

THE LAW REFORM COMMISSION OF HONG KONG

CONSULTATION PAPER ON

THE AGE OF CRIMINAL RESPONSIBILITY IN HONG KONG

This consultation paper can be found on the Internet at <http://www.info.gov.hk> during the consultation period.

Mr Peter Kwok Bun SIT, Government Counsel, was principally responsible for the writing of this consultation paper.

This Consultation Paper has been prepared by the Law Reform Commission. It does not represent the final views of the Law Reform Commission, and is circulated for comment and criticism only.

The Law Reform Commission would welcome submissions on the proposals contained in this Consultation Paper. You are invited to make your views known to the Law Reform Commission, in writing, by 31 March 1999. All correspondence should be addressed to :

*The Secretary
The Law Reform Commission
20th Floor, Harcourt House
39 Gloucester Road
Wanchai
Hong Kong*

Tel : (852) 2528 0472

Fax : (852) 2865 2902

E-mail : reform@justice.gcn.gov.hk

It may be helpful for the Commission, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Commission will assume that the response is not intended to be confidential.

Anyone who responds to this consultation paper will be acknowledged by name in the subsequent report. If an acknowledgement is not desired, please indicate so in your response.

THE LAW REFORM COMMISSION OF HONG KONG

CONSULTATION PAPER ON

THE AGE OF CRIMINAL RESPONSIBILITY

IN HONG KONG

CONTENTS

Chapter	Page
Preface	1
1. The criminal responsibility of children in Hong Kong	3
The historical development of the principle of “ <i>doli incapax</i> ”	3
The irrebuttable presumption of “ <i>doli incapax</i> ”	4
The rebuttable presumption of “ <i>doli incapax</i> ”	5
Difficulties with the current law	9
The history of calls for reform	10
2. The minimum age of criminal responsibility in other jurisdictions	12
Introduction	12
Guidance from the United Nations	12
Europe	13
North America	15
Australasia	16
Asia	18
Africa	20
Oceania and the Pacific islands	21
Other overseas jurisdictions	21
International trends	22
3. Arguments for and against the raising of the minimum age of criminal responsibility in Hong Kong	24
Introduction	24
Arguments in favour of retaining the age of 7 years as the minimum age of criminal responsibility	24
Arguments in favour of raising the minimum age of criminal responsibility from seven to a higher age	32

4.	The rebuttable presumption of “<i>doli incapax</i>”	39
	Introduction	39
	Arguments in favour of retaining the rebuttable presumption of “ <i>doli incapax</i> ”	39
	Arguments in favour of the abolition of the rebuttable presumption of “ <i>doli incapax</i> ”	41
	Conclusion	45
5.	Options for reform	47
	Introduction	47
	Option A - Retain the present system	48
	Option B - Raise the minimum age of criminal responsibility but abolish the rebuttable presumption of “ <i>doli incapax</i> ”	49
	Option C - Raise the minimum age of criminal responsibility and retain the rebuttable presumption of “ <i>doli incapax</i> ” for persons between the revised age and 14 years. The burden of rebutting the presumption continues to rest with the prosecution	50
	Option D - Raise the minimum age of criminal responsibility and create a rebuttable presumption of “ <i>doli capax</i> ” for persons between the revised age and 14 years. The burden of rebutting the presumption would rest with the defence	50
	Conclusion	51
	Annex 1	52
	Arrests of children aged between 7 and 14 years for specific selected offences (1993 - 1997)	52
	Tables 1 - 5	
	Annex 2	57
	Children aged between 7 and 14 years cautioned under the Police Superintendents’ Discretion Scheme (PSDS) in specific selected offences (1993 - 1997)	57
	Tables 6 - 10	
	Annex 3	62
	The age of criminal responsibility in jurisdictions covered by the Consultation Paper	62

Preface

1. In Hong Kong, the minimum age of criminal responsibility is statute based. Section 3 of the Juvenile Offenders Ordinance (Cap. 226) 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.

2. In respect of a child of seven but under 14 years of age, 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 can then be charged, prosecuted and convicted for any offence allegedly committed.

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 in the Committee on the Rights of the Child 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.

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 as to whether the present minimum age of criminal responsibility should be raised (and, if so, to what age), and as to whether the rebuttable presumption of *doli incapax* should continue to apply to children between seven and 14, the Commission considers it timely for the whole issue of the age of criminal responsibility to be reviewed, and to seek the public’s views on a number of options for reform.

6. Accordingly, on 15 June 1998, the Chief Justice and the Secretary for Justice made a reference to the 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.”

7. This consultation paper is the result of that reference. It endeavours to set out the existing law that governs the age of criminal responsibility in Hong

Kong and the arguments for and against amendment to that law. The paper also outlines the relevant law and practice of a number of overseas jurisdictions; and presents a range of possible options for reform, with their respective advantages and disadvantages. It should, however, be stressed at the outset that in writing this paper, the Commission has reached no firm conclusion as to which of the options is to be preferred. The paper is issued to provoke public discussion on the issues raised and the options which would best serve the interests of both the children and the community. The Commission welcomes views on this paper and the options for reform it presents.

Chapter 1 - The criminal responsibility of children in Hong Kong

1.1 Under section 2 of the Juvenile Offenders Ordinance (Cap. 226) (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 adult².

1.2 While seven years was fixed by statute as the minimum age of criminal responsibility in Hong Kong in 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.

The historical development of the principle of “*doli incapax*”

1.3 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.

1.4 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

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.*”

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

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

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

1.6 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 has been 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”

1.7 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.

⁴ Cited above, “Criminal Responsibility of Infants”, at 263.

⁵ J Smith and the late B Hogan, *Criminal Law* (Butterworths, 1996), at 195.

1.8 As mentioned in the earlier part of this chapter, the minimum age of criminal responsibility in England and Wales has experienced two upward adjustments, with the present minimum age now set at ten years. Hong Kong has made similar attempts but failed to achieve the desired result. 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.

The rebuttable presumption of “doli incapax”

1.9 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

⁶ Cited above, *Criminal Law*, at 195.

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

1.10 Under the principle as stated in *Gorrie*, 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

1.11 The requirement for knowledge that the child's conduct was "seriously wrong" was further examined in *J. M. (A Minor) v Runeckles* where it was held that knowledge that his conduct was seriously wrong went beyond being 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 reas 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

1.12 In the same case, it was further observed that knowledge that his conduct was seriously wrong was not necessarily an appreciation on the part of the child that the act was morally wrong, as that was considered to be only one type of act which a child could appreciate to be seriously 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 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

1.13 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

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.

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

presumption, the court would consider the particular 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 considerations relevant to the court's consideration.

1.14 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 valuable consideration. The fact that a child was raised in a respectable family, 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, 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."

1.15 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

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 of age.

¹³ [1989] Mag App 436/89, at 5.

¹⁴ [1997] 1 Cr App R 27.

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 or her 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.”

1.16 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:

*“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

1.17 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 incapax*¹⁷ *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.*

¹⁵ [1991] C.O.D. 442, D.C.

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.

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 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

1.18 In recent years there have been increasing calls 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. In England and Wales, we have seen that the common law minimum age of criminal responsibility has been abandoned in favour of a more mature age of ten years of age.

1.19 One of the reasons given in support of change is the unfavourable comparison between the minimum age in Hong Kong and that currently adopted in other countries, where the minimum age is generally set within the range of ten to 12 years of age

1.20 A further 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 and to be made subject to complex and perhaps lengthy criminal proceedings which flow from a prosecution. These advocates have queried the appropriateness of exposing a child of, say, nine years of age to the full rigours of the criminal justice system.

1.21 In answer to these arguments, those who favour maintaining the existing age of criminal responsibility argue that, because of the greater opportunity for education through the system of compulsory education in Hong Kong, children now acquire mental and social maturity at a relatively early age. Today's children in Hong Kong, it is argued, can readily distinguish right from wrong at an early age. It is further argued that raising the minimum age from seven years would not only enable children to be abused by adult criminals in the advancement of their criminal designs, but would also be harmful in that it would deprive these children of a chance for early rehabilitation through the criminal justice system.

¹⁸ [1996] 2 Cr App. R 50, at 53.

The history of calls for reform

1.22 The call to raise the minimum age of criminal responsibility is not a recent phenomenon. Indeed, a Juvenile Offenders (Amendment) Bill 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 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.

1.23 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.

1.24 Over the years, a number of representations for change have been made to the Administration, 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. It is therefore argued 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.

1.25 Demands to raise the age of criminal responsibility are not confined to local commentators. The United Nations Committee on the Rights of the Child (the UN Committee) 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 UN 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 from 1992 to 1995 of children between seven and ten 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.”

1.26 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.

1.27 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. In order to enable the public to reach a properly considered view as to whether or not the law should be changed (and, if so, in what way), we set out in chapters 3 and 4 the arguments for and against reform.

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. This chapter looks at 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. The purpose 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 to which Hong Kong may wish to refer, having taken account of Hong Kong's particular circumstances, in determining the best way forward.

2.2 It must be stressed at the outset that this chapter is concerned only with the narrow compass of the minimum age of criminal responsibility in other jurisdictions and does not attempt to examine substantive matters such as the juvenile justice systems of the jurisdictions covered, save for the purpose of illustrating how children below the minimum age or young offenders involved in serious crimes are dealt with by the relevant jurisdictions. To do so would inevitably complicate the study and take it beyond the major purpose which this chapter intends to serve.

Guidance from the United Nations

2.3 A significant factor in determining appropriate standards 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 the 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.”

2.4 While the Convention does not 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 felt able to criticise 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.

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 Europe¹⁹:

¹⁹ 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.

Council of Europe

Countries and Territories	Age of Criminal Responsibility
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
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, Liechtenstein and Switzerland) still maintain seven years as the minimum age of criminal responsibility. This triggered the following comments 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.”²⁰

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, 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.”*²¹

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.”*²²

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.

North America

United States of America

2.9 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:

“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

²⁰ House of Commons Standing Committee B (pt 10) <<http://www.parliament.the-stationery-o...798/cmstand/b/st980430/am/80430s10.htm>> (23 June 1998).

²¹ P Cavadino, “Goodbye Doli, Must We Leave You?” (1997) Vol 9, No 2, Child and Family Law Quarterly 165, at 170.

²² P Cavadino, “Children Who Kill: a European Perspective” (1996) September 13 New Law Journal, at 1325.

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.²³

The lowest age adopted in any of the US states is reportedly ten years.²⁴

Canada

2.10 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.

Australasia

Australia

2.11 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 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.

²³ Hansard, HL Deb, vol 564, col WA 82, 27 February 1995.

²⁴ 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.

2.12 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.

2.13 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.”*

2.14 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.”*

2.15 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.”*

2.16 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.”*

2.17 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.”*

2.18 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

2.19 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

2.20 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. However, where the crime of intentional killing of another, intentional injuring of another causing serious injury or death, rape, robbery, drug trafficking, arson, explosion or poisoning is committed by a person who has attained the age of 14 but is below the age of 16 years, he or she shall be criminally responsible for 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

2.21 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 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 mitigated sentence.

Singapore

2.22 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.”*

2.23 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.”²⁵

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

2.24 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.”²⁶ Under section 293 of the Malaysian

²⁵ Tan Yock Lin, *Criminal Procedure* (Butterworths Asia, 1997) at para 4 XXI 2.

²⁶ Cited above, *Criminal Procedure*, at para 4 XXI 2.

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

2.25 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 twelve 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.”

Japan

2.26 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 on 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

2.27 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.*”²⁷ 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

2.28 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

²⁷ South African Law Commission, *Juvenile Justice* (1997), Issue Paper 9, at paragraph 3.5.

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 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.”

2.29 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

2.30 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:

Countries and Territories	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

2.31 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 3.

International trends

2.32 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. 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 13. 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'."*²⁸

2.33 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.²⁹

2.34 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. In the following chapter we set out the arguments for and against the raising of the minimum age of criminal responsibility in Hong Kong.

²⁸ Cited above, "Goodbye Doli, Must We Leave You?", at 170.

²⁹ *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.

Chapter 3 - Arguments for and against the raising of the minimum age of criminal responsibility in Hong Kong

Introduction

3.1 As we have seen, while the minimum age of criminal responsibility in Hong Kong is fixed at seven years, the operation of the rebuttable presumption of *doli incapax* in respect of children between the ages of seven and fourteen means that such children will not be criminally liable unless the prosecution can prove that they knew at the time they committed the offence that their conduct was seriously wrong. There is, in effect, an intermediate stage through which a child passes when the full rigours of the criminal justice system are not automatically applied to him, even though he has attained the minimum age of criminal responsibility. Any adjustment to the minimum age of criminal responsibility will obviously affect the number of children who fall within this category and the question of the minimum age and the application of the rebuttable presumption of *doli incapax* are closely linked.

3.2 We consider in the next chapter whether it is desirable to maintain the rebuttable presumption of *doli incapax* or whether this should be abolished altogether, as has recently been done in England. In this chapter we confine ourselves to the question of the minimum age of criminal responsibility and set out the arguments for and against change. There have been no suggestions in Hong Kong that the age should be lowered; in setting out the arguments for and against change in the following paragraphs we are therefore concerned only with proposals that the minimum age should be raised.

Arguments in favour of retaining the age of 7 years as the minimum age of criminal responsibility

Minimises exploitation of children by adult criminals

3.3 One of the most cogent 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, the greater will 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 objections to the proposed increase in the minimum age of criminal responsibility:

“Mr Woo: - Sir, my 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.

THE ATTORNEY GENERAL (MR ROBERTS): - Sir, in view of the anxiety expressed by the honourable Member, the Government will not oppose the amendment which he proposes to make at the Committee Stage.”³⁰

Similar concerns were expressed in the UN Report submitted in 1996 on behalf of the Hong Kong Government to the Committee on the Rights of the Child of the United Nations:

“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.”³¹

It should be pointed out, however, that where it could be proved that an adult had instigated criminal conduct by a child, the existing criminal law would allow the adult to be prosecuted as a principal.

Greater maturity of present day children

3.4 It has been suggested that the enhanced educational opportunities for children (not least through the increased availability of knowledge through the media and the internet) mean that children nowadays have acquired a greater degree of social maturity than their counterparts in the past; and are thus capable of distinguishing right from wrong at a young age.

³⁰ Hong Kong Hansard, Session 72/73, 446 (14 February 1973).

³¹ 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.

3.5 In Hong Kong, most children begin their kindergarten education at the early 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 for their students academic training, but are also tasked to develop in them:

“... 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.”³²

3.6 On these premises, it is argued 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. This contrasts with the era where opportunity for education was more limited; and social maturity in children accordingly came at a later stage of their infancy, thus justifying the deferral of the imposition of criminal responsibility.

Children are no longer subject to draconian penalties

3.7 A principal reason 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 fourteen. 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.

3.8 The UN Report 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...”³³ 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 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.

3.9 The range of sentences which may be imposed on children and young persons are deliberately restricted with a view to encouraging 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.

³² Cited above, the Report to the UN, at 163.

³³ Cited above, the Report to the UN, at 186.

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

In addition, 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 PCJO); 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 any 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 are 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.

3.10 The following are the common options generally available to courts for the purposes of rehabilitating young offenders between seven and fourteen 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 school 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.

3.11 This outline of the sentencing options available to the courts is provided to support the argument that present day sentences on children and young persons are aimed at rehabilitation rather than retribution and do not warrant a raising of the minimum age of criminal responsibility. It is not the intention of this paper to go further into a detailed examination of the broader juvenile justice system of Hong Kong, nor consider other sentencing options such as orders for the detention of young offenders to Detention Centres, Training Centres, Drug Addiction Treatment Centres as these sentencing options are mainly designed for those at or above the age of 14 years.

Enables delinquent behaviour to be nipped in the bud

3.12 It follows that as the options available to a court of law in dealing with young offenders focusing mainly on rehabilitation, the raising of the minimum age of criminal responsibility would have the negative effect that it would remove 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.

Adequate existing provision to limit prosecution of children under ten

3.13 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.

3.14 In response, it can be argued that under the existing prosecution policy, special allowances have been made for offenders aged between seven and ten years. It is pointed out in the Report to the UN³⁴ that in reaching a decision as to whether or not to prosecute a particular case, the prosecuting authority would take into consideration a range of factors including:

- ◆ the seriousness of the alleged offence;

³⁴ Cited above, the Report to the UN, at 187-188.

- ◆ 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.*³⁵

3.15 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. However, before a decision in favour of a caution can be made, the police officer must be satisfied that:

- ◆ 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 seriousness of the offence is understandably one of the most significant considerations. 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.

3.16 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 below those below the age of ten) are diverted to non-court processes whenever possible. To illustrate this point, according to information provided by the Police³⁶, a total of 8,810 persons below 18 years of age were arrested for various criminal offences in 1997. Of these, 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. This gives a caution rate of 68% out of those eligible for the PSDS.

³⁵ Department of Justice, *Prosecution Policy: Guidance For Government Counsel* (1998), at 18-19.

³⁶ From information provided in a letter and its enclosure dated 26 September 1998 by the Police to the Secretary of the Law Reform Commission, for which the Commission is grateful.

Figures on recidivism³⁷ 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.

3.17 It is argued that, since measures have been designed to ensure that very young children would not be subject to indiscriminate prosecution, 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.

Essential for the prosecution of more serious crimes

3.18 It can be argued that the preservation of the power to prosecute children between the ages of seven and 14 is an essential instrument through which serious challenges to law and order by young delinquents 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. 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.

3.19 Statistical data provided by the Police on the number of persons aged between seven and 14 years arrested in the period 1993 to 1997 make clear that, while only a very small number of children below aged between seven and ten are arrested for serious offences such as robbery or burglary, such cases do occur. The statistics are at Tables 1 to 5 at Annex 1. 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. It is therefore argued that, although 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 to provide the necessary power to deal with children and young persons whose acts amount to serious challenges to the law and order of the community.

The rebuttable presumption of *doli incapax* adequately protects children between the ages of 7 and 14

3.20 In answer to the suggestion that it is inappropriate to subject children as young as seven years of age to the formal prosecution process, it can be argued that the existing rebuttable presumption of *doli incapax* operates to protect children aged between seven and 14 years from the full force of criminal responsibility. Only those children within the age-group who can be proved to know that their conduct amounted to a serious wrong will be held criminally responsible for their acts. Where

³⁷ 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.

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

3.21 Those who argue in favour of raising of the minimum age of criminal responsibility propose a number of different ages as the new minimum. There is, however, 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 modern society 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

3.22 One of the most forceful arguments put forward by those 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 acts were seriously wrong. Indeed, as stated earlier, the age of seven years was arbitrarily fixed by the courts in late medieval England. In the light of modern knowledge of child psychology and human development, the situation is unsatisfactory. Those proficient in these fields 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.

3.23 This paper does not pretend to present a detailed description of the various theories of child psychology and human development, and can at best provide only a limited outline of views expressed by leading psychologists which are relevant to the question of whether the present minimum age is appropriate.

3.24 The concepts of "good" and "bad"; "right" and "wrong" are essentially culturally based. What is "right" for one particular culture might not be "right" for another cultural setting. A person's concept of "right" and "wrong" is acquired through learning or socialisation within the cultural setting in which the person is raised. It follows that a decision to do "right" or "wrong" is an exercise of moral judgment which reflects the established laws, social norms, rules and convention of the cultural setting. According to Lawrence Kohlberg, a leading American psychologist specialising in moral development, moral judgment and reasoning are developed in three distinct levels which can be further sub-divided 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.

3.25 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.”³⁸

3.26 Kohlberg’s findings should be treated with some caution in a Hong Kong context, as they were based on studies in the USA. There have been no credible studies of Asian children of which we are aware. Some studies have suggested that Asian adults are controlled by *external* values (such as a fear of retribution, or a loss of face) rather than an *internal* set of moral values. Regardless of racial background, it would appear that science is inconclusive as to the age at which a child clearly perceives right from wrong.

Unfair to require a seven year old child to stand trial

3.27 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 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:

³⁸ L M, Archives “Now we are all 10 again”, <<http://www.informinc.co.uk/LM/Lm105/LM105Doli.html>>, (Issue 105, 1997) at 2.

“... 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.”³⁹

Undesirable to impose the stigma of conviction on a child

3.28 Apart from being unfair and inappropriate to subject a seven year old child to the traumatic and confusing experience of appearing in court, 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 for 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, whether in respect of overseas studies, career development or emigration. A conviction early in life may serve to alienate the child from society and prompt him to a life of anti-social conduct.

Other jurisdictions have higher minimum age of criminal responsibility

3.29 Our examination in Chapter 2 of the minimum ages of criminal responsibility in other jurisdictions reveals 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 recommendation by the UN Committee that Hong Kong should review its present minimum age with a view to raising it. The majority of other jurisdictions adopt a higher minimum age, and it is argued that Hong Kong should reflect developments in other common law jurisdictions by raising the minimum age of criminal responsibility.

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

3.30 Those favouring 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*:

³⁹ P Cavadino, “Goodbye Doli, Must We Leave You?” (1997) 9, No 2 *Child and Family Law Quarterly* 165 at 169.

“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.”⁴⁰

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.*”⁴¹

Young children should in principle be exempt from prosecution

3.31 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 10 years have been dealt with by alternatives other than prosecution. Many of these cases are dealt with by the PSDS. It can thus be argued that prosecution policy has in fact tacitly recognised the inappropriateness and undesirability of subjecting young children to criminal proceedings which are essentially designed for adult offenders. Advocates for the raising of the minimum age of criminal responsibility suggest that what is needed is for the law to be amended to reflect the practice by raising the minimum age.

No significant crime committed by young children

3.32 The figures contained in the following Table are computed from statistical data provided by the Police for the purposes of illustrating the total number of persons aged between seven and 14 arrested from 1993 to 1997.

⁴⁰ [1995] 2 WLR 383, at 396.

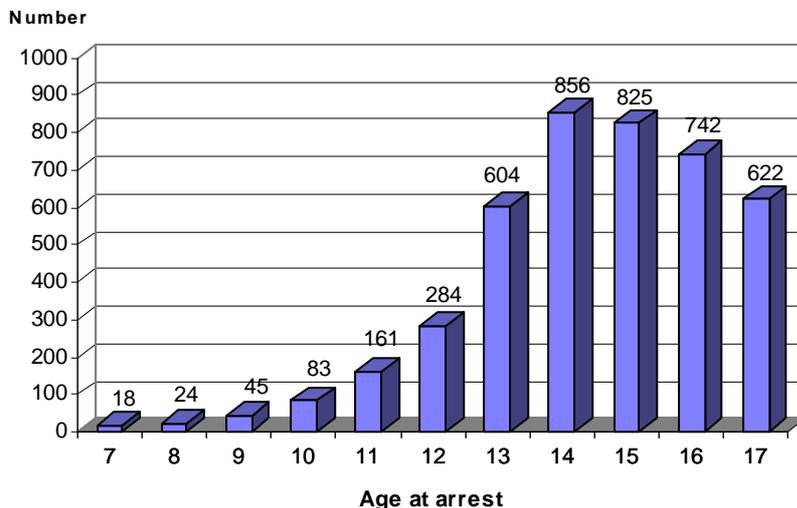
⁴¹ Cited above, “Goodbye Doli, Must We Leave You?” at 167.

**Persons aged 7 - 14 arrested for crime from 1993 to 1997
(by age at arrest)**

Age Year	No. of Persons Arrested (%)								
	7	8	9	10	11	12	13	14	Total
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)
1993 - 1997	128 (0.55)	268 (1.15)	483 (2.08)	929 (4.00)	1,668 (7.18)	3,297 (14.19)	6,905 (29.72)	9,556 (41.13)	23,234 (100)

3.33 It is significant to note that in each of the years from 1993 to 1997, less than 1% of the total number of arrested persons aged between seven and 14 years of age are seven-year-olds. The equivalent percentage for eight-year-olds is less than 2%, and for nine-year-olds, less than 3% of the total number of arrested persons falling within the ages of seven to 14 years. Similar findings can be reached from the statistical data of the following chart provided by the Police, showing the number of persons who were below eighteen years of age at the time of their arrest in the period from January to June 1998.

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



3.34 These statistics show that, in reality, young children at or below the age of nine pose very little threat to law and order. In the circumstances, it is 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 the full rigour of criminal proceedings.

The present minimum age is inconsistent with other legislative provisions which protect children up to the age of 14

3.35 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 ironical as “people may be deemed too young for some activities, yet old enough for others”⁴²

3.36 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 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....”⁴³

3.37 It is argued that the present application of criminal responsibility at the age of seven is inconsistent with the protection afforded to children in a wide range of other legal provisions, and should accordingly be revised upwards.

Adequate alternatives to criminal prosecution already available

⁴² B Franklin, *The Right of Children*, (Basil Blackwell Ltd., 1986), at 7.

⁴³ Cited above, the Report to the UN, at 15-18.

3.38 Raising the age of criminal responsibility would not prompt an increase in juvenile crime by those no longer falling within the net of criminal liability. There already exist alternatives to prosecution which enable unruly children to be brought under control. For example, the Protection of Children and Juveniles Ordinance (Cap. 213) (the PCJO) is designed to protect children and juveniles who are in need of care or protection. Under section 34(2)(d) of the PCJO, a child or juvenile in need of care and protection is one “*who is beyond control, to the extent that harm may be caused to him or to others*”. Thus, a child who is beneath the age of criminal responsibility may nonetheless be susceptible to control under section 34(1) of the PCJO:

“A juvenile court, on its own motion or upon the application of the Director of Social Welfare or any person authorized by the Director of Social Welfare in writing in that behalf either generally or specially or of any police officer upon being satisfied that any person of or above the age of 7 years brought before the court or any other person under the age of 7 years is a child or juvenile in need of care or protection, may:-

- (a) appoint the Director of Social Welfare to be the legal guardian of such 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 specific period, not exceeding 3 years under the supervision of a person appointed for the purpose of the court”.*

3.39 The raising of the minimum age of criminal responsibility would not result in children between the age of seven and the new, higher, age being left uncontrolled. Orders would be available under the PCJO, which may in any case be preferable to criminal prosecution as counselling and supervision provided under such orders to young delinquent children may prove more beneficial than a criminal sanction.

Chapter 4 - The rebuttable presumption of “*doli incapax*”

Introduction

4.1 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 fourteen, a fact reflected in our terms of reference. The law on the presumption of *doli incapax* has been examined in Chapter 2 of this paper, but to recap its essential elements, under section 3 of the Juvenile Offenders Ordinance (Cap 226) (the JOO), a conclusive or irrebuttable presumption arises that a child is *doli incapax* or is 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 for 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”.

4.2 We have outlined in the previous chapter the arguments for and against raising the age at which the irrebuttable presumption of *doli incapax* ceases to apply and gives way to a rebuttable presumption. 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 if so to what age group it should apply

4.3 In this regard, there seems little dispute that full criminal responsibility should apply to a child of 14. It is generally assumed that by 14 years of age, a person would have reached a degree of social and mental maturity sufficient to make him accountable for his own deeds, including criminal deeds. According to Kohlberg’s theory on human development referred to in Chapter 3, an adolescent should be capable from around the age of 13 years of learning to be law abiding for the maintenance and preservation of community welfare. The question is therefore not whether the existing rebuttable presumption should be extended to children of 14 and above but whether it should be restricted, or disapplied altogether. The arguments set out in this chapter proceed on that basis.

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

Ensures only mature children would be fully responsible for their acts

4.4 Those in favour of retaining the rebuttable presumption of *doli incapax* 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.

4.5 Furthermore, it is 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.

4.6 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.

Children should not be treated in the same way as adults

4.7 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 the 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.”⁴⁴

Added to this observation is the concern 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.

⁴⁴ House of Commons Standing Committee B (Pt 7) <<http://www.parliament.the-stationery-office/798/cmstand/b/st980512/pm/80512s04.htm>> (23 June 1998).

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

4.8 Laws J set out in his judgment in *C (A Minor) v DPP* a detailed critique of the rebuttable presumption of *doli incapax*. He began 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.”⁴⁵

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.”⁴⁶

4.9 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 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.”⁴⁷

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.”⁴⁸*

4.10 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. However, it was observed in the House of Lords that the doctrine was not without problems and that a review by the legislature, it was suggested, would be appropriate. Just such a review resulted in the repeal of the rebuttable presumption in England and Wales by section 34 of the Crime and Disorder Act 1998, which provides:

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

⁴⁵ [1994] 3 WLR 888 (the Divisional Court), at 894.

⁴⁶ Cited above, the Divisional Court, at 894 to 895.

⁴⁷ Cited above, the Divisional Court, at 897.

⁴⁸ Cited above, the Divisional Court, at 898.

The presumption is conceptually obscure

4.11 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”.

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

4.12 Those in favour of removing the rebuttable presumption 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 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 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.”⁴⁹

Youngsters should learn to be responsible for their own actions

4.13 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 youngsters the need to be responsible for their own actions. Mr 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.”

⁴⁹ House of Commons Standing Committee B (Pt 7) <<http://www.parliament.the-stationery-office.gov.uk/798/cmstand/b/st980512/pm/80512s07.htm>> (23 June 1998).

*Neither justice nor the young people are served by permitting the latter to evade responsibility for their actions.*⁵⁰

Children's involvement in serious crimes

4.14 According to information provided by the Police, young children between the ages of seven and 14 in Hong Kong are arrested for a range of offences. Tables 1 to 5 of Annex 1 show the arrest figures for a number of these offences which are relatively serious in nature. It can be seen that from 1993 to 1997, while children between the ages of seven and 14 were arrested for a range of offences, arrests involving children at or below the age of nine years were (with the exception of shop theft) relatively insignificant. The number of those arrested starts to pick up at the age of ten years, grows in momentum and reaches a point of concern at the age of 12 years and beyond. The figures illustrate that children within the age range to which the rebuttable presumption currently applies (particularly those aged ten and above) have in fact been involved in relatively serious offences. The nature of those offences, it is argued, must imply knowledge on the part of the child that his or her conduct goes beyond mere mischievousness and illustrates the inappropriateness of continuing to apply the rebuttable presumption of *doli incapax*.

4.15 The figures included in the Tables show that from the age of seven to 14 years, there is a steady increase in the number of children arrested. This leads to the argument that the presumption of *doli incapax* should not be indiscriminately applied to all children within that age-bracket. Readers may wish to consider whether the differing degrees of participation in crime by children of different ages justify a narrowing of the age range to which the rebuttable presumption applies, or its outright abolition.

The presumption stands in the way of early rehabilitation

4.16 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."*⁵¹

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

⁵⁰ House of Commons Standing Committee B (Pt 7) <<http://www.parliament.the-stationery-o...798/cmstand/b/st980512/pm/80512s07.htm>> (23 June 1998).

⁵¹ Glanville L Williams, "The Criminal Responsibility of Children" (1954) Crim. L. R.493, at 495.

“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 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....”⁵²

4.18 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.”*⁵³

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

4.19 It is further argued that the removal of the rebuttable presumption would not unfairly expose children to adult justice. As mentioned in Chapter 3, the JOO 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 presumption is defective as it presumes abnormality

4.20 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:

*“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.”*⁵⁴

The presumption is both divisive and perverse

⁵² House of Commons Standing Committee B (Pt 7) <<http://www.parliament.the-stationery-o...798/cmstand/b/st980512/pm/80512s06.htm>> (23 June 1998).

⁵³ Cited above, the Divisional Court, at 896.

⁵⁴ Cited above, the Divisional Court, at 895.

4.21 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 respectable families as more capable of appreciating their criminal acts to be seriously wrong; thus rendering these children more likely to be classified as being *doli capax* than those from relatively humble origins. 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.

Conclusion

4.22 On the basis of these arguments, Laws J reached the conclusion that the rebuttable presumption of *doli incapax* had ceased to be the law of England. On appeal, the House of Lords reversed the ruling and held that the rebuttable presumption would continue to be the governing law. The Lords did not, however; refute the argument that the doctrine was defective. On the contrary, having thoroughly considered the views of Laws J, Lord Lowry observed that the matter was a classic case for parliamentary investigation, deliberation and legislation. The recent abolition of the rebuttable presumption by section 34 of the Crime and Disorder Act 1998 may be seen as a direct consequence of the views expressed by the House of Lords.

4.23 In his judgment, Lord Lowry agreed that the rebuttable presumption was “out of step with the general law”, but explained that the general law was not meant to apply without qualification to children under 14. Lord Lowry also agreed that the phrase “seriously wrong” was conceptually obscure. He qualified this statement, however, by saying that the meaning of the phrase was reasonably clear when contrasted with the phrase “merely naughty or mischievous”. On Laws J’s allegation that the rebuttable presumption had led to the conclusion that a child was presumed not to be of normal capacity for his age, Lord Lowry observed:

“Proof of mental normality has in practice (understandably but perhaps not logically) been largely accepted as proof that the child can distinguish right from wrong and from a criminal intent. The presumption itself is not, and never has been, completely logical; it provides a benevolent safeguard which evidence can remove. Very little evidence is needed but it must be adduced as part of the prosecution’s case, or else there will be no case to answer.”⁵⁵

4.24 On Laws J’s assertion that the presumption was both “divisive” and “perverse” as children from a more respectable background would be tested by a higher standard, Lord Lowry was also unable to provide a satisfactory reply. He said that:

“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.”⁵⁶

⁵⁵ [1995] 2 WLR 383 (the House of Lords), at 397.

⁵⁶ Cited above, the House of Lords, at 399.

4.25 Lord Lowry made clear in his judgment, however, that it was never his intention to refute the conclusions reached by Laws J. Indeed, Lord Lowry concluded that:

“... the time had come to examine further a doctrine which appears to have been inconsistently applied and which is certainly capable of producing inconsistent results, according to the way in which courts treat the presumption and depending on the evidence to rebut it which is available in each case.”⁵⁷

⁵⁷ Cited above, the House of Lords, at 403.

Chapter 5 - Options for reform

Introduction

5.1 In the preceding chapters, we have outlined the law relating to the minimum age of criminal responsibility and the rebuttable presumption of *doli incapax* and set out the arguments for and against reform. In this chapter we offer a number of possible options for reform. In doing so, we should make clear that the Commission has not concluded in favour of one option rather than another, or set its face against options not explored in this paper. We include in our options for reform the option of retaining the law unchanged, and we should stress that at this stage we remain as open to that conclusion as to any of the alternatives for reform properly so called.

5.2 The possible alternative approaches to reform are too numerous to list exhaustively. In practical terms, therefore, we have restricted the options proposed in this paper to what seem to us to be the four most realistic. In identifying those options, we have borne in mind the following factors:

- a) the Committee on the Rights of the Child of the United Nations has specifically requested that Hong Kong review its current law with a view to raising the minimum age of criminal responsibility;
- b) the international trend appears to be towards a raising of the minimum age of criminal responsibility;
- c) there is no significant body of opinion which contends that the existing age of criminal responsibility is too high; and
- d) following judicial disapproval of the consequence of the application of the rebuttable presumption of *doli incapax*, that doctrine has been abolished in England and Wales.

Those factors lead us to the suggestion 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, we are not aware of any commentator who has argued for an *extension* of the application of this presumption). In addition, it appears to be generally accepted by those who favour change that the minimum age of criminal responsibility should not exceed fourteen years. We accordingly consider that debate on the proper minimum age should be confined to the years between seven and fourteen.

5.3 In reaching any conclusion as to which option should be pursued, we believe that a number of factors must be taken into account:

- a) the solution chosen must reflect Hong Kong's particular circumstances and community views;

- b) while practice in other common law jurisdictions and international legal trends are persuasive, they should not be taken as conclusive evidence of a need for change;
- c) the incidence and nature of juvenile crime at various ages;
- d) prosecution policy in relation to young offenders; and
- e) the alternatives to criminal prosecution which are currently available in respect of young offenders.

5.4 Turning now to the options for reform, the four options we have identified for reform are as follows:

- 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.**

Option A - Retain the present system

5.5 This option maintains the status quo. Under this option, those below seven years of age are irrebuttably presumed to be *doli incapax*, while those aged between seven and 14 years of age are presumed to be *doli incapax*, though this presumption is capable of being rebutted by the prosecution on proof beyond reasonable doubt that at the time of the alleged offence, the person in question knew his or her act to be seriously wrong.

5.6 As the merits and demerits of the present system have been examined in Chapters 3 and 4, they will not be repeated here. While the current minimum age of criminal responsibility is low when compared with many other overseas jurisdictions, the various safeguards or alternatives to prosecution are generally sufficient to ensure that young children involved in crime are dealt with by means other than prosecution. The reality is that while the present system might technically expose a child as young as seven years of age to the risk of prosecution and conviction, the majority of young offenders are spared this process. According to information provided by the Police, of the 8,810 juveniles arrested for various offences in 1997, 4,802 (54.5%) persons were eligible for the Police Superintendent's Discretion Scheme. A total of 3,265 of these eligible offenders were cautioned; giving a caution rate of 68% of those eligible for the Scheme and 37.1% out of the total 8,810 juveniles arrested. Tables 6 to 10 of Annex 2 provide a breakdown of some of the more serious crimes involving children and young persons

from the ages of seven to 14. It can be seen that the Scheme has been more widely applied in favour of younger children. From these data, it can be argued that the preservation of the status quo is necessary to protect the community in relation to those cases involving more serious offences committed by young children.

Option B - Raise the minimum age of criminal responsibility but abolish the rebuttable presumption of “*doli incapax*”

5.7 The arguments for and against the raising of the minimum age of criminal responsibility, as well as the abolition of the rebuttable presumption of *doli incapax*, have been examined in Chapters 3 and 4 and these arguments, again, will not be repeated here. This option requires consideration of the appropriate level to which the minimum age of criminal responsibility should be raised. The removal of the rebuttable presumption of *doli incapax* would expose to automatic criminal liability those between the new minimum age of criminal responsibility and the age of fourteen. The difficulty lies in determining who within the ages of seven to 14 years should be included in the revised minimum age. The selection is by no means easy. In England and Wales the minimum age is ten years. The abolition of the rebuttable presumption of *doli incapax* means that all persons at or above the age of ten years in England and Wales are now made fully responsible for their criminal acts. If a similar approach is to be adopted in Hong Kong, it is necessary first to be satisfied that children here are sufficiently mature at the age of ten years (or indeed whatever is the chosen age) to justify the imposition on them of full criminal responsibility.

5.8 One advantage of this option is that it would greatly simplify the law by applying only one test as to criminal responsibility. It would also mean that children who had formerly been exposed to criminal proceedings at an inappropriately young age would be spared that ordeal. Furthermore, the abolition of the rebuttable presumption of *doli incapax* would rid Hong Kong of a doctrine which, in Lord Lowry's words, “*has been inconsistently applied and which is certainly capable of producing inconsistent results*”.

5.9 One disadvantage of the abolition of the rebuttable presumption of *doli incapax* would be the loss of a protective mechanism to take account of those aged between the revised minimum age and 14 years who are less mature than their peers. Under this option, these young persons would be subject to full adult criminal justice.

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

5.10 This option would appear to result in the least change to the present system. Under this option, both the irrebuttable and rebuttable presumptions of *doli incapax* are retained, save for the raising of the minimum age of criminal responsibility. Also, under this option, the burden of rebutting the presumption remains with the prosecution, who must prove beyond reasonable doubt that the child knew the particular act constituting the offence was seriously wrong. Like option B, however, the principal difficulty is determining the appropriate point at which the revised minimum age could be set. This option arguably provides a compromise between the two earlier options by raising the minimum age (thus ensuring support from those who have criticised the current minimum age as outdated and unjustifiably exposing undeserving young children to criminal proceedings) while at the same time maintaining some protection for children in the “intermediate years” between the revised minimum age and fourteen years. The option does not, however, answer the numerous criticisms which have been made of the rebuttable presumption of *doli incapax*, both judicially and in the United Kingdom Parliament.

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

5.11 Under this option, the present rebuttable presumption of *doli incapax* would give way to a new rebuttable presumption of *doli capax* where those aged between the revised minimum age and 14 years would be presumed to be capable of committing a crime unless they are able to adduce evidence to the contrary. The advantages of this option are that it not only responds to criticism that the present minimum age of criminal responsibility is too low, but also preserves some discretion in respect of children between the revised minimum age and 14 years, and goes some way to answer criticisms of the existing rebuttable presumption of *doli incapax*.

5.12 The major difference between this option and option C is that instead of being presumed to be *doli incapax*, as in the case of option C, those aged between the revised minimum age and 14 years would be deemed to be capable of committing an offence (ie *doli capax*), but would be provided an opportunity for rebuttal. The burden of rebutting the presumption of *doli capax* would lie on the defence. However, as in most criminal cases where the defendant is legally required to prove an issue, the standard of proof required of the defence would be the lower civil standard of proof on the balance of probabilities, and not the criminal standard of proof beyond reasonable doubt.

Conclusion

5.13 In concluding this consultation paper, we invite comment principally on the specific options for reform which we have identified in this chapter, but would welcome thoughts on other means of improving the present system for determining the age of criminal responsibility in criminal cases. The Commission remains open-minded on the best way forward, and seeks input from the community as to the preferred option.

**Arrests of children aged between 7 and 14 years
for specific selected offences
(1993 - 1997)**

**Table 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 (D.D.)	-	-	-	1	-	-	3	7
Possession of D.D. 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

**Arrests of children aged between 7 and 14 years
for specific selected offences
(1993 - 1997)**

**Table 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 (D.D.)	-	-	-	-	-	-	4	7
Possession of D.D. 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

**Arrests of children aged between 7 and 14 years
for specific selected offences
(1993 - 1997)**

**Table 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 (D.D.)	-	-	-	-	-	-	5	14
Possession of D.D. 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

**Arrests of children aged between 7 and 14 years
for specific selected offences
(1993 - 1997)**

**Table 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 (D.D.)	-	1	-	1	-	-	1	5
Possession of D.D. 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

**Arrests of children aged between 7 and 14 years
for specific selected offences
(1993 - 1997)**

**Table 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 (D.D.)	-	-	-	-	-	-	1	4
Possession of D.D. 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

**Children aged between 7 and 14 years cautioned under
the Police Superintendents' Discretion Scheme (PSDS)
for specific selected offences
(1993 - 1997)**

**Table 6
(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	-	-	-	-	-	-	1	-	-	-	-	-	3	-	7	-
Possession of Dangerous Drugs 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

**Children aged between 7 and 14 years cautioned under
the Police Superintendents' Discretion Scheme (PSDS)
for specific selected offences
(1993 - 1997)**

**Table 7
(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	-	-	-	-	-	-	-	-	-	-	-	-	3	1	7	-
Possession of Dangerous Drugs 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	-

**Children aged between 7 and 14 years cautioned under
the Police Superintendents' Discretion Scheme (PSDS)
for specific selected offences
(1993 - 1997)**

**Table 8
(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	-	-	-	-	-	-	-	-	-	-	-	-	5	-	14	-
Possession of Dangerous Drugs 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	-

**Children aged between 7 and 14 years cautioned under
the Police Superintendents' Discretion Scheme (PSDS)
for specific selected offences
(1993 - 1997)**

**Table 9
(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	-	-	1	-	-	-	1	-	-	-	-	-	1	-	5	-
Possession of Dangerous Drugs 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

**Children aged between 7 and 14 years cautioned under
the Police Superintendents' Discretion Scheme (PSDS)
for specific selected offences
(1993 - 1997)**

**Table 10
(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	-	-	-	-	-	-	-	-	-	-	-	-	1	-	4	-
Possession of Dangerous Drugs 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

Annex 3

**The age of criminal responsibility in jurisdictions
covered by the Consultation Paper**

<i>Countries and Territories</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

Austria	14
Bulgaria	14
Germany	14
Hungary	14
Italy	14
Latvia	14
Lithuania	14
Mainland 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