

THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON

**THE AGE OF CRIMINAL RESPONSIBILITY
IN HONG KONG**

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The Law Reform Commission was established by the Executive Council in January 1980 to consider such reforms of the laws of Hong Kong as may be referred to it by the Secretary for Justice or the Chief Justice.

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Preface

1. In June 1998, in response to calls for a review of the law governing the age of criminal responsibility in Hong Kong, the Chief Justice and the Secretary for Justice made a reference to the Law Reform Commission in the following terms:

“To review the law regarding the minimum age of criminal responsibility and the presumption of doli incapax and to consider such reforms as may be necessary.”

On 13 January 1999, the Commission published its *Consultation Paper on the Age of Criminal responsibility in Hong Kong* (the consultation paper), for the purpose of seeking input from the community as to what should be the appropriate age at which a person should be held responsible or accountable for his criminal conduct.

2. The scope of the consultation paper was deliberately confined to a review of the law governing the age of criminal responsibility in Hong Kong, and did not attempt a review of the juvenile justice system as a whole. Any such extension of the bounds of the reference would have added considerably to the complexity and duration of the study, thus delaying the original purpose of examining the age of criminal responsibility in Hong Kong. It became clear during the process of consultation, however, that any decision on whether or not to raise the age of criminal responsibility would be contingent on the adequacy of alternative means to prosecution in dealing with children below the age of criminal responsibility. For that reason, this final report includes a chapter on the mechanisms currently available for dealing with unruly persons below the age of 18, and on the present legislative provisions which protect young children from exploitation by adult criminals. The material in chapter five is therefore intended to answer concerns which would properly be voiced that any raising of the minimum age of criminal responsibility would adversely affect the law and order of our community.

3. In recent years, there have been calls in Hong Kong for the minimum age of criminal responsibility to be raised. Those favouring a change argue that it is undesirable to subject young children who are still socially and mentally immature to the full panoply of criminal proceedings, with their attendant sanctions and stigma. These demands have been echoed by the United Nations Committee on the Rights of the Child, and by the United Nations Committee on the International Covenant on Civil and Political Rights (ICCPR), both of which bodies have called for a review of the law in Hong Kong with a view to raising the minimum age of criminal responsibility in the light of the principles and provisions of the United Nations Convention on the Rights of the Child and the ICCPR.

4. In reply, those who favour maintaining the present minimum age of criminal responsibility argue that bringing young delinquents into the criminal justice system in their formative years provides an opportunity for systematic rehabilitation. Sanctions imposed on a child reduce the likelihood that he will develop a life-long pattern of criminal behaviour.

5. In the light of this divergence of views, the consultation paper presented the following four options for reform:

Option A: Retain the present system;

Option B: Raise the minimum age of criminal responsibility but abolish the rebuttable presumption of *doli incapax*;¹

Option C: Raise the minimum age of criminal responsibility and retain the rebuttable presumption of *doli incapax* for persons between the revised age and 14 years. The burden of rebutting the presumption continues to rest with the prosecution;

Option D: Raise the minimum age of criminal responsibility and create a rebuttable presumption of *doli capax* for persons between the revised age and 14 years. The burden of rebutting the presumption would rest with the defence.

6. The process of consulting the public opinion on the age of criminal responsibility in Hong Kong took two forms. The first was the publication of the consultation paper, which set out the range of options for comment. Secondly, a public opinion survey on the age of criminal responsibility in Hong Kong was conducted by the Department of Applied Social Studies of the City University of Hong Kong on the Commission's behalf.

7. Comment on the consultation paper was invited during the period between 13 January 1999 and 31 March 1999, principally on the four options for reform set out above. The public opinion survey was conducted between 28 April and 8 May 1999. The report which follows is the result of our careful consideration both of the responses received and of the survey findings obtained by the City University.

8. In reaching the conclusions contained in this report we have been greatly assisted by the advice and comments given by experts in this area of the law. We are particularly grateful to all those who responded to our consultation paper. Their comments have been invaluable to the shaping of this final report. The individuals and organisations who responded are listed in Annex 1. We

¹ The rebuttable presumption of *doli incapax* applies to a child between the ages of seven and 14 and means that a child of that age cannot be convicted unless the prosecution rebut the presumption by proving beyond reasonable doubt that, at the time of the offence, the child was well aware that his act was seriously wrong, and not merely naughty or mischievous.

wish to express our thanks to the City University of Hong Kong for the public opinion survey which they conducted on our behalf. We are particularly indebted to the Hong Kong Police for their assistance and for providing the statistical data contained in both the consultation paper and this report.

Chapter 1

The criminal responsibility of children in Hong Kong

1.1 In Hong Kong, the minimum age of criminal responsibility is statute based. Section 3 of the Juvenile Offenders Ordinance (Cap. 226) (the JOO) provides that: “*It shall be conclusively presumed that no child under the age of 7 can be guilty of an offence.*” This creates in Hong Kong a conclusive or irrebuttable presumption that a child is *doli incapax* (incapable of committing a crime). Under the law as it stands, any person under the age of seven will be fully and legally excused from criminal responsibility, even if there is cogent evidence which unequivocally points to the child’s commission of a crime.

1.2 In respect of a child aged between seven and 14 years, Hong Kong follows the common law rule established in medieval England that a rebuttable presumption of *doli incapax* will apply. The presumption can be rebutted by the prosecution on proof beyond reasonable doubt that, at the time of the offence, the child was well aware that his or her act was seriously wrong, and not merely naughty or mischievous. When this presumption is rebutted or removed, full criminal responsibility will be imposed on the child who may then be charged, prosecuted and convicted for any offence allegedly committed.

1.3 Under section 2 of the JOO, a “child” is defined as “*a person who is, in the opinion of the court having cognizance of any case in relation to such person, under the age of 14 years*”. The definition is significant as it distinguishes a “child” from a “young person”¹ or an adult, both of whom are fully responsible for the crime committed, although the sentence imposed on a young person might be different from that applied to an adult.²

1.4 While seven years has been fixed by statute as the minimum age of criminal responsibility in Hong Kong since 1933, that age finds its roots in medieval England. To understand the existing law it is therefore necessary to explain not only the law which governs the presumptions of *doli incapax*, but also the historical background and conditions upon which the various age-lines were first established in England and Wales.

¹ Under section 2 of the JOO, a “young person” is defined as “*a person who is, in the opinion of the court having cognizance of any case in relation to such person, 14 years of age or upwards and under the age of 16 years*”.

² Restrictions on punishment of young persons are provided in section 11(2) of the JOO which provides that: “*No young person shall be sentenced to imprisonment if he can be suitably dealt with in any other way.*”

The historical development of the principle of *doli incapax*

1.5 In its formative years, the common law provided no definite point as the age at which a child would be held criminally responsible. Early records show that different treatment was meted out to children below the age of seven years, according to whether or not they were considered able to distinguish right from wrong. Thus, up to the seventeenth century in England, it was almost impossible to tell with certainty the age at which a person would be held answerable for a crime committed. It was left to the individual judge in each case to decide whether the child brought before the court was old enough to be criminally sanctioned. This approach stemmed from a recognition of the severity of the punishments imposed at that time, which were based on vengeance. In an age where a person would be hanged for stealing a sheep, it was considered necessary to protect young children from the full rigours of harsh adult justice.

1.6 In an article entitled "*Criminal Responsibility of Infants*",³ the author states that during Anglo-Saxon times, a child could not be found guilty of a crime until he attained the age of 12. By the time of Edward I, the law had become more severe and the age of criminal responsibility was reduced to seven. This marked the beginning of an era where, until that age was attained, no evidence that the child knew that his conduct was wrong would avail. This was based upon the notion that a child within that age group should not be punished as he or she had yet to acquire adequate discretion or understanding of the crime. Photis points out, however, that although the Year Books 30, 31 Ed. 1 recorded that a child of tender years was incapable of committing a crime, the Register of Writs refers to a precedent of a pardon to a child under seven, and so implies that children under that age were still on occasions prosecuted. The controversy as to the age at which criminal responsibility should commence continued until the age of seven was confirmed by Hale, who further confirmed the common law rule that children between the ages of seven and 14 were presumed to be *doli incapax*, though this presumption was capable of being rebutted by evidence to the contrary.⁴

1.7 It is perhaps worth noting at this point that the antiquity of the origin of the common law rule setting the minimum age of criminal responsibility at seven years of age does not of itself imply that the rule is no longer valid in modern times. Many common law rules of long standing are still applied today and have survived the test of time. The issue is whether the circumstances and conditions which prevailed in medieval England and in the light of which the age of seven was set are still of relevance to present day Hong Kong. In addition, there is a need to weigh the evidence of modern findings as to the age at which a child can reasonably be expected to differentiate right from wrong. A more

³ A D Photis, "Criminal Responsibility of Infants" (April 25, 1987) Justice of the Peace, at 263.

⁴ Cited above, "Criminal Responsibility of Infants", at 263.

systematic and scientific approach to establishing the age at which criminal responsibility should commence would thus seem justified.

1.8 The common law rule as to the minimum age of criminal responsibility has long been abandoned in England and Wales. The minimum age in England and Wales was raised from seven to eight years of age under section 50 of the Children and Young Persons Act 1933. It was further raised to ten years of age by section 16 of the Children and Young Persons Act 1963. The common law rule of a rebuttable presumption that children between seven and 14 were *doli incapax* continued to apply in England and Wales, subject only to an increase in the statutory minimum age, until recently abolished by section 34 of the Crime and Disorder Act 1998. Section 34 provides that:

“The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished.”

The irrebuttable presumption of *doli incapax*

1.9 As noted above, the minimum age of criminal responsibility in Hong Kong is statute-based, albeit the age fixed is identical to that laid down in the medieval English common law rule. Section 3 of the JOO provides that: *“It shall be conclusively presumed that no child under the age of 7 years can be guilty of an offence.”* Thus, under this provision, a conclusive or irrebuttable presumption arises that the child is *doli incapax* (incapable of committing a crime) on proof or admission of the basic fact that he is under seven years of age. No evidence is admissible to rebut this presumption. It follows that if a child was under seven years old at the time of the offence, the child is *doli incapax* and cannot be found guilty of a crime even though *“there may be the clearest evidence that the child caused an actus reus with mens rea”*.⁵

1.10 As mentioned earlier, the minimum age of criminal responsibility in England and Wales has twice been adjusted upwards, with the present minimum age now set at ten years. Hong Kong has made similar attempts at reform but without success. In 1973, an attempt was made to raise the minimum age of criminal responsibility from seven to ten through the Juvenile Offenders (Amendment) Bill 1973. The Bill foundered as it was thought that children below the age of ten were old enough to be manipulated by undesirable characters for unlawful purposes. There has been pressure for change since, but Hong Kong’s minimum age of criminal responsibility remains seven years of age.

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J Smith and the late B Hogan, *Criminal Law* (Butterworths, 1996), at 195.

The rebuttable presumption of *doli incapax*

1.11 In Hong Kong, for a child who has attained seven but is under 14 years of age, the presumption of *doli incapax* continues to apply but can be rebutted by the prosecution on proof “*beyond reasonable doubt not only that he caused an actus reus with mens rea but also he knew that the particular act was not merely naughty or mischievous, but ‘seriously wrong’*.”⁶ Under this common law rule, the rebuttable presumption of *doli incapax* operates on proof or admission of the basic fact that the child was between the ages of seven and 14. The child must be presumed to be *doli incapax* in the absence of evidence that at the time of the offence he knew the particular act constituting the offence was seriously wrong. Under this rebuttable presumption, it follows that once it is proved beyond reasonable doubt that the child knew the act to be seriously wrong, in the sense that he was not merely naughty or mischievous, the presumption of *doli incapax* will be rebutted. The child will thus become *doli capax* (capable of committing a crime) and will be subject to prosecution and conviction accordingly. The principle governing this area of the law was explained in *R v Gorrie* as follows:

“In the case of persons under fourteen years of age, the law presumed that they were not criminally responsible; they were not supposed to have that discretion which would make them criminally responsible. But in any particular case, if the prosecution could show that although the accused was under fourteen the act was done with what was called mischievous discretion, then they could rebut the presumption that the child was not responsible. Therefore, the jury should first of all consider whether it would be their duty to find him guilty if he were over fourteen, and then consider whether mischievous discretion deprived him of the shelter which he would otherwise have. If it was an assault and not an accident - if, however little he might have meant to do him any harm, he did in fact intentionally stab the other boy with the penknife and thereby caused his death, that was manslaughter Then they came to the second point. The boy was under fourteen, and the law presumed that he was not responsible criminally; and if the prosecution sought to show that he was responsible although under fourteen, they must give them very clear and complete evidence of what was called mischievous discretion: that meant that they must satisfy the jury that when the boy did this he knew that he was doing what was wrong - not merely what was wrong, but what was gravely wrong, seriously wrong. It was for the jury to say whether there was any evidence that this boy when, as was alleged, he ‘jabbed’ the

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Cited above, *Criminal Law*, at 195.

*other with the knife in this horseplay, had any consciousness that he was doing that which was gravely wrong.*⁷

1.12 The effect of the principle stated in *Gorrie* is that, in order to secure the conviction of a child aged between the ages of seven and 14 years, the prosecution must **first** prove beyond reasonable doubt that the child committed the offence with the necessary *mens rea*. It must **also** show that the child should be criminally responsible for the alleged offence by proof beyond reasonable doubt that the child had in him or her a **mischievous discretion**, in the sense that, at the time of the alleged offence, the child knew that the act constituting the offence was **gravely or seriously wrong**. It is therefore insufficient for the prosecution to prove that the offence was committed by the child. The prosecution has to go a step further to prove that the child knew his conduct was seriously wrong at the material time. Under this principle, the *“mere proof of the doing of the act charged, however horrifying or obviously wrong the act might have been, cannot establish the requisite guilty knowledge and rebut the presumption.”*⁸

1.13 The requirement that the child must be aware that his conduct was “seriously wrong” was further examined in *J. M. (A Minor) v Runeckles* where it was held that the requisite knowledge went beyond being a realisation that the conduct was merely naughty or mischievous. Goff L.J. in this case observed that:

*“the prosecution has to prove that the child knew that what he or she was doing was seriously wrong. The point is that it is not enough that the child realized that what he or she was doing was naughty or mischievous. It must go beyond childish things of that kind. That, as I understand it, is the real point underlying the presumption that a child under the age of 14 has not yet reached the age of discretion, because children under that age may think what they are doing is nothing more than mischievous. It would not be right for a child under that age to be convicted of a crime, even if they had committed the relevant actus reus and had the relevant mens rea specified in the statute, unless they appreciated that what they were doing was seriously wrong and so went beyond childish activity of that kind.”*⁹

1.14 In the same case, a distinction was drawn between conduct that was seriously wrong and conduct that was morally wrong. Mann J held that:

“I regard an act which a child knew to be morally wrong as being but one type of those acts which a child can appreciate to be

⁷ [1918] 83 JP, at 136.

⁸ Archbold, *The Indictment* (Sweet & Maxwell, 1998 ed), at paragraph 1-91.

⁹ [1984] 79 Cr App R 255, at 260.

seriously wrong. I think it is unnecessary to show that the child appreciated that his or her action was morally wrong. It is sufficient that the child appreciated the action was seriously wrong. A court has to look for something beyond mere naughtiness or childish mischief."¹⁰

1.15 Despite the fact that the test laid down for rebutting the presumption of *doli incapax* has been well established, there is as yet no absolute formula for satisfying all the requirements set out in the test. The reason is that in rebutting the presumption, the court would consider the background of the particular child, as well as the unique features of the case, before arriving at its decision as to the knowledge of the child at the time in question. The actual age of the child, though an important factor to be taken into consideration, is not conclusive. However, in most cases, matters such as the circumstances of the case, things said or done by the child both before and after the act, the age of the child, and the individual particulars of the child are matters relevant to the court's consideration.

1.16 In *B v R*,¹¹ Lord Chief Justice Parker observed that evidence which was clear and showed beyond all possibility of doubt that the child knew the act to be a serious wrong was relevant to rebut the presumption. The evidence must be "strong and pregnant". Indeed, the lower the age of the child, the stronger would be the evidence required for the successful rebuttal of the presumption. Lord Chief Justice Parker in the same case further observed that the family background of a child would also be a consideration. The fact that a child was raised in a respectable family, was properly brought up and was generally well behaved were all important factors to be considered. Lord Chief Justice Parker said:

"There is no doubt in the case of a child between the age of eight¹² and fourteen that there is a presumption that the child is not in possession of that knowledge of which mens rea is an essential ingredient, and it is to be observed that, the lower the child is in the scale between eight and fourteen, the stronger the evidence necessary to rebut that presumption, because in the case of a child under eight it is conclusively presumed he is incapable of committing crime. It has often been put in this way, that in order to rebut the presumption 'guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt,' or, as it has also been put, 'there must be strong and pregnant evidence that he understood what he did....' Here is a child who has had apparently every opportunity in life,

¹⁰ Cited above, *J M (A Minor) v Runeckles*, at 259.

¹¹ [1958] 44 Cr App R 1, at 3-4.

¹² The minimum age of criminal responsibility was 8 years of age at the time when this case was heard. It thus followed that the age-lines for the rebuttable presumption of *doli incapax* were 8 to 14 years.

coming from a respectable family and properly brought up, who, one would think, would know in the ordinary sense the difference between good and evil and what he should do and what he should not do. Here, he is taking part, first, in the testing of the house at the back and front, climbing through the window, and on leaving taking the key and returning later with a gang, completely wrecking the house and taking certain articles. For my part, I cannot say there was no evidence on which the magistrates could come to the conclusion that this boy had guilty knowledge.”

1.17 Evidence of the circumstances of the case and the child’s conduct, statement or demeanour associated with the offence is admissible to prove knowledge of a serious wrong. In *R v Li Wai-lun*, it was held that the answers provided by the child appellant to questions put to him by the police would be a valid consideration upon which knowledge of a serious wrong could be inferred as the child was considered by the court to be “*careful enough to avoid giving any incriminating answers*”.¹³ In *A v DPP*,¹⁴ it was held that the circumstances in which the victim of an indecent assault charge was taken to a remote location and threatened were sufficient evidence to rebut the presumption that the 12-year-old appellant was *doli incapax*. However, if the conduct of a child is such that it is uncertain or equivocal to conclude that he had in him the knowledge of a serious wrong, this would be insufficient to rebut the presumption. Thus, in *A v DPP*,¹⁵ it was held that the fact that the 11-year-old appellant was seen running away from the scene of crime was not:

“... by itself sufficient to enable the justices to find that the presumption in law had been rebutted. A naughty child would run away even if what it has done is not criminal but merely a breach of school or parental rule. In the absence of other evidence, such as evidence about the appellant’s upbringing or his reaction when seen by the police, the justices could not justifiably base their decision on that fact alone.”

1.18 It is important to note that although knowledge of a serious wrong, coupled with any necessary implication from the age of the child, can be inferred from the circumstances of the case, a child cannot be presumed to know the nature of the act simply because other children of his age and background would normally be held to possess such knowledge. In rebutting the presumption, the prosecution must prove beyond reasonable doubt that the child himself or herself knew what he or she had done was seriously wrong, and was not being merely childish, naughty or mischievous. This important issue was raised in *CC (A Minor) v DPP*, where Mitchell J observed as follows:

¹³ [1989] Mag App 436/89, at 5.

¹⁴ [1997] 1 Cr App R 27.

¹⁵ [1991] C.O.D. 442, D.C.

“In determining that question, the tribunal of fact must avoid the trap of applying another presumption, one which has been termed the ‘presumption of normality’. That presumption is to the effect that any normal boy of his age in society, as it is today, must have known that what he was doing was seriously wrong. Such an approach as that reverses the relevant presumption of doli incapax.”¹⁶

1.19 There are other factors which have been considered by the courts, but the observations made by Simon Brown L.J in *Sheldon* provide a useful summary:

- “1. It is presumed that a child between the ages of 10 and 14 is doli incapax¹⁷ and in all cases it is for the crown to rebut the presumption: to prove that when doing the act charged the child knew that this act was seriously wrong as distinct from an act of mere naughtiness or childish mischief.*
- 2. The criminal standard of proof applies: clear positive evidence is required, not consisting merely in the evidence of the act amounting to the offence itself, however horrifying or obviously wrong that act may be.*
- 3. The older the defendant is and (logically, notwithstanding paragraph 2 above) the more obviously wrong the act, the easier it will generally be to prove guilty knowledge.*
- 4. The surrounding circumstances are clearly relevant and what the defendant said and did both before and after the act may go to prove guilty knowledge. Certain conduct, however, such as running away or lying, may, depending on the circumstances, be equivocal, as consistent with naughtiness as with wickedness.*
- 5. Proof that the defendant was a normal child for his age (which must not be presumed but, assuming guilty knowledge can otherwise be established, need not be proved) will not necessarily prove also that he knew his action was seriously wrong. The less obviously wrong the act, the less likely is it to do so.*
- 6. Even where, as in Coulburn (1988) 87 Cr. App. R. 309 (a murder case), the doli incapax presumption is overlooked, if on appeal the Court is satisfied that had the issue been*

¹⁶ [1996] 1 Cr App R 375, at 381.

¹⁷ This is contrasted with the position in Hong Kong where the ages to which the rebuttable presumption of doli incapax apply are between 7 and 14 years.

*left to the jury they must inevitably have found that the defendant knew that his act was seriously wrong, the verdict will be found safe and the appeal will fail.*¹⁸

Difficulties with the current law

1.20 In recent years, there have been calls in Hong Kong and from the United Nations to review both the irrebuttable and rebuttable presumptions of *doli incapax* on the general ground that the relevant ages set for the two presumptions are unrealistically low, and are thus contrary to the interests of children and the community at large. The principal argument advanced for the raising of Hong Kong's minimum age of responsibility is the suggestion that a seven year old child is too young to take full criminal responsibility for his actions and to be made subject to complex and perhaps lengthy criminal proceedings which flow from a prosecution. Those advocating change query the appropriateness of exposing a child to the full rigours of the criminal justice system. They point out in addition that the age of seven is the lowest minimum age of criminal responsibility applied in the common law world.

1.21 These demands for reform have been echoed in the Committee on the Rights of the Child and the Human Rights Committee of the United Nations, which has called for a review of the law of Hong Kong with a view to raising the minimum age of criminal responsibility in the light of the principles and provisions of the United Nations Convention on the Rights of the Child and the International Covenant on Civil and Political Rights (ICCPR).

1.22 In response, those who favour maintaining the existing age of criminal responsibility argue that bringing young delinquents into the criminal justice system in their formative years provides an opportunity for systematic rehabilitation. Sanctions imposed on a child reduce the likelihood that he will develop a life-long pattern of criminal behaviour. Those favouring the status quo further argue that the system of compulsory education in Hong Kong means that children now acquire mental and social maturity at a relatively early age. Today's children in Hong Kong, it is said, can readily distinguish right from wrong at an early age. A further argument advanced for maintaining the existing age of criminal responsibility is that any raising of the minimum age would place young children at risk of exploitation by adult criminals in furthering their criminal designs.

The history of calls for reform

1.23 The call to raise the minimum age of criminal responsibility is not a recent phenomenon. Indeed, the Juvenile Offenders (Amendment) Bill 1973 was debated in the Hong Kong Legislative Council in 1973 in an unsuccessful attempt to raise the minimum age to ten years of age. As we have seen, this

¹⁸ [1996] 2 Cr App. R 50, at 53.

attempt failed as it was thought that children above the age of seven were old enough to be used by adult criminals for unlawful purposes. Subsequent to this unsuccessful attempt at reform, there have been periodic calls for change.

1.24 In a letter dated 31 July 1992 to the then Attorney General, Mr Jeremy Matthews, the Hong Kong Bar Association invited Mr Matthews to consider, in conjunction with this Commission, the whole question of the appropriate minimum age of criminal responsibility in Hong Kong. In his letter of reply to the Association dated 12 October 1992, Mr Matthews pointed out that the issue of the minimum age of criminal responsibility had been considered by the Standing Committee of Young Offenders in February 1988 where it was agreed that the age of criminal responsibility should remain at seven years. In his letter, Mr Matthews argued that the time was not ripe for a review of the subject, having regard to local concerns about the rising crime rate; the fact that young juveniles were more susceptible to the influence of triads and to vices such as drug abuse and violence; the fact that the majority of young offenders aged under ten continued to be cautioned under the Police Superintendent's Discretion Scheme; and the views of the then Secretary for Security and the Police.

1.25 Over the years, a number of representations for change have been made to the Administration, some supported by the research findings of sociologists and psychologists which suggest that children only begin to have full control of themselves at about the age of 12, and that a mature moral concept of right from wrong would only develop at the ages of 12 to 13. Proponents of change therefore argue that it is harsh and unreasonable to impose criminal responsibility on children below these ages, when they are neither able to exercise full self-control nor have developed a mature personality.

1.26 As noted above, demands to raise the age of criminal responsibility are not confined to local commentators. The United Nations Committee on the Rights of the Child has also expressed concern at the minimum age of criminal responsibility in Hong Kong. Pursuant to Article 44 of the United Nations Convention on the Rights of the Child which was extended to Hong Kong in 1994, the Hong Kong Government responded to the concerns of the Committee through its submission of an *"Initial Report of the United Kingdom of Great Britain and Northern Ireland in respect of Hong Kong under article 44 of the Convention on the Rights of the Child"* to the Committee on 2 and 3 October 1996. At that hearing, issues arising from the prosecution in Hong Kong during the period from 1992 to 1995 of children between seven and 10 years of age were considered. Following the hearing, the Committee issued its "Concluding Observations", in which it recommended at paragraph 34 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 the light of the principles and provision of the Convention."

1.27 A similar recommendation was recently made by the Human Rights Committee of the United Nations. In its “Concluding Observations” at the hearing in November 1999 of the HKSAR’s report submitted under Article 40 of the International Covenant on Civil and Political Rights, the Committee stated at paragraph 17 that:

“The Committee is concerned that the age of criminal responsibility is 7 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.”¹⁹

1.28 As mentioned earlier, however, views are not one-sided in favour of raising the minimum age of criminal responsibility. Those in favour of maintaining seven as the minimum age have argued that bringing young children within the criminal justice system enables them to be given greater professional care and attention and should be taken as a positive move. Raising the minimum age of criminal responsibility would do a disservice to those currently subject to full criminal process, as these children would be deprived of the protective and rehabilitative opportunities incidental to criminal proceedings.

1.29 This divergence of opinion has led to questions as to whether the presumptions of *doli incapax* should be maintained and, if so, whether the present ages for their application should be preserved. To some extent, any age which is chosen to apply full criminal responsibility must be arbitrary. It is, however, in the interests of both children and the community at large that the law should be based so far as is possible on rational grounds which reflect current societal values.

¹⁹ Article 24(1) of the ICCPR provides that every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Chapter 2

The minimum age of criminal responsibility in other jurisdictions

Introduction

2.1 In endeavouring to determine whether or not change is necessary to Hong Kong's existing minimum age of responsibility, it is clearly relevant to examine the approach adopted in other jurisdictions. Our consultation paper set out the comparative position not only in common law jurisdictions with which Hong Kong traditionally has links, but also in non-common law jurisdictions such as Mainland China, Taiwan and Japan with which Hong Kong has cultural similarities or a geographical nexus. One of the purposes of this chapter, therefore, is to outline the laws on the minimum age of criminal responsibility in these jurisdictions, not necessarily as conclusive indicators which Hong Kong must follow, but rather as an objective yardstick which Hong Kong may wish to consider, having taken account of Hong Kong's particular circumstances.

Guidance from the United Nations

2.2 In considering the appropriate age at which a person in Hong Kong should be held criminally responsible for his or her conduct, a significant determining factor is the view adopted by the United Nations (the UN) on the issue of the age of criminal responsibility. This is embodied in the United Nations Convention on the Rights of the Child (the Convention) which was extended to Hong Kong in 1994. The Convention is silent as to what should be the appropriate minimum age, save for the provision in Article 1 of the Convention that a child is a person below the age of 18 unless the age of majority is attained earlier under the domestic law as applicable to the child. Under Article 40 of the Convention, states parties are required to give recognition to the rights of every child who has allegedly acted contrary to the penal law of the land, and to take account of his age:

"States parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of

promoting the child's reintegration and the child's assuming a constructive role in society."

Article 40(3) refers to the age of criminal responsibility:

"States 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 below which children shall be presumed not to have the capacity to infringe the penal law;*
- (b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected."*

Under Article 40(4) of the Convention, it is further provided that:

"A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

2.3 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) were adopted by the UN General Assembly in 1985. They are not binding in international law, but states are invited to adopt them. Article 4 provides that:

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

While neither the Beijing Rules nor the Convention purport to fix a minimum age of criminal responsibility of universal application, the Committee on the Rights of the Child of the United Nations has criticised jurisdictions which it believes adopt too low an age. Subsequent to a hearing on the position of Hong Kong on matters involving the interests of children, the UN Committee called for a review of the relevant Hong Kong legislation with a view to raising the age of criminal responsibility in the light of the principles and provisions of the Convention.

2.4 As we noted in chapter one of this report, a similar call for Hong Kong to raise her existing minimum age of criminal responsibility was recently

made by the Human Rights Committee of the United Nations. In paragraph 17 of its “Concluding Observations” published in November 1999, the Committee stated that:

“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 rights of children under article 24.”

Europe

2.5 In a written answer to the House of Lords in the United Kingdom on 27 February 1995, Baroness Chalker of Wallasey provided details of the age of criminal responsibility adopted in each of the member states of the Council of Europe:¹

Council of Europe

<i>Countries and Territories</i>	<i>Age of Criminal Responsibility</i>
Cyprus	7
Ireland	7
Liechtenstein	7
Switzerland	7
Scotland (UK)	8
Northern Ireland (UK)	8
Malta	9
England and Wales (UK)	10
Greece	12
Netherlands	12
San Marino	12
Turkey	12
France	13
Austria	14
Bulgaria	14
Germany	14
Hungary	14
Italy	14
Latvia	14
Lithuania	14

¹ Hansard, HL Deb, vol 564, col WA 82, 27 February 1995. The order of the list has been changed for our purposes from an alphabetical list to one arranged according to age.

Romania	14
Slovenia	14
Czech Republic	15
Denmark	15
Estonia	15
Finland	15
Iceland	15
Norway	15
Slovakia	15
Sweden	15
Andorra	16
Poland	16
Portugal	16
Spain	16
Belgium	18
Luxembourg	18

2.6 It is significant to note that of the 36 jurisdictions shown on the list only four (Cyprus, Ireland,² Liechtenstein and Switzerland) still maintain seven years as the minimum age of criminal responsibility. This triggered the following comment from Mr Humfrey Malins during the debate in the House of Commons on the Crime and Disorder Bill 1998:

“What about the age of criminal responsibility? I did some research and discovered that, as at three years ago, the age of criminal responsibility varied enormously in the 38 countries in the Council of Europe. Most of them have an age of criminal responsibility much higher than ours; in only five countries is it as young as ours or younger. The average age was 12 years seven months; in this country it is 10. That ought perhaps to be looked at on another day.”³

2.7 The simple age at which a child bears full criminal responsibility does not necessarily tell the full story, however. It is equally relevant to consider whether or not there exists in a given jurisdiction a provision similar to Hong Kong’s rebuttable presumption of *doli incapax*. France, Germany and Spain, for example, appear to adopt such a provision:

“... in France a child under 13 cannot be prosecuted, while for children aged 13-18 a presumption of incapacity applies which is rebuttable by the prosecution on evidence in each individual case. Similarly, in Germany a child aged under 14 cannot be prosecuted, while for children aged between 14 and 18,

² The Children Bill 1999 proposes to raise the minimum age of criminal responsibility in Ireland from the present age of seven years to 12 years.

³ House of Commons Standing Committee B (pt 10) <<http://www.parliament.the-stationery-office.gov.uk/pa/cm/1998/cmstand/b/st980430/am/80430s10.htm>> (23 June 1998).

*responsibility is linked with the maturity of the child on trial. The Spanish penal code states that children under 16 are exempt from criminal liability, while young people aged 16-18 must have their criminal responsibility alleviated by reason of their age.*⁴

2.8 A legitimate concern aroused by proposals to raise the minimum age of criminal responsibility would be that it would allow deviant behaviour of those below the minimum age of criminal responsibility to go unchecked. A number of European jurisdictions have adopted measures designed to ensure care and control of these children:

*“In most other European countries, children under 14 who commit offences do not appear before the criminal courts, but are dealt with by family courts concerned with the need for compulsory measures of care.”*⁵

For example, in France, although a child below the age of 13 cannot be held criminally responsible, a child aged ten or above can be brought to a civil court in relation to certain offences for a detention order to be made.

2.9 In a recent judgement of the European Court of Human Rights, the Court observed that:

*“... at the present time, there is not yet a commonly accepted minimum age for the imposition of criminal responsibility in Europe. While most of the Contracting States have adopted an age-limit which is higher than that in force in England and Wales, other States, such as Cyprus, Ireland, Liechtenstein and Switzerland, attribute criminal responsibility from a younger age.”*⁶

North America

United States of America

2.10 In the United States of America, the age of criminal responsibility varies between states. A written reply submitted to the Parliament of the United Kingdom on 27 February 1995 provided a summary of the position in the United States:

⁴ P Cavadino, “Goodbye Doli, Must We Leave You?” (1997) Vol 9, No 2, Child and Family Law Quarterly 165, at 170.

⁵ P Cavadino, “Children Who Kill: a European Perspective” (1996) September 13 New Law Journal, at 1325.

⁶ *V v the United Kingdom* (European Court of Human Rights, Application No. 24888/94), at page 17.

“In most of the United States of America the age of criminal responsibility is 18. In eight states the age is 16; these are Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, South Carolina and Texas. In Connecticut, New York and South Carolina the age of criminal responsibility is 15.

All US states have provision for juveniles to be tried as adults in a criminal court. Certain serious offences, such as murder, are statutorily excluded from the jurisdiction of the juvenile courts. In all states except Nebraska and New York, a juvenile court may waive jurisdiction over a case and transfer it to a criminal court.”⁷

The lowest age adopted in any of the US states is reportedly ten years.⁸

Canada

2.11 In Canada, the age of criminal responsibility has recently been raised from the established common law rule of seven to 12 years of age. The rebuttable presumption of *doli incapax* has ceased to operate in Canada. Section 13 of the Canadian Criminal Code provides that:

“No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.”

While no child under 12 years of age may be held criminally responsible, a child below this age whilst involved in criminal activity may be subject to provincial child welfare legislation. Children aged between 12 and 14 years of age are not dealt with by ordinary criminal courts, but are instead brought before a youth court, where special procedures are adopted at the hearing which make allowance for their relative young age. Those between 14 and 18 years of age are, under normal circumstances, tried in youth courts. Where serious indictable offences are involved, however, they would be transferred to ordinary criminal courts for trial should the arrangements be considered appropriate under all the circumstances of the case, including the interests of both the community and the young defendants.

⁷

Hansard, HL Deb, vol 564, col WA 82, 27 February 1995.

⁸

C McClain, “Problems relating to age and criminal capacity” in J Soth-Nielsen (ed) *South African Juvenile Justice: Law Practice and Policy*, quoted in South African Law Commission, *Juvenile Justice* (1997), Issue Paper 9, at paragraph 3.10.

Australasia

Australia

2.12 In most Australian states other than Tasmania, the minimum age of criminal responsibility is ten years of age. In Tasmania, the corresponding age is seven years. In some of the Australian states, there are legislative provisions similar to the rebuttable presumption of *doli incapax* giving exemption from criminal responsibility for children aged between the minimum age and a certain higher age unless it is proved that, at the time of the offence, the child knew that he or she ought not to do the act or make the omission constituting the offence. The following is an outline of the various ages of criminal responsibility in some of the Australian states.

2.13 In the Commonwealth, under the Crimes Act 1914, it is provided that a child under ten years of age cannot be liable for an offence against a law of the Commonwealth.

2.14 In the Northern Territory, section 38 of the Criminal Code provides that:

- “(1) *A person under the age of 10 years is excused from criminal responsibility for an act, omission or event.*
- (2) *A person under the age of 14 years is excused from criminal responsibility for an act, omission or event unless it is proved that at the time of doing the act, making the omission or causing the event he had capacity to know that he ought not to do the act, make the omission or cause the event.”*

2.15 In New South Wales, section 5 of the Children (Criminal Proceedings) Act 1987 provides that: *“It shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence.”*

2.16 In Queensland, similar provisions are made for persons of immature age under section 29 of the Criminal Code Act 1899:

- “(1) *A person under the age of 10 years is not criminally responsible for any act or omission.*
- (2) *A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.”*

2.17 Section 5 of the Young Offenders Act 1993 in South Australia provides as follows: *“A person under the age of 10 years cannot commit an offence.”*

2.18 Section 18 of the Criminal Code Act 1924 in Tasmania provides as follows:

“(1) No act or omission done or made by a person under 7 years of age is an offence.

(2) No act or omission done or made by a person under 14 years of age is an offence unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make.”

2.19 In Western Australia, under section 29 of the Criminal Code:

“A person under the age of 10 years is not criminally responsible for an act or omission. A person under the age of 14 is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.”

New Zealand

2.20 In New Zealand, both the minimum age of criminal responsibility and the rebuttable presumption of *doli incapax* are governed by statute. Sections 21 and 22 of the New Zealand Crimes Act 1961 provide as follows:

“21(1) No person shall be convicted of an offence by reason of an act done or omitted by him when under the age of 10 years.

22(1) No person shall be convicted of an offence by reason of any act done or omitted by him when of the age of 10 but under the age of 14 years, unless he knew either that the act or omission was wrong or that it was contrary to law.”

Asia

Mainland China

2.21 In Mainland China, a child who has not attained the age of 14 is exempt from criminal responsibility. Under Article 17, Chapter 2 of the Criminal Law of the

People's Republic of China, a person who has attained the age of 16 shall be criminally responsible for the crime committed. For a person who has attained the age of 14 but is below the age of 16 years and has committed the crime of intentional killing of another, intentional injuring of another causing serious injury or death, rape, robbery, drug trafficking, arson, explosion or poisoning, he or she shall be criminally responsible for committing any of these offences. However, a person who has attained the age of 14 but is below the age of 18 shall be given a lesser punishment or a mitigated punishment for the crime committed. It is further provided under the same Article that where a person is not criminally punished because he has not reached 16 years of age, the head of his family or guardian will be ordered to subject the person to discipline. Shelter and rehabilitation will be provided by the government on a need basis.

Taiwan

2.22 In Taiwan, Article 18 of the Criminal Law provides that a child who has not attained the age of 14 years will not be punished for his act. An order will instead be made under Article 86 for him or her to be sent to a rehabilitation centre where rehabilitating education will be provided. A person over 14 but below the age of 18 years is criminally responsible for the crime committed, but will receive a reduced sentence.

Singapore

2.23 Under the Singapore Children and Young Persons Act 1993, a child is defined as a person who is below the age of 14 years. A juvenile is defined as a person aged between seven and 16 years of age while a young person is a person aged between 14 and 16 years of age. In Singapore, provisions are made in respect of the criminal responsibility of a child up to the age of 12 years of age. Sections 82 and 83 of the Singapore Penal Code respectively provide that:

“82 Nothing is an offence which is done by a child under 7 years of age.

83 Nothing is an offence which is done by a child above 7 years of age and under 12, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion.”

2.24 Under section 2 of the Singapore Criminal Procedure Code:

“... the youthful offender is defined as including any child convicted of any offence punishable by fine or imprisonment who in the absence of legal proof to the contrary is above the age of

*seven and under the age of 16 years in the opinion of the court before which the child is convicted.*⁹

A youthful offender in Singapore would thus include those who fall within the definitions of a child, a juvenile and a young person. Under section 235 of the Singapore Criminal Procedure Code, the criminal court is given a discretion to deal with a youthful offender in accordance with the Children and Young Persons Act 1993. This legislation has the effect of allowing youthful offenders to be tried and dealt with in juvenile courts where their interests will be taken into consideration in sentencing. Powers of sentencing include the making of care and supervision orders in respect of these offenders.

Malaysia

2.25 In Malaysia, the age of criminal responsibility is defined in sections 82 and 83 of the Malaysia Penal Code:

“(82) Nothing is an offence which is done by a child under ten years of age.

(83) Nothing is an offence which is done by a child above ten years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion.”

In this respect, the legal position in Malaysia is similar to that in Singapore, save that *“the floor age is ten instead of seven years”*.¹⁰ Under section 293 of the Malaysian Criminal Procedure Code, the criminal court is given a discretion to deal with a youthful offender under the Juvenile Courts Act 1947, thus giving a similar flexibility to that provided by the Children and Young Persons Act in Singapore.

India

2.26 In India, section 82 of the Indian Penal Code provides that *“Nothing is an offence which is done by a child under seven years of age.”* A child under seven years of age is thus exempt from any criminal responsibility. For a child above seven and under 12 years of age, section 83 of the Penal Code provides that:

“Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.”

⁹ Tan Yock Lin, *Criminal Procedure* (Butterworths Asia, 1997) at paragraph 4 XXI 2.

¹⁰ Cited above, *Criminal Procedure*, at paragraph 4 XXI 2.

Japan

2.27 In Japan, the age of criminal responsibility is 16. Offenders aged between 16 and 20 are generally dealt with in family courts where the sentences imposed are relatively lenient compared with those imposed on adult offenders for similar charges, and would include counselling, monitoring at home or detention at a juvenile institution. The recent unlawful killing in Japan of a 16 year old boy, Takakazu Take, by a 16 year old boy has provoked demands for the lowering of the age at which a person can be charged.

Africa

South Africa

2.28 The minimum age of criminal responsibility in South Africa is seven years of age. A child below the age of seven years is irrebuttably presumed to lack criminal capacity, while a child between the ages of seven and 14 years is “*deemed to lack criminal responsibility unless the State proves that the person in question can distinguish between right and wrong and knew the wrongfulness of the offence at the time of its commission*”.¹¹ Unlike the position in Hong Kong, the burden of proof imposed on the prosecution in seeking to rebut the presumption is proof on a balance of probabilities, rather than proof beyond reasonable doubt.

Oceania and the Pacific islands

Fiji

2.29 In Fiji, similar presumptions of *doli incapax* are adopted in respect of the law governing the age of criminal responsibility of children and young persons, albeit the ages set for the irrebuttable and rebuttable presumptions are different from those adopted in Hong Kong. Section 14 of the Fiji Penal Code (Cap. 17) provides as follows:

- “1. A person under the age of ten years is not criminally responsible for any act or omission.
2. A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had

¹¹ South African Law Commission, *Juvenile Justice* (1997), Issue Paper 9, at paragraph 3.5.

capacity to know that he ought not to do the act or make the omission.

3. *A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.”*

2.30 Section 29 of the Juvenile Act (Cap. 56) further provides that:

- “1. *It shall be conclusively presumed that no child under the age of ten years can be guilty of any offence.*
2. *A person of or over the age of ten and under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not do the act or make the omission.*
3. *A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.”*

Other overseas jurisdictions

2.31 To give a more complete picture of the range of ages at which criminal responsibility is fixed in other overseas jurisdictions, the following list shows the minimum age of criminal responsibility in a number of jurisdictions which have not been examined in the preceding paragraphs:

Jurisdiction	Age of Criminal Responsibility
Belize	7
Ghana	7
Malawi	7
Nigeria	7
Papua New Guinea	7
Bermuda	8
Cayman Islands	8
Gibraltar	8
Kenya	8
Sri Lanka	8
Western Samoa	8
Zambia	8
Guyana	10
Kiribati	10
Vanuatu	10
Jamaica	12
Uganda	12

Mauritius	14
Macau	16

2.32 In addition, a comprehensive list showing the age of criminal responsibility in all the jurisdictions referred to in this consultation paper is provided in Annex 2.

International trends

2.33 It is clear from the material contained in this chapter that there is considerable disparity among different jurisdictions as to the minimum ages adopted for imposing criminal responsibility. There is no doubt that Hong Kong's minimum age is at the low end, with minimum ages ranging internationally from seven to 16 years. Hong Kong is not alone in adopting seven as the minimum age, however. That age is followed in such varied jurisdictions as Singapore, Switzerland and South Africa. What is perhaps of more significance is that where change has taken place, the trend appears to have been towards a raising of the minimum age.¹² This has prompted the observation that:

*"There has been a trend internationally towards raising the age in recent years - for example, in Canada from seven to 12 and in Israel from nine to 12. In a report of January 1995, the UN Committee on the Rights of the Child recommended that 'serious consideration be given to raising the age of criminal responsibility throughout the areas of the United Kingdom'."*¹³

2.34 Australia, too, has changed its laws in this area and has abandoned the common law rule of seven years as the minimum age of criminal responsibility. With the exception of Tasmania (which still retains seven years as the minimum age), most of the Australian states and territories have now adopted ten years as the minimum age of criminal responsibility. New South Wales, South Australia, Queensland, Western Australia, Victoria and the Northern Territory have all now adopted ten years of age as the minimum age of criminal responsibility. Similarly, in Africa, the Children's Statute 1996 in Uganda raised the minimum age from seven to 12, while proposals have been made in both Ghana and South Africa to raise the minimum age from the present seven years of age.¹⁴ Under the Children Bill 1999, Ireland has likewise proposed to raise the minimum age of criminal responsibility from the present age of seven years to 12 years.

¹² It was, however, reported in the *Hong Kong Standard* on 11 March 2000 ("Macau may lower criminal age as youth violence flares") that the Macau SAR Government is considering lowering the age of criminal responsibility in Macau (at present 16 years) to deal with a surge in juvenile crime.

¹³ Cited above, "Goodbye Doli, Must We Leave You?", at 170.

¹⁴ *Report by the Ghana National Commission on Children* (1996), Part VII, article 1, referred to in South African Law Commission, *Juvenile Justice*, above, at 3.11.

2.35 The international trend towards a raising of the minimum age of criminal responsibility must be viewed with some caution, however. Equally, while the practice in other jurisdictions is of relevance, it cannot be regarded as presenting a conclusive case for change, particularly in an area of the law which even more than most reflects the cultural and social values of the particular jurisdiction.

Chapter 3

The arguments for and against reform

Introduction

3.1 In the first part of this chapter we set out the general arguments for and against raising the minimum age of criminal responsibility, and in the second part we examine the arguments for and against abolition or reform of the closely linked rebuttable presumption of *doli incapax*. The arguments follow those presented in the consultation paper.

Arguments in favour of retaining the age of seven years as the minimum age of criminal responsibility

Minimises exploitation of children by adult criminals

3.2 The consultation paper pointed out that one of the principal arguments in favour of preserving the present minimum age is the concern that raising the minimum age would widen the pool of young children available for exploitation by undesirable characters. The higher the minimum age is fixed, it was argued, the greater would be the number of children exempt from prosecution, thus enlarging the number of “more mature” young children capable of exploitation by adult criminals. Indeed, the fear that children above the age of seven were old enough to be used by criminals for unlawful purposes was the principal reason for the rejection by the Legislative Council in 1973 of a proposal in the Juvenile Offenders (Amendment) Bill (the Bill) to raise the minimum age of criminal responsibility to ten. In the second reading of the Bill, Mr Woo Pak-chuen raised the following objection to the proposed increase in the minimum age of criminal responsibility:

“[M]y Unofficial colleagues and I have given anxious consideration to the increase in the minimum age of criminal responsibility proposed in clause 4 of this bill. Our conclusion is that this change would be most undesirable in the present circumstance of Hong Kong.

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. Members of this Council will no doubt recall that there have been reports of racketeers using such young children to carry drug packets. 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.

My Unofficial colleagues and I are of the opinion that the minimum age of criminal responsibility should remain, at least for the time being, unchanged. I shall accordingly move an amendment to clause 4 of the bill at the Committee Stage, the effect of which will be to restore that age from 10 years to 7 years.”¹

3.3 In the light of that objection, the Attorney General of the day indicated that the Government would not oppose the proposed amendment and the age of criminal responsibility accordingly remained unchanged. Similar concerns were expressed in the report submitted in 1996 on behalf of the Hong Kong Government to the United Nations Committee on the Rights of the Child:

“Organised crime syndicates could conceivably exploit a rise in the age at which a child would be liable to prosecution by coercing or employing young children to act as thieves or drug-runners in the knowledge that they could not be prosecuted. The higher the age of criminal responsibility, the easier it would be for gangsters to exploit children.”²

Greater maturity of present day children

3.4 It can be argued that the enhanced educational opportunities available to today’s children (not least through the increased availability of knowledge through the media and the Internet) mean that they reach social maturity more quickly than their counterparts in earlier times, and are capable of distinguishing right from wrong at a young age.

3.5 Most children in Hong Kong begin their kindergarten education at the age of three or four. School attendance is compulsory for those between the ages of six and 15. Under the “*General Guidelines on Moral Education in Schools*” promulgated by the Education Department, schools are required not only to provide academic training for their students, but are also tasked to develop in them:

¹ Hong Kong Hansard, Session 72/73, 446 (14 February 1973).

² Initial Report of the United Kingdom of Great Britain and Northern Ireland in respect of Hong Kong under Article 44 of the Convention on the Rights of the Child (the Report to the UN), at 186.

“... reflective and critical thinking, moral attitudes and social values. Pupils are provided with opportunities to practise moral values and make moral decisions under teachers’ guidance.”³

3.6 It is argued by those who favour retaining the existing age of criminal responsibility that, since children would have received some four years of formal education (two years in kindergarten and another two years in primary schooling) by the age of seven years, they must by then have had inculcated in them the notion of “right” and “wrong”, as well as the necessary “moral attitudes” and “social values” essential for their recognition that a certain act is a “serious wrong” in the ordinary sense of the term.

3.7 Opinion was divided on this point among those who responded to the consultation paper, with some agreeing that today’s children reached maturity at a younger age than those of earlier generations, while others such as the majority of the Lawyer’s Group of the Amnesty International Hong Kong Section maintain⁴ that children under 14 years of age are not mentally mature enough to appreciate the serious wrongfulness of their criminal conduct. This latter group argues that it is therefore inappropriate to expose these children to a criminal prosecution process whose procedure and underlying educational value they do not understand.

Children are no longer subject to draconian penalties

3.8 The consultation paper pointed out that one of the principal reasons for the development of the common law rules on criminal responsibility was to avoid the necessity of imposing on children the harsh penalties which applied to transgressions of the criminal law in medieval times. Hence, the fixing of a minimum age of criminal responsibility was coupled with the rebuttable presumption of *doli incapax* in respect of children between seven and 14. Draconian penalties are now consigned to history, and there is no reason to seek to raise the age of criminal responsibility to protect children from inappropriate punishment.

3.9 As mentioned in the consultation paper, the Report to the UN argues that the Juvenile Offenders Ordinance (Cap. 226) (the JOO) “adequately protects children from the full penalties of the law as they apply to adults”.⁵ Under section 3A of the JOO, a Juvenile Court presided over by a permanent magistrate shall have jurisdiction to hear and determine a charge against a child or a young person of any offence other than homicide. Although the procedure adopted in the Juvenile Court is basically identical to that in ordinary courts, special allowances are permitted to cater for the age and maturity of the

³ Cited above, the Report to the UN, at 163.

⁴ In a letter to the Secretary to the Commission dated 1 May 1999.

⁵ Cited above, the Report to the UN, at 186.

particular child defendant. Moreover, when a child is found guilty of an offence in the Juvenile Court, the presiding magistrate, in considering what should be the appropriate sentence to be imposed, may take advice from two members of the Juvenile Courts Advisory Panel. These persons are well-versed in what should be the appropriate methods for dealing with juvenile offenders.

3.10 To further illustrate the assertion that children nowadays are no longer subject to draconian penalties, the consultation paper examined a range of sentences which might be imposed on children and young persons. These sentencing options are designed to encourage rehabilitation rather than punishment of these offenders. This principle is enshrined in section 11 of the JOO:

“(1) No child shall be sentenced to imprisonment or committed to prison in default of payments of a fine, damages, or costs.

(2) No young person shall be sentenced to imprisonment if he can be suitably dealt with in any other way.”

3.11 Under section 15 of the JOO, various sentencing alternatives to imprisonment are provided for children and young persons for the purposes of rehabilitation through counselling, discipline and training. These methods include: the provision of care and protection under section 34 of the Protection of Children and Juveniles Ordinance (Cap. 213); the paying of a fine, damages or costs either by the offender or parent or guardian of the offender; the ordering of the parent or guardian of the offender to give security for his good behaviour; the committing of the offender to custody in a place of detention; and *“dealing with the case in any other manner in which it may be legally dealt with”* (section 15(1)(n) of the JOO). In addition, where a child or a young person is tried by any court for an offence and the court is satisfied of the person’s guilt, the court may nevertheless dismiss the charge by virtue of section 15(1)(a) of the JOO. This discretion is widely exercised by magistrates in the juvenile courts. Before exercising this discretion, the magistrate would usually take into consideration all the relevant circumstances, including the seriousness of the offence and the background of the child or young person in question. Usually, a probation officer’s report or a report from the Social Welfare Department is called for to assist in the court’s better understanding of the person’s background. Once the charge is dismissed under this section, no conviction record would be entered against the person.

3.12 The following are the options generally available to courts for the purposes of rehabilitating young offenders between seven and 14 years of age:

(i) *A Probation Order*

Under the Probation of Offenders Ordinance (Cap 298), a probation order can be made against an offender of any age

group. It has a maximum duration of three years. Within the probation period, regular meetings with the probation officer are required for counselling. The probation officer can also direct the offender in terms of work, study, and residence. For young offenders under the age of 16 years, they may be required under the probation order to reside in a probation home during some of the probation period where they are required to undergo a five-hour academic or pre-vocational training each day, on top of a two-hour group training on weekdays. In addition, with a view to cultivating a sense of civic responsibility amongst these youngsters, the residents are required to provide community service to the elderly and the disabled.

(ii) *A Reformatory School Order*

Under the Reformatory Schools Ordinance (Cap 225), the court may order offenders below 16 years of age to be detained in reformatory schools. One of the major purposes of these schools is to remove young offenders from undesirable influences, and so enhance the chance of successful rehabilitation. The maximum period of “in-home” training is three years where academic and pre-vocational training are provided. Participation in community service programmes is also arranged for the purposes of cultivating a sense of civic responsibility.

(iii) *The Community Support Service Scheme*

The scheme was introduced by the Social Welfare Department and two non-Government organisations with the purpose of reactivating young persons’ interest in school or in work, and to develop their social skills. The scheme operates as an added support to those who are subject to probation orders, reformatory school orders or who have been cautioned under the Police Superintendents’ Discretionary Scheme.

(iv) *A binding over order*

A binding over order aims to prevent a future breach of the peace. In *R v To Kwan-hang and Another*,⁶ it was explained that a breach of the peace occurs where a person resorts to violence which injures someone or damages property, or which puts someone in immediate danger of injury or puts property in immediate danger of damage.

A binding over order may be made in respect of anyone before the court if the court is satisfied that the peace will be disturbed by such a person unless he is bound over. Accordingly, such an order

⁶ [1994] 2 HKC 293.

is appropriate not only for a defendant who is brought before the court; but can also be applied to a complainant, an informant or a witness who is before the court, if the court foresees any disturbance of the peace on his or her part.

One of the situations where a binding over order can be made is where the prosecution agrees to offer no evidence in respect of the acts of a defendant on condition that the defendant agrees to bind himself over, and to keep the peace for a certain period of time. In those circumstances, there is no conviction and the binding over order is therefore not a sentence. Accordingly, the accused's consent to be bound over by either himself entering into his own recognizance or to find sureties to be of good behaviour would not result in any criminal record being entered against him.

Prevents establishment of pattern of delinquent behaviour

3.13 Noting that the options available to a court of law in dealing with young offenders focus mainly on rehabilitation, the consultation paper presented the argument that raising the minimum age of criminal responsibility would have the negative effect of removing children from the safety net of these rehabilitation measures until they were older and therefore more likely to have established a pattern of delinquent behaviour. Attempts at rehabilitation may prove less successful where such behaviour has become established.

3.14 This argument was supported by some who responded to the consultation paper, who observed that the Police Superintendents' Discretion Scheme has worked well to "nip things in the bud" as far as young offenders are concerned and serves to discipline young children who might have otherwise gone astray.

Adequate existing provision to limit prosecution of children under ten

3.15 It is argued by those in favour of raising the present minimum age of criminal responsibility that children in their formative years should not be made subject to criminal proceedings as the trauma caused may be damaging. It is thus suggested that seven years is too young an age for court proceedings as well as too young an age for criminal sanctions.

3.16 In response, the consultation paper pointed out that it can be argued that under the existing prosecution policy, special allowances have been made for offenders aged between seven and ten years, thus making it the exception rather than the rule to subject children in their formative years to the trauma of criminal proceedings. The consultation paper referred to the Report to the UN,⁷ which had pointed out that in reaching a decision as to whether or not to

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Cited above, the Report to the UN, at 187-188.

prosecute a particular case, the prosecuting authority would take into consideration a range of factors including:

- the seriousness of the alleged offence;
- the age, apparent maturity and mental capacity of the child;
- the efficacy of available alternatives to prosecution (such as a Police Superintendent's discretionary power to issue a caution);
- the sentencing options available to the Juvenile Court;
- the child's family circumstances; the child's antecedents; and
- the question of whether a prosecution would be harmful or inappropriate.

Indeed, most of these considerations have been included in the prosecution policy guidelines issued by the Department of Justice as guidance for Government Counsel when considering the institution or continuation of criminal proceedings. The guidelines provide, *inter alia*, that:

"It is a long standing statutory requirement that the Courts shall have regard to the welfare of the juvenile appearing before them, in criminal as in civil proceedings. It is accordingly necessary that, in deciding whether or not the public interest requires a prosecution, the welfare of the juvenile should be fully considered as well as the provisions of section 109A of the Criminal Procedure Ordinance, Chapter 221 which restricts sentences of imprisonment of persons between 16 and 21 years of age.

There may be positive advantages for the individual and for society in using prosecution as a last resort. In general there is, in the case of juvenile offenders, a much stronger presumption in favour of methods of disposal which fall short of prosecution unless the seriousness of the offence or other exceptional circumstances dictate otherwise. The objective should be to divert juveniles from court wherever possible. Prosecution should always be regarded as a severe step.

It will never be right to prosecute a juvenile solely to secure access to the welfare powers of the court. Where Government Counsel thinks that there may be grounds for care proceedings and that this might better serve the public interest and welfare of the individual, he should invite the police to put this possibility to the Social Welfare Department.

In deciding whether or not the public interest warrants the prosecution of a juvenile regard should be had to such of the factors set out below:

- (i) the seriousness of the alleged offence;*
- (ii) the age and apparent maturity and mental capacity of the juvenile;*
- (iii) the available alternatives to prosecution, particularly a Police Superintendent's discretion power to issue a caution to juveniles, and their efficacy;*
- (iv) the sentencing options available to the relevant Juvenile Court if the matter were to be prosecuted;*
- (v) the juvenile's family circumstances particularly whether the parents of the juvenile appear able and prepared to exercise effective discipline and control over the juvenile;*
- (vi) the juvenile's antecedents, including the circumstances of any previous caution the juvenile may have been given, and whether they are such as to indicate that a less formal disposal of the present matter would be inappropriate; and*
- (vii) whether a prosecution would be likely to be harmful to the juvenile or be inappropriate, having regard to such matters as the personality of the juvenile and his or her family circumstances.⁸*

3.17 The consultation paper pointed out that one of the most frequently used alternatives to criminal prosecution in dealing with an arrested person below the age of 18 is to administer a caution under the Police Superintendents' Discretion Scheme (the PSDS). Under this scheme, a police officer of or above the rank of Superintendent may exercise his or her discretion not to prosecute an offender under 18 years of age, but instead to administer a caution. Depending on the circumstances, the Superintendent may (subsequent to the caution) make an order for the Juvenile Protection Service (JPS) of the Police to pay follow-up visits to the cautioned person; or may instead refer the person to the Social Welfare Department, Education Department, and/or Community Support Services Scheme through JPS for professional after care measures.

3.18 The combined effect of the prosecution policy to which we referred earlier and the range of alternatives to formal court proceedings which are available is that young offenders under the age of 18 years (and particularly those below the age of ten) are diverted to non-court processes whenever possible. To illustrate this point, we noted in the consultation paper that according to information provided by the Police,⁹ a total of 8,810 persons below 18 years of age were arrested for various criminal offences in 1997. Of these,

⁸ Department of Justice, *Prosecution Policy: Guidance For Government Counsel* (1998), at 18-19.

⁹ In a letter to the Secretary to the Commission dated 26 September 1998.

4,802 (54.5%) were eligible for the PSDS. Of those eligible for the scheme, a total of 3,265 persons were not prosecuted, but were cautioned under the PSDS instead. The number of children aged between seven and 14 years cautioned under the PSDS for specific selected offences from 1993 to 1998 is provided at Tables 3.1 to 3.6 of Annex 3. This gives a caution rate of 68% out of those eligible for the PSDS. Figures on recidivism¹⁰ confirm the scheme to be a success, as a great majority of juvenile offenders who have been diverted from court proceedings through the PSDS have refrained from committing further criminal offences during the monitoring period. Of the total number of persons cautioned and dealt with under the PSDS for criminal cases, the recidivist rate for the years 1993 to 1995 is 14.3%, 15.7% and 17.7% respectively.

3.19 In its submission to the Commission, the Hong Kong Police remarked that one of the reasons for their support of the present minimum age of criminal responsibility and the present procedure for dealing with young persons is that the present system as a whole helps to facilitate the operation of the PSDS which can, in appropriate cases, divert young persons of up to the age of 18 years from the full impact of the criminal justice system. It should be noted that the effect of raising the minimum age of criminal responsibility would be to remove children below that age from eligibility for the PSDS.

3.20 It followed from this line of argument that, since alternative measures have been designed to limit the prosecution of very young children, the present minimum age should be retained so that community interests could be safeguarded by retaining the formal prosecution option for the rare cases where a serious crime is committed by a young child.

3.21 This point was taken up by one commentator, who remarked that “wickedness” or “evilness” was not the prerogative only of adults. He observed that in other jurisdictions incidents had occurred where violent and disturbed children had been involved in threats, assault and even homicide. The “Bulger case” in the United Kingdom and a recent case in Hong Kong involving the torture and killing of a young teenager by his peers were illustrations of the extent to which young children had been involved in serious crime.

3.22 A contrary view was expressed by another respondent who considered that there were inadequate provisions to limit the prosecution of children under ten years of age. The discretionary power of the police to arrest these offending children and the discretionary power of the prosecution to prosecute them may, according to this commentator, be exercised with variations from district to district and from time to time. The PSDS had weaknesses, which included the fact that the scheme is only open to an offender with no previous criminal record; the offender must have admitted the offence, and that the caution administered makes no distinction between a child who understands the seriousness of his act and one who does not.

¹⁰ According to the Police, a person is regarded as a recidivist if he/she is re-arrested for crime within two years from the date of the caution, or before he/she reaches 17 years old (for those arrested after 1st September 1995, before reaching 18 years old), whichever occurs first.

3.23 The Boys' and Girls' Clubs Association of Hong Kong shared a similar view on this point and remarked¹¹ that there is a substantial disparity in the ways young children are handled by the police: they may decide to prosecute a child in one case but may decide not to do so in a similar case involving a different child.

Essential for the prosecution of more serious crimes

3.24 Those favouring the retention of the existing age of criminal responsibility argue that the preservation of a power to prosecute children between the ages of seven and 14 is essential in order that young delinquents who commit serious offences can be effectively dealt with. While instances of such conduct may be rare, it is necessary to retain the option of formal prosecution in the most serious cases. As we have seen, existing prosecution policy ensures that this power is used sparingly, but exceptional cases may require its use. As noted above, one such was the Bulger case in England, where James Bulger was killed by two boys who were aged ten at the time of the offence and were 11 years of age when tried.

3.25 Statistical data provided by the Police on the number of persons aged between seven and 14 years arrested in the period between 1993 and 1999 make clear that, while only a very small number of children aged between seven and ten are arrested for serious offences such as robbery or burglary, such cases do occur. The statistics are at Tables 4.1 to 4.7 of Annex 4. The number of persons arrested for breaking the law increases proportionally to age, and it is not unusual for children aged between 12 and 14 years to be arrested for serious offences such as indecent assault, wounding, serious assault, criminal intimidation, robbery, burglary, criminal damage. For this reason, the consultation paper noted the argument that while the number of occasions when children of seven may be involved in serious criminal conduct are few, such cases do arise and justify the retention of the present minimum age.

3.26 This argument was supported by, among others, the Immigration Department which suggested that:¹²

“although statistics show that very young children pose little threat to law and order, the present minimum age should be retained so that community interest could be safeguarded by retaining the formal prosecution option for the rare cases, such as the Bulger case in England (para.3.18), where a serious crime is committed by a young child.”

¹¹ In a letter to the Commission dated 31 March 1999.

¹² In a letter to the Secretary to the Commission dated 8 April 1999.

3.27 Those supporting this view argued that the preservation of the power to prosecute children between the ages of seven and 14 would not only provide a necessary instrument for the prosecution of serious offences involving young children, but would also act as a deterrent to children at risk of becoming further involved in crime.

3.28 Others, however, disagreed with this argument on the basis that the small number of children below the age of ten who were arrested did not justify the retention of the existing minimum age of criminal responsibility. Those few young children who were involved in serious crimes could in any case be more appropriately dealt with by measures other than the criminal justice system.

The rebuttable presumption of *doli incapax* adequately protects children between the ages of seven and 14

3.29 In answer to the suggestion that it is inappropriate to subject children as young as seven years of age to the formal prosecution process, the consultation paper noted that it could be argued that the existing rebuttable presumption of *doli incapax* has operated to protect children between seven and 14 years from the full force of criminal responsibility, leaving only those children within the age-group who can be proved to know that their conduct was a serious wrong to be held criminally responsible for their acts. Where such knowledge cannot be established because of the child's immaturity, a prosecution will not succeed. The existing law therefore enables criminal sanctions to be applied to young children who are aware of the nature of their conduct, while protecting from prosecution those of a similar age who have not yet reached a sufficient level of maturity.

Arguments in favour of raising the minimum age of criminal responsibility from seven to a higher age

3.30 We pointed out in the consultation paper that those who favour raising the minimum age of criminal responsibility propose a variety of different ages as the new minimum, but there has been no strong suggestion that the minimum age of criminal responsibility should be fixed at an age higher than 14 years. It appears to be generally accepted that in a modern society like Hong Kong a child aged 14 or above should be mentally mature enough to be accountable for his or her deeds. This leads to the generally recognised notion that the criminal liability of a person at or above the age of 14 should be the same as those who are 20, 30 or 40, although the sentence imposed on a 14 year old would take into consideration the young age of the offender. This, however, goes to mitigation and not to responsibility. With that in mind, the arguments which follow in favour of a raising of the age of criminal responsibility assume that any new minimum would not exceed 14 years of age.

A seven year old child is too young to appreciate the gravity of his actions

3.31 The consultation paper noted that the principal argument in favour of raising the present minimum age of criminal responsibility in Hong Kong is that the age was set at a time when there was no scientific basis for the assertion, albeit rebuttable, that a seven year old child was capable of appreciating that his or her acts were seriously wrong. Indeed, as stated earlier, the age of seven years was fixed by the courts in late medieval England. Those arguing for change point out that, in the light of modern knowledge of child psychology and human development, the present situation is unsatisfactory and argue that a child of seven is unable to appreciate whether particular conduct amounts to a serious wrong. Indeed, it is argued that a young child's entanglement in crime makes him more a "victim" than a perpetrator of the offences alleged.

3.32 The consultation paper referred to the findings of Lawrence Kohlberg, a leading American psychologist specialising in moral development, moral judgment and reasoning. According to Kohlberg, these moral aspects of an individual would develop in three distinct levels which can be further subdivided into six different stages. In the "preconventional level" (level 1) which is generally believed to include children between the ages of four and ten years, Kohlberg argues that observance of rules and regulations is mainly based on a desire to avoid punishment. In the "conventional level" (level 2) which is generally believed to include children between the ages of ten and 13 years, Kohlberg believes that children at the lower end of this age-group are conforming to the generally acceptable norms and rules with an intent to avoid disapproval or dislike of others. As they grow older within this age bracket, children begin to conform for the purposes of avoiding sanctions by legitimate authorities and findings of guilt as a result of breaking the law. At adolescence at around 13 years of age, the child proceeds to what Kohlberg has termed the "postconventional stage" (level 3) where conformity to the law is motivated by the desire to maintain and preserve community welfare.

3.33 Kohlberg's theory suggests that conformity by a child under the age of 13 to rules and commands is generally motivated by a desire to avoid punishment or disapproval, rather than by an awareness that the conduct is seriously wrong. It is therefore argued that it is wrong to subject a child of seven to the consequences of criminal proceedings on the basis that he might be capable of appreciating the nature of his conduct. It can further be argued that even if a child of nine or ten is able to tell "right" from "wrong"; it is doubtful whether he would be able to appreciate an act to be a serious wrong. The inappropriateness of imposing criminal liability on a young child has been expressed as follows:

"It seems ridiculous to say that, at the age of 10, when it is probably somebody else who chooses which clothes you wear, what you eat and where you go, a child should be held

*accountable for what it does in the same way that an autonomous and independent adult should be. The distinction between adult and child is blurred - and in the process, the real meaning of being independent and responsible is lost.*¹³

3.34 The Hong Kong Psychological Society agrees with the assertion that a seven-year old child is too young to be called upon to bear criminal responsibility for his or her conduct. In its submission to us, the Society expressed the view that children would have learned of the importance of law and order, and the expectations society would have of them, by the age of ten to 12 years, corresponding to the age at which a child's cognitive and moral maturity begin to develop.

3.35 A substantial number of those who responded to the consultation paper agreed that a seven-year old child is too young to appreciate the gravity of his actions. The Duty Lawyer Service (DLS), among others, agreed¹⁴ that children would only begin to have full control of themselves at about the age of 12 years and that a mature moral concept of right or wrong would only develop at the age of 12 or 13 years. The DLS further commented that only children aged 12 (who have received seven out of nine years of formal education) could have acquired sufficient knowledge of "right" and "wrong", and not children of seven years of age (who have only completed one to two years of primary education).

3.36 In its submission to the Commission, the Department of Health said that:

"Developmental psychologists believe that the ability to act on right and wrong depends on many factors, including cognitive understanding of the rules of society, perspective taking and empathic feelings. These factors are important determinants of children's moral judgement and reasoning. They follow a developmental path and are closely tied to children's age. A child 10 years and under is unlikely to have attained the necessary skills to judge right and wrong and to fully realize the serious consequences of his/her actions."

3.37 Similarly, the Hong Kong Young Women's Christian Association believes¹⁵ that present day children are only more mature than those in the past in their outward appearance. It is therefore inappropriate to expose them to the rigours of the criminal justice system.

¹³ L M, Archives "Now we are all 10 again", <<http://www.informinc.co.uk/LM/Lm105/LM105Doli.html>>, (Issue 105, 1997) at 2.

¹⁴ In a letter to the Secretary to the Commission dated 11 March 1999.

¹⁵ In a letter to the Secretary to the Commission dated 16 March 1999.

Unfair to require a seven year old child to stand trial

3.38 A further argument in favour of raising the age of criminal responsibility is that the nature of the trial process means that a young child will be placed at a severe disadvantage in conducting his defence, as compared to an adult defendant. That disadvantage may be so significant as to negate the possibility of a fair trial. The inability of a young child to cope with the daunting experience of going to court, or to comprehend the proceedings, may mean that he is neither able to appreciate advice given to him by his legal representative nor to provide proper and well-reasoned instructions. This must inevitably affect adversely the child's interests at the trial. Indeed, the trial in England of the two 11 year old boys charged with the killing of James Bulger prompted the following comment:

*"... most foreign commentators were amazed that children of this age should be dealt with by an adult-style Crown Court criminal trial. Many observers questioned whether such young children were really able to comprehend the complexities of a lengthy criminal prosecution and trial; whether they should have appeared in the full glare of media coverage of Crown Court proceedings; whether they understood all the issues and language used, in order to give clear instructions as necessary; whether their decision not to give evidence arose from fear of speaking in such a public forum; and whether it was right to lift reporting restriction after conviction, thereby allowing their names and photographs to be widely published with the difficulties which this would pose for their eventual rehabilitation."*¹⁶

3.39 In the particular circumstances of the Bulger case, the European Court of Human Rights subsequently held in respect of one of the accused that he:

*"... was unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing in breach of Article 6(1) [of the European Convention for the Protection of Human Rights and Fundamental Freedoms]."*¹⁷

¹⁶ P Cavadino, "Goodbye Doli, Must We Leave You?" (1997) 9, No 2 *Child and Family Law Quarterly* 165 at 169.

¹⁷ *V v the United Kingdom* (European Court of Human Rights, Application No 24888/94), at 18. Article 6(1) of the Convention provides that in "the determination of ... any charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgments shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

In reaching that conclusion, the court took account of psychiatric evidence as to the accused's ability to participate in the proceedings, and the formality and ritual of the Crown Court which "*must at times have seemed incomprehensible and intimidating for a child of eleven.*" There was evidence that:

*"... certain of the modifications made to the courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and the public."*¹⁸

3.40 A number of respondents supported the assertion that young children should never be subject to criminal proceedings. The Hong Kong Family Law Association believes that it is not necessary to charge, try and sentence a young offender in order to bring him back on the right lines. More convictions and more custodial sentences will not, according to the Association, solve the problems of young offenders; rather, the reverse is likely to occur. The Association argues that a child in trouble should be rehabilitated through mechanisms other than the criminal justice system.

Undesirable to impose the stigma of conviction on a child

3.41 Apart from being unfair and inappropriate to subject a seven-year old child to the traumatic and confusing experience of appearing in court, those favouring a change in the law point out that another undesirable effect of prosecuting and convicting a young child is the fact that he will bear the stigma for the rest of his life of wrongs committed at a young age. On conviction, the child will be left with a criminal record which may adversely affect him in later life. This argument was supported by a number of respondents to our consultation paper, who believed that imposing a criminal conviction on a young child involved in crime would alienate him from society, and may eventually lead him towards a criminal career.

Other jurisdictions have higher minimum age of criminal responsibility

3.42 The figures in the previous chapter show that Hong Kong is in a minority in imposing criminal responsibility at the age of seven. The trend is towards a raising of the age of criminal responsibility, and that trend has been emphasised by the United Nations Committee on the Rights of the Child and the United Nations Human Rights Committee, both of which have recommended that Hong Kong should consider raising its age of criminal responsibility.

¹⁸ Cited above, *V v the United Kingdom*, at 18.

Better education does not necessarily guarantee a greater readiness to distinguish right from wrong

3.43 Those favouring the retention of the existing age of criminal responsibility argue that better education opportunities in Hong Kong through compulsory school attendance for children between the ages of six and 15 have rendered present day children more mature, and they are thus capable of distinguishing right from wrong at an early age. In response, those arguing for a raising of the age claim that better education does not necessarily guarantee a greater ability in young children to distinguish right from wrong. This observation was further elaborated by Lord Lowry in the House of Lords' decision in *C (A Minor) v DPP*:

*"It is true that there is (and has been for a considerable time) compulsory education and, as the judge said, perhaps children now grow up more quickly. But better formal education and earlier sophistication do not guarantee that the child will more readily distinguish right from wrong."*¹⁹

Echoing this comment from Lord Lowry is the suggestion that "... *in view of the association between truancy and offending and the recent sharp rise in school exclusion, that many of the children concerned have in practice failed to benefit from universal compulsory education*".²⁰

3.44 A number of respondents observed that better educational opportunities do not necessarily mean that children today are more readily able to distinguish right from wrong. It could be argued that while children nowadays might be seen as more sophisticated than their predecessors, they are also subject to greater levels of misinformation, which may impede their ability to distinguish right from wrong. One respondent remarked that present day education places too much emphasis on intellectual development, sometimes at the expense of moral development. Students are thus not adequately taught or trained in the making of correct moral, social and value judgements. Accordingly, greater educational opportunity would not guarantee any greater appreciation by young children of the risk and consequences of their acts.

Young children should in principle be exempt from prosecution

3.45 It is clear from the outline of prosecution policy given earlier in this chapter that, while children between the ages of seven and 14 are liable to be prosecuted under the law as it stands, the majority of criminal cases involving children below the age of ten years have been dealt with by alternatives other than prosecution. Many of these cases are dealt with by the PSDS. It could be said that the prosecution policy has in fact tacitly recognised the

¹⁹ [1995] 2 WLR 383, at 396.

²⁰ Cited above, "Goodbye Doli, Must We Leave You?" at 167.

inappropriateness and undesirability of subjecting young children to criminal proceedings which are essentially designed for adult offenders.

3.46 Mr Ian Wingfield, Law Officer of the Civil Division of the Department of Justice, noted²¹ that almost none of the 20 to 30 children between the ages of seven and 11 prosecuted each year in Hong Kong were convicted. Mr Wingfield assumed that the court on each of those occasions had ruled that the child had not had the requisite capacity. Mr Wingfield concluded that the chances of a child below the age of 11 being convicted were so remote that the reason given for retaining seven years as the age of criminal responsibility could not be justified by the facts.

3.47 Figures provided by the Prosecutions Division of the Department of Justice for 1998 and 1999 for the number of defendants aged 11 years or younger appear to bear out this contention.

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)***

	<i>No. of persons arrested (%)</i>
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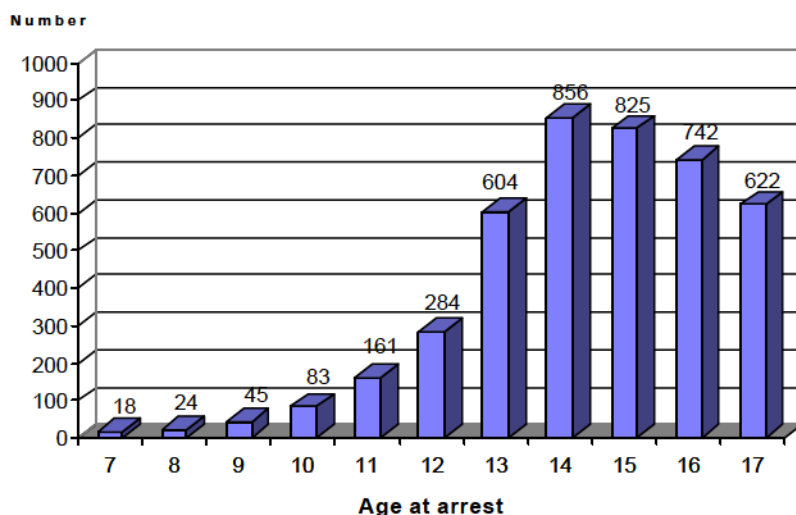
²¹

In a letter to the Secretary to the Commission dated 18 March 1999.

Age Year	7	8	9	10	11	12	13	14	Total (7-14)
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)	665 (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)

3.49 It is significant to note that in each of the years from 1993 to 1999, less than 1% of the total number of arrested persons aged between seven and 14 years of age are seven-year-olds. Eight-year-olds constitute just over 1%, and nine-year-olds just over 2%, of the total number of arrested persons aged between seven and 14 years. A similar picture emerges from the following chart provided by the Police, which shows the number of persons arrested in the period from January to June 1998 who were below 18 years of age.

**Persons aged under 18 arrested in Hong Kong
January - June 1998**



3.50 These statistical findings confirm that, in reality, young children at or below the age of nine pose very little threat to law and order. Accordingly, the consultation paper noted that it could be argued that the law should reflect this reality and adjust the minimum age of criminal responsibility to a more

appropriate age to ensure that young children who pose no substantial threat to society should not be subject to criminal proceedings.

3.51 The Duty Lawyer Service confirmed²² that no significant offences have been committed by young children. In respect of those represented by the Service aged between eight and 11 years the offences committed were mainly theft and were not of a serious nature. For this reason, the Service believes that young children at or below the age of 12 pose no substantial threat to society and should not incur criminal responsibility for their actions, a view supported by a substantial number of individual respondents as well as organisations with an interest in youth matters.

The present minimum age is inconsistent with other legislative provisions which protect children up to the age of 21

3.52 Critics of the present minimum age point out that it is inconsistent with the general tenor of most legislative provisions involving children in Hong Kong, which recognise that special provision must be made for young children to reflect their lack of maturity and judgment. In view of the relatively young age the law has fixed for criminal responsibility to commence, it has been observed that the situation in Hong Kong is anomalous as “*people may be deemed too young for some activities, yet old enough for others*”.²³

3.53 A convenient summary of the different definitions adopted in Hong Kong’s legislation for “child” is provided in the Report to the UN:

“The Age of Majority (Related Provision) Ordinance (Cap. 410) provides for a person generally to attain majority at the age of 18. Consequential legislative amendments have been made to enable a person who has attained the age of 18 to make testamentary dispositions, act as a co-trustee and guarantor, be qualified to assume the duties of a company director and enter contracts.... The Rules of the Supreme Court provide that a person under 18 cannot sue or be sued in his own name in civil proceedings: he sues by his ‘next friend’ and is sued in the name of his ‘guardian ad litem’ ... All children aged between six and 15 are required by law to attend school.... Under the Crimes Ordinance (Cap 200), the minimum age of consent for sexual acts is 16 years for heterosexual acts and 21 years for homosexual acts.... The Marriage Ordinance (Chapter 181) provides that the minimum age at which persons may marry is

²² In a letter to the Commission dated 11 March 1999.

²³ B Franklin, *The Right of Children*, (Basil Blackwell Ltd., 1986), at 7.

16. *Parental consent is required if the person intending to marry is under the age of 21 years.... The Criminal Procedure Ordinance (Chapter 221) and the Evidence Ordinance (Chapter 8) provide for special procedures to be adopted for the giving of evidence in court by witnesses under 14 years of age. Under the Criminal Procedure Ordinance, the special procedures apply to witnesses under 17 years of age in relation to offences of sexual abuse.... The Criminal Procedure Ordinance (Chapter 221) provides for testimony from a child witness to be given through closed circuit television from a place outside the courtroom by way of a video-recording of an interview.... The Evidence Ordinance (Chapter 8) provides that the evidence of a child under 14 years of age shall be given unsworn. Corroboration from other material evidence is not necessary for a conviction nor is it required that a jury be warned against convicting an accused on the uncorroborated evidence of a child.... The Juvenile Offenders Ordinance (Chapter 226) contains further provisions protecting the privacy of children who are involved in court proceedings....*²⁴

3.54 Those favouring change argue that the present application of criminal responsibility at the age of seven is inconsistent with the protection afforded to children by a wide range of other legal provisions, which recognise that children under 14 years do not have the capacity or ability to make decisions with serious consequences for themselves or others.

Adequate alternatives to criminal prosecution already available

3.55 In answer to concerns that raising the minimum age of criminal responsibility would prompt an increase in juvenile crime by those no longer falling within the net of criminal liability, those arguing for change point out that there exist a range of alternatives to prosecution which enable unruly children to be brought under control. We examine those alternatives in chapter five.

Arguments in favour of retaining the rebuttable presumption of *doli incapax*

3.56 As stated in the consultation paper, an inevitable part of any review of the law governing the minimum age of criminal responsibility in Hong Kong must be the rebuttable presumption of *doli incapax* which applies in respect of children between the ages of seven and 14, a fact reflected in our terms of reference. Under section 3 of the Juvenile Offenders Ordinance (Cap 226), a conclusive or irrebuttable presumption arises that a child is *doli incapax* or is

²⁴

Cited above, the Report to the UN, at 15-18.

incapable of committing a crime on proof or admission of the basic fact that the child is under seven years of age. The presumption of *doli incapax* continues to apply to a child who has attained seven but is under 14 years of age, but can be rebutted 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”.

3.57 We have presented in the preceding paragraphs of this chapter the views put forward by those who responded to the consultation paper arguing for and against the raising of the age at which the irrebuttable presumption of *doli incapax* applies. Allied to the question of determining the appropriate point at which to fix the minimum age of criminal responsibility is the question of whether or not the rebuttable presumption of *doli incapax* should be retained, and the arguments each way are set out below.

Ensures only mature children are held criminally responsible for their acts

3.58 The consultation paper suggested that those in favour of retaining the rebuttable presumption of *doli incapax* would argue that it provides the necessary leeway for a class of young people whose degree of maturity may vary not only among children of different ages, but also among children of the same age. It is suggested that the rebuttable presumption has helped to achieve a fair and objective assessment which ensures that only those who have been proved to possess sufficient maturity to appreciate that their criminal acts amount to serious wrongs would be held fully responsible and would face criminal sanction.

3.59 The consultation paper argued that the removal of the rebuttable presumption would result in unfairness. If the minimum age is set at too low an age, the removal of the rebuttable presumption would necessitate the indiscriminate prosecution of children at a young age, without the discretion to take account of the individual child’s level of maturity, or to disregard those cases where the child acted through a sense of mischief rather than a realisation that what he was doing amounted to a serious wrong.

3.60 Even where the minimum age is fixed at a reasonably high level so that those older than that minimum age will generally be mature enough to appreciate the wrongfulness of their acts, there remains the possibility that a handful of those within the group will be less mature than the majority. Should the rebuttable presumption of *doli incapax* be removed, it is argued that this would prejudice less well developed children who would be irrebuttably presumed to be *doli capax*. The preservation of the rebuttable presumption would help to prevent such unfairness.

3.61 A number of those who responded to the consultation paper supported the suggestion that the rebuttable presumption of *doli incapax* should

be retained as it ensures only mature children who are able to appreciate that their criminal acts are serious wrongs would be made criminally responsible. These respondents agreed that the rebuttable presumption does provide an essential discretion without which children of varying maturity above the minimum age of criminal responsibility would all be made liable to prosecution.

3.62 Mr Ian Dobinson, an Associate Professor of the Department of Law of the City University of Hong Kong, believes that the “mischievous discretion” approach is an important legal safeguard for the interests of young offenders. Mr Dobinson explained.²⁵

“...I agree with some of the ‘legal’ arguments favouring its abolition but I am concerned about the possible negative social effects of such a change. How these changes will affect the situation in England will have to await proper research but at this stage I would have to predict significant social problems. Hong Kong need not take this risk. The research has not been done and there is no need to rush to change the law. Subject to an increase of the minimum age to 10, the law need not be changed. As mentioned above, the system appears to be working. If in the future, there is good evidence to support the abolition of the rebuttable presumption, then the matter could be raised then. Until such evidence exists, however, Hong Kong should not change this legal approach.”

3.63 Many of those who responded in favour of raising the minimum age of criminal responsibility considered it important to retain the rebuttable presumption in order to offer greater protection for less mature children who fall between the revised minimum age and 14 years.

Children should not be treated in the same way as adults

3.64 One of the assertions of those in favour of removing the rebuttable presumption is that if the minimum age of criminal responsibility were adjusted upwards, the rebuttable presumption could be removed altogether as sufficient protection would be given to younger children by the absolute bar on prosecution imposed by the minimum age of criminal responsibility. To counter this argument, it has been observed that:

“Whilst it is common sense to presume that most children know the difference between right and wrong in a general sense, we do not believe that this should automatically lead to the conclusion that they can be expected to assume the same degree of responsibility for their actions as an adult.”²⁶

²⁵

In a letter to the Secretary to the Commission dated 25 March 1999.

²⁶

House of Commons Standing Committee B (Pt 7) <<http://www.parliament.the-stationery->

3.65 Concern has also been expressed that once the rebuttable presumption is abolished, children will be treated in the same way as adults, and exposed to the full trauma of the prosecution process. A number of respondents observed that the existing rebuttable presumption of *doli incapax* in effect provides a gradual progression to full criminal responsibility as the child matures.

Arguments in favour of the abolition of the rebuttable presumption of *doli incapax*

It is no longer necessary and is out of step with the general law

3.66 The consultation paper referred to the judgment of Laws J in *C (A Minor) v DPP* in which the judge gave a detailed critique of the rebuttable presumption of *doli incapax* by stating that:

“... if this presumption is to be rebutted, there must be clear positive evidence that the defendant knew his act was seriously wrong, not consisting merely in the evidence of the acts amounting to the offence itself.”²⁷

On this issue, Laws J took the view that the presumption was in principle objectionable and out of step with the general law:

“It is no part of the general law that a defendant should be proved to appreciate that his act is ‘seriously wrong’. He may even think his crime to be justified; in the ordinary way no such consideration can be prayed in aid in his favour. Yet in a case where the presumption applies, an additional requirement, not insisted upon in the case of an adult, is imposed as a condition of guilt, namely a specific understanding in the mind of the child that his act is seriously wrong. This is out of step with the general law.”²⁸

3.67 Laws J in the Divisional Court argued strongly for the abolition of the rebuttable presumption:

“The common law is not a system of rigid rules, but of principles, whose application may alter over time, and which themselves may be modified. It may, and should, be renewed by succeeding generations of judges, and so meet the needs of a society that is itself subject to change. In the present case the conditions under

²⁷ o...798/cmstand/b/st980512/pm/80512s04.htm> (23 June 1998).

²⁷ [1994] 3 WLR 888 (the Divisional Court), at 894.

²⁸ Cited above, the Divisional Court, at 894 to 895.

*which this presumption was developed in the earlier law now have no application. It is our duty to get rid of it, if we properly can.*²⁹

Laws J concluded that: *"In those circumstances, I would hold that the presumption relied on by the defendant is no longer part of the law of England"*.³⁰

3.68 On appeal in 1995, the House of Lords overruled the Divisional Court's decision and confirmed that the rebuttable presumption of *doli incapax* was still the law. In response to the specific point made by Laws J that the presumption was "out of step with the general law", Lord Lowry observed:

*"True enough, but the general law was not meant to apply without qualification to children under 14."*³¹

The House of Lords conceded the doctrine was not without problems and suggested that a review by the legislature would be appropriate. Just such a review resulted in the subsequent repeal of the rebuttable presumption in England and Wales by section 34 of the Crime and Disorder Act 1998.

3.69 Mr I Grenville Cross, QC, SC, Director of Public Prosecutions of the Department of Justice, agrees that the rebuttable presumption should go and said:³²

"... there is no longer any need for the doli incapax rule: we now have compulsory education in Hong Kong, plus a range of non-custodial disposals and treatments. There is obvious force in the view of Professor Glanville Williams that the 'knowledge of wrong' test stands in the way not of punishment but of education treatment. 'It saves the child not from prison, transportation, or the gallows, but from the probation officer, the foster parent, or the approved school'. The paradoxical result, the Professor adds, is that 'the more warped the child's moral standards, the safer he is from the correctional treatment of the criminal law.'"

The presumption is conceptually obscure

3.70 To rebut the presumption, it is necessary for the prosecution to prove that the child knew at the time of the offence that his actions were "seriously wrong". Laws J criticised this requirement as being "conceptually obscure" as the term meant neither "legally wrong" nor "morally wrong". In the

²⁹ Cited above, the Divisional Court, at 897.

³⁰ Cited above, the Divisional Court, at 898.

³¹ [1996] 1 AC 1, at 33

³² In a letter to the Secretary to the Commission dated 31 March 1999.

House of Lords, Lord Lowry agreed that the phrase “seriously wrong” was conceptually obscure, but went on to say:

“... but, when the phrase is contrasted with ‘merely naughty or mischievous’, I think its meaning is reasonably clear.”³³

Lord Lowry pointed out that while the presumption was not, and never had been, completely logical, it provided a “benevolent safeguard” which evidence could remove.

3.71 M. R. Nunns, a barrister, in responding to our consultation paper observed³⁴ that:

*“As Laws J. would have it, in C (A Minor) V DPP, the doctrine of *doli incapax* is ‘conceptually obscure’. This writer would go further and describe it as a woolly concept. It is wrong that the Court should have to grapple with such a concept when deciding whether or not it has jurisdiction to deal with a young offender. This is so, whatever the child’s age. On the assumption that the minimum age of responsibility be now raised to, say, 10 years, there can be even less excuse for thus complicating the court procedure.”*

3.72 A number of respondents suggested that the uncertainties arising from the concept of what amounts to a “serious wrong” would be removed if the rebuttable presumption of *doli incapax* were abolished altogether. The protection it affords to children could be met by an upward adjustment of the minimum age of criminal responsibility in Hong Kong.

Present day children are able to distinguish right from wrong at a young age

3.73 Those in favour of removing the rebuttable presumption of *doli incapax* question whether it is right to maintain the presumption that all children between the ages of seven and 14 are invariably unable to understand the difference between right and wrong, or that children within that age bracket are unable to appreciate when an act amounts to a serious wrong. Many of these advocates and some who responded to the consultation paper see the presumption as providing a means for children (particularly between the ages of ten and 14) to avoid proper court sanctions. Given the complexities of the modern world in which today’s children have been brought up, it is argued that they acquire the ability to distinguish right from wrong at an earlier age than their forbears. There is therefore no justification for applying the presumption of *doli incapax* to them. If anything, the presumption should be that children are

³³ [1996] 1 AC 1, at 33

³⁴ In a letter to the Secretary to the Commission dated 22 January 1999.

presumed to know right from wrong unless the contrary can be shown. In the parliamentary debate on the Crime and Disorder Bill 1997 (the UK Bill), Mr Alun Michael observed that:

*“The essence of the doli incapax doctrine is that children under 10 are below the age of criminal responsibility, and nothing in the proposal will change that. The presumption that generally children aged between 10 and 14 do not know the difference between right and wrong defies common sense. Anyone who has worked with children in that age group knows that they have a very well developed sense of right and wrong, and if that is not so in a particular case, evidence of the problem should be brought before the court. It is better for the court to take account of the offender’s age and maturity at the point of sentence.”*³⁵

3.74 In *C (A Minor) v DPP*, Lord Jauncey said:

*“It is, no doubt, undesirable that a young person who commits an offence and who genuinely does not know that he is doing something seriously wrong should suffer the rigours of the criminal law. But is a blanket presumption such as exists in England and Wales at the moment the best way to achieve protection for such a person? There must be many youthful offenders under the age of 14 who are very well aware that what they are doing is seriously wrong. Indeed it is almost an affront to common sense to presume that a boy of 12 or 13 who steals a high powered motor car, damages other cars while driving it, knocks down a uniformed police officer and then runs away when stopped is unaware that he is doing wrong.”*³⁶

3.75 Responding to the argument that better education means that present day children are better equipped to distinguish right from wrong, Lord Lowry said in the same case:

*“It is true that there is (and has been for a considerable time) compulsory education and, as the judge said, perhaps children now grow up more quickly. But better formal education and earlier sophistication do not guarantee that the child will more readily distinguish right from wrong.”*³⁷

³⁵ House of Commons Standing Committee B (Pt 7) <<http://www.parliament.the-stationery-o...798/cmstand/b/st980512/pm/80512s07.htm>> (23 June 1998).

³⁶ [1996] 1 AC 1, at 21

³⁷ [1996] 1 AC 1, at 33

Children should learn to be responsible for their own actions

3.76 An argument repeatedly advanced in the Parliamentary debates on the UK Bill was the fact that the abolition of the rebuttable presumption would serve to impress upon children the need to be responsible for their own actions. Mr Alun Michael observed that:

*“... If children of the age in question have committed a criminal offence, it is more, not less, necessary for their wrongdoing to be acknowledged, and corrective action to be taken. Appropriate punishment and effective intervention at that stage would prevent many such children from becoming tomorrow’s adult criminals. Neither justice nor the young people are served by permitting the latter to evade responsibility for their actions.”*³⁸

The presumption stands in the way of early rehabilitation

3.77 It has been argued that the operation of the rebuttable presumption does a disservice to both the child concerned and the community at large as it stands in the way of early rehabilitation and makes a return to the “right track” unlikely, if not impossible. Such a view was raised by Professor Glanville Williams in the 1950s when he said:

*“Thus at the present day the ‘knowledge of wrong test’ stands in the way not of punishment, but of educational treatment. It saves the child not from prison, transportation, or the gallows, but from the probation officer, the foster-parent, or the approved school. The paradoxical result is that, the more warped the child’s moral standards, the safer he is from the correctional treatment of the criminal law.”*³⁹

3.78 The observations of Professor Glanville Williams were echoed in the English Parliamentary debates where Mrs Eleanor Laing observed that:

“As has been mentioned, the doctrine of doli incapax was originally introduced in the 14th century, when it protected 10 to 13-year-olds from harsh adult justice. Surely things have changed significantly, so that rather than being exposed to harsh adult justice, a child is in the 1990s more likely to be helped than punished on being found guilty of a crime at that age. If we do not abolish the doctrine of doli incapax, we shall be denying another chance to children who, if found guilty, could be protected, given additional education or removed from

³⁸ House of Commons Standing Committee B (Pt 7) <<http://www.parliament.the-stationery-o...798/cmstand/b/st980512/pm/80512s07.htm>> (23 June 1998).

³⁹ Glanville L Williams, “The Criminal Responsibility of Children” (1954) Crim. L. R.493, at 495.

*unfortunate surroundings.... If a person is considered to be a child and therefore doli incapax until the age of 14, someone a week short of his or her 14th birthday can escape justice and proper punishment....*⁴⁰

3.79 Laws J expressed similar views and condemned the doctrine on the grounds that it meant that young delinquents: “...are left outside the law, free to commit further crime, perhaps of increasing gravity, unchecked by the courts whose very duty it is to bring them to book.”⁴¹ In contrast, Lord Lowry remarked in the same case when it came before the House of Lords that:

*“... while times have greatly changed since the days when children of 8 and 10 years were hanged for offences much less heinous than murder, it should be observed that the purpose and effect of the presumption is still to protect children between 10 and 14 from the full force of the criminal law.”*⁴²

Children would not be unfairly exposed to adult justice by the removal of the presumption

3.80 It is further argued that the removal of the rebuttable presumption would not unfairly expose children to adult justice. As mentioned earlier in this chapter, the Juvenile Offenders Ordinance provides adequate protection to children from the full rigours of the law that would otherwise be imposed on adult offenders. Children and young persons would in most cases be tried in juvenile courts, while as far as practicable young persons would not be sentenced to imprisonment if there are other suitable disposals available. The views of those who responded to the consultation paper in respect of the argument that children nowadays are no longer subject to draconian penalties were dealt with in the earlier parts of this chapter. These arguments will not be repeated here.

The presumption is defective as it presumes abnormality

3.81 Laws J pointed out that the doctrine was defective as it presumed a defendant under 14 years of age to possess a “subnormal mental capacity”, in the sense that a child under 14 years of age is not to be presumed to know the nature of his or her acts simply because other children of his or her age and background would normally be held to possess such knowledge. Laws J considered this presumption to be unacceptable and commented that:

⁴⁰ House of Commons Standing Committee B (Pt 7) <<http://www.parliament.the-stationery-office...798/cmstand/b/st980512/pm/80512s06.htm>> (23 June 1998).

⁴¹ Cited above, the Divisional Court, at 896.

⁴² [1996] 1 AC 1, at 36

*“There can be no respectable justification for such a bizarre state of affairs. It means that what is by definition the exception is presumed to be the rule. It means that the law presumes nothing as regards a child between 10 and 14 except that he lacks the understanding of all his average peers. If that is the state of law, we should be ashamed of it.”*⁴³

3.82 In response, Lord Lowry pointed out that the purpose of the presumption was to protect children between seven and 14 years from the full rigour of the criminal law. It was a “benevolent safeguard” which was not and never had been completely logical, but its purpose was benign.

The presumption is both divisive and perverse

3.83 In addition to these alleged defects, Laws J further criticised the doctrine as being both divisive and perverse. According to the judge, it was divisive as it tended to regard children from “good homes” as more capable of appreciating their criminal acts to be seriously wrong, and so more likely to be classified as being *doli capax* than those from “bad homes”. Laws J considered the doctrine to be perverse as it tended to absolve from criminal responsibility the very children most likely to commit criminal acts.

3.84 In the House of Lords, Lord Lowry responded to Laws J’s assertion as follows:

*“One answer to this observation (not entirely satisfying, I agree) is that the presumption contemplated the conviction and punishment of children who, possibly by virtue of their superior upbringing, bore moral responsibility for their actions and the exoneration of those who did not.”*⁴⁴

⁴³ Cited above, the Divisional Court, at 895.

⁴⁴ Cited above, the House of Lords, at 399.

Chapter 4

Responses to the consultation exercise

Introduction

4.1 The consultation exercise which we conducted to gauge the public's views on the appropriate age at which to fix the minimum age of criminal responsibility took two forms. Firstly, we issued a consultation paper which offered four possible options for reform, and secondly we commissioned the Department of Applied Social Studies of the City University of Hong Kong to conduct a telephone survey of public opinion on this issue on our behalf. This chapter sets out the results of that combined consultation exercise.

The options for reform

4.2 The consultation paper offered four possible options for reform:

- A) Retain the present system;
- B) Raise the minimum age of criminal responsibility, but abolish the rebuttable presumption of *doli incapax*;
- C) Raise the minimum age of criminal responsibility and retain the rebuttable presumption of *doli incapax* for persons between the revised age and 14 years. The burden of rebutting the presumption continues to rest with the prosecution;
- D) Raise the minimum age of criminal responsibility and create a rebuttable presumption of *doli capax* for persons between the revised age and 14 years. The burden of rebutting the presumption would rest with the defence.

In arriving at these options, we noted that there is no significant body of opinion which contends that the existing age of criminal responsibility is too high and that the international trend appears to be towards a raising of the minimum age of criminal responsibility. We therefore concluded that the realistic alternatives to maintaining the current law unchanged should be restricted to a raising of the minimum age of criminal responsibility, and the abolition or curtailment of the

existing rebuttable presumption of *doli incapax* (on this latter point, one of those who responded to our consultation paper argued that the rebuttable presumption should be extended to children up to the age of 18, but there seemed to be no other support for that view in the bulk of submissions received).

Responses to the consultation paper

4.3 The consultation paper elicited responses from a wide range of individuals and organisations. In addition, the paper was discussed by a number of District Fight Crime Committees, by the Standing Committee of Young Offenders of the Fight Crime Committee and by the Fight Crime Committee itself. We are grateful to those concerned for providing us with minutes of those meetings (or a summary of the discussion).

4.4 The table below endeavours to provide a breakdown of all the comments we received. In compiling this table, we have treated a submission from an individual in identical numerical terms as that from an organisation. The Law Society's collective response, for instance, is counted as "one", just as is that of an individual solicitor who responded to us separately. Where we have been presented with minutes of meetings at which a range of differing views were expressed by identified members, we have counted each named speaker's views separately in the table below.

4.5 Where a response does not clearly sit within one of the four options presented in the consultation paper, we have allocated it in the table according to the minimum age favoured by the respondent. Thus, four responses favoured option B (raising the age and abolishing the presumption of *doli incapax*) but supported the retention of the existing minimum age of seven. We have taken the minimum age as the determining feature and have therefore included these responses under option A (retaining the *status quo*), rather than option B, but with suitable annotations to make the position clear.

Option	No of responses in favour
A – retain minimum age of 7 and presumption	24
[includes retain minimum age of 7, but reduce presumption from 14 to 12]	[1]
[includes retain minimum age of 7, but abolish presumption]	[1]
[includes retain minimum age of 7, but reverse presumption]	[4]
B – raise age and abolish presumption	17
C – raise age and retain presumption	29
[includes raise age, but reduce presumption from 14 to 12]	[1]
[includes raise age, and raise presumption from 14 to 18]	[1]
D – raise age and reverse presumption	3

Raise age – no view expressed on presumption	14
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4.6 Any attempt to draw all but the most general conclusions from these figures must be treated with some caution for a number of reasons. Firstly, as we explained in the preceding paragraph, the figures evaluate collective responses in the same way as those from individuals. So, for instance, option B was favoured in the submissions made by the Law Society, the Bar and the Judiciary. Those views count for only three in the table above, but it could reasonably be assumed that each of those submissions reflects a significant proportion of the membership of the respective bodies.

4.7 Secondly, where we have been provided with minutes of meetings we have attributed the views of individual speakers to the appropriate category. Where, however, we have been provided only with a summary of the conclusions reached at a particular meeting, with no individual views recorded, we have reflected the concluded collective view in the table. The consequence is that the views of an individual member of District Fight Crime Committee A are accorded the same numerical weight as those expressed collectively by District Fight Crime Committee B.

4.8 Thirdly, there is inevitably a grey area between the responses for options B and C. Four of those who favoured option B did so on the understanding that the minimum age would be raised to 14, and that the presumption of *doli incapax* would therefore become redundant in any case. Similarly, two of those who favoured option C did so only on the basis that the minimum age was set at a lower age than 14.

4.9 Those respondents who favoured a higher minimum age proposed ages ranging from nine to 14 years. The responses on this aspect of the issue are set out in the table below.

Age favoured	No of responses in favour
7	24
9	1
10	27
11	1
12	7
13	1
14	20
Above 7, but not specified	6

4.10 Taking the contents of these two tables together (and bearing in mind the *caveats* we expressed earlier), we would draw the following tentative conclusions:

- The majority of responses support an increase in the minimum age of criminal responsibility (63 in favour, to 24 against)
- Of those who wish to raise the minimum age and who have specified an age, ten years has most support (27 responses), with 14 years the next most favoured age (20 responses)
- Of the 63 who wish to raise the minimum age, 29 wish to retain the presumption of *doli incapax* between the revised age and 14. A further 19 who wish to retain the current minimum age of 7 also wish to retain the presumption of *doli incapax* in some form
- Twenty-five of the 73 who expressed a view on the presumption wish it abolished or reversed
- The strongest support is for option C.

Responses to the public opinion survey

4.11 Between 28 April and 8 May 1999, the Department of Applied Social Studies of the City University of Hong Kong conducted a random sample telephone survey on the Commission's behalf. A total of 1,144 people aged 15 or above were interviewed to determine their views on the age of criminal responsibility. The questionnaire and the full report of the survey findings can be found at Annex 5.

4.12 The survey found that the majority of those surveyed (89.4%) were in favour of raising the minimum age of criminal responsibility to eight years or above. More than half of those surveyed (52.1%) were in favour of raising the minimum age of criminal responsibility to 14 years. Of those surveyed, 18.1% were in favour of raising the minimum age to 18 years. As the minimum age of criminal responsibility proposed under the survey ranges from eight to 23 years, the average minimum age proposed is 14.5 years.

4.13 In respect of the rebuttable presumption of *doli incapax*, the survey findings revealed that a substantial portion of those surveyed (28.4%) supported in principle the retention of the rebuttable presumption. A total of 21.4% of those surveyed were in favour of retaining the rebuttable presumption of *doli incapax* for persons between a revised minimum age of criminal responsibility and 14 years.

4.14 The survey findings also revealed that only a small proportion of those surveyed (6.9%) were in support of option D (the creation of a rebuttable presumption of *doli capax*, where a person is presumed capable of committing an offence).

4.15 While the responses to both the consultation paper and the public opinion survey suggest that a majority of the community favour raising the minimum age of criminal responsibility, we are conscious of the concerns which have been expressed that any raising of the minimum age might lead to an increase in juvenile crime, or to the exploitation of children by adult criminals. In the next chapter, therefore, we examine the provisions which currently exist to deal with unruly children.

Chapter 5

Existing provisions for dealing with unruly children

Introduction

5.1 Both the findings of the public opinion survey and the responses to our consultation paper show a majority in favour of raising the minimum age of criminal responsibility. In 1973 a proposal to increase the minimum age from seven to ten was rejected by the Legislative Council because of fears that it would encourage exploitation of young children by adult criminals. In the words of one member of the Council, raising the age might “*play into the hands of those who would use young children as safe pawns in furtherance of their own vile rackets*”.¹ Those concerns continue to be expressed by those opposed to a raising of the minimum age of criminal responsibility. In addition, they argue that a raising of the minimum age would remove a necessary protection for the community against the criminal activities of young children.

5.2 Before we consider whether or not the age of criminal responsibility should be raised in Hong Kong, we therefore set out in this chapter the mechanisms currently available for dealing with an unruly child, with a view to ascertaining if they would be adequate to deal with unruly children below the age of criminal responsibility should that age be raised from seven years to a higher age. This chapter also considers the ways in which increased exploitation of young children by adult criminals can be prevented following any raising of the minimum age of criminal responsibility. It concludes by way of contrast by examining alternative approaches adopted in two other jurisdictions for dealing with unruly children below the age of criminal responsibility.

Measures currently available for dealing with unruly children in Hong Kong

The power of arrest and the power to stop and detain

5.3 Section 50 of the Police Force Ordinance (Cap 232) provides that a police officer may lawfully arrest any person whom “he reasonably believes will be charged with or whom he reasonably suspects of being guilty of”, *inter alia*,

¹ The Hon Mr Woo Pak-chuen, Hong Kong Hansard, Session 72/73, 446 (14 February 1973).

any offence for which the sentence is fixed by law, or for which a person may be sentenced to imprisonment. It follows that an arrest would only be lawful under this provision if the arresting officer reasonably believed that the child was seven years of age or above, and thus susceptible to criminal process.

5.4 By contrast, section 54(1) of Cap 232 has no such restriction. That provides that where a police officer finds any person “who acts in a suspicious manner” he may:

- a) stop the person for the purpose of demanding proof of identity;
- b) detain the person “for a reasonable period” while he inquires whether the person is suspected of having committed “any offence at any time”; and
- c) if he considers it necessary, search the person for anything that “may present a danger to the police officer” and detain the person for the purposes of the search.

These powers can be exercised by a police officer in respect of any person, regardless of whether or not they are above the minimum age of criminal responsibility.

5.5 Section 54(2) of Cap 232 empowers a police officer to stop, detain and search any person “whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence.” The powers to stop and detain are the same as those under section 54(1), but the power of search extends to a search for “anything of value ... to the investigation of any offence that the person has committed, or is reasonably suspected of having committed or of being about to commit.” By tying the exercise of these powers to the fact of the offence, rather than the guilt of the perpetrator (as is the case with section 50), it could be argued that they may be invoked in respect of any person, regardless of whether or not that person has reached the minimum age of criminal responsibility.

5.6 At common law, there is a general power of arrest which may be exercised by the police or a member of the public where:

- d) a breach of the peace is committed in the arrestor’s presence;
- e) the arrestor reasonably believes that a breach of the peace is about to be committed; or
- f) a breach of the peace has been committed and it is reasonably believed that it will be renewed.²

² See *R v Howell* [1982] QB 416.

Again, this power is not limited by a reference to the capacity of the arrested person, but can be applied to any person regardless of age.

5.7 A further power of apprehension is to be found in section 101 of the Criminal Procedure Ordinance (Cap 221). Section 101(3) provides that “any person” to whom any property is offered to be sold, pawned, or delivered, and who has “reasonable ground” to suspect that “any arrestable offence has been or is about to be committed on or with respect to such property” may “apprehend” the person offering the property and take possession of it. Section 101(4) empowers any person to arrest anyone in possession of any property which the arrestor suspects “on reasonable grounds” may have been obtained by means of an arrestable offence. The wording of these provisions would not seem to preclude their application to a child below the minimum age of criminal responsibility.

The Police Superintendents’ Discretion Scheme

5.8 The Police Superintendents’ Discretion Scheme (the PSDS) is frequently used as an alternative to criminal prosecution in respect of a young offender who is below the age of 18 years. Instead of subjecting the child to criminal prosecution, a formal caution or warning as to his conduct is given by a Police Superintendent to the child. The main purpose of the scheme is to bring home to young offenders the seriousness of their conduct without the necessity of bringing them into the criminal justice process.

5.9 The PSDS, however, has its limitations. Before it can be invoked, a number of conditions must be satisfied:

- 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.

The nature and seriousness of the offence is understandably one of the most significant considerations. Most importantly for our purposes the PSDS does not apply to a person who is below the age of criminal responsibility. The basis of the PSDS is that it is an alternative to prosecution, and before a caution under the scheme can be administered the police officer must be satisfied, *inter alia*, that the evidence available is sufficient to support a prosecution. That condition cannot be satisfied where the individual concerned is below the age of criminal responsibility and therefore irrebuttably deemed to be *doli incapax*. Following

any raising of the minimum age of criminal responsibility, the PSDS would therefore only apply to persons between that new age and 18.

The Protection of Children and Juveniles Ordinance

5.10 The Protection of Children and Juveniles Ordinance (Cap 213) (the PCJO) is the principal legislation governing the care and protection of children³ and juveniles.⁴ It contains provisions enabling the specified authorities to deal with unruly children and juveniles aged below 18 years. The PCJO's provisions would therefore continue to apply to children below the minimum age of criminal responsibility if this were raised to an age below 18.

5.11 Section 34(1) of the PCJO provides that a juvenile court may make one of a range of orders where it is satisfied that a child is in need of care or protection. Section 34(2) of the PCJO provides that:

“... a child or juvenile in need of care or protection means a child or juvenile -

- (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 to others,*

and who requires care or protection.”

5.12 An order may be made in respect of any person below the age of 18 years who is in need of care or protection. Section 34(1) of the PCJO specifically provides that an order may be made in respect of any person above or below the age of seven years, though where the person is above the age of seven years he must be brought before the court. Accordingly, a child below the minimum age of criminal responsibility may be made subject to a care or protection order.

³ Under section 2 of the Juvenile Offenders Ordinance (Cap 226), a child is defined as a person who is, in the opinion of the court having cognizance of any case in relation to such person, under the age of 14 years.

⁴ Under section 2 of the Protection of Children and Juveniles Ordinance (Cap 213), a juvenile is defined as a person who is, in the opinion of a court or a person exercising any power under this Ordinance, 14 years of age or upwards and under the age of 18 years.

5.13 An order for the care or protection of a child or juvenile may be made by a juvenile court on its own motion, or on the application of the Director of Social Welfare or of any person authorised by the Director or of any police officer.

5.14 Section 34(1) of the PCJO allows the court to make one of a range of orders. It may:

- “(a) appoint the Director of Social Welfare to be the legal guardian of the child or juvenile; or*
- (b) commit him to the care of any person whether a relative or not, who is willing to undertake the care of him, or of any institution which is so willing; or*
- (c) order his parent or guardian to enter into recognizance to exercise proper care and guardianship; or*
- (d) without making such order or in addition to making an order under paragraph (b) or (c), make an order placing him for a specified period, not exceeding 3 years under the supervision of a person appointed for the purpose by the court.”*

5.15 Where the court has vested the Director with the legal guardianship of the child or juvenile under section 34(1)(a) of the PCJO, the Director may, by virtue of section 34(5)(a) of the PCJO, make any order regarding the custody and control of the child or juvenile. This would include an order from the Director to remove and detain the child or juvenile in a place of refuge. One of the possible results of this arrangement is to dissociate the child or juvenile from the risk of becoming further involved in crime or undesirable influences.

5.16 The Director, as the legal guardian of the child or juvenile, is statutorily empowered by section 34(5)(b) of the PCJO to call upon any person who has custody to produce him. Failure without reasonable excuse to comply with this request constitutes an offence. The Director is also entitled to visit the residence of his ward at any reasonable time and to interview him to ensure that his general welfare has been well maintained.

5.17 When a child or juvenile is committed to the care or protection of any person or institution under section 34(1)(b) of the PCJO, section 34(4) provides that such a person or institution would have the like control over him as the parent; and that the child or juvenile would continue to be in their care or protection notwithstanding any claim by either his parent or any other person. This provision takes account of the fact that the parent or guardian may themselves present undesirable influence on the child. To further safeguard any unauthorised taking away of the child or juvenile from his legitimate protection

under an order, sections 34(4)(i) and (ii) of the PCJO makes it an offence for any person knowingly to assist or induce the child or juvenile to escape from the person or institution in whose care he has been placed, or knowingly to harbour or conceal him, or to prevent him from returning to that person or institution.

5.18 In practice, the Police and the Social Welfare Department (SWD) are mainly responsible for drawing the court's attention to the needs of children or juveniles at risk. As we have seen, the Police may stop and detain a child below the age of criminal responsibility under section 54 of the Police Force Ordinance (Cap. 232) for enquiry. Should the enquiry reveal that the child is at risk of becoming involved in crime, or that he is already involved in crime, the Police may either apply to the court direct for an order for care or protection pursuant to section 34(1) of the PCJO, or in appropriate cases refer the matter to the SWD for follow-up action.

5.19 While an order is in force, the SWD plays a supervisory role in advising, assisting and befriending the child in question. Depending on the circumstances, the SWD would also help the child to establish better communication and understanding with his parents, guardian or family members. Through regular visits to, or face-to-face contact with, the child the SWD provides counselling and guidance to help promote the general welfare of the child.

Measures to prevent exploitation of young children by adult criminals in Hong Kong

Prosecuting the adult criminal as a principal

5.20 Where it can be proved that an adult has instigated criminal conduct by a child below the age of criminal responsibility, the existing criminal law would allow the adult to be prosecuted as a principal. It is unnecessary in law for a principal to be actually present when the offence was committed; nor is it necessary for the act constituting an offence to be perpetrated by the principal himself. Accordingly, if an offence is committed through an innocent agent (such as a child below the minimum age of criminal responsibility), the adult who directed its commission would be answerable as a principal even though the child could not himself be prosecuted for his criminal conduct. Archbold⁵ states that:

"If a child under the age of discretion, or any other person who is not criminally responsible (whether by reason of defect of understanding, ignorance of the facts, absence of mens rea or other cause) is incited to the commission of any crime, the inciter, though absent when the act constituting the crime is committed, is liable for the act of his agent, and is a principal."

⁵

Archbold 1998, para. 18-7, at 1439.

Specific offences aimed at protecting children and juveniles

5.21 A range of vice offences relating to conduct involving children or juveniles are embodied in the Crimes Ordinance (Cap 200). These offences may provide some deterrence to adults seeking to involve children or juveniles in unlawful sexual activities or undertakings. They include the following provisions of the Crimes Ordinance :

- section 123 – intercourse with a girl under 13
- section 124 – intercourse with a girl under 16
- section 130 – control over persons for purpose of unlawful sexual intercourse or prostitution
- section 131 – causing prostitution
- section 134 – detention for intercourse or in vice establishment
- section 135 – causing or encouraging prostitution of, intercourse with, or indecent assault on, a girl or boy under 16
- section 137 – living on the earnings of prostitution of others
- section 139 – keeping a vice establishment
- section 140 – permitting a girl or boy under 13 to resort to or be on premises or vessel for intercourse
- section 141 – permitting a young person to resort to or be on premises or vessel for intercourse, prostitution, buggery, or homosexual act
- section 143 – letting premises for use as a vice establishment
- section 144 – tenant etc. permitting premises or vessel to be kept as a vice establishment
- section 145 – tenant etc. permitting premises or vessel to be used for prostitution
- section 146 – indecent conduct towards a child under 16.

The text of these provisions is at Annex 6 of this report.

Other provisions of the PCJO

5.22 In addition to section 34 referred to earlier, there are other provisions in the PCJO which provide protection for children or juveniles who are at risk of being exploited by adult criminals.

5.23 Under section 16 of the PCJO, a police officer of the rank of sergeant or above or any person authorised by the Director of Social Welfare may at any time enter any place to interrogate any persons there if there are reasons to believe that the place has been used as a lodging house for prostitutes, a brothel, or in connection with the commission of any offence prohibited under the PCJO. Where young children or missing youngsters are recovered in these raids, the police would in appropriate circumstances liaise with the SWD as to the action to be taken to safeguard the general welfare of these youngsters.

5.24 Section 34E of the PCJO provides that a police officer of the rank of station sergeant or above or any person authorised by the Director of Social Welfare may take a child or juvenile “who appears to be in need of care or protection” to a place of refuge or any other appropriate place. The child or juvenile may be detained there until he is brought before a juvenile court. An application to a juvenile court in respect of the child or juvenile, however, must be made within 48 hours of his being brought to a safe place.

5.25 Under section 44(1) of the PCJO, an officer authorised by the Director of Social Welfare may enter and search any place to ascertain if any child or juvenile is there who should be protected under any of the provisions of the PCJO. If such a child or juvenile is found, he can be brought to a safe place and an application under sections 34(1) or 34C (discharging or variation of orders under section 34(1)) of the PCJO must be made to a juvenile court within 48 hours.

5.26 Where a child or juvenile is in the custody, control or direction of a person and is exposed to any danger of seduction or prostitution, or to any moral or physical danger, the Director of Social Welfare may, under section 35 of the PCJO, make any order regarding the child’s or juvenile’s control and custody. That includes an order for removal to and detention in a place of refuge. Where such an order is made, an application under section 34(1) or 34C (discharging or variation of orders under section 34(1)) of the PCJO must be made within 48 hours of the child or juvenile being brought to a safe place.

Education and publicity

(i) Police

5.27 The Police run a number of publicity and education schemes for children, designed to curb anti-social behaviour and foster a positive relationship with the Police. Under the School Liaison Officer Programme, School Liaison Officers (SLOs) are regularly sent to schools and youth organisations to disseminate the “fight-crime” message and to encourage the reporting of crime. SLOs are also tasked to identify at schools any undesirable influences that are adverse to the pupils’ behavioural or moral development. In addition, the “fight-crime” message is spread to children through TV and radio programmes such as “Junior Police Call”.

(ii) Social Welfare Department

5.28 The SWD is responsible for providing statutory care or protection to youngsters under 18 years of age who are at risk. In March 1998, there were 1,911 children under statutory care or protection.⁶

⁶ 1997-1998 Departmental Report of the Social Welfare Department (SWD Report), at 45.

5.29 The Child Protective Services Unit of the SWD was established to provide early intervention and intensive casework service for the protection of children who have been neglected, ill-treated or abused. The Child Protection Special Investigation Team frequently works with the Police to carry out joint investigation of cases involving child abuse. Where appropriate, a care or protection order would be applied for.

5.30 School social work service is yet another way through which students in general and those at risk of becoming involved in crime are provided with guidance and assistance by school social workers of both the SWD and other Non-Governmental Organisations (NGOs). In nearly all secondary schools, school social workers are available to assist students whose social and emotional development is at risk.

5.31 Outreaching social workers are deployed by both the SWD and other NGOs to provide counseling services and other necessary guidance and assistance to school dropouts, runaway children and members of street gangs. As at March 1998, there were 33 teams of outreaching social workers serving in priority areas, i.e. those with higher juvenile crime rates.⁷

(iii) Education Department

5.32 As noted earlier, the Education Department (ED) works closely with the Police and SWD to protect school children from undesirable influences. Through the school social worker services and the School Liaison Officers scheme, students with emotional or behavioural problems or those who are at risk of becoming involved in crime are referred by the school authority to either the SWD or the Police for follow-up action.

5.33 The ED has issued guidelines to all primary and secondary schools to deal with students with general disciplinary problems. The guidelines encourage schools to initiate measures to prevent students from becoming problematic, and stipulate that any disciplinary measures must not be inconsistent with the human dignity of the child.

Measures for dealing with unruly children below the age of criminal responsibility in England and Wales and Ireland

5.34 We conclude this chapter by examining the mechanisms adopted or proposed to be adopted in two other jurisdictions for dealing with unruly children below the minimum age of criminal responsibility. These mechanisms may provide a reference for Hong Kong in determining reforms of the present

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Cited above, the SWD Report, at 62.

arrangements available for dealing with an unruly child below the age of criminal responsibility.

5.35 The English and Irish experiences are of particular relevance as the minimum ages of these jurisdictions (ten years in England and a proposed increase to 12 years in Ireland) are within the age range favoured by the majority of respondents in both the consultation exercise and the public opinion survey. The English and Irish reforms provide a model which Hong Kong may wish to consider following any raising of the minimum age of criminal responsibility here.

England and Wales - The Crime and Disorder Act 1998

5.36 As noted earlier, the minimum age of criminal responsibility in England and Wales was raised from seven to 8 years of age by section 50 of the Children and Young Persons Act 1933, and raised again, to ten years of age, by section 16 of the Children and Young persons Act 1962. The common law rebuttable presumption of *doli incapax* continued to be applied in England and Wales, subject only to an increase in the statutory minimum age, until its recent abolition by section 34 of the Crime and Disorder Act 1998.

5.37 In addition to abolishing the rebuttable presumption of *doli incapax*, the 1998 Act introduces a range of measures to curb anti-social behaviour by children below the age of criminal responsibility. These measures are outlined below.

Child safety orders

5.38 Sections 11 and 12 of the Act govern the making of a child safety order. Under section 11(1) of the Act, on the application of a local authority, a magistrates' court may make a child safety order if it is satisfied that one or more of the conditions specified in section 11(3) are fulfilled in respect of a child under the age of 10. These conditions are:

- “(a) that the child has committed an act which, if he had been aged 10 or over, would have constituted an offence;*
- (b) that a child safety order is necessary for the purpose of preventing the commission by the child of such an act as is mentioned in paragraph (a) above;*
- (c) that the child has contravened a ban imposed by a curfew notice; and*
- (d) that the child has acted in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself.”*

5.39 Under a child safety order, a child below the minimum age of criminal responsibility would be placed under the supervision of a responsible

officer (ie a social worker of a local authority social services department or a member of a youth offending team).⁸ The court may also require the child to comply with any such terms or conditions as the court considers necessary to keep him in proper control and to prevent any repetition of the kind of behaviour which led to the making of the order. A child safety order would generally last no more than three months, though in exceptional cases the order may last for up to 12 months.

Parenting orders

5.40 A parenting order may be made by a court where a child safety order has been made; or where a person has been convicted of an offence under section 443 (failure to comply with school attendance order) or section 444 (failure to secure regular attendance at school of registered pupil) of the Education Act 1996. In these circumstances, the court may make a parenting order in respect of a person who is a parent or guardian of the child or young person,⁹ or the person convicted of an offence under section 443 or 444.¹⁰

5.41 A parent¹¹ under a parenting order is required by law to comply with all the conditions specified in the order for a period not exceeding 12 months; and to attend counselling or guidance sessions for a concurrent period not exceeding three months. These conditions are imposed for the purposes of preventing the repetition of the kind of behaviour which led to the child safety order as well as to prevent the commission of further offence under section 443 or 444 of the Education Act 1996.

Local child curfew schemes

5.42 Under section 14(1) of the Act, a local authority¹² approved by the Secretary of State may give a notice banning children of specified ages (under 10) from appearing in a public place within a specified area. The prohibition

⁸ Under section 39(5) of the Act, a youth offending team shall include at least one of the following, namely: (a) a probation officer; (b) a social worker of a local authority social services department; (c) a police officer; (d) a person nominated by a health authority any part of whose area lies within the local authority's area; (e) a person nominated by the chief education officer appointed by the local authority under section 532 of the Education Act 1996.

⁹ Under section 117 of the Act, a child is defined as a person under the age of 14 and a young person is defined as a person who has attained the age of 14 and is under the age of 18.

¹⁰ Under section 443 of the Education Act, a parent would be charged if he/she fails to comply with the requirement of a school attendance order. Under section 444 of the Education Act, if a child of compulsory school age who is a registered pupil at a school fails to attend regularly at the school, his parent is guilty of an offence.

¹¹ Under section 576 of the Education Act, a "parent" includes any person who is not a parent of a child or young person but who has parental responsibility for him, or who has care of him.

¹² Under section 14(8) of the Act, a local authority means (a) in relation to England, the council of a district or London borough, the Common Council of the City of London, the Council of the Isle of Wight and the Council of the Isles of Scilly (b) in relation to Wales, the council of a county or county borough.

should last no more than 90 days. The curfew would take effect during specified hours (between 9 pm and 6 am) at such times as the child is not under the effective control of a parent or a responsible person aged 18 or over. The notice may specify different hours in relation to children of different ages. Notice of the curfew must be given by posting this in a conspicuous place or places within the specified area; and in such other manner, if any, as appears to the local authority to be desirable for giving publicity to the notice.

5.43 Where a constable has reasonable cause to believe that a child is in contravention of the ban imposed by a curfew order, section 15 of the Act requires the constable to inform the local authority of the area in which the child has contravened the ban, and to remove the child to his place of residence.

Removal of truants to designated premises etc

5.44 Under section 16(3) of the Act, a police constable is empowered to remove from any public place any child or young person of compulsory school age who is absent from a school without lawful authority and to take him to designated premises or to the school from which he is absent.

Ireland - The Children Bill 1999

5.45 On 30 September 1999, the Children Bill was published in Ireland with a view to replacing the Children Act of 1908. The major purpose of the Bill is to provide a new juvenile justice system which will apply to persons under the age of 18 years. One of the key proposals of the Bill is to raise the minimum age of criminal responsibility from seven to 12 years while preserving for Ireland the rebuttable presumption of *doli incapax*. Section 52 of the Bill provides as follows:

- “(1) *It shall be conclusively presumed that no child under the age of 12 years is capable of committing an offence.*
- (2) *There is a rebuttable presumption that a child who is not less than 12 but under 14 years of age is incapable of committing an offence because the child did not have the capacity to know that the act or omission concerned was wrong.*”

5.46 For the purposes of our study, the relevant provisions of the Bill can be conveniently divided into two main categories: the revised juvenile justice system under the Bill and the ways in which those below the proposed minimum age of criminal responsibility are to be dealt with under the new system.

5.47 In the press release dated 30 September 1999 issued to introduce the publication of the Bill, it was described as a blueprint for the development of

a new juvenile justice system which acknowledged that creative solutions and options must be put in place to deal with young persons in trouble. Under this new juvenile justice system, the option of incarcerating young offenders of 12 years of age or above is preserved, but would be made the ultimate sanction when, in the words of the press release, *“a whole range of what are essentially community-based measures have been exhausted”*.

5.48 This new direction was affirmed by the Minister for Justice, Equality and Law Reform, Mr John O’ Donoghue, who in his speech delivered to introduce the Bill said:

“What will happen under the proposed new arrangements when a child of 12 years of age or over is apprehended on suspicion of having committed an offence? Typically, the details of the offence will be forwarded to the Garda National Juvenile Office for a decision on whether the child will be admitted to the Garda Diversion Programme. This already highly successful Programme, formally called the juvenile liaison officer scheme, is being placed on a statutory basis and extended by the incorporation into it of restorative justice measures, including the holding of a Conference. Every Conference will formulate an action plan for the child, which may, among other matters, include provision for the making of an apology or reparation to the victim. Other new features of the Garda Conference include the possibility of its being chaired by a person who is not a member of the Garda Síochána.

A unique feature of the Diversion Programme will be the introduction of restorative cautioning. This will be a type of mini-conference which may apply in cases where the full Garda convened Conference is not warranted. It means that where a formal caution is being administered to a child offender who has been admitted to the Diversion Programme, the victim may be present. This will provide an opportunity to confront the child with the consequences of his or her offending in the presence of the victim and for the child to be invited to offer an apology or make reparation to the victim.

Part 4 of the Bill, which deals with the Diversion Programme, is now underpinned by a principle that requires the Gardai to consider admission to the Programme when a child commits an offence. It would envisage an expansion of the Diversion Programme and even greater success for it when the new measures become fully operational.

As a matter of policy the intention is that as many children as possible who commit offences will be admitted to the Diversion Programme. The reality of course is that, no matter what diversionary provisions are in place, a certain number of young offenders will continue to appear in court; these would be the more persistent and serious offenders. The fact that they come before the courts is of less importance as to what options will be open to the courts when dealing with young offenders. The Bill has several important initiatives that will give the courts real options for dealing with every child, no matter what the child's needs may be or what he or she has done. Two of these options can actually avoid the case against the child progressing to a finding. The first of these empowers the court to refer the child to the local health board where it considers that the child's real problem is a need of care or protection; in other words the offending, usually something like petty larceny, may be a cry for help. The health board will investigate the child's circumstances and report back to the court. The second option is where the court can direct the Probation and Welfare Service to convene a Family Conference in respect of the child; another manifestation of restorative justice.

Where the court does proceed to a finding and that finding is one of guilt it will have many new options at its disposal when deciding on how to deal with the child. These options are an essential feature of the Bill as they will allow effect to be given to the principle that detention for young offenders will be a last resort."

5.49 Part 5 of the Bill focuses on ways to deal with unruly children below the revised age of criminal responsibility. Section 53 (1) of the Bill provides that where a member of the Garda Síochána¹³ has reasonable grounds for believing that a child under the age of 12 years is responsible for an act or omission which, but for the fact that the child is below 12 years and is thus by virtue of section 52 of the Bill incapable of committing an offence, would constitute an offence, the child should be taken to his or her parent or guardian.

5.50 When the child is taken to his or her parent or guardian but it is believed that the child is not receiving adequate care or protection, the health board for the area in which the child normally resides will be informed accordingly by the member of the Garda Síochána.

5.51 Where it is not practicable for the child to be taken to his or her parent or guardian, the child would be placed under the custody of the health board for the area in which the child normally resides.

¹³

The Garda Síochána is Ireland's National Police Service.

5.52 Where the health board considers that the child brought before it is in need of care or protection, the health board would apply to court for a care or a supervision order. Section 53(5) further provides:

“Where, in relation to a child to whom sub-section (1) applies, the member of the Garda Síochána concerned has reasonable grounds for believing –

- (a) that there is an immediate and serious risk to the health or welfare of the child, and*
- (b) that it would not be sufficient for his or her protection from that risk to await the making of an application for an emergency care order by a health board under section 13 of the Act of 1991,*

the member may remove the child to safety, and Part III of the Act of 1991 shall then apply as if the removal were a removal under section 12 of that Act.”

5.53 Thus, when the Bill comes into operation, the health board will be empowered statutorily to provide care or protection for a child below 12 years of age whose conduct but for his or her age would amount to an offence.

5.54 One of the options to which the health board may resort for the care and protection of an unruly child above or below 12 years is to convene a family welfare conference for such a child and his or her family. These conferences would be appropriate for children who are at risk but who have not committed any offence, as well as for children who have been brought before the court for their criminal behaviour but whom the court considers may need care or protection. These conferences would lead to measures which could include the monitoring of the child’s attendance at school or at approved sports activities, the provision of special treatment for the child, the awarding of compensation to the victim of the child and the imposition of a curfew in respect of the child. Section 7(1) of the Bill provides:

“Where –

- (a) a health board receives a direction from the Children Court under section 78 to convene a family welfare conference in respect of a child, or*
- (b) it appears to a health board that a child who resides or is found in its area may require special care or protection which the child is unlikely to receive unless a court makes an order in respect of him or her under Part IV A (inserted by this Act) of the act of 1991,*

the health board shall appoint a person (in this Part referred to as a 'coordinator') to convene on its behalf a family welfare conference in respect of the child."

5.55 A family welfare conference chaired by a coordinator may be attended by the child in question, his or her parents, guardian, guardian *ad litem*, relatives, officers of the board and any other persons whose presence would make a positive contribution to the conference. The conference will decide if the child in question is in need of special care or protection which the child is unlikely to receive unless an order is made under Part IV A of the Child Care Act 1991 (the 1991 Act). Where the conference arrives at the decision that the child is in such need, a recommendation would be made to the health board for an application of the order. However, where the conference decides that no such order is necessary, it would recommend to the health board such care or protection of the child as the conference considers necessary, including a recommendation that the health board should apply for a care order or a supervision order under the 1991 Act in respect of the child.

5.56 Upon receipt of any recommendation from the family welfare conference in respect of a child, the health board under section 13 (1) may:

- "(a) apply for an order under part IV A (inserted by this Act) of the Act of 1991,*
- (b) apply for a care order or a supervision order under that Act, or*
- (c) provide any service or assistance for the child or his or her family as it considers appropriate, having regard to the recommendations of the conference."*

5.57 As mentioned above, one of the options open to a health board following a recommendation from a family welfare conference will be the lodging of an application to the court for a special care order. Part 3 of the Bill amends and extends the 1991 Act by inserting a new Part IVA. According to the Explanatory Memorandum of the Bill, the newly inserted section 23A under Part IVA of the 1991 Act would *"provide the health boards with an additional range of powers so as to ensure that non-offending children who are out of control receive special care, education and treatment"*.

5.58 Section 23A of the 1991 Act provides that where a health board is of the view, subsequent to the convening of a family welfare conference, that a child who resides or is found in its area is in need of special care or protection which he or she is unlikely to receive unless an order is made by a court, the board would apply to a court for a "special care order" or an "interim special care order".

5.59 Where a court to which such an application is made is satisfied that the behaviour of the child has posed a real and substantial risk to his or her

health, safety, development or welfare and that the child is in need of special care or protection, a special care order will be made in respect of the child thus placing the child under the care of the health board concerned for so long as the order remains in force. By this order, the health board is authorised under section 23B(2):

“... to provide appropriate care, education, and treatment for the child and, for that purpose, to place and detain the child in a special care unit provided by or on behalf of the health board pursuant to section 23K.”

5.60 The duration of a special care order will be specified in the order, which in general would last for a period which is not less than six months or more than 12 months. The court may extend the validity of the order on an application by the health board should the grounds for the making of the order continue to exist with respect to the child. On the other hand, should the circumstances leading to the making of the order no longer exist in respect of the child, the court may discharge the order on an application filed by the board.

5.61 An interim special care order would be applied for by a health board to the Children Court requiring a child named in the order to be placed and detained in a special care unit generally for a period not exceeding 28 days, and on application for a period exceeding 28 days. Such an order would be made in respect of a child when the Court under section 23C(1) of the 1991 Act is satisfied:

“(a) that either –

(i) a family welfare conference (within the meaning of the Children Act, 1999) is being arranged or is about to be convened in respect of a child, or

(ii) an application for a special care order in respect of a child has been or is about to be made by the board,

and

(b) that there is reasonable cause to believe that –

(i) the behaviour of the child is such that it poses a real and substantial risk to his or her health, safety, development or welfare, and

(ii) it is necessary in the interests of the child, pending determination of the application for a special care order, that he or she be placed and detained in a special care unit provided under section 23K...”

5.62 Under these arrangements, children below the proposed new minimum age of criminal responsibility who are at risk of involvement in crime will be provided with systematic care or protection.

Chapter 6

Our conclusions and recommendations

6.1 Our terms of reference enjoin us to review the law regarding the age of criminal responsibility and to consider what reforms may be necessary. To enable us to reach a conclusion, we think the appropriate way to proceed is to answer the following deceptively simple questions:

- 1) Should the existing minimum age of criminal responsibility be raised?
- 2) If so, what should be the new minimum age?
- 3) If the new minimum age is below 14, should the rebuttable presumption of *doli incapax* be retained between the new minimum age and the age of 14?

We now seek to answer each of these questions in turn.

Should the existing minimum age of criminal responsibility be raised?

6.2 In chapter 3 we outlined the principal arguments for and against reform. These included not only points which we had identified in our earlier consultation paper, but also those made by respondents to that paper. We note the views of the Hong Kong Police Force, the Security Bureau and the Immigration Department that the existing minimum age should be retained. Those bodies generally believe that the present system governing the age of criminal responsibility in Hong Kong has not only proved to be a success in tackling crimes committed by young people, but is also capable of striking a balance between the need to bring young offenders to justice and the need to facilitate their rehabilitation. In our view, however, the case for raising the minimum age outweighs that for retaining the *status quo*.

6.3 Firstly, we are persuaded that it cannot be right to hold a child as young as seven criminally responsible for his actions. While we understand that scientific evidence appears to be inconclusive, the weight of opinion seems to be that a seven-year old child cannot fully appreciate the criminal nature of his

actions. Indeed, it could be said that a young child's involvement in crime makes him more of a "victim" than a perpetrator of the offences alleged.

6.4 Secondly, there is no evidence that imposing criminal responsibility at such a young age is necessary to protect the community from any significant level of criminal activity by young children. The figures at Annex 4 show that virtually no children below the age of ten are arrested for having committed a serious crime. Even where they are, and there is a subsequent prosecution, only a handful of young children are found guilty.¹

6.5 Thirdly, we do not believe that the most effective or humane way to correct errant behaviour by a young child is to subject him to full panoply of the criminal justice system. Even in those rare cases where a serious offence is committed, an approach which is rehabilitative rather than punitive would seem to us to offer the best chance of long-term success where a young child is concerned.

6.6 The results of the consultation exercise reinforce us in our views. It is clear from both the responses to our consultation paper and the public opinion survey that a majority of those who expressed a view were in favour of raising the minimum age. We consider of particular significance the views of organisations with an interest in young persons and their welfare. Those who responded to our consultation paper included the Hong Kong Council of Social Service, the Boys' and Girls' Clubs Association of Hong Kong, the Hong Kong Social Workers' General Union, the Hong Kong Girl Guides Association, the Hong Kong Committee on Children's Rights, the Hong Kong Young Women's Christian Association, the Hong Kong Federation of Youth Groups and the Hong Kong Family Welfare Society. All of these organisations were in general in favour of raising the minimum age of criminal responsibility, although they hold different views on what should be done thereafter.

6.7 A similar breadth of support for change was to be found within the legal profession. Those who argued in favour of a raising of the minimum age of criminal responsibility included the Law Society of Hong Kong, the Hong Kong Bar Association, the Judiciary Administrators' Office, the Director of Public Prosecutions, the Law Officer of the Civil Division of the Department of Justice, the Duty Lawyer Service, the Hong Kong Family Law Association and the Hong Kong Young Legal Professionals Association.

6.8 We find further support for a raising of the minimum age in the fact that the international trend favours such an approach. The comments of the United Nations Human Rights Committee in November 1999 to which we referred in chapter 2 emphasise that Hong Kong's law in this regard is out of step with internationally accepted standards.

¹ See the table at paragraph 3.47, above.

6.9 Taking all these considerations into account, we have concluded that the minimum age of criminal responsibility should be raised, and we so recommend.

What should be the new minimum age?

6.10 We pointed out in chapter 2 that while a number of international conventions referred to fixing a minimum age at which a child could be made criminally responsible for his actions, none of these stipulated a specific age which should be adopted. From the comments made by the Human Rights Committee of the United Nations, it is however clear that seven is considered unacceptably low. Beyond that, little guidance can be gleaned from the UN conventions as to the appropriate minimum age. The Commentary to Article 4 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) states:

“The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of criminal responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc).”

6.11 Those who responded to our consultation paper and who favoured raising the minimum age suggested ages which ranged from 9 to 14. The age of ten was suggested by more respondents than any other age, with 14 receiving the next largest support. These views contrast markedly with the results of the opinion survey conducted by City University, which found that more than half those surveyed suggested their preferred minimum age to be 14 or above. The most popular minimum age was 18, with 16 the next most popular.

6.12 Somewhat different results were found by a survey carried out by the Hong Kong Federation of Youth Groups in September 1998.² Almost 60% of respondents preferred the minimum age to remain at seven. Of the 33% in favour of a higher age, roughly 68% suggested the age of criminal responsibility be raised to between 10 and 13, but no clear consensus emerged as to the most popular age.

² A Study on the Age of Criminal Responsibility in Hong Kong, Youth Study Series No 16, Hong Kong Federation of Youth Groups.

6.13 The figures at Annex 4 for the number of persons arrested between the ages of seven and 14 suggest that there is a marked increase in criminal activity from the age of ten. Arrests for the offence of shop theft, for instance, in some years virtually double between the ages of nine and ten, and again between ten and 11. Arrests of children below ten are rare for serious assaults, but increase significantly from ten onwards.

6.14 We are conscious that it is impossible to be scientifically precise as to the proper age at which criminal responsibility should begin. Nevertheless, we believe that a sensible case can be made for adopting the age of ten as the appropriate level. In so recommending, we take cognizance of the following points:

- ◆ Such statistics as are available to us 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. The table at Annex 2 shows that the age of ten is adopted, *inter alia*, by England and Wales, Malaysia and New Zealand. It would be higher than the age adopted in jurisdictions which include Northern Ireland, Scotland, Singapore, South Africa and Switzerland.
- ◆ A significant number of those who responded to our consultation paper were in favour of the age of ten. These included the Hong Kong Federation of Youth Groups, the Hong Kong Young Women's Christian Association, the Hong Kong Council of Social Service, the Boys & Girls Clubs Association, the Hong Kong Psychological Society, the Hong Kong Social Workers' General Union, the Department of Health, the Director of Public Prosecutions and the Judiciary.
- ◆ We believe that we should proceed cautiously in this matter. It is difficult to predict what effect a raising of the minimum age will have on the conduct of young children. Rather than raise the age too radically, we prefer a cautious approach initially which will allow the Administration to evaluate the situation after the increase and, if appropriate, take steps to raise the age further.

6.15 We find support for our view in the judgment of the European Court of Human Rights in *V v the United Kingdom*.³ The court observed that:

³ Application no. 24888/94.

“... at the present time, there is not yet a commonly accepted minimum age for the imposition of criminal responsibility in Europe. While most of the Contracting States have adopted an age-limit which is higher than that in force in England and Wales, other States, such as Cyprus, Ireland, Liechtenstein and Switzerland, attribute criminal responsibility from a younger age. Moreover, no clear tendency can be ascertained from examination of the relevant international texts and instruments Rule 4 of the Beijing Rules which, although not legally binding, might provide some indication of the existence of an international consensus, does not specify the age at which criminal responsibility should be fixed but merely invites States not to fix it too low, and Article 40(3)(a) of the UN Convention requires States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law, but contains no provision as to what that age should be.

The Court does not consider that there is at this stage any clear common standard amongst the member States of the Council of Europe as to the minimum age of criminal responsibility. Even if England and Wales is among the few European jurisdictions to retain a low age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age-limit followed by other European States.”⁴

6.16 In his concurring judgment, Lord Reed said:

“... although the minimum age in England and Wales is towards the lower end of the range, it cannot be said to be out of line with any prevailing standard. Moreover, the purpose of attributing criminal responsibility to a child of a given age is not to cause that child suffering or humiliation, but to reflect a consensus in the society in question as to the appropriate age at which a child is sufficiently mature to be held criminally responsible for his or her conduct. Since perceptions of childhood reflect social, cultural and historical circumstances, and are subject to change over time, it is unsurprising that different States should have different ages of responsibility.”⁵

6.17 Legitimate concerns have been expressed that a raising of the age of criminal responsibility may lead to an upsurge in youth crime, or increased exploitation of under-age children by adult criminals. We set out in the previous chapter the existing provisions for dealing with unruly children below the

⁴ Cited above, at 16.

⁵ Cited above, at 25.

minimum age of criminal responsibility, and looked at measures available to prevent adult exploitation of the young. We do not pretend that these are without difficulties. For instance, while it may be theoretically possible to prosecute the adult criminal as a principal, such a course will often present considerable evidentiary problems. Similarly, while the provisions of the Protection of Children and Juveniles Ordinance (Cap 213) (the PCJO) allow a care or protection order to be made in respect of an under-age child in certain circumstances, it is doubtful if they would be of any avail where the child's conduct is an isolated initial instance of wrongdoing. Section 34(2) of the PCJO refers to a child "*who is beyond control*" or "*whose health, development or welfare appears likely to be neglected or avoidably impaired*", but such criteria would seem to apply to a child who has already embarked on a course of anti-social conduct, rather than one who is about to start. We note in contrast that section 11 of the Crime and Disorder Act 1998 in England and Wales allows a child safety order to be made where a child has committed an act which "*would have constituted an offence*" if he had been over the age of criminal responsibility. That provision would, it seems to us, allow an order to be made in respect of a single instance of wrongdoing.

6.18 Despite our reservations that there appear to be aspects of the existing juvenile justice provisions which require re-examination, we do not think that raising the age of criminal responsibility to ten presents any significant threat to law and order in the community. As we have already pointed out, the existing number of arrests of children below ten is small and there is no reason to suppose that raising the age of criminal responsibility will lead to any marked increase. In answer to concerns that there may be an increase in the level of exploitation of young children by adult criminals, we would observe that it must be wrong in principle to hold a child criminally responsible simply because he may otherwise be exploited by adults. The proper course must surely be to devise ways to curb or minimise exploitation, rather than penalising the child. Furthermore, adults will make use of children no matter what age is chosen as the minimum and the level to which young children are exploited will depend more on the reliability of the children in carrying out the particular purposes than on whether the children are criminally responsible.

6.19 In all the circumstances, we therefore recommend that the minimum age of criminal responsibility be increased to ten years of age.

Should the rebuttable presumption of *doli incapax* be retained between the new age of criminal responsibility and 14?

6.20 Chapter 3 examined the arguments for and against retaining the rebuttable presumption of *doli incapax*. In Chapter 4, we set out the results of the consultation exercise on this issue. Of the 73 respondents to our consultation paper who expressed a view on the presumption, 18 wished to see it abolished

and a further seven argued that it should be reversed. Nineteen of those who wished to retain the current minimum age of criminal responsibility also wished to retain the rebuttable presumption in some form, while a further 29 who wished to raise the age wished to retain the presumption. The tentative conclusion to be drawn is that a majority of respondents preferred to retain the existing rebuttable presumption.

6.21 The findings of the City University survey appear less clear-cut, largely because 52.1% of those polled wanted the minimum age raised above the age of 14, which would effectively amount to the abolition of the rebuttable presumption. Around 21% of those polled thought that the rebuttable presumption should be applied to those falling between a raised minimum age and 14, with a total of 7.8% opposed to such a course. Taking out of the equation those who favoured raising the minimum age above the age of 14, some 63% of respondents favoured applying the rebuttable presumption between the new minimum age and 14. Again, a tentative conclusion would appear to be that, if the minimum age is raised to ten years as we propose, a majority of the community would wish to retain the rebuttable presumption for children between the ages of ten and 14.

6.22 We have set out in Chapter 3 Laws J's trenchant criticisms of the rebuttable presumption in the case of *C (a Minor) v DPP*.⁶ We accept that the presumption is imperfect and that it is not entirely logical. We note also that it has been abolished in England and Wales by section 34 of the Crime and Disorder Act 1998, and that the rebuttable presumption has never existed in a number of other jurisdictions. Nevertheless, we have concluded that there are sound reasons for retaining the rebuttable presumption at least in the short term. In particular, we believe it acts (in Lord Lowry's words in *C (a Minor) v DPP*) as a "benevolent safeguard" to ensure that only a child who is fully aware that what he has done is seriously wrong will be subject to criminal process. To quote Lord Lowry more fully:

"We start with a benevolent presumption of doli incapax, the purpose of which was to protect children between 7 (now by statute 10) and 14 years from the full rigour of the criminal law. The fact that this presumption was rebuttable has led the courts to recognise that the older the child ... and the more obviously heinous the offence, the easier it is to rebut the presumption. Proof of mental normality has in practice (understandably but perhaps not always logically) been largely accepted as proof that the child can distinguish right from wrong and form a criminal intent. The presumption is not, and never has been, completely logical; it provides a benevolent safeguard which evidence can remove."

6.23 We have previously pointed out that it is not possible to determine with scientific certainty whether seven, ten, 12 or some other age is the specific point at which a child's mental capacity is adequate to determine right from

⁶ [1966] 1 AC 1.

wrong. In the absence of such scientific certainty, we think it reasonable to allow some flexibility through the operation of the rebuttable presumption to ensure that children who are insufficiently mature are not subject to criminal process.

6.24 We argued earlier in relation to determining the appropriate age at which to apply criminal responsibility that we should adopt a cautious approach. We think that that applies with equal force when considering whether or not to abolish the rebuttable presumption. Any change in this area of the law represents a significant social change which should not in our view be undertaken lightly. It should be noted that while the minimum age of criminal responsibility was raised from seven to ten in England and Wales in 1933, the rebuttable presumption was not abolished until 65 years later by the Crime and Disorder Act 1998. Similarly, we note that while the Children Bill 1999 in Ireland proposes to raise the age of criminal responsibility from seven to 12, it specifically retains the rebuttable presumption in respect of children between 12 and 14 years of age.

6.25 **We accordingly recommend that the rebuttable presumption of *doli incapax* should continue to apply to children of ten and below 14 years of age.**

Other recommendations for reform

6.26 Our terms of reference were focused on the narrow question of determining what changes, if any, should be made to the minimum age of criminal responsibility and the associated presumption of *doli incapax*. They did not extend to a review of the juvenile justice system as a whole. As part of our study, however, we felt it necessary to examine the existing measures which were available to deal with unruly children below the age of criminal responsibility, and this forms the content of chapter 5. We have concluded that the existing mechanisms could with advantage be significantly improved, and we believe that the Administration should undertake a comprehensive review of juvenile justice.

6.27 We have already referred at paragraph 6.17 above to the shortcomings of section 34(2) of the Protection of Children and Juveniles Ordinance (Cap 213) (the PCJO), and the difficulty which may be caused by the standard of “*beyond control*” which the section requires. Section 34(2)(d) applies to cases where a child “*is beyond control, to the extent that harm may be caused to him or others, and who requires care or protection.*” This definition may represent too high a threshold. For example, where a child has not committed any anti-social act but frequents a location favoured by triad members (thereby exposing himself to undesirable influences), it is doubtful that the behaviour of the child could be argued to be “*beyond control*” in the particular sense of the term used in the PCJO. For this reason, we would suggest either that the test of “*beyond control*” be redefined and expanded to take into account delinquent behaviour which falls short of the current definition, or alternatively, that new intermediate measures be

created, ranging somewhere between voluntary counselling from trained social workers and formal and mandatory care or protection orders.

6.28 We believe that a new “guidance order” might provide one such mechanism. As the term implies, a “guidance order” would be a court order made for the specific purpose of providing guidance to a child who has not committed any anti-social acts, but who is at risk of becoming involved in crime or criminal association. Under such an order, the relationship between the social worker and the child in question would be warm and informal. The intention would be that such an approach would help bring into line those children who are not eligible for care or protection orders, but who might otherwise go astray.

6.29 In chapter 5 of this report, we outlined a range of other measures adopted in England and Wales under the Crime and Disorder Act 1998 intended to curb anti-social behaviour by children below the age of criminal responsibility. We also discussed the relevant parts of the Irish Children Bill 1999 which deal specifically with unruly children below the minimum age of criminal responsibility. We are of the opinion that both the English and Irish experiences are appropriate references for any future review of our legislation governing the provision of care and protection to youngsters. We consider that the Administration should examine carefully the measures contained in the English model, including the child safety order, the parenting order, the local child curfew order and the removal of truants to designated premises. Similarly, the idea of a family welfare conference, provided for in the Irish Children Bill of 1999, is worthy of consideration here for the rehabilitation of children who have not committed any offences but are at risk of being undesirably influenced either by their peers or adult criminals. A family welfare conference such as is proposed under the Irish Bill would consider measures which could include the monitoring of the child’s attendance at school or at approved activities, the provision of special treatment for the child, the award of compensation to a victim of the child, the imposition of a curfew on the child. In short, the family welfare conference would provide an action plan for the unruly child.

6.30 We explained earlier that we believed we should adopt a cautious approach when considering the minimum age of criminal responsibility and the rebuttable presumption of *doli incapax*. We also suggested that these issues could be re-examined by the Administration once the results of raising the minimum age to ten have been properly assessed. As part of that re-examination, we believe that there should be a comprehensive review of the juvenile justice system to ensure that there are effective alternatives to prosecution available which on the one hand provide adequate security to the community while on the other hand preventing errant youngsters from degenerating into hardened criminals.

6.31 **We accordingly recommend that the Administration carry out a general review of the juvenile justice system.**

**List of those who made submissions on the Consultation Paper
on the Age of Criminal Responsibility in Hong Kong**

1. Against Child Abuse
2. Amnesty International Hong Kong Section
3. Mr Ruy Barretto
4. The Boy's & Girls' Clubs Association of Hong Kong
5. Mr A A Bruce SC (Senior Assistant Director of Public Prosecutions,
Prosecutions Division, Department of Justice)
6. Caritas Outreaching Social Work Team – Aberdeen
7. Mr P S Chapman (Senior Assistant Director of Public Prosecutions,
Prosecutions Division, Department of Justice)
8. Mr K C Cheung
9. Mr Cheung Wai-sun (Senior Assistant Director of Public Prosecutions,
Prosecutions Division, Department of Justice)
10. Correctional Services Department
11. Mr I Grenville Cross SC (Director of Public Prosecutions, Department of
Justice)
12. Department of Health
13. Mr Ian Dobinson (Associate Professor, City University of Hong Kong,
Department of Law)
14. Ms Charlotte Draycott
15. Professor David Dudgeon (University of Hong Kong, Department of
Ecology & Biodiversity)
16. Duty Lawyer Service
17. Fight Crime Committee
18. Home Affairs Bureau
19. Hong Kong Bar Association
20. Hong Kong Christian Service
21. The Hong Kong Committee on Children's Rights
22. The Hong Kong Council of Social Service

23. The Hong Kong Family Law Association
24. Hong Kong Family Welfare Society
25. The Hong Kong Federation of Youth Groups
26. The Hong Kong Girl Guides Association
27. Hong Kong Human Rights Monitor
28. Hong Kong Outward Bound School
29. Hong Kong Playground Association, Wan Chai/North Point Outreach Social Work Team
30. Hong Kong Police Force
31. The Hong Kong Psychological Society
32. Hong Kong Social Workers' General Union
33. Hong Kong Student Aid Society
34. Hong Kong Young Legal Professionals Association Limited
35. Hong Kong Young Women's Christian Association
36. Mr Alan Hoo SC
37. Immigration Department
38. Ms Maria Ip (Senior Assistant Director of Public Prosecutions, Prosecutions Division, Department of Justice)
39. Judiciary
40. JUSTICE
41. Kwai Tsing District Fight Crime Committee
42. Mr Kwan Kim Chung
43. Professor Y L Lau (University of Hong Kong, Department of Paediatrics)
44. The Law Society of Hong Kong
45. Legal Aid Department
46. Mr Francis Lo (Senior Assistant Director of Public Prosecutions, Prosecutions Division, Department of Justice)
47. Mr P Y Lo
48. The Honourable Christine Loh
49. Ms Krista Ma
50. Mr Harry Macleod (Deputy Director of Public Prosecutions, Prosecutions Division, Department of Justice)

51. Mr I C McWalters (Senior Assistant Director of Public Prosecutions, Prosecutions Division, Department of Justice)
52. Mr Ngai Ngan Pun (Associate Professor, Chinese University of Hong Kong, Department of Social Work)
53. Mr M R Nunns
54. Ms Nia A Pryde
55. Dr Nirmala Rao (Associate Professor, University of Hong Kong, Department of Education)
56. Ms Corinne Remedios
57. ReSource The Counselling Centre
58. Mr D G Saw SC (Deputy Director of Public Prosecutions, Prosecutions Division, Department of Justice)
59. Security Bureau
60. Shum Shui Po District Fight Crime Committee
61. Ms Mary Sin (Senior Assistant Director of Public Prosecutions, Prosecutions Division, Department of Justice)
62. Mr Rupert Spicer
63. St. John's Cathedral Counselling Service
64. Standing Committee of Young Offenders of the Fight Crime Committee
65. The Honourable Mr Justice Stuart-Moore JA
66. Tai Po District Fight Crime Committee
67. Mr David Tolliday-Wright
68. Mr Paul Hin Sum Tong
69. TREATS
70. Mr Ian Wingfield (Law Officer (Civil Law), Department of Justice)
71. Mr Wong Chow Ket (Tsuen Wan Adventist Hospital)
72. Dr Dennis S W Wong (Assistant Professor, City University of Hong Kong, Department of Applied Social Studies)
73. Mr Valentine S T Yim
74. Mr Selwyn Yu

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
Malta	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

<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

**Number of children aged between 7 and 14 years cautioned under the
Police Superintendents' Discretion Scheme (PSDS) for specific
selected offences from 1993 to 1998**

Table 3.1 – 1993

Type of offence	Age at 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	4	1	8	6	18	11
Wounding	-	-	-	-	-	-	-	-	-	1	3	-	10	1	27	-
Serious assault	-	1	-	-	-	1	1	3	3	8	16	13	55	45	111	52
Criminal intimidation	-	-	-	-	-	-	-	-	-	-	1	1	5	2	17	5
Robbery with pistol like object	-	-	-	-	-	-	-	-	-	-	-	-	1	1	2	1
Other robberies	1	-	-	-	1	3	2	2	6	7	28	25	126	48	209	52
Blackmail	-	-	-	-	-	-	-	-	-	-	3	4	22	5	41	17
Arson	-	-	-	-	1	-	1	-	-	3	3	1	2	1	5	3
Burglary with breaking	1	-	1	-	2	3	4	3	6	8	13	8	40	8	48	16
Burglary without breaking	-	1	1	2	1	-	3	1	13	13	13	10	29	17	25	6
Theft (snatching)	-	-	-	-	1	1	1	2	-	6	4	6	5	10	11	-
Theft (pickpocketing)	-	-	-	1	1	-	1	-	-	-	2	1	1	2	2	1
Theft (shop theft)	2	16	2	34	8	45	13	100	14	151	44	185	96	238	119	265
Taking conveyance without authority	-	-	-	-	-	-	-	-	-	-	2	1	6	1	12	3
Handling stolen goods	1	-	-	-	-	1	2	2	1	4	8	4	15	1	9	4
Deception	-	-	-	-	-	-	-	-	-	-	1	-	1	1	9	3
Unlawful sexual intercourse	-	-	-	-	-	-	-	-	-	-	1	-	-	-	12	1
Trafficking in dangerous drugs (DD)	-	-	-	-	-	-	1	-	-	-	-	-	3	-	7	-
Possession of DD for trafficking	-	-	-	-	-	-	-	-	-	-	2	-	6	-	15	-
Criminal damage	-	-	1	-	1	5	1	1	3	4	12	14	28	21	40	25
Disorder/fighting in public place	-	-	-	-	-	-	-	-	-	-	1	1	6	3	33	6
Offences against public order	-	-	-	-	-	-	-	-	-	-	-	-	1	-	2	-
Unlawful society offences	-	-	-	-	-	-	-	-	-	-	7	4	36	9	54	16
Object dropped from height	1	-	-	3	1	-	-	3	3	2	-	4	3	5	-	4
Other crimes	-	-	-	-	-	-	-	-	-	1	-	-	1	-	2	-
Possession of offensive weapon	-	-	-	-	-	-	-	-	-	-	1	2	20	11	34	9
Going equipped for stealing	1	-	-	-	1	2	2	2	1	4	4	9	10	14	12	23
Loitering	-	-	-	-	-	-	-	-	-	-	-	-	1	-	3	1

Table 3.2 – 1994

Type of offence	Age at 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	-	-	-	-	2	5	3	21	4	31	15
Wounding	-	-	-	-	-	-	1	1	3	-	4	1	10	2	23	1
Serious assault	-	1	-	-	1	3	1	3	4	9	17	12	67	47	149	65
Criminal intimidation	-	-	-	-	-	-	-	-	-	-	1	-	8	2	15	5
Robbery with pistol like object	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	-
Other robberies	-	1	-	1	1	-	2	-	9	3	35	23	106	37	163	51
Blackmail	-	-	-	-	1	-	1	-	2	4	9	3	27	17	42	16
Arson	-	-	-	-	-	3	-	-	2	1	7	1	8	2	6	2
Burglary with breaking	-	-	-	2	-	1	4	-	7	6	16	6	30	13	51	12
Burglary without breaking	-	-	-	-	2	2	3	1	6	4	9	11	26	14	30	11
Theft (snatching)	-	-	-	-	-	-	1	-	-	-	5	1	7	1	12	-
Theft (pickpocketing)	-	-	-	1	1	-	1	-	2	1	3	-	15	-	9	1
Theft (shop theft)	2	15	10	42	4	65	17	107	22	145	42	193	117	302	140	302
Taking conveyance without authority	-	-	-	-	-	-	-	-	-	3	-	2	6	4	15	2
Handling stolen goods	-	-	-	-	-	-	-	-	-	2	1	2	7	4	4	14
Deception	-	-	-	-	-	-	-	-	-	2	-	-	1	5	6	1
Unlawful sexual intercourse	-	-	-	-	-	-	-	-	-	-	-	-	-	1	20	1
Trafficking in dangerous drugs (DD)	-	-	-	-	-	-	-	-	-	-	-	-	3	1	7	-
Possession of DD for trafficking	-	-	-	-	-	-	-	-	-	-	1	-	2	-	13	-
Criminal damage	-	1	-	-	2	2	2	1	2	8	7	9	32	22	45	34
Disorder/fighting in public place	-	1	-	-	1	-	-	-	-	-	1	5	12	8	23	6
Offences against public order	-	-	-	-	-	-	-	-	-	-	1	-	3	-	6	-
Unlawful society offences	-	-	-	-	-	-	-	1	1	-	8	3	34	15	75	20
Object dropped from height	2	-	-	-	-	2	2	2	6	1	1	4	2	6	-	7
Other crimes	-	-	-	-	-	-	-	-	-	-	-	-	3	-	3	-
Possession of offensive weapon	-	-	-	-	-	-	-	-	1	2	1	3	9	5	26	2
Going equipped for stealing	-	-	-	-	-	-	2	1	1	10	6	7	14	22	13	23
Loitering	-	-	-	-	-	-	-	-	-	-	-	1	-	-	3	-

Table 3.3 – 1995

Type of offence	Age at 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	2	3	5	13	10	24	3
Wounding	-	-	-	-	-	-	-	-	-	1	2	1	14	-	20	1
Serious assault	-	-	1	-	-	-	1	1	4	7	20	20	74	50	173	81
Criminal intimidation	-	-	-	-	-	-	3	-	3	1	3	1	14	6	23	2
Robbery with pistol like object	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Other robberies	-	-	2	-	1	-	1	1	10	1	22	11	64	26	97	30
Blackmail	-	-	-	-	-	-	-	-	-	5	2	2	14	13	28	15
Arson	-	-	-	-	-	-	-	1	1	1	2	-	8	4	4	-
Burglary with breaking	-	1	-	1	-	1	2	3	4	2	17	7	50	13	71	13
Burglary without breaking	1	-	1	-	-	-	3	1	1	3	15	5	26	18	48	11
Theft (snatching)	-	-	-	-	-	-	-	1	1	2	1	5	7	1	7	1
Theft (pickpocketing)	-	-	-	-	-	-	1	-	3	-	-	-	1	-	3	-
Theft (shop theft)	5	12	4	34	8	66	10	118	23	160	58	237	115	368	151	355
Taking conveyance without authority	-	-	-	-	-	-	1	-	-	-	1	1	-	-	3	-
Handling stolen goods	-	-	-	-	-	-	-	2	-	6	7	11	3	12	9	13
Deception	-	-	-	-	-	-	-	-	1	-	1	-	2	2	3	4
Unlawful sexual intercourse	-	-	-	-	-	-	-	-	-	-	1	-	1	-	15	1
Trafficking in dangerous drugs (DD)	-	-	-	-	-	-	-	-	-	-	-	-	5	-	14	-
Possession of DD for trafficking	-	-	-	-	-	-	-	-	-	-	1	-	10	-	21	-
Criminal damage	-	1	-	2	1	1	2	9	5	4	5	8	17	18	33	24
Disorder/fighting in public place	-	-	-	-	-	-	-	-	1	1	6	2	9	7	41	14
Offences against public order	-	-	-	-	-	-	-	-	-	-	-	-	2	-	6	-
Unlawful society offences	1	-	-	-	-	-	-	-	1	-	3	6	34	9	62	14
Object dropped from height	-	1	-	1	1	-	1	2	1	2	1	4	2	4	-	4
Other crimes	-	-	-	-	-	-	-	-	-	-	1	-	2	1	4	-
Possession of offensive weapon	-	-	-	-	1	-	-	1	-	-	-	1	5	4	9	1
Going equipped for stealing	-	-	-	-	-	-	-	-	2	2	10	9	6	16	12	32
Loitering	-	-	-	-	-	-	-	-	-	-	-	-	1	3	3	-

Table 3.4 – 1996

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	-	2	8	16	14	25	10
Wounding	-	-	-	-	-	-	-	-	-	-	2	2	9	2	34	3
Serious assault	-	-	-	1	1	1	3	4	5	9	30	15	89	62	160	99
Criminal intimidation	-	-	-	-	-	-	-	-	-	-	2	-	6	3	17	6
Robbery with pistol like object	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Other robberies	-	-	-	-	1	1	-	6	5	4	26	9	49	16	88	26
Blackmail	-	-	-	-	-	-	-	-	-	-	13	4	17	14	26	11
Arson	-	-	-	1	-	1	-	2	1	4	-	2	2	5	1	2
Burglary with breaking	-	-	-	-	-	1	1	1	7	2	10	4	13	11	28	21
Burglary without breaking	1	-	-	-	1	-	3	1	4	8	3	7	14	10	17	9
Theft (snatching)	-	-	-	-	-	-	-	1	1	1	1	2	7	2	6	1
Theft (pickpocketing)	-	-	-	-	-	1	-	-	2	1	1	1	-	-	-	-
Theft (shop theft)	3	16	9	26	7	69	19	95	32	143	69	223	96	373	177	397
Taking conveyance without authority	-	-	-	-	-	-	-	1	-	-	2	1	7	-	8	6
Handling stolen goods	-	-	-	-	-	-	-	-	2	3	3	1	10	9	8	12
Deception	-	-	-	-	-	-	-	-	-	1	2	1	11	2	8	7
Unlawful sexual intercourse	-	-	-	-	-	-	-	-	-	-	-	-	2	-	14	-
Trafficking in dangerous drugs (DD)	-	-	1	-	-	-	1	-	-	-	-	-	1	-	5	-
Possession of DD for trafficking	-	-	-	-	1	-	-	-	-	-	2	-	3	-	9	-
Criminal damage	-	1	-	1	1	3	2	6	5	4	6	10	25	23	24	33
Disorder/fighting in public place	-	-	1	-	-	-	-	-	-	-	6	1	21	2	26	12
Offences against public order	-	-	-	-	-	-	-	-	-	-	1	-	2	-	16	-
Unlawful society offences	-	-	-	-	-	-	-	-	-	-	2	-	37	7	70	14
Object dropped from height	-	-	1	1	2	-	-	2	1	7	2	4	1	2	2	1
Other crimes	-	-	-	-	-	-	-	-	-	-	-	-	-	1	1	1
Possession of offensive weapon	-	-	-	-	-	-	-	2	-	-	2	-	13	6	18	8
Going equipped for stealing	-	-	-	-	-	-	1	2	-	3	3	9	4	16	10	19
Loitering	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	2

Table 3.5 – 1997

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	-	-	-	-	-	-	2	6	4	12	6	16	10
Wounding	-	-	-	-	-	-	1	-	-	-	3	-	12	-	43	11
Serious assault	-	-	-	-	1	1	1	1	4	7	18	23	80	67	168	89
Criminal intimidation	-	-	-	-	-	-	-	1	1	-	3	3	17	5	23	4
Robbery with pistol like object	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Other robberies	1	-	-	-	-	-	-	-	9	4	19	3	55	9	93	11
Blackmail	-	-	-	-	-	-	-	-	1	-	6	4	15	10	32	12
Arson	-	-	-	-	-	-	-	-	-	1	5	1	8	-	11	2
Burglary with breaking	1	1	1	-	-	3	2	2	4	3	7	5	23	11	20	8
Burglary without breaking	-	-	-	-	-	-	2	4	1	4	7	2	19	4	29	11
Theft (snatching)	-	-	-	-	-	-	2	1	-	1	3	2	2	6	9	1
Theft (pickpocketing)	1	-	-	-	-	-	-	-	-	-	1	-	-	-	-	-
Theft (shop theft)	4	11	6	34	13	46	21	83	22	129	67	226	127	347	166	364
Taking conveyance without authority	-	-	-	-	-	-	-	-	-	-	-	-	3	1	2	2
Handling stolen goods	-	-	-	-	-	-	-	-	-	1	2	7	5	7	7	10
Deception	-	-	-	-	-	-	-	-	-	-	-	-	1	1	5	-
Unlawful sexual intercourse	-	-	-	-	-	-	-	-	-	-	-	-	2	2	19	4
Trafficking in dangerous drugs (DD)	-	-	-	-	-	-	-	-	-	-	-	-	1	-	4	-
Possession of DD for trafficking	-	-	-	-	-	-	-	-	-	-	-	-	2	-	3	-
Criminal damage	-	1	1	-	1	-	1	1	4	4	6	12	13	12	37	18
Disorder/fighting in public place	-	-	-	-	-	-	-	-	4	-	2	3	9	6	42	11
Offences against public order	-	-	-	-	-	-	-	-	-	-	1	-	15	-	40	-
Unlawful society offences	-	-	-	-	-	-	-	-	-	-	2	4	19	7	60	5
Object dropped from height	-	1	-	1	-	-	-	1	-	1	1	-	3	2	1	7
Other crimes	-	-	-	-	-	-	-	-	-	-	-	-	-	3	2	1
Possession of offensive weapon	-	-	-	-	-	-	-	-	1	-	2	-	10	-	20	2
Going equipped for stealing	-	-	-	-	-	-	-	1	3	1	3	4	4	11	4	5
Loitering	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2	1

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	26	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	156	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	6	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	-

**Number of arrests of children aged between 7 and 14 years
for specific selected offences from 1993 to 1999**

Table 4.1 – 1993

Type of offence	Age at arrest							
	7	8	9	10	11	12	13	14
Indecent assault	-	1	-	-	1	5	14	29
Wounding	-	-	-	-	1	3	11	27
Serious assault	1	-	1	4	11	29	100	163
Criminal intimidation	-	-	-	-	-	2	7	22
Other robberies (robberies with pistol like object excluded)	1	-	4	4	13	53	174	261
Blackmail	-	-	-	-	-	7	27	58
Burglary with breaking	1	1	5	7	14	21	48	64
Burglary without breaking	1	3	1	4	26	23	46	31
Theft (snatching)	-	-	2	3	6	10	15	11
Theft (pickpocketing)	-	1	1	1	-	3	3	3
Theft (shop theft)	18	36	53	113	165	229	334	384
Taking conveyance w/o authority	-	-	-	-	-	3	7	15
Handling stolen goods	1	-	1	4	5	12	16	13
Deception	-	-	-	-	-	1	2	12
Unlawful sexual intercourse	-	-	-	-	-	1	-	13
Trafficking in dangerous drugs (DD)	-	-	-	1	-	-	3	7
Possession of DD for trafficking	-	-	-	-	-	2	6	15
Criminal damage	-	1	6	2	7	26	49	65
Disorder/fighting in public place	-	-	-	-	-	2	9	39
Unlawful society offences	-	-	-	-	-	11	45	70
Other crimes	-	-	-	-	1	-	1	2
Possession of offensive weapon	-	-	-	-	-	3	31	43
Going equipped for stealing	1	-	3	4	5	13	24	35
Loitering	-	-	-	-	-	-	1	4

Table 4.2 – 1994

Type of offence	Age at arrest							
	7	8	9	10	11	12	13	14
Indecent assault	-	1	1	-	2	8	25	46
Wounding	-	-	-	2	3	5	12	24
Serious assault	1	-	4	4	13	29	114	214
Criminal intimidation	-	-	-	-	-	1	10	20
Other Robberies (robberies with pistol like object excluded)	1	1	1	2	12	58	143	214
Blackmail	-	-	1	1	6	12	44	58
Burglary with breaking	-	2	1	4	13	22	43	63
Burglary without breaking	-	-	4	4	10	20	40	41
Theft (snatching)	-	-	-	1	-	6	8	12
Theft (pickpocketing)	-	1	1	1	3	3	15	10
Theft (shop theft)	17	52	69	124	167	235	419	442
Taking conveyance w/o authority	-	-	-	-	3	2	10	17
Handling stolen goods	-	-	-	-	2	3	11	18
Deception	-	-	-	-	2	-	6	7
Unlawful sexual intercourse	-	-	-	-	-	-	1	21
Trafficking in dangerous drugs (DD)	-	-	-	-	-	-	4	7
Possession of DD for trafficking	-	-	-	-	-	1	2	13
Criminal damage	1	-	4	3	10	16	54	79
Disorder/fighting in public place	1	-	1	-	-	6	20	29
Unlawful society offences	-	-	-	1	1	11	49	95
Other crimes	-	-	-	-	-	-	3	3
Possession of offensive weapon	-	-	-	-	3	4	14	28
Going equipped for stealing	-	-	-	3	11	13	36	36
Loitering	-	-	-	-	-	1	-	3

Table 4.3 – 1995

Type of offence	Age at arrest							
	7	8	9	10	11	12	13	14
Indecent assault	-	-	1	-	3	8	23	27
Wounding	-	-	-	-	1	3	14	21
Serious assault	-	1	-	2	11	40	124	254
Criminal intimidation	-	-	-	3	4	4	20	25
Other robberies (robberies with pistol like object excluded)	-	2	1	2	11	33	90	127
Blackmail	-	-	-	-	5	4	27	43
Burglary with breaking	1	1	1	5	6	24	63	84
Burglary without breaking	1	1	-	4	4	20	44	59
Theft (snatching)	-	-	-	1	3	6	8	8
Theft (pickpocketing)	-	-	-	1	3	-	1	3
Theft (shop theft)	17	38	74	128	183	295	483	506
Taking conveyance w/o authority	-	-	-	1	-	2	-	3
Handling stolen goods	-	-	-	2	6	18	15	22
Deception	-	-	-	-	1	1	4	7
Unlawful sexual intercourse	-	-	-	-	-	1	1	16
Trafficking in dangerous drugs (DD)	-	-	-	-	-	-	5	14
Possession of DD for trafficking	-	-	-	-	-	1	10	21
Criminal damage	1	2	2	11	9	13	35	57
Disorder/fighting in public place	-	-	-	-	2	8	16	55
Unlawful society offences	1	-	-	-	1	9	43	76
Other crimes	-	-	-	-	-	1	3	4
Possession of offensive weapon	-	-	1	1	-	1	9	10
Going equipped for stealing	-	-	-	-	4	19	22	44
Loitering	-	-	-	-	-	-	4	3

Table 4.4 – 1996

Type of offence	Age at arrest							
	7	8	9	10	11	12	13	14
Indecent assault	-	-	-	1	1	10	30	35
Wounding	-	-	-	-	-	4	11	37
Serious assault	-	1	2	7	14	45	151	259
Criminal intimidation	-	-	-	-	-	2	9	23
Other robberies (robberies with pistol like object excluded)	-	-	2	6	9	35	65	114
Blackmail	-	-	-	-	-	17	31	37
Burglary with breaking	-	-	1	2	9	14	24	49
Burglary without breaking	1	-	1	4	12	10	24	26
Theft (snatching)	-	-	-	1	2	3	9	7
Theft (pickpocketing)	-	-	1	-	3	2	-	-
Theft (shop theft)	19	35	76	114	175	292	469	574
Taking conveyance w/o authority	-	-	-	1	-	3	7	14
Handling stolen goods	-	-	-	-	5	4	19	20
Deception	-	-	-	-	1	3	13	15
Unlawful sexual intercourse	-	-	-	-	-	-	2	14
Trafficking in dangerous drugs (DD)	-	1	-	1	-	-	1	5
Possession of DD for trafficking	-	-	1	-	-	2	3	9
Criminal damage	1	1	4	8	9	16	48	57
Disorder/fighting in public place	-	1	-	-	-	7	23	38
Unlawful society offences	-	-	-	-	-	2	44	84
Other crimes	-	-	-	-	-	-	1	2
Possession of offensive weapon	-	-	-	2	-	2	19	26
Going equipped for stealing	-	-	-	3	3	12	20	29
Loitering	-	-	-	-	-	-	-	3

Table 4.5 – 1997

Type of offence	Age at arrest							
	7	8	9	10	11	12	13	14
Indecent assault	-	1	-	-	2	10	18	26
Wounding	-	-	-	1	-	3	12	54
Serious assault	-	-	2	2	11	41	147	257
Criminal intimidation	-	-	-	1	1	6	22	27
Other Robberies (robberies with pistol like object excluded)	1	-	-	-	13	22	64	104
Blackmail	-	-	-	-	1	10	25	44
Burglary with breaking	2	1	3	4	7	12	34	28
Burglary without breaking	-	-	-	6	5	9	23	40
Theft (snatching)	-	-	-	3	1	5	8	10
Theft (pickpocketing)	1	-	-	-	-	1	-	-
Theft (shop theft)	15	40	59	104	151	293	474	530
Taking conveyance w/o authority	-	-	-	-	-	-	4	4
Handling stolen goods	-	-	-	-	1	9	12	17
Deception	-	-	-	-	-	-	2	5
Unlawful sexual intercourse	-	-	-	-	-	-	4	23
Trafficking in dangerous drugs (DD)	-	-	-	-	-	-	1	4
Possession of DD for trafficking	-	-	-	-	-	-	2	3
Criminal damage	1	1	1	2	8	18	25	55
Disorder/fighting in public place	-	-	-	-	4	5	15	53
Unlawful society offences	-	-	-	-	-	6	26	65
Other crimes	-	-	-	-	-	-	3	3
Possession of offensive weapon	-	-	-	-	1	2	10	22
Going equipped for stealing	-	-	-	1	4	7	15	9
Loitering	-	-	-	-	-	-	-	3

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

**Survey of public opinion on the Age of Criminal
Responsibility in Hong Kong carried out by the Social Data
Research Unit, Department of Applied Social Studies of the
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With the support of its **Social Data Research Unit**, which facilitates social research with computer-assisted telephone interviewing with and without an interviewer, to conduct both phone-in and phone-out surveys

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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.

Report

1. Following a pre-test of 33 interviews on April 22 and 23, 1999, a random sample telephone survey interviewed 1,144 people in Hong Kong between April 28 and May 8, 1999. This pretest and full-scale surveys drew samples of the population through the sample frame of all residential telephone number in Hong Kong. The random sampling procedure involved two steps: (1) drawing a random sample of residential telephone numbers and (2) drawing a random sample of members of households with the selected telephone numbers. Trained and qualified interviewers conducted the survey with the aid of computer-assisted interviewing facilities. The facilities can ensure the correct flow of the interview and the quality of data input. The pretest served to improve survey questions so as to guarantee their clarity, comprehensibility, legitimacy, and feasibility when used in the full-scale survey.
2. The response rate of the full-scale survey was 36.2%, estimated in terms of the ratio of the number of successful interviews to the sum of that number and the number (2,016) of households that refused to participate in the survey.
3. To maximize the representativeness of the data, a weighting procedure attached a weight to each case according to the age and sex of the respondent so as to make the resultant distribution of age and sex equivalent to the population projected for 1999 (based on the 1996 bi-census). That is, a case whose age and sex were underrepresented in the sample relative to the population would be more important and thus have a weight higher than one. Conversely, a case whose age and sex were overrepresented in the sample would have a weight lower than one. As a result, distribution figures in terms of unweighted and weighted data are available. In addition, figures are available for the case that excludes missing values due to "not understanding" and "not willing to answer." These figures derived from the assumption that those not understanding or not willing to answer would have the same distribution of valid responses as those giving valid responses.

Profile of the Sample

4. Respondents' age ranged from 15 to 87 years, with an average of 37.1 (see Table 1). The average age was slightly lower the mean (40.9) of the population, as a result of the weighting procedure that equated the distribution of the sample to that of the population in age and sex. The sample tended to overrepresent respondents aged between 15 and 19 years. After application of the weighting procedure, the weighted proportion of the youngest category reduced. The sample consisted slightly of more female respondents than male respondents (52.9% vs. 45.8%; 1.3%

unidentified, see Table 2). After weighting, the proportion of male people became closer to that of female people. An overwhelming majority (97.8%) of the interviews employed Chinese as the medium (see Table 3). Only 25 interviews used English as the medium. Most respondents attained the senior secondary level (Secondary 4 to Secondary 7) of education (see Table 4). Few people had not received any formal education. About 70% of the population aged 15 or above did not have religious faith (see Table 5).

Table 1: Distribution of responses to Question 12: What is your age?

	15-19	20-29	30-39	40-49	50-59	60-69	70 or above	Not willing to answer
Unweighted count	162	170	219	178	86	63	58	208
Unweighted percent	14.2	14.9	19.1	15.6	7.5	5.5	5.1	18.2
Weighted percent	7.3	14.6	20.3	17.8	8.8	7.6	5.6	18.1
Weighted percent, excluding missing	8.9	17.8	24.8	21.7	10.8	9.3	6.8	-

Unweighted mean = 37.1; weighted mean = 40.9

Notes: The unweighted count was the number existing in the sample.

The unweighted percent was the percent in the sample.

The weighted percent was the percent in the population by adjusting data from the sample based on the distribution of age and sex.

The weighted percent with missing excluded was the percent in the population by excluding those responses of “not understand” and “not willing to answer” from the basis of calculation.

“-”: treated as a missing value.

Table 2: Distribution of responses to Question 13: What is your sex?

	Male	Female	Not identified
Unweighted count	524	605	15
Unweighted percent	45.8	52.9	1.3
Weighted percent	48.3	50.4	1.3
Weighted percent, excluding missing	48.9	51.1	-

Table 3: Distribution of responses to Question 14: Language used during the interview

	Chinese	English
Unweighted count	1119	25
Unweighted percent	97.8	2.2
Weighted percent	97.7	2.3

Table 4: Distribution of responses to Question 11: What is your level of education?

	No	Primary	Junior secondary	Senior secondary	Post-secondary	Not willing to answer
Unweighted count	63	152	254	448	198	29
Unweighted percent	5.5	13.3	22.2	39.2	17.3	2.5
Weighted percent	6.4	15.0	21.4	36.2	18.2	2.9
Weighted percent, missing excluded	6.6	15.4	22.0	37.2	18.7	-

Table 5: Distribution of responses to Question 10: Do you have any religious faith?

	Yes	No	Not willing to answer
Unweighted count	302	822	12
Unweighted percent	26.4	71.9	1.7
Weighted percent	28.2	70.2	1.6
Weighted percent, missing excluded	28.7	71.3	-

Opinions on the Age of Criminal Responsibility

5. The majority of the population with age of 15 years or above preferred the age of criminal responsibility should be at least 8 years or above (see Table 6). According to the weighted figures with missing excluded, 89.4% of the population preferred such an option. This figures also assumed that 89.4% of those failing to give responses to the question would also preferred a minimum age of 8 years or above for criminal responsibility. At any rate, the exact proportion might be between 86.7% and 89.4%, depending on the true preference of those who failed to give responses to the survey question. On the other hand, only 0.9% of the population preferred to have criminal responsibility beginning at an age under 7.

Table 6: Distribution of responses to Question 1: At what age do you think persons should be held criminally responsible for their actions?

	Below 7	7	8 or above	Not sure	No comment	Not under-stand	Not willing to answer
Unweighted count	13	17	997	42	48	22	5
Unweighted percent	1.1	1.5	87.2	3.7	4.2	1.9	0.4
Weighted percent	0.9	1.3	86.7	3.8	4.2	2.5	0.2
Weighted percent, missing excluded	0.9	1.4	89.4	8.3		-	-

6. Only 7 respondents who preferred an age of criminal responsibility below 7 indicated the minimum age of criminal responsibility (see Table 7). The proportion of the population favoring each of the suggested ages was very small.

Table 7: Distribution of responses to Question 1.1: What should be the minimum age of criminal responsibility given that it should be below 7?

	0	1	5	6
Unweighted count	1	1	2	3
Unweighted percent	0.1	0.1	0.2	0.3
Weighted percent	0.0	0.0	0.2	0.2

6 respondents being unsure of the age

7. According to weighted data, 18.1% of the population preferred the minimum age of criminal responsibility to be 18 years (see Table 8). This age was the most popular among the population. The next popular minimum age of criminal responsibility was 16 years, with 15.5% of the population favoring that age. Few people preferred the minimum age to be 19 years or above. The average minimum age preferred by those preferring a minimum age of 8 years or above for criminal responsibility was 14.5 years. More than half (52.1%) of the population clearly suggested their preferred minimum age of criminal responsibility to be 14 or above. In other words, among those indicating a minimum age that was 8 years or above, 67.5% indicated an age of 14 years or above.

Table 8: Distribution of responses to Question 1.2: What should be the minimum age of criminal responsibility given that it should be 8 or above?

	8	9	10	11	12	13	14	15	16	17	18	19	20	21	23
Unweighted count	68	6	63	33	93	19	59	120	189	13	200	1	6	5	1
Unweighted percent	5.9	0.5	5.5	2.9	8.1	1.7	5.2	10.5	16.5	1.1	17.5	0.1	0.5	0.4	0.1
Weighted percent	5.8	0.3	4.9	2.3	9.7	1.9	5.1	10.5	15.5	1.1	18.1	0.1	0.7	0.6	0.1

Number of respondents = 876

Unweighted mean = 14.5; unweighted % of 14 or above = 51.9

Weighted mean = 14.5; weighted % of 14 or above = 52.1

8. Combining data from 900 (7 indicating an age below 7, 17 preferring the age of 7, and 876 indicating an age of 8 or above) respondents who indicated their preferred minimum age of criminal responsibility, the weighted mean of the preferred age was 14.4 years, which represented the average of preferred age in the population of people aged 15 years or above in Hong Kong. The age of 14.4 would be the best estimate of the preferred minimum age of criminal responsibility for anyone aged 15 or above. Associated with the estimate was a standard deviation of 3.36 years, which meant that an individual in general might have an average deviation of 3.36 years above or below the average preferred age of 14.4 years (i.e., between 11.04 and 17.22). On the other hand, 15.6% of the population would have a preferred minimum age around 14 and 15 years.
9. Weighted data indicated that 6.4% of the population indicated the rebuttable presumption of *doli incapax* was right (an answer of “right” to the question, “Do you think the current rebuttable presumption of *doli incapax* for persons between 7 and 14 years of age is right or not?”) (see Table 9). Only 0.7% of the population indicated the rule was not right and required change. Moreover, 1.9% of the population reported that the rule was not right but it did not require change.

Table 9: Distribution of responses to Question 2: Do you think the current rebuttable rule of law of *doli incapax* for persons between 7 and 14 years of age is right or not?

	Right	Not right only	Not right and should change	Not sure	No comment	Not understand	Not willing to answer	Not applicable
Unweighted count	66	19	8	11	23	19	2	996
Unweighted percent	5.8	1.7	0.7	1.0	2.0	1.7	0.2	87.1
Weighted percent	6.3	1.9	0.7	0.8	1.9	1.8	0.1	86.6
Weighted percent, missing excluded	6.4	1.9	0.7	2.7		-	-	88.3

Note: The “not applicable” were those not necessary to answer the question because they did not prefer a range of 7 and 14 years for the rebuttable rule.

10. To persons aged between 7 and 14, only 2 respondents suggested to lower the upper age for applying the rebuttable presumption of *doli incapax* (answer the question, “How do you think the current rebuttable presumption of *doli incapax* should be changed?”) (see Table 10). Only one respondent suggested to raise the upper age and only one respondent preferred to abolish the rule. Hence, very few of the population indicated the way of changing the rule.
11. None of the respondents who suggested either to lower or raise the upper age reported an age instead of the upper age of 14.

Table 10: Distribution of responses to Question 3: How do you think the current rebuttable rule of law of *doli incapax* should be changed?

	Lower the upper age of 14	Raise the upper age of 14	Abolish the rule	Not sure	No comment	Not understand	Not willing to answer	Not applicable
Unweighted count	2	1	1	2	2	0	0	1136
Unweighted percent	0.2	0.1	0.1	0.2	0.2	0.0	0.0	99.3
Weighted percent	0.2	0.1	0.1	0.1	0.2	0.0	0.0	99.3
Weighted percent, missing excluded	0.2	0.1	0.1	0.3		-	-	99.3

Note: The “not applicable” were those not necessary to answer the question because they did not prefer a change of the rebuttable rule.

12. Only 0.9% of the population thought that applying the rebuttable presumption of *doli incapax* was right to persons aged between a suggested lower minimum age and 14 years (answer to the question: Do you think the current

rebuttable presumption of *doli incapax* for persons between the lowered minimum age and 14 years of age is right or not?) (see Table 11). Only 0.3% of the population thought that applying the rule was not right.

Table 11: Distribution of responses to Question 4: Do you think the current rebuttable rule of *doli incapax* for persons between the lowered minimum age and 14 years of age is right or not?

	Right	Not right only	Not right and should change	Not sure	No comment	Not understand	Not willing to answer	Not applicable
Unweighted count	12	3	0	0	0	1	0	1128
Unweighted percent	1.0	0.3	0.0	0.0	0.0	0.1	0.0	98.6
Weighted percent	0.9	0.3	0.0	0.0	0.0	0.0	0.0	98.8
Weighted percent, missing excluded	0.9	0.3	0.0	0.0	0.0	-	-	98.8

Note: The “not applicable” were those not necessary to answer the question because they did not prefer an age lower than 7.

13. Weighted data showed that 21.4 of the population thought that applying the rebuttable presumption of *doli incapax* was right to persons aged between a suggested raised minimum age and 14 years (answer to the question: Do you think the current rebuttable presumption of *doli incapax* for persons between the raised minimum age and 14 is right or not?) (see Table 12). Only 4.1% of the population thought that applying the rule was not right but did not require change and 3.7% of the population thought that applying the rule was not right and required change.

Table 12: Distribution of responses to Question 5: Do you think the current rebuttable rule of *doli incapax* for persons between the raised minimum age and 14 is right or not?

	Right	Not right only	Not right and should change	Not sure	No comment	Not understand	Not willing to answer	Not applicable
Unweighted count	248	49	39	35	12	5	2	754
Unweighted percent	21.7	4.3	3.4	3.1	1.0	0.4	0.2	65.9
Weighted percent	21.3	4.1	3.7	3.0	0.9	0.4	0.1	66.5
Weighted percent, missing excluded	21.4	4.1	3.7	3.9		-	-	66.9

Note: The “not applicable” were those not necessary to answer the question because they did not prefer an age higher than 7 but lower than 14.

14. Only 1.3% of the population preferred to lower the upper age of 14 in order to change the application of the rebuttable presumption of *doli incapax* was right to persons aged between a suggested raised minimum age and 14 years (answer to the question: How do you think it should be changed given the lower age lowered or raised?) (see Table 13). Only 0.1% of the population preferred to raise the upper age and 0.3% of the population proposed to abolish the rule.

Table 13: Distribution of responses to Question 6: How do you think it should be changed given the lower age lowered or raised?

	Lower the upper age of 14	Raise the upper age of 14	Abolish the rule	Not sure	No comment	Not understand	Not willing to answer	Not applicable
Unweighted count	12	2	4	5	2	1	0	1118
Unweighted percent	1.0	0.2	0.3	0.4	0.2	0.1	0.0	97.7
Weighted percent	1.3	0.1	0.3	0.8	0.1	0.0	0.0	97.5
Weighted percent, missing excluded	1.3	0.1	0.3	0.9		-	-	97.5

Note: The “not applicable” were those not necessary to answer the question because they did not prefer a change of the rebuttable rule.

15. To lower the upper age for applying the rebuttable presumption of *doli incapax* to persons aged between a suggested raised minimum age and the upper age, 1.4% of the population suggested an upper age from 3 to 12 years (see Table 14). Among these lowered upper ages, the age of 12 was

the most popular, with 0.8% of the population showing such a preference.

Table 14: Distribution of responses to Question 6.1: Lowered upper age

	3	7	8	9	10	11	12	Not applicable
Unweighted count	1	1	2	1	3	1	5	1130
Unweighted percent	0.1	0.1	0.2	0.1	0.3	0.1	0.4	98.8
Weighted percent	0.1	0.1	0.2	0.1	0.2	0.1	0.8	98.6

Note: The “not applicable” were those not necessary to answer the question because they did not prefer a lowered upper age.

16. To raise the upper age for applying the rebuttable presumption of *doli incapax* to persons aged between a suggested raised minimum age and the upper age, only one respondent suggested to an upper age of 16 (see Table 15).

Table 15: Distribution of responses to Question 6.2: Raised upper age

	16	Not applicable
Unweighted count	1	1143
Unweighted percent	0.1	99.9
Weighted percent	0.1	99.9

Note: The “not applicable” were those not necessary to answer the question because they did not prefer a raised upper age.

17. Data showed that 6.9% of the population agreed to apply the rebuttable presumption of *doli capax* to persons aged between 7 and 14 or some other ranges preferred by respondents (answer to the question: Do you agree to the rebuttable presumption of *doli capax*?) (see Table 16). This was only slightly more than the 6.0% of population who disagreed to apply the rule.

Table 16: Distribution of responses to Question 7: Do you agree to the reversed rule of *doli capax*?

	Agree	Disagree	Not sure	No comment	Not understand	Not willing to answer	Not applicable
Unweighted count	83	61	20	28	13	8	931
Unweighted percent	7.3	5.3	1.7	2.4	1.1	0.7	81.4
Weighted percent	6.8	5.9	1.7	2.2	1.1	0.6	81.6
Weighted percent, missing excluded	6.9	6.0	4.0		-	-	83.1

Note: The “not applicable” were those not necessary to answer the question because they did not prefer an age below 14.

18. Overall, 28.4% of the population thought that applying the rebuttable presumption of *doli incapax* was right to persons aged either between 7 and 14, between 7 and a more preferable upper age, between a more preferable lower age and 14, or between a more preferable lower age and a more preferable upper age (see Table 17). This proportion was considerably greater than that (6.9%) agreeing to apply the reverse rebuttable presumption of *doli capax*. Support for the rebuttable presumption applied to persons between a raised minimum age and 14 years accounted for a large portion of the overall support (75.4% = 21.4% (see Table 12) /28.4% (see Table 17)).

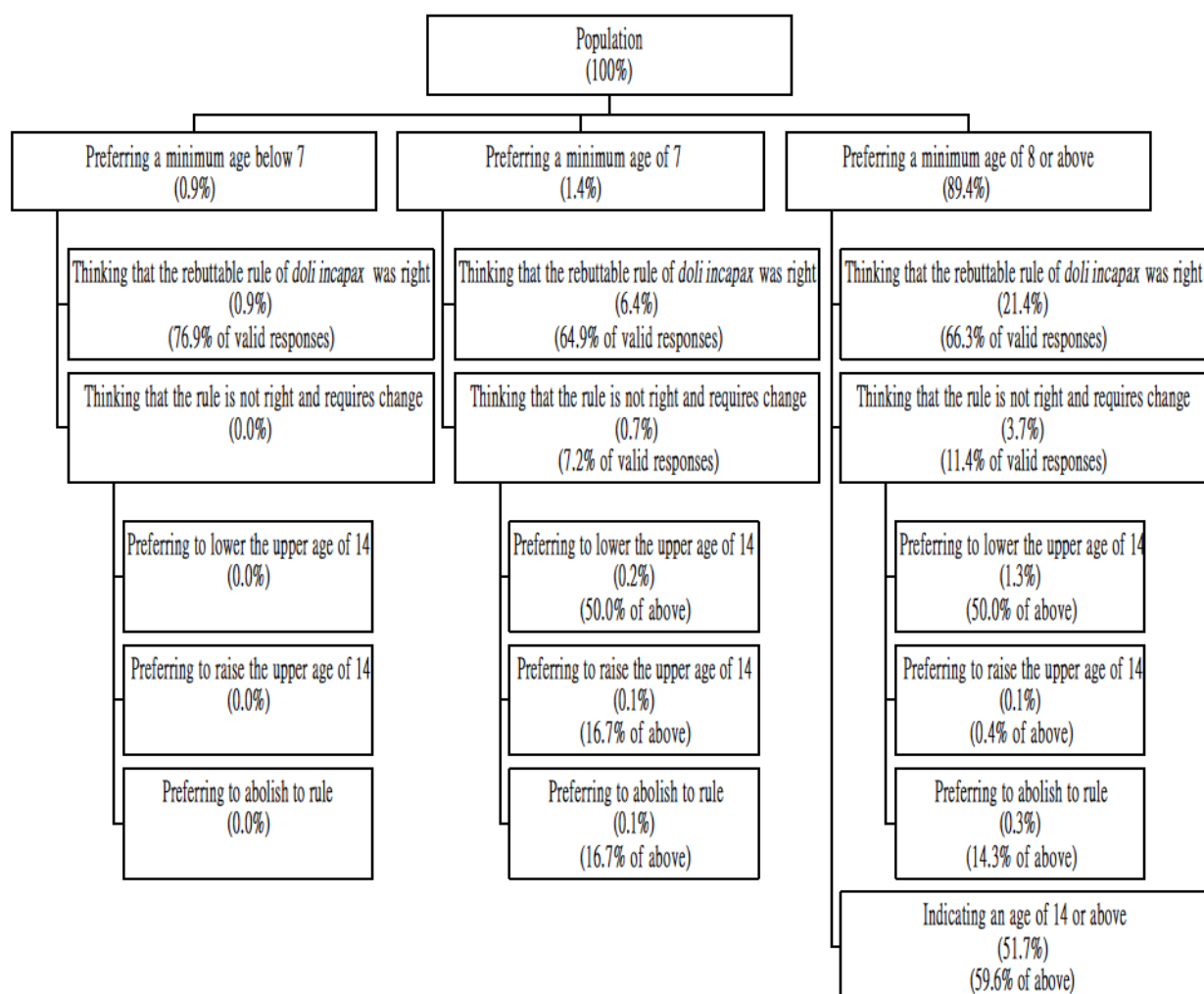
Table 17: Distribution of overall support of the rule of *doli incapax*

	Right	Other than right
Unweighted count	323	821
Unweighted percent	28.2	71.8
Weighted percent	28.4	71.6

19. To sum up,
- 19.1 Support was most remarkable for considering the age of 8 years or above as the minimum age of criminal responsibility (89.4% of the population);
 - 19.2 Preference for a minimum age of 14 years or above for criminal responsibility was present in 52.1% of the population;
 - 19.3 The average age regarded as the minimum age of criminal responsibility was 14.4 years;
 - 19.4 More than a quarter (28.4%) of the population supported the rebuttable presumption of *doli incapax* in general;
 - 19.5 Slightly more than one-fifth (21.4%) of the population supported applying the rebuttable presumption of *doli incapax* to persons between a raised minimum age and 14 years;

19.6 Support for the rebuttable presumption of *doli capax* was low (6.9%);
 19.7 Support for the current application of the rebuttable presumption of *doli incapax* to persons between 7 and 14 years of age was similarly low (6.4%).

20. The distribution of responses to critical concerns about the minimum age of criminal responsibility, the rebuttable presumption of *doli incapax*, and change for the rule is shown in the following chart.



21. Accordingly, the overwhelming majority (89.4%) of the population preferred a minimum age of 8 or above. Among this majority, 59.6% indicated an age of 14 or above. Again out of this majority, 21.4% of the population thought that the rebuttable presumption of *doli incapax* was right. This figure represented 66.3% of those who indicated a minimum age between 7 and 14. Furthermore, 6.4% of the population thought that the rebuttable presumption of *doli incapax* was right to apply to persons aged between 7 and 14. Another 0.9% of the population also thought that the rule was right to apply to persons between a preferable age below 7 and 14. In total, 28.4% of the population thought that the rebuttable presumption was right.

On the other hand, only 4.4% of the population thought that the presumption was not right and required change.

Knowledge about the Age of Criminal Responsibility

22. About 30% of the population reported that they knew that criminal responsibility did not apply to persons aged under 7 years (see Table 18). In addition, 22.6% of the population reported that they knew that the rebuttable presumption of *doli incapax* applied to persons aged between 7 and 14 years (see Table 19).

Table 18: Distribution of responses to Question 8: Did you know that in Hong Kong the law provides that a person below 7 years of age cannot be found guilty of a criminal offence?

	Yes	No	Not sure	No comment	Not understand	Not willing to answer
Unweighted count	342	736	41	4	5	16
Unweighted percent	29.9	64.3	3.6	0.3	0.4	1.4
Weighted percent	29.9	64.5	3.5	0.3	0.4	1.5
Weighted percent, missing excluded	30.4	65.6	3.9		-	-

Table 19: Distribution of responses to Question 9: Did you know that in Hong Kong the law provides that a person between the ages of 7 and 14 years cannot be found guilty of a criminal offence unless the prosecution proves that the person knew at the time of the offence that his act was seriously wrong?

	Yes	No	Not sure	No comment	Not understand	Not willing to answer
Unweighted count	249	813	50	4	12	16
Unweighted percent	21.8	71.1	4.4	0.3	1.0	1.4
Weighted percent	22.1	69.8	5.7	0.3	0.8	1.3
Weighted percent, missing excluded	22.6	71.3	6.0		-	-

Opinion on Criminal Responsibility among Various Characteristics

23. At the outset, the study was conscious of variation across or contamination by background characteristics including religious faith, education, sex, age, and use of English, and knowledge about the law of criminal responsibility. To determine and eliminate the bias, breakdown of the distribution among various characteristics was necessary. The breakdown involved a test of association between each characteristic and opinion. The appropriate measure of association would be Cramer's V which ranges from 0 to 1, with 1 indicating maximum association and 0 indicating no association. Cramer's V was a typical measure of association between categorical data.
24. Concerning the first question about the age of criminal responsibility, breakdown analysis indicated that age and education had significant associations with the preferred age. On the contrary, sex, religion, use of English, and knowledge about the law of criminal responsibility made no difference in the distribution of responses regarding the age of criminal responsibility (see Table 20).
25. Regarding the association with age, people aged between 20 and 29 were most (94.0%) likely to prefer the age of criminal responsibility to be 8 or above. On the other hand, people aged 70 or above were least (79.7%) likely to prefer the age of 8 or above. Results also show that people aged between 50 and 59 were relatively more (4.1%) likely to prefer the minimum age of criminal responsibility to be 7 years, among the population.
26. Regarding the association with education, people with senior secondary education were most (92.5%) likely to prefer the age of criminal responsibility to be 8 or above. On the other hand, people with no formal education were least (71.7%) likely to prefer the age of 8 or above. They instead were most (25.0%) likely to be uncertain about the age of criminal responsibility, among the population.

Table 20: Percentage distribution of responses to Question 1: At what age do you think persons should be held criminally responsible for their actions?

	Below 7	7	8 or above	Not sure or no comment
Male	0.6	1.5	89.4	8.5
Female	1.3	1.3	89.4	8.1
Cramer's V	.039			
Age 15-19	2.4	3.6	90.5	3.6
Age 20-29	1.2	0.6	94.0	4.2
Age 30-39	0.4	0.9	92.3	6.4
Age 40-49	0.0	1.5	87.3	11.2
Age 50-59	1.0	4.1	88.8	6.1
Age 60-69	0.0	0.0	81.0	19.0
Age 70 or above	3.4	0.0	79.7	16.9
Cramer's V	.131*			
Having religious faith	1.0	0.6	88.5	9.9
Having no religious faith	1.0	1.6	90.0	7.4
Cramer's V	.087			
Below primary education	3.3	0.0	71.7	25.0
Primary education	0.0	0.0	89.4	10.0
Junior secondary education	2.1	0.8	89.2	7.9
Senior secondary education	0.5	2.4	92.5	4.6
Postsecondary education	0.5	1.4	89.5	8.0
Cramer's V	.122*			
Interview in Chinese	1.0	1.4	89.6	8.0
Interview in English	0.0	0.0	80.0	20.0
Cramer's V	.068			
Knowledge about the law for persons under 7	0.9	2.1	90.5	6.5
Not knowing	0.9	1.2	89.5	8.4
Cramer's V	.046			
Knowledge about the law for persons between 7 and 14	0.4	1.6	90.3	7.7
Not knowing	1.1	1.3	89.9	7.8
Cramer's V	.031			

* significant at .05 level, meaning that the possibility of no association in the population was less than 5%.

27. Agreement with the rebuttable presumption of *doli capax* showed significant associations with sex, age, religion, and education. On the other hand, associations between the agreement and use of English and knowledge about the law of criminal responsibility were not significant (see Table 21).
28. Regarding association with sex, men were less likely to agree with the rule than were women (5.5% vs. 8.3%).

29. Regarding association with age, people aged between 50 and 59 years were most (15.0%) likely to agree to the reverse rule. On the other hand, people aged between 40 and 49 were least (4.4%) likely to agree with the rule.
30. Regarding association with religious faith, people having religious faith were more likely to disagree to the rule than people having no religious faith (9.4% vs. 4.8%). Religious people therefore tended to agree to the rule slightly less than nonreligious people (6.9% vs. 7.1%).
31. Regarding association with education, people having attained senior secondary education were most (9.0%) likely to agree to the rule. On the other hand, people with no formal education were least (4.3%) likely to agree to the rule.

Table 21: Percentage distribution of responses to Question 7: Do you agree to the reversed rule of *doli capax*?

	Agree	Disagree	Not sure or no comment	Not applicable
Male	5.5	6.4	2.6	85.5
Female	8.3	5.5	5.3	81.0
Cramer's V	.092*			
Age 15-19	7.1	6.0	4.8	82.1
Age 20-29	7.2	7.8	1.2	83.7
Age 30-39	8.2	2.6	3.0	86.3
Age 40-49	4.4	6.9	6.9	81.9
Age 50-59	15.0	2.0	0.0	83.0
Age 60-69	5.8	23.3	4.7	66.3
Age 70 or above	5.4	3.6	8.9	82.1
Cramer's V	.165*			
Having religious faith	6.9	9.4	2.5	81.3
Having no religious faith	7.1	4.8	4.4	83.8
Cramer's V	.096*			
Below primary education	4.3	2.9	13.0	79.7
Primary education	6.6	12.0	8.4	73.1
Junior secondary education	4.9	4.5	3.3	87.2
Senior secondary education	9.0	4.6	1.5	85.0
Postsecondary education	6.7	7.2	3.4	82.7
Cramer's V	.123*			
Interview in Chinese	6.7	5.9	4.0	83.4
Interview in English	14.8	11.1	3.7	70.4
Cramer's V	.061			
Knowledge about the law for persons under 7	7.3	5.8	2.9	83.9
Not knowing	6.9	6.2	4.3	82.7
Cramer's V	.034			
Knowledge about the law for persons between 7 and 14	4.4	4.8	3.6	87.3
Not knowing	7.8	8.4	3.8	82.0
Cramer's V	.065			

32. Concerning support for the rebuttable presumption of *doli incapax*, associations with education and knowledge about the law of criminal responsibility were significant. On the other hand, associations with sex, age, religious faith, and use of English were not significant (see Table 22).
33. Regarding association with education, people with no formal education were most (38.4%) likely to think that the rebuttable presumption of *doli incapax* was right, among the population. On the other hand, people with primary education were least (20.3%) likely to support the rule.
34. Regarding association with knowledge about the law for persons under 7 years of age, people reporting to have such knowledge were more likely to

support the rebuttable presumption of *doli incapax* than people not knowing about the law (33.5% vs. 26.2%).

35. Regarding association with knowledge about the law for persons between 7 and 14 years of age, people who knew about the law were more likely to support the rebuttable presumption of *doli incapax* than were those who did not know (36.2% vs. 26.3%).

Table 22: Percentage distribution of responses favoring the rebuttable presumption of *doli incapax*

	Right	Not right
Male	27.3	72.7
Female	29.2	70.8
Cramer's V	.021	
Age 15-19	28.6	71.4
Age 20-29	35.1	64.9
Age 30-39	31.8	68.2
Age 40-49	31.4	68.6
Age 50-59	20.8	70.2
Age 60-69	28.7	71.3
Age 70 or above	25.0	75.0
Cramer's V	.090	
Having religious faith	29.8	70.2
Having no religious faith	27.8	72.2
Cramer's V	.020	
Below primary education	38.4	61.6
Primary education	20.3	79.7
Junior secondary education	29.3	70.7
Senior secondary education	29.6	70.4
Postsecondary education	26.8	73.2
Cramer's V	.093*	
Interview in Chinese	28.4	71.6
Interview in English	25.9	74.1
Cramer's V	.008	
Knowledge about the law for persons under 7	33.5	66.5
Not knowing	26.2	73.8
Cramer's V	.074*	
Knowledge about the law for persons between 7 and 14	36.2	63.8
Not knowing	26.3	73.7
Cramer's V	.082*	

36. The preceding breakdown analysis illustrates significant variation among people of different characteristics regarding their opinions on the age of criminal responsibility. People who are knowledgeable about the law and receive no education tend to support the rebuttable presumption of *doli incapax*. Younger people and higher educated people tend to consider a higher minimum age of criminal responsibility. Religious people tend to disagree to the rebuttable presumption of *doli capax*.

37. As regards variation among people of different age ranges, preference for a minimum age of 8 or above for criminal responsibility varied from 79.7% among people aged 70 or above to 94.0% among people aged 20 to 29; support for the rebuttable presumption of *doli capax* varied from 4.4% among people aged 40 to 49 and 15.0% among people aged 50 to 59; support for the rebuttable presumption of *doli incapax* varied from 20.8% among people aged 50 to 59 to 35.1% among people aged 20 to 29, although the variation was not statistically significant.
38. As regards variation among people with different levels of education, preference for a minimum age of 8 or above for criminal responsibility varied from 71.7% among people with no formal education to 92.5% among people with senior secondary education; support for the rebuttable presumption of *doli capax* varied from 4.3% among people with no formal education to 9.0% among people with senior secondary education; support for the rebuttable presumption of *doli incapax* varied from 20.3% among people with primary education level to 38.4% among people with no formal education
39. Taking the variation into account, 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.

Conclusion

40. By inferring from data of a random sample of people in Hong Kong, the study finds out that most (89.4%) of the people preferred a minimum age of 8 or above for criminal responsibility. The proportions of people in different age ranges showing such a preference varied from 79.7% to 94.0%. Younger people were more likely to prefer the minimum age than older people. On the other hand, the proportions of people with different levels of education showing such a preference varied from 71.7% to 92.5%. People with higher education were more favorable to a minimum age of 8 or above. In all, at least 70% of a significant subpopulation preferred the minimum age range. From their preference, it appears that 51.7% of people preferred a minimum age of 14 or above. Hence, it seems that these people would not need to consider the rebuttable presumption of *doli incapax*. However, preference for a minimum age range does not necessarily mean support for a change in the current rule of law. Only 4.4% of people indicated that the rule was not right and required change.

41. The finding shows that 28.4% of people supported applying the rebuttable presumption of *doli incapax* to persons aged either between 7 and 14 years, between 7 and a more preferable upper age, between a more preferable lower age and 14, or between a more preferable lower age and a more preferable upper age. Significant variation appeared in the proportion of people with different levels of education and knowledge about the law regarding age of criminal responsibility. The proportions of people supportive of the rule varied from 20.3% to 38.4% among people with different levels of education. People without formal education were most likely to support the rule. Those who were knowledgeable about the rule of law for people between 7 and 14 years of age were more likely to be supportive of the rule than were other people (36.2% vs. 26.3%).
42. On the other hand, the rebuttable presumption of *doli capax* received support from a low proportion (6.9%) of people. Significant variation in the support appeared among people of different sexes, age ranges, and levels of education and between those with religious faith. The proportions varied from 4.3% of people with formal education to 15.0% of people aged between 50 and 59. However, people who were supportive of the reverse rule were in the minority.

The Questionnaire (English Version)

- Hello! I am an interviewer of the City University of Hong Kong. I would like to conduct a simple opinion survey. This is a survey commissioned by the Law Reform Commission of Hong Kong.
 - For the sake of fair sampling, I would like to know about people who are 15 years of old or above in your household. Please tell me one by one. (e.g., father, mother, eldest brother)
 - According to the random sampling procedure, I need to interview _____. May I talk to him/her?
 - (in case the selected person is not available) When will he/she come back? (jot down the person and time)

 - (use the computerized random sampling procedure to select a person to receive the phone) Hello! I am an interviewer of the City University of Hong Kong. I would like to conduct a simple opinion survey. This is a survey commissioned by the Law Reform Commission of Hong Kong.
 - This survey would like to ask you opinions about the criminal responsibility of juveniles. Criminal responsibility refers to the case in which one, under most circumstances, can be charged, prosecuted, and convicted, given sufficient verdict, for any offence allegedly committed.
 - Information obtained from this survey is certainly helpful to the work of the Law Reform Commission of Hong Kong. Your personal information must be kept strictly confidential.
 - For the following questions, if you do not understand, are not sure, or have no comment, you can just tell me about it.
 - On the other hand, you can interpret question in your best and express your opinion. There is no correct and incorrect answer for your opinion. In all, all you opinions would be regarded as important.
1. At what age do you think persons should be held criminally responsible for their actions?
- (1) Below 7. (Go to Q.1.1)
 - (2) 7. (Go to Q.2)
 - (3) 8 or above. (Go to Q.1.2)
 - (6) Not sure. (Go to Q.2)
 - (7) No comment. (Go to Q.2)
 - (8) Question not understood. (Go to Q.2)
 - (9) Not willing to answer. (Go to Q.2)
- 1.1 What should be the minimum age?
- _____ years old. (Go to Q.4)
 - (66) Not sure. (Go to Q.2)
 - (99) Not willing to answer. (Go to Q.2)

- 1.2 What should be the minimum age?
_____ years old. (Go to Q.5)
[if the age is 14 or above, then Go to Q.8]
(66) Not sure. (Go to Q.2)
(99) Not willing to answer. (Go to Q.2)

2. The law provides that persons between 7 and 14 years of age cannot be found guilty of a criminal offence unless the prosecution proves that they knew at the time of the offence that what they did was seriously wrong.

Do you think this rule of law is right or not?

- (1) Think it is right. (Go to Q.8)
(2) Think it is not right. (Go to Q.7)
(3) Think it is not right. It should be changed. (Go to Q.3)
(6) Not sure. (Go to Q.7)
(7) No comment. (Go to Q.7)
(8) Question not understood. (Go to Q.7)
(9) Not willing to answer. (Go to Q.7)

3. How do you think this rule of law should be changed?

- (1) Upper age of 14 years should be lowered to _____ [specify new age]. (Go to Q.7)
(2) Upper age of 14 years should be raised to _____ [specify new age]. (Go to Q.7)
(3) This rule of law should be abolished, so that all persons aged 7 and above are criminally responsible. (Go to Q.8)
(6) Not sure. (Go to Q.7)
(7) No comment. (Go to Q.7)
(8) Question not understood. (Go to Q.7)
(9) Not willing to answer. (Go to Q.7)

4. The law provides that persons between 7 and 14 years of age cannot be found guilty of a criminal offence unless the prosecution proves that they knew at the time of the offence that what they did was seriously wrong.

Just now you said that the minimum age of criminal responsibility should be lowered to () [age given in response to Q1.1], so that persons between the age of () [age given in response to Q1.1] and 14 would then not be found guilty unless the prosecution proves that they knew at the time of the offence that what they did was seriously wrong.

Do you think such a rule is right or not?

- (1) Think it is right. (Go to Q.8)
(2) Think it is not right. (Go to Q.7)
(3) Think it is not right. It should be changed. (Go to Q.6)
(6) Not sure. (Go to Q.7)
(7) No comment. (Go to Q.7)

- (8) Question not understood. (Go to Q.7)
- (9) Not willing to answer. (Go to Q.7)

5. The law provides that persons between 7 and 14 years of age cannot be found guilty of a criminal offence unless the prosecution proves that they knew at the time of the offence that what they did was seriously wrong.

Just now you said that the minimum age of criminal responsibility should be raised to () [age given in response to Q1.2], so that persons between the age of () [age given in response to Q1.2] and 14 would then not be found guilty unless the prosecution proves that they knew at the time of the offence that what they did was seriously wrong.

Do you think such a rule is right or not?

- (1) Think it is right. (Go to Q.8)
- (2) Think it is not right. (Go to Q.7)
- (3) Think it is not right. It should be changed. (Go to Q.6)
- (6) Not sure. (Go to Q.7)
- (7) No comment. (Go to Q.7)
- (8) Question not understood. (Go to Q.7)
- (9) Not willing to answer. (Go to Q.7)

6. How do you think it should be changed?

- (1) Upper age of 14 years should be lowered to _____ [specify new age]. (Go to Q.7)
- (2) Upper age of 14 years should be raised to _____ [specify new age]. (Go to Q.7)
- (3) The rule should be that all persons aged between () [age given in response to Q1.1/1.2] and above are criminally responsible. (Go to Q.8)
- (6) Not sure. (Go to Q.7)
- (7) No comment. (Go to Q.7)
- (8) Question not understood. (Go to Q.7)
- (9) Not willing to answer. (Go to Q.7)

7. Well, if this rule of law were to be reversed so that all persons aged between () [age given in response to Q.1, 1.1, or 1.2. If no age has been given, then the age is 7] and () [age given in response to Q.3 or 6. If no age has been given, then the age is 14] are criminally responsible unless they can show that at the time of the offence they did not know that their actions were seriously wrong, would you agree?

[If question is not understood, then say “reversing this rule of law means that it is not for the prosecution to prove that the accused knew at the time of the offence that what he did was seriously wrong. Rather, it would be

for the defence to prove that at the time of the offence the accused did not know that what he did was seriously wrong.”]

- (1) Agree.
- (2) Disagree.
- (6) Not sure.
- (7) No comment.
- (8) Question not understood.
- (9) Not willing to answer.
- (Go to Q.8)

8. Prior to this interview, did you know that in Hong Kong the law provides that a person below 7 years of age cannot be found guilty of a criminal offence?

- (1) Yes.
- (2) No.
- (6) Not sure.
- (7) No comment.
- (8) Question not understood.
- (9) Not willing to answer.
- (Go to Q.9)

9. Prior to this interview, did you know that in Hong Kong the law provides that a person between the ages of 7 and 14 years cannot be found guilty of a criminal offence unless the prosecution proves that the person knew at the time of the offence that his act was seriously wrong?

- (1) Yes.
- (2) No.
- (6) Not sure.
- (7) No comment.
- (8) Question not understood.
- (9) Not willing to answer.
- (Go to Q.10)

10. Do you have any religious faith?

- (1) Yes.
- (2) No.
- (9) Not willing to answer.

11. What is your level of education?

- (1) Received no education.
- (2) Primary.
- (3) Secondary 1 to 3.
- (4) Secondary 4 to 7.
- (5) Post secondary or above.
- (9) Not willing to answer.

12. What is your age? [approximate age acceptable]
_____ years old.

- (99) Not willing to answer.
13. [Ask only when in doubt] What is your sex?
- (1) Male.
 - (2) Female.
 - (9) Not willing to answer.

(Thank you very much)

14. Language used during the interview:
- (1) Chinese
 - (2) English

- END -

Extracts from the Crimes Ordinance (Cap 200)

123. Intercourse with girl under 13

A man who has unlawful sexual intercourse with a girl under the age of 13 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.

124. Intercourse with girl under 16

(1) Subject to subsection (2), a man who has unlawful sexual intercourse with a girl under the age of 16 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years.

(2) Where a marriage is invalid under section 27(2) of the Marriage Ordinance (Cap. 181) by reason of the wife being under the age of 16, the invalidity shall not make the husband guilty of an offence under this section because he has sexual intercourse with her, if he believes her to be his wife and has reasonable cause for the belief.

130. Control over persons for purpose of unlawful sexual intercourse or prostitution

(1) A person who -

- (a) harbours another person or exercises control or direction over another person with the intention that that person shall do unlawful sexual acts with others; or
- (b) harbours another person or exercises control, direction or influence over another person for the purpose of or with a view to that person's prostitution,

shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 14 years.

(2) A person shall not be convicted of an offence under this section on the evidence of one witness only, unless the witness is corroborated in some material particular by evidence implicating the accused.

131. Causing prostitution

(1) A person who –

- (a) procures another person to become, in Hong Kong or elsewhere, a prostitute; or
- (b) procures another person to leave Hong Kong, intending that other person to become, elsewhere, an inmate of or frequent any premises, vessel or place kept as a vice establishment; or
- (c) procures another person to leave her or his usual place of abode in Hong Kong, intending that other person to become an inmate of or frequent any premises, vessel or place kept as a vice establishment, in Hong Kong or elsewhere, for the purpose of prostitution,

shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

(2) A person shall not be convicted of an offence under this section on the evidence of one witness only, unless the witness is corroborated in some material particular by evidence implicating the accused.

134. Detention for Intercourse or In vice establishment

(1) A person who in any manner or by any means detains another person against her or his will –

- (a) with the intention that the other person shall do an unlawful sexual act; or
- (b) on any premises or vessel, or in any place, kept as a vice establishment,

shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 14 years.

(2) Where a person is on any premises or vessel for the purpose of doing an unlawful sexual act or is on any premises or vessel, or in any place, kept as a vice establishment, another person shall be deemed for the purposes of subsection (1) to detain that person there if, with the intention of compelling or inducing that person to remain there, the other person –

- (a) withholds from that person any of that person's clothes or other property; or

- (b) threatens that person with legal proceedings in the event of that person taking away clothes provided for that person by the other person or on the other person's directions.

(3) A person shall not be liable to any legal proceedings, whether civil or criminal, for taking away or being found in possession of any clothes she or he needed to enable her or him to leave premises or a vessel on which she or he was being detained for the purpose of doing an unlawful sexual act or to leave any premises, vessel or place kept as a vice establishment.

135. Causing or encouraging prostitution of, intercourse with, or indecent assault on, girl or boy under 16

(1) A person who causes or encourages the prostitution of or an unlawful sexual act with a girl or boy under the age of 16 for whom that person is responsible shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

(2) Where a girl or boy is a prostitute or has done an unlawful sexual act, a person shall be deemed for the purposes of this section to have caused or encouraged the same if that person knowingly allowed the girl or boy to consort with, or to enter or continue in the employment of, any prostitute or person of known immoral character.

(3) Subject to subsection (4), the persons who for the purposes of this section are to be treated as responsible for a girl or boy are -

- (a) any person who is her or his parent or legal guardian;
- (b) any person who has actual possession or control of her or him, or to whose charge she or he has been committed by her or his parent or legal guardian or by a person having the custody of her or him; and
- (c) any other person who has the custody, charge or care of her or him.

(4) In subsection (3), "parent" (父母) does not include, in relation to any girl or boy, a person deprived of her or his custody by order of a court of competent jurisdiction but, subject to that, in the case of a girl or boy who has been adopted under the Adoption Ordinance (Cap. 290) means her or his adopters and in the case of a girl or boy who is illegitimate, and has not been so adopted, means her or his mother and any person who has been adjudged to be her or his putative father.

137. Living on earnings of prostitution of others

(1) A person who knowingly lives wholly or in part on the earnings of prostitution of another shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

(2) For the purposes of subsection (1), a person who lives with or is habitually in the company of a prostitute, or who exercises control, direction or influence over another person's movements in a way which shows he or she is aiding, abetting or compelling that other person's prostitution with others, shall be presumed to be knowingly living on the earnings of prostitution, unless he or she proves the contrary.

139. Keeping a vice establishment

(1) A person who on any occasion -

- (a) keeps any premises, vessel or place as a vice establishment; or
- (b) manages or assists in the management, or is otherwise in charge or control, of any premises, vessel or place kept as a vice establishment

shall be guilty of an offence and shall be liable -

- (i) on summary conviction to imprisonment for 3 years; or
- (ii) on conviction on indictment to imprisonment for 10 years.

(2) Where –

- (a) a charge under this section is preferred against a person or is withdrawn; or
- (b) a person is acquitted or convicted of, or successfully appeals against a conviction for, an offence under this section,

section 145A applies.

Use of premises, etc. for illicit sexual purposes

140. Permitting girl or boy under 13 to resort to or be on premises or vessel for intercourse

An owner or occupier of any premises or vessel, and any person who manages or assists in the management or control of any premises or vessel, who induces or knowingly suffers a girl or boy under the age of 13 to resort to or

be on such premises or vessel for the purpose of doing an unlawful sexual act or for the purpose of prostitution shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.

141. Permitting young person to resort to or be on premises or vessel for intercourse, prostitution, buggery or homosexual act

An owner or occupier of any premises or vessel, and any person who manages or assists in the management or control of any premises or vessel, who induces or knowingly suffers -

- (a) a girl under the age of 16 to resort to or be on such premises or vessel for the purpose or having unlawful sexual intercourse with a man or for the purpose of prostitution;
- (b) a girl or boy under the age of 21 to resort to or be on such premises or vessel for the purpose or committing buggery with a man; or
- (c) a boy under the age of 21 to resort to or be on such premises or vessel for the purpose of committing an act of gross indecency with a man,

shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 14 years.

143. Letting premises for use as a vice establishment

(1) A person who, being the owner or tenant of any premises or his agent -

- (a) lets the whole or part of the premises with the knowledge that it is to be kept, in whole or in part, as a vice establishment; or
- (b) where the whole or part of the premises is used as a vice establishment, is wilfully a party to that use continuing,

shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 7 years.

(2) Where -

- (a) a charge under this section is preferred against a person or is withdrawn; or
- (b) a person is acquitted or convicted of, or successfully appeals against a conviction for, an offence under this section.

section 145A applies.

144. Tenant etc. permitting premises or vessel to be kept as a vice establishment

(1) A person who -

- (a) being the tenant or occupier, or person in charge, of any premises permits or suffers the whole or part of the premises to be kept as a vice establishment; or
- (b) being the owner, or the master or other person in charge, of any vessel permits or suffers the whole or part of the vessel to be kept as a vice establishment,

shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 7 years.

(2) Where -

- (a) a charge under this section is preferred against a person or is withdrawn; or
- (b) a person is acquitted or convicted of, or successfully appeals against a conviction for, an offence under this section,

section 145A applies.

145. Tenant etc. permitting premises or vessel to be used for prostitution

(1) A person who -

- (a) being the tenant or occupier, or person in charge, of any premises permits or suffers the whole or part of the premises to be used for the purposes of habitual prostitution; or
- (b) being the owner, or the master or other person in charge, of any vessel permits or suffers the whole or part of the vessel to be used for the purpose of habitual prostitution,

shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 7 years.

(2) Where -

- (a) a charge under this section is preferred against a person or is withdrawn; or

- (b) a person is acquitted or convicted of, or successfully appeals against a conviction for, an offence under this section,

section 145A applies.

Miscellaneous offences and provisions

146. Indecent conduct towards child under 16

(1) Subject to subsection (3), a person who commits an act of gross indecency with or towards a child under the age of 16, or who incites a child under the age of 16 to commit such an act with or towards him or her or another, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

(2) It shall not be a defence to a charge under this section to prove that the child consented to the act of gross indecency.

(3) A person who commits an act of gross indecency with or towards a child or who incites a child to commit such an act with or towards him or her is not guilty of an offence under this section if that person is, or believes on reasonable grounds that he or she is, married to the child.