

LEGISLATIVE COUNCIL BRIEF

JUVENILE OFFENDERS (AMENDMENT) BILL 2001

INTRODUCTION

At the meeting of the Executive Council on 23 October 2001, the Council **ADVISED** and the Chief Executive **ORDERD** that the Juvenile Offenders (Amendment) Bill 2001, at Annex A, should be introduced into the Legislative Council to raise the minimum age of criminal responsibility from seven to ten years of age.

BACKGROUND AND ARGUMENT

General Background

2. At present, under the Juvenile Offenders Ordinance, no child under the age of seven can be guilty of an offence. 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 LRC, after conducting a public consultation exercise and a telephone survey on the law regarding the age of criminal responsibility and the presumption of *doli incapax* in 1999, 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.

Proposal to Raise the Minimum Age of Criminal Responsibility

4. During the public consultation exercise in 1999, the majority of respondents supported an increase in the minimum age, with 63 in favour and 24 against. Moreover, about 90% of the respondents to a related telephone survey were in favour of raising the minimum age. Supporting reasons are summarized 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. Development psychologists believe that cognitive understanding of the rules of society, perspective taking and empathic feelings are important determinants of children's ability to act on right and wrong. These factors follow a development path and are closely tied to children's age. A child at the age of ten or below 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 the LRC is that subjecting a young child to full panoply of the criminal justice system is neither fair nor in the interest of the child. Children below ten are generally thought 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 ten have been dealt with by alternatives other than prosecution. Many of these cases are dealt with by the Police Superintendent's Discretion Scheme. This prosecution policy has therefore implicitly recognized that it is inappropriate to require young children to stand trial.

8. 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 about 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 ten per year) include assault, robberies, burglary and criminal damage. We consider that the limited number of crimes committed by children under ten years old and the nature of offences committed do not support maintaining the existing age of criminal responsibility.

9. While overseas experience indicates considerable disparity among different jurisdictions as to the minimum ages, 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 UNCRC, the ICCPR and the ICESCR have all called for a review of our law on the minimum age (see relevant extracts from their concluding observations at Annex D).

10. Though the United Nations Committees have not stipulated a specific age which should be adopted, we recommend that ten be adopted as the revised minimum age. This is in line with the LRC's recommendation which was arrived at after thorough consideration of the results of the public consultation, findings of the telephone survey as well as the ages adopted in overseas countries. Moreover, we observe that the arrests of children in Hong Kong increase significantly from ten years of age onwards. Despite the views of some interest groups on children's rights and human rights groups that the minimum age should be raised to 14 years, we consider that it is more appropriate to take a cautious approach in reforming the minimum age in view of the perceived increase in youth crime recently.

11. Having considered the above arguments, we propose that the minimum age should be raised from seven to ten years of age.

Proposal to Retain the Rebuttable Presumption of Doli Incapax

12. In addition to the stipulation of a minimum age 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, for example, 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 - 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 telephone survey conducted by the LRC, 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 so as 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 common law presumption of *doli incapax* for children aged between the revised minimum age of ten and below 14.

THE BILL

16. The main provisions of the Bill are –

- (a) clause 2 raises the minimum age of criminal responsibility from seven years of age to ten years of age;

and

- (b) clauses 3 and 4 make consequential amendments to the Reformatory Schools Ordinance.

BASIC LAW IMPLICATIONS

17. The Department of Justice advises that the Bill does not conflict with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

18. The Department of Justice advises that the Bill is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

19. The Bill does not affect the current binding effect of the existing provisions of the Juvenile Offenders Ordinance.

FINANCIAL AND STAFFING IMPLICATIONS

20. We expect that the proposal will potentially bring in savings to the prosecuting departments (mainly Department of Justice) and courts due to lesser number of prosecutions and court proceedings. However, the amount of savings is likely to be insignificant given the very few number of court cases which involve children under ten, as shown in the past years.

ECONOMIC IMPLICATIONS

21. The proposal involves no economic implications.

PUBLIC CONSULTATION

22. The LRC has conducted a wide public consultation exercise on

the subject in 1999 before releasing its final Report. Majority of the respondents supported raising the minimum age of criminal responsibility. We have also consulted the Legislative Council Panel on Administration of Justice and Legal Services (also attended by Members of the Legislative Council Panel on Security) and the Fight Crime Committee in September 2001. They generally welcomed the proposal to raise the minimum age of criminal responsibility. A few Legislative Councillors suggested that the minimum age should be increased to 14 years of age.

LEGISLATIVE TIMETABLE

23. The legislative timetable will be –

Publication in the Gazette	2 November 2001
First Reading and commencement of Second Reading debate	14 November 2001
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

PUBLICITY

24. A press release will be issued on 31 October 2001. A spokesman will be available to answer media and public enquiries.

ENQUIRIES

25. For any enquiries on this brief, please contact Miss Eliza Yau, Principal Assistant Secretary for Security, at 2810 2632.

Security Bureau
31 October 2001

JUVENILE OFFENDERS (AMENDMENT) BILL 2001:

ANNEXES

- Annex A - Juvenile Offenders (Amendment) Bill 2001
- Annex B - Number of persons aged 7 to 14 arrested for crime from 1993 to 2000
- Annex C - The age of criminal responsibility in other jurisdictions
- Annex D - Extracts of Concluding Observations of United Nations Committees on UNCRC, ICCPR and ICESCR

A BILL

To

Amend the Juvenile Offenders Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Juvenile Offenders (Amendment) Ordinance 2001.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Age of criminal responsibility

Section 3 of the Juvenile Offenders Ordinance (Cap. 226) is amended by repealing "7" and substituting "10".

Consequential Amendments

Reformatory Schools Ordinance

3. Interpretation

Section 2 of the Reformatory Schools Ordinance (Cap. 225) is amended, in the definition of "youthful offender", by repealing "7" and substituting "10".

**4. Order not to be invalidated by
subsequent proof of age**

Section 37 is amended by repealing "7" and substituting "10".

Explanatory Memorandum

This Bill -

- (a) amends section 3 of the Juvenile Offenders Ordinance (Cap. 226) to raise the age of criminal responsibility from 7 years of age to 10 years of age (clause 2); and
- (b) makes consequential amendments to the Reformatory Schools Ordinance (Cap. 225) (clauses 3 and 4).

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%

United Nations Convention on the Rights of the Child
Concluding Observations of the Committee on the Rights of the Child
(October 1996)

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.