I consider that the appropriate age of criminal responsibility should be set at 14, not 10 as proposed by the Administration, so as to exclude children aged 10 to 13.

2. Who is a child

- 2.1 A “child” – defined as under 18.

See: UN Convention on the Rights of the Child

- 2.2 HK age of majority - 18

See: The Age of Majority (Related Provisions) Ordinance, Cap. 410

- 2.3 Compulsory school age – 6 to 15:

nb a child does not commence secondary education until the age of 12 at the earliest.

- 2.4 Special procedure for child witnesses – under 14

evidence in chief by video recording; evidence in court by video link

See: Criminal Procedure Ordinance, Cap. 221

2.5 Unsworn evidence of a child witness – under 14

For the purposes of giving evidence in court, a “child” is defined as a person under 14 and such evidence shall be given unsworn.

See: Section 4, Evidence Ordinance, Cap. 8, amended in 1995 [Appendix 1]

2.6 **Comment:**

2.6.1 The legislature as recently as 1995 presumed *conclusively* that a child witness under 14 is incapable of understanding the importance of telling the truth with the consequence of perjury.

2.6.2 The 1995 amendment to the Evidence Ordinance abolished the former practice of the court determining the maturity of child witnesses on a case by case basis, before requiring them to take the oath.

2.6.3 It is submitted that the former practice was recognised to be unreliable and to produce inconsistent results; and that the solution, (ie presuming in *all* cases that child witnesses under 14 were insufficiently mature to take the oath and bear the consequences of perjury), was a realistic one.

2.6.4 However, contrary to that approach, in amending comparable legislation as to the age of criminal responsibility, the Administration now proposes nevertheless to adopt a lower age limit of 10 and to retain the unreliable and inconsistent practice of determining maturity, on a case by case basis, so as to render “delinquent” children aged between 10 and 13 criminally liable for their action.

3. **Comment on the Legislative Council Brief**

3.1 The Administration overlooks the fact that most, if not all, of its arguments in favour of raising the criminal age of responsibility to the age of 10, apply to raising the age limit to 14, namely:

- public opinion (para. 4, Brief)

- youth (para. 5, Brief)
- undesirable exposure to the criminal justice system: traumatic, stigmatic, unfair and not in the interests of the child (para. 6, Brief)
- prosecution policy (tending to keep children out of court) implicitly recognising inappropriateness of the criminal justice system for children (para. 7, Brief)
- arrest statistics for children remaining consistently low (para. 8, Brief)
- overseas experience showing that HK's minimum age is at "the lowest end" (para. 9, Brief).

Public Opinion

- 3.2 The Administration's Brief fails to mention the results of a telephone survey carried by the Law Reform Commission whereby *more than half of the persons surveyed preferred a minimum age of 14 or above*: the preferred average minimum age of criminal responsibility was 14.4 years (see: Appendix 2 - extract from LRC Report).

Youth

- 3.3 The Administration's proposals will continue to permit prosecutions of primary school children.

The Criminal Justice System

- 3.4 If the professed objective when dealing with children aged 10 to 13, is rehabilitation, what additional benefit is there in stigmatising by a criminal conviction a child considered too young to give evidence on oath in court?

Prosecution Policy

- 3.5 The Administration does not appear to have considered the very low number of "successful" convictions of children aged 10 to 13. Given the post-conviction objective of rehabilitation, public funds wasted in police investigations and abortive prosecutions would be better spent on preventive and rehabilitative measures for HK's primary school children, identifying and coping with children at risk, without the need to invoke the criminal justice system.

Arrest Statistics

3.6 The Administration, in excluding the 10 to 13 year olds from the amendment, purports to

“take a cautious approach in reforming the minimum age in view of the *perceived* increase in youth crime recently” (italics supplied),

but the statistics for persons arrested relied upon by the Administration do not support an *actual* increase in youth crime in the 10 to 13 year age group. (See: Annex B to the Legco Brief)

	Age 10	Age 11	Age 12	Age 13	Total Persons Arrested (Aged 10 – 13)
1993	198	358	664	1,368	2,588
2000	148	277	588	1,338	2,351

“Overseas Experience”

3.7 The Administration need not look “overseas” for comparables – it has ignored the age adopted by the People’s Republic of China - 14.

3.8 The Administration also has ignored the age adopted in other jurisdictions with comparable ethnic and social backgrounds, such as HK’s immediate neighbours:

Taiwan – 14
Macau – 16
Japan – 16

4. The Need for Reform and to an Appropriate Age Level

4.1 The UN Convention on the Rights of the Child has, since October 1996, repeatedly called for review of legislation in relation to the age of criminal responsibility (see: Legco Brief, Annex D)

4.2 It has taken HK 6 years, so far, to respond to a growing world-recognition that children have rights and need protection.

4.3 The “half-way measure” of reform to the age of 10 is “too little, too late”.

4.4 Moreover, the “half-way measure” is inconsistent with existing, recently-amended, comparable legislation, such as that adopted in respect of child witnesses.

5. Conclusion

- 5.1 The proposal to increase the minimum age of criminal responsibility is long overdue and should be supported.
- 5.2 The proposed amendment to the age of 10, thereby advocating the retention of criminal responsibility for a primary school child is “too little too late”.
- 5.3 The appropriate watershed for maturity should be after that child has embarked on a secondary education ie after the age of 13.
- 5.4 For all the reasons outlined for increasing the relevant age limit, and in conformity with the legislative approach adopted for child witnesses in the Criminal Procedure Ordinance, the appropriate age for criminal responsibility should be “under 14”.

Dated this 3rd day of September 2002

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“銀行”(bank)指借憲章、或根據或憑藉任何條例或國會法令設立而合法經營銀行業務的任何法團、公司或社團、或任何在香港經營業務的外地銀行公司；(由 1950 年第 9 號附表修訂；由 1984 年第 37 號第 11 條修訂)

“銀行紀錄”(banker's record)包括——

- (a) 在銀行的通常業務中使用的任何文件或紀錄；及
- (b) 任何如此使用的紀錄，而該紀錄是以可閱形式以外的其他形式備存，並能複製成可閱形式者。(由 1984 年第 37 號第 2 條代替)

第 II 部

可接納的證人及證據

3. 因稚年或精神不健全而沒有資格

只有以下的人沒有資格在任何法律程序中提供證據——

- **(a)* (由 1995 年第 70 號第 2 條廢除)
- (b) 精神不健全而在接受訊問之時看似不能對訊問所關乎的事實得到適當的印象或如實敘述該等事實的人；並且在傳召任何已知為精神不健全的人到某人或法庭席前作證人前，須先取得該人或法庭的同意。

*4. 兒童所提供的證據

(1) 在本條中，“兒童”(child)指未屆 14 歲的人。

(2) 在刑事法律程序中，兒童的證據須在未經宣誓下提供，並能作為任何其他人士所提供的證據(經宣誓或未經宣誓)的佐證。

* 請注意 1995 年第 70 號第 1(2) 條，其內容如下——

“第 2 及 3 條不適用於本條例生效日期之前已展開的——

- (a) 任何審訊；或
- (b) 任何《裁判官條例》(第 227 章)第 71A 條所指的交付審判程序。”

1995 年第 70 號於 1995 年 7 月 28 日生效。

“court”(法院、法庭) includes the Chief Justice and any other judge, also every magistrate, justice, officer of any court, commissioner, arbitrator, or other person having, by law or by consent of parties, authority to hear, receive, and examine evidence with respect to or concerning any action, suit, or other proceeding civil or criminal, or with respect to any matter submitted to arbitration or ordered to be inquired into or investigated under any commission; (*Amended 50 of 1911; 62 of 1911 Schedule; 27 of 1912*) [*cf. 1851 c. 99 s. 16 U.K.*]

“Government Chemist”(政府化驗師) means the person appointed as such by the Governor and such other person as the Governor may appoint in writing to carry out examinations or analyses of articles or substances and to sign certificates under section 25 in relation thereto. (*Added 31 of 1969 s. 2. Amended 42 of 1973 s. 2*)

PART II

ADMISSIBLE WITNESSES AND EVIDENCE

3. Incompetency from immature age or unsoundness of mind

The following persons only shall be incompetent to give evidence in any proceedings—

- **(a)* (*Repealed 70 of 1995 s. 2*)
- (b) persons of unsound mind, who, at the time of their examination, appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly; and no person who is known to be of unsound mind shall be liable to be summoned as a witness without the consent previously obtained of the court or person before whom his attendance is required.

*4. Evidence given by children

(1) In this section, “child” (兒童) means a person under 14 years of age.

(2) A child's evidence in criminal proceedings shall be given unsworn and shall be capable of corroborating the evidence, sworn or unsworn, given by any other person.

* Please note section 1(2) of 70 of 1995. It reads as follows—

“Sections 2 and 3 do not apply in relation to—

- (a) any trial; or
- (b) any committal proceedings within the meaning of section 71A of the Magistrates Ordinance (Cap. 227),

that commenced before the commencement of this Ordinance.”

70 of 1995 commenced operation on 28 July 1995.

(3) 兒童在未經宣誓下所提供的證據，為刑事法律程序的目的，可錄取為書面供詞，猶如該證據是在宣誓下提供的一樣。

(由 1995 年第 70 號第 3 條代替)

*4A. 廢除關乎兒童所提供證據的佐證規則

(1) 如根據任何規定，在法官會同陪審團主持的審訊中以及在法官會同陪審團席前進行的審訊中，法官就根據某兒童的無佐證證據將被告人定罪一事而必須向陪審團給予警告者，則就純因證據是兒童證據而必須給予警告的個案而言，該規定現予廢止。

(2) 任何適用於由法官或裁判官進行的審訊並且是與第(1)款所述的規定相應的規定，現予廢止。

(由 1995 年第 70 號第 3 條增補。由 1998 年第 25 號第 2 條修訂)

4B. 廢除關於性罪行的佐證規則

(1) 凡有任何規定要求在由法官會同陪審團進行的審訊中，法官僅因為被告人被指稱就某人犯《刑事罪行條例》(第 200 章)第 VI 或 XII 部所訂的罪行而該人提供無佐證證據，而必須就根據該證據裁定被告人犯該罪行向陪審團給予警告，則該規定現予廢止。

(2) 任何適用於法官或裁判官所進行的審訊並且是相當於第(1)款所述規定的規定，現予廢止。

(3) 本條不適用於在本條的生效日期前已展開的——

(a) 任何審訊；或

(b) 《裁判官條例》(第 227 章)第 71A 條所指的任何交付審判程序。

(由 2000 年第 43 號第 2 條增補)

* 請注意 1995 年第 70 號第 1(2) 條，其內容如下——

“第 2 及 3 條不適用於本條例生效日期前已展開的——

(a) 任何審訊；或

(b) 任何《裁判官條例》(第 227 章)第 71A 條所指的交付審判程序。”

1995 年第 70 號於 1995 年 7 月 28 日生效。

(3) A deposition of a child's unsworn evidence may be taken for the purposes of criminal proceedings as if that evidence had been given on oath.

(Replaced 70 of 1995 s. 3)

*4A. Abolition of corroboration rule in respect of evidence given by a child

(1) Any requirement whereby at a trial by and before a judge and jury it is obligatory for the judge to give the jury a warning about convicting the accused on the uncorroborated evidence of a child is hereby abrogated in relation to cases where such a warning is required by reason only that the evidence is the evidence of a child.

(2) Any requirement that is applicable at a trial by a judge or magistrate and corresponds to the requirement mentioned in subsection (1) is hereby abrogated.

(Added 70 of 1995 s. 3)

4B. Abolition of corroboration rule in respect of sexual offences

(1) Any requirement whereby at a trial by and before a judge and jury it is obligatory for the judge to give the jury a warning about convicting the accused of an offence under Part VI or XII of the Crimes Ordinance (Cap. 200) on the uncorroborated evidence of a person merely because that person is the person in respect of whom that offence is alleged to have been committed is hereby abrogated.

(2) Any requirement that is applicable at a trial by a judge or magistrate and corresponds to the requirement mentioned in subsection (1) is hereby abrogated.

(3) This section shall not apply to—

(a) any trial; or

(b) any committal proceedings within the meaning of section 71A of the Magistrates Ordinance (Cap. 227),

that commenced before the commencement of this section.

(Added 43 of 2000 s. 2)

* Please note section 1(2) of 70 of 1995. It reads as follows

“Sections 2 and 3 do not apply in relation to

(a) any trial; or

(b) any committal proceedings within the meaning of section 71A of the Magistrates Ordinance (Cap. 227),

that commenced before the commencement of this Ordinance.”

70 of 1995 commenced operation on 28 July 1995.

Survey of Public Opinion on the Age of Criminal Responsibility in Hong Kong

Summary

Between April 28 and May 8, 1999, the Department of Applied Social Studies, City University of Hong Kong conducted a random sample telephone survey on behalf of the Law Reform Commission of Hong Kong. This survey successfully interviewed 1,144 people aged 15 or above to collect their opinions on the age of criminal responsibility. Their opinions indicated that an overwhelming majority (89.4% of the population as estimated from the survey) of people preferred a minimum age of criminal responsibility at an age of 8 years or above. A minimum age of 14.4 years was the average in the population. More than a quarter (28.4%) of people supported applying the rebuttable presumption of *doli incapax* to persons aged either between 7 and 14 years or specified ranges preferred by respondents. It was particularly favorable for applying to persons between a raised minimum age and 14 years, according to an appreciable proportion (21.4%) of people. However, relative few (6.4%) people supported applying the rebuttable presumption of *doli incapax* to persons between 7 and 14 years of age. On the other hand, the rebuttable presumption of *doli capax* received support from a low proportion (6.9%) of people.

Significant variation in the opinions appears among people of different characteristics. The preferred minimum age of criminal responsibility varied significantly among different characteristics of people's age and education. Agreement to the rebuttable presumption of *doli capax* varied significantly among different characteristics of people's sex, age, religious faith, and education. Furthermore, support for the rebuttable presumption of *doli incapax* significantly varied among different levels of education and knowledge about the law of criminal responsibility. Hence, preference for a minimum age of 8 or above varied from 71.7% among people with no formal education to 94.0% among people aged between 20 and 29 years of age. Agreement to the rebuttable presumption of *doli capax* ranged from 4.3% among people with no formal education to 15.0% among people aged between 50 and 59 years of age. General support for the rebuttable presumption of *doli incapax* ranged from 20.3% of people with primary education to 38.4% among people with no formal education. All these opinions were significantly different among people of different educational levels.