

**Bills Committee on
Juvenile Offenders (Amendment) Bill 2001**

**Whether the Minimum Age of
Criminal Responsibility should be raised to 12 or 14**

Purpose

This paper sets out the Administration's response to some deputations' proposals to raise the minimum age of criminal responsibility from the existing level of seven years of age to 12 or 14, instead of the Law Reform Commission's recommendation of ten.

Background

2. At the last Bills Committee meeting held on 19 September 2002, some deputations and Members expressed the views that the proposal to raise the minimum age of criminal responsibility to ten was inadequate in protecting children. They advocated for further raising it to 12 or 14 years. Some members would also like to know what the anticipated problems are if the minimum age of criminal responsibility was raised to 12 or 14 years.

**The Law Reform Commission's Report on the Age of Criminal
Responsibility in Hong Kong**

3. The Administration's proposal for raising the minimum age of criminal responsibility from seven to ten years of age is made on the basis of

the Law Reform Commission's Report on the subject. The Commission's recommendation was made following a thorough study and wide public consultation. The main reasons for its recommending the age of ten as the appropriate level are summed up in Paragraph 6.14 of the Report and highlighted below for ease of reference –

- Available statistics suggest that there is no significant level of criminal activity among children below the age of ten. Equally, there appears to be a marked increase in criminal activity from the age of ten.
- The age of ten (though at the low end of the scale) would not be out of step with international standards.
- A significant number of those who responded to the Commission's consultation paper were in favour of the age of ten.
- The Commission believe that we should proceed cautiously in this matter.

Why the Age of 10 is Appropriate

Statistics on Young Children Arrested for Crimes

4. The Administration agree with the Law Reform Commission that the revised minimum age should be pitched at the age of ten. Empirical statistics for the period from 1993 to 2001 show that the number of children aged seven to nine arrested for crimes remain at a consistent low level. The average

number of arrested persons aged from seven to nine in a year is 162 for the above period. This represents roughly 0.4% of the total number of persons arrested in a year.

5. The number of arrested persons increases noticeably starting from the age of ten. On average, 478 children aged from 10 to 11, which is about 3 times of the figures for those age below ten, were arrested for crimes in a year during the period from 1993 to 2001. The figure for those aged 12 to 13 rose even more significantly to an average of 1 934, representing more than 10 times of the figure for children aged below ten. Detailed statistics are as follows –

Year	Number of Children Arrested		
	Aged 7 to 9	Aged 10 to 11	Aged 12 to 13
1993	178	556	2032
1994	201	573	2182
1995	176	531	2116
1996	176	510	2010
1997	148	427	1862
1998	156	470	1770
1999	139	391	1619
2000	168	425	1926
2001	112	422	1888
<i>Average</i>	<i>162</i>	<i>478</i>	<i>1934</i>

6. In view of the significant increase in the number of persons arrested starting from the age of ten, the Administration consider that it is important to adopt a prudent and step-by-step approach in reforming the minimum age of criminal responsibility.

7. Members are also invited to note that children under 14 arrested for

crime are most likely to be dealt with under the Police Superintendent Discretion Scheme (PSDS) rather than being subject to the full panoply of the criminal justice system. The relevant statistics are as follows -

Year		Aged 7-9	Aged 10-11	Aged 12-13	Total
1999	arrested	139	391	1 619	2 149
	PSDS	91	291	884	1 266
	prosecuted	4	20	254	278
	convicted	0	7	134	141
2000	arrested	168	425	1 926	2 519
	PSDS	129	328	1 105	1 562
	prosecuted	3	30	333	366
	convicted	0	2	122	124
2001	arrested	112	422	1 888	2 422
	PSDS	79	308	1 096	1 483
	prosecuted	3	17	346	366
	convicted	0	6	202	208

Possible Exploitation by Adults Criminals

8. In deciding what the appropriate new minimum age should be, the Administration have considered the need to render protection to children of tender age as well as the need to ensure law and order and public safety of the community at large. Any raise in the minimum age may increase the risk of young children being exploited and used by criminals for committing crimes. Similar concerns were raised during the Government's attempt to raise the minimum age from seven to ten in 1973. During the resumption of Second Reading debate of the then Juvenile Offenders (Amendment) Bill 1973, the following opinion was recorded –

"It is arguable whether a child of 7, 8, or 9 years of age is capable of carrying out an act with criminal intent. But leaving this question aside we consider that children of those ages are old enough to be used by criminals for unlawful purposes.To raise the minimum age therefore we may play into the hands of those who would use young children as safe pawns in furtherance of their own vile rackets."

Due to the above concern, the then Council resolved that the minimum age should be retained at seven.

9. Some depositions have commented that children below the age of 14 may not have fully developed their ability to comprehend what is right or wrong. We believe that for children between 10 and 14, the degree of maturity varies not only among children of different ages, but also among children of the same age. For children below 14 who are yet to fully develop their capability in differentiating right from wrong, removal of any possibility for criminal responsibility may heighten the risk of these young children being used by criminals for illicit acts. If the presumption of *doli incapax* were to be made irrebuttable for all children aged below 14 years old, they may be even more easily tempted to commit an act which would be an offence if the same were committed by person above the minimum age, since they may perceive that the consequences of their actions are minimal. Moreover, it is likely that the older children are more attractive to adult criminals in view of their relatively higher ability to follow instructions and reliability in discharging a task.

10. We fully agree with the view that in cases where children are exploited by adult criminals, it should be the latter, not the children being used,

who should be penalized. However, regardless of whether the children will be held criminally liable because of their young ages, there should be no dispute on the fact that any such exploitation by adult criminals is already by itself a harmful thing and has a very negative impact on the children. As such, it is of utmost importance that we should minimize such from happening as far as possible. To propose raising the minimum age of criminal responsibility from seven to ten, instead of 12 or 14, is one of the deterrent measures that we should adopt.

Presumption of Doli Incapax

11. Under the proposal of the Juvenile Offenders (Amendment) Bill 2001, all children below the age of ten will be presumed to be incapable of committing a crime. This presumption is irrebuttable. Together with the Administration's proposal to retain the common law presumption of doli incapax for children aged from ten to below 14, which may be rebutted, the effect is that all children below the age of 14 will be presumed incapable of committing a crime.

12. The rebuttable presumption of doli incapax is capable in providing adequate protection for children above the revised minimum age and below the age of 14, since the burden of proof on criminal intent is on the prosecution. The standard of test is also a high one, which is **beyond reasonable doubt** not only that the child caused an actus reus with mens rea, but also he knew that the particular act was not merely naughty or mischievous, but seriously wrong.

13. Given the presumption of doli incapax (which is rebuttable for persons aged from ten to below 14) for all children below 14, prosecution against children under 14 years of age is considered only as a last resort. The

proposed retention of the rebuttable presumption of doli incapax for those aged ten and below 14 is to provide a mechanism to cater for exceptionally serious cases committed by children of the mentioned age group, when other measures such as the PSDS are considered not suitable, e.g. where a child is found to have committed offences repeatedly despite previous cautions and follow-up services duly provided.

14. In spite of the fact that there is no specific age which, upon reaching, will indicate a child have definitely attained sufficient maturity and is capable of forming a criminal intent, we cannot rule out the possibility that some children yet to reach the age of 14 may be mature enough in this regard. Past statistics show that the nature of offences committed by relatively older children tends to be more serious than those committed by younger children. For example, the children from 10 to 11 arrested for serious offences, such as wounding and serious assaults and robbery, were on a rise, and particularly significant increase was observed on children aged 12 years onwards -

	<i>1999</i>		<i>2000</i>		<i>2001</i>		<i>2002 (Jan-Jul)</i>	
	<i>10-11</i>	<i>12-13</i>	<i>10-11</i>	<i>12-13</i>	<i>10-11</i>	<i>12-13</i>	<i>10-11</i>	<i>12-13</i>
<i>Wounding and serious assault</i>	12	170	24	194	26	213	15	121
<i>Robbery</i>	8	99	8	182	9	183	8	106
<i>Criminal damage</i>	15	58	13	77	18	73	4	28
<i>Unlawful society offences</i>	1	34	2	58	0	40	0	16
<i>Possession of offensive weapon</i>	1	13	7	20	2	18	0	10

15. In view of the more serious nature of the offences committed by children above ten years of age, it is necessary to retain the rebuttable

presumption of *doli incapax* for those aged between ten and 14, and the presumption should not be made irrebuttable so as to preserve a mechanism under which serious cases where prosecution is warranted can be dealt with.

Services for Children at Risk vs. Services for Children Committed Crimes

16. At the last meeting of the Bills Committee, there were views that children who have committed crimes should be provided with services rather than being made to go through the full panoply of the criminal justice system. The Administration recognize the possible impact criminal proceedings might have on young children's emotional and psychological development. This is why under the existing practice, children under 14 are all presumed to be incapable of committing crimes as explained in the above paragraphs.

17. However, children who have committed crimes and other at risk children (for example, those who are found to have anti-social behaviour) are showing different degree of deviance. They should therefore be treated differently having regard to their specific problems and needs. While the Administration has been placing great emphasis in providing a comprehensive spectrum of support services for children and young people, including those at risk, to promote their healthy development, many of such programmes can achieve their intended effectiveness only if the children concerned and their parents agree to participate in them voluntarily. Where cooperation from the children and their family members is lacking and a child is found to have committed an offence, a strong signal should be sent and services more appropriate for the circumstances should be provided. The PSDS and its follow-up services provide useful avenues. The criteria for PSDS to be administered are summarised as follows –

- the offender is under 18 years of age at the time when the caution is administered;
- the offender has no previous criminal record;
- the evidence available is sufficient to support a prosecution;
- the offender voluntarily and unequivocally admits the offence; and
- the offender and his parents or guardian have agreed to the caution.

18. Available aftercare service following caution by Police Superintendents include those provided by the Police's Juvenile Protection Section or Community Support Service Scheme. They may also be referred to the Social Welfare Department or the Education Department for follow-up.

19. Where the presumption of *doli incapax* can be rebutted and prosecution is taken out as a last resort, the subsequent conviction will allow the court to order the child to receive the most appropriate services (for example, those under a probation order) as provided for under the various sentencing options. However, if prosecution could not be initiated in any circumstances, there might be the possibility that no appropriate rehabilitation service can be imposed on the children who have offended. They might continue to be influenced by bad elements and develop into recidivists.

20. Some deputations suggested that young children who have committed crimes should not be prosecuted as they might be dealt with adequately by existing means of care or protection orders issued under the Protection of Children and Juvenile Ordinance (Cap 213) (the PCJO). Under the PCJO, a juvenile court may issue care or protection orders for children who are in need of care or protection and –

- (a) who has been or is being assaulted, ill-treated, neglected or

- sexually abused; or
- (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 others.

Children falling outside the above categories cannot benefit from the care or protection orders issued by juvenile courts. Therefore we cannot rely on the care or protection orders to provide appropriate services and timely intervention to children who have offended but cannot be held criminally liable because they may not fall within the definition of "in need of care or protection".

21. Under our existing juvenile justice system, children and young persons under the age of 16 (except those charged for homicide) will be dealt with by juvenile courts. These courts may take advice from the Juvenile Courts Advisory Panel in determining the method of dealing with a child or young person who has been found guilty of an offence. This arrangement, on the one hand, helps rehabilitate the children concerned, and on the other, addresses the community's concern about law and order.

Anticipated Problems if the Minimum Age of Criminal Responsibility is Raised to 12 or 14 years

22. If the minimum age of criminal responsibility is raised to 12, on the basis of statistics in the past years, an average of 485 children aged 10 to 11

who may otherwise be arrested for crimes will be released unconditionally each year. The criminal cases concerned will not be pursuable as far as these children are concerned. If the minimum age is raised to 14, there may be an additional 1 940 such cases on average each year. In all of these cases, the flexibility provided by the rebuttable presumption of *doli incapax* which may cater for individual differences in varying circumstances will also be removed completely.

23. The PSDS is derived from the prosecution policy of the Department of Justice. Since 1963, police officers of the rank of Superintendent and above have been authorised by the then Attorney General to caution, rather than to prosecute, young offenders in appropriate cases. One of the criteria to be satisfied before a caution under the PSDS may be administered is that the evidence available is sufficient to support a prosecution. As such, raising the minimum age to 12 or 14 years will result in no case for prosecution against children below such age and the PSDS will therefore no longer be applied to children in these age groups. Valuable opportunities for giving a clear caution and to provide early intervention and appropriate services for misbehaving children will be lost. Releasing children who have committed crimes unconditionally not only sends a wrong signal to these children and the community, but also opens up vast opportunities for criminal groups to make use of these children and lure them to take part in illicit activities. Coupled with the loss of opportunities to provide timely and appropriate services to these children, the results for these children and the community may be disastrous. The extent of concern may be more serious if the minimum age is raised to 14 years, but similar problems will occur even if the minimum age is raised to 12 years.

Conclusion

24. Having regard to the above, instead of taking a big leap and raise the minimum age of criminal responsibility from seven to 12 or 14 in one go, the Administration maintain the view that it is important to follow the Law Reform Commission's recommendation and adopt a step by step approach in taking forward the reform. The revised minimum age of criminal responsibility should most appropriately be pitched at the age of ten years.

Security Bureau

October 2002