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Legislative Council

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Bills Committee on Criminal Procedure (Amendment) Bill 2004

Background brief prepared by the Legislative Council Secretariat

Criminal Procedure (Amendment) Bill 2004

Purpose

This paper gives a summary of the issues and concerns raised by members of the Panel on Security on the Administration's proposals in the Criminal Procedure (Amendment) Bill 2004.

Background

2. In a court case in 2002, the Court of First Instance (CFI) held that section 67C of the Criminal Procedure Ordinance (CPO), which gave the Chief Executive (CE) the power to determine the minimum term that prisoners serving discretionary life sentence or detained at Executive discretion must serve, was inconsistent with Article 80 of the Basic Law and was therefore invalid. As a result of the case, prisoners serving discretionary life sentence or mandatory life sentences, or detained at Executive discretion, are left with no lawfully determined minimum terms. The Administration proposes to revise the scheme so that the determination of minimum terms of these prisoners would be made by a judge of CFI instead of by CE.

The Administration's proposals and issues and concerns raised by Members at meetings of the Panel on Security

Meeting of the Panel on Security on 13 November 2003

3. At its meeting on 13 November 2003, the Panel on Security was consulted on the Administration's proposal to amend CPO to provide for a revised scheme for determination of minimum terms of imprisonment to be

served by certain prisoners affected by the CFI's judgment in September 2002.

4. Under the Administration's proposal, the power to determine the relevant minimum terms should be vested in a judge of CFI. There would be a right of appeal to the Court of Appeal. Amendments would also be made to enable the prisoners to apply for legal aid.

5. Members raised various concerns about the Administration's proposal. The major concern was that certain young prisoners would still be faced with prolonged and open-ended uncertainty as to when they would be released.

Meeting of the Panel on Security on 12 February 2004

6. In the light of Members' comments at the Panel meeting on 13 November 2003, the Administration prepared a revised proposal and presented it to the Panel at its meeting on 12 February 2004 for consultation. The Administration informed Members that under the revised proposal, a new provision would be added to give the CFI judge the discretion, subject to the consent of the concerned prisoner, to give a determinate sentence as an alternative to determining a minimum term for 12 prisoners detained at Executive discretion for having committed murder under the age of 18 and two prisoners serving mandatory life sentences for having committed murder under the age of 18.

7. Members raised the following issues and concerns on the Administration's revised proposal -

- (a) there should be rules or guidelines providing for the early release of a prisoner and information relating to the provision of such early release should be made available to prisoners;
- (b) imposing a minimum term of imprisonment was inconsistent with the views of the European Court of Human Rights;
- (c) a judge of CFI might still impose a minimum term of imprisonment;
- (d) all prisoners should be given a determinate sentence;
- (e) the court might impose a longer term of imprisonment, if it was forced to impose a determinate sentence in cases where it was unable to do so;
- (f) the Long-term Prison Sentences Review Board should be more transparent in its review on the sentences of prisoners; and

- (g) the Administration's revised proposal would be no different from overturning a previous sentence and imposing a new sentence. Other prisoners might ask for their original sentence to be overturned and new ones imposed.

Relevant minutes of meetings

8. Members may wish to refer to the following minutes for further details of the discussions at the two Panel meetings -

- (a) extract from the minutes of the Panel meeting held on 13 November 2003 (**Appendix I**); and
- (b) extract from the minutes of the Panel meeting held on 12 February 2004 (**Appendix II**).

Council Business Division 2
Legislative Council Secretariat
1 June 2004

**Extract from Minutes of meeting of
Panel on Security held on 13 November 2003**

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III. Criminal Procedure (Amendment) Bill
(LC Paper No. CB(2)271/03-04(03))

5. At the invitation of the Chairman, Acting Deputy Secretary for Security 2 (DS for S2 (Atg)) briefed Members on the legislative proposals to amend the Criminal Procedure Ordinance (CPO) to provide for a revised scheme for determination of minimum terms of imprisonment to be served by certain prisoners affected by a judgment of the Court of First Instance (CFI) in September 2002.

6. Mr LEUNG Yiu-chung said that when the Long Term Prison Sentences Review Bill was examined in 1997, many prisoners had expressed concern about indeterminate sentences. The European Court of Human Rights had pointed out that imposing an indeterminate sentence on a person was inhumane. It had also pointed out in relation to a case in the United Kingdom (UK) that a minimum term of imprisonment should be treated with flexibility and the term of imprisonment should be regularly reviewed. He asked whether the Administration would consider introducing a tariff period to replace the minimum term of sentence adopted in Hong Kong.

7. Senior Assistant Solicitor General (SASG) responded that to his knowledge, the view of the European Court of Human Rights was given in relation to a UK case where the Home Secretary had intervened to increase the minimum term initially set down by the judge. Senior Government Counsel (SGC) added that in the judgment delivered by CFI on 14 August 2003 in the case of *Lai Hung Wai v Superintendent of Stanley Prison*, the judge acknowledged the difference between the system in UK, which adopted a tariff period, and the Hong Kong system which adopted a minimum term. The judge also took the view that the Hong Kong system was not in contravention of human rights. The Chairman requested the Administration to provide Members with a copy of the judgment.

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8. Mr LEUNG Yiu-chung reiterated that a minimum term of imprisonment should be replaced by a tariff period as adopted in UK. DS for S2 (Atg) responded that the prisoners concerned had been convicted and sentenced to indeterminate sentences by the court. It would not be appropriate to ask the court to impose determinate sentences in substitution for indeterminate sentences. He added that minimum term was only one of the factors considered by the Long Term Prison Sentences Review Board (LTPSRB) in deciding whether or not to make a recommendation for a determinate sentence.

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9. Miss Margaret NG asked whether a prisoner could be released before the end of a minimum term.

10. SASG responded that under section 16 of the Long-term Prison Sentences Review Ordinance (Cap. 524), a prisoner could petition the Chief Executive (CE) for early release before the end of a minimum term. CE could then refer the matter to LTPSRB for a recommendation. Thus, there was scope for early release before the end of a minimum term. He added that even in the UK system, a prisoner might not be released after the tariff period applicable to him.

11. Miss Margaret NG asked whether a prisoner would be released after serving a minimum term. She considered that a date by which a prisoner would be released should be specified.

12. DS for S2 (Atg) responded that the prisoners serving indeterminate sentences might not be released at the end of a minimum term. He said that the sentences of prisoners who were serving discretionary life sentences or mandatory life sentences would be periodically reviewed by LRPSRB.

13. The Chairman asked whether at present, an indeterminate sentence could be imposed on a person. DS for S2 (Atg) responded that it was possible to impose an indeterminate sentence and after amendments were made to CPO on 30 June 1997, the judge must specify the minimum term that the person must serve when imposing a discretionary life sentence on a person.

14. Mr Albert HO said that an indeterminate sentence was no different from a life sentence for a juvenile prisoner. Mr Andrew WONG considered that an indeterminate sentence was even worse than a life sentence.

15. Mr LEUNG Yiu-chung expressed concern that when reviewing the sentence of a prisoner, LTPSRB could not order the early release of a prisoner before any minimum term applicable to the prisoner.

16. SASG responded that under section 15(1)(a)(ii) of the Long-term Prison Sentences Review Ordinance, LTPSRB was able, when reviewing the sentence of a prisoner, to recommend that the CE should substitute a determinate sentence for a prisoner's indeterminate sentence. He added that a prisoner could seek judicial review if the CE refused to implement the LTPSRB's recommendation.

17. The Chairman asked whether a maximum sentence could be specified in addition to an indeterminate sentence. SGC responded that indeterminate sentences were specified in cases where a trial judge could not determine, at the time of imposing the sentence, a specific term of imprisonment while the

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prisoner needed to serve before he should be released from prison. The question of whether a prisoner could be released after serving his minimum term would be considered by LTPSRB when it conducted a review of the prisoner's sentence, having regard to a number of factors including whether the prisoner would pose a threat to the safety of the community. If the bill were to specify a deadline for the release of such a prisoner, it might be difficult and in conflict with the spirit of an indeterminate sentence already imposed on the prisoner by the trial judge.

18. Miss Margaret NG considered that a maximum term after which a prisoner would be released should be specified. Her view was echoed by Mr Andrew WONG. Mr Albert HO said that it would be unfair to withhold the release of a prisoner merely for the reason that the prisoner would pose a threat to the community. Mr LEUNG Yiu-chung considered that a tariff period should be adopted in place of a minimum term.

19. The Chairman concluded that as many Members had expressed reservations about the policy aspects of issues arising from the Administration's legislative proposals, the Panel might consider holding a special meeting or form a subcommittee to further discuss the issues. DS for S2 (Atg) suggested that the introduction of the bill into the Legislative Council (LegCo) and the discussion of the issues raised by the Panel could proceed in parallel.

20. The Chairman said that while it was up to the Administration to decide whether to introduce the bill into LegCo, it should be noted that a majority of Members present were not in support of the introduction of the bill.

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**Extract from Minutes of meeting of
Panel on Security held on 12 February 2004**

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**IV. Legislative proposals to amend the Criminal Procedure Ordinance
(Cap. 221)**

(LC Paper Nos. CB(2)1229/03-04(03) and (04))

7. Members noted a submission, which was tabled at the meeting, from the relative of a victim of crime.

(Post-meeting note : The submission tabled at the meeting was circulated vide LC Paper No. CB(2)1334/03-04 on 13 February 2004.)

8. At the invitation of the Chairman, Permanent Secretary for Security (PS for S) briefed Members on the Administration's revised proposals to amend the Criminal Procedure Ordinance (CPO) (Cap. 221).

9. Miss Margaret NG said that the proposals in the Administration's paper had addressed most of her concerns. Referring to paragraph 5 of the Administration's paper, she suggested that there should be rules or guidelines providing for the early release of a prisoner and information relating to the provision of such early release could be made available to prisoners.

10. PS for S responded that matters relating to early release were determined by the Long-term Prison Sentences Review Board (LTPSRB), which was an independent statutory body. He undertook to refer Miss Margaret NG's suggestion to LTPSRB. He added that to his knowledge, after 30 June 1997 LTPSRB had decided to convert the indeterminate sentences into determinate sentences for three "young murderers" and as a result the prisoners' imprisonment was on average about 12 months longer than their minimum terms of imprisonment. Miss NG requested the Administration to inform Members of LTPSRB's response when the relevant legislative proposal was introduced into the Legislative Council.

11. Referring to paragraph 3 of the Administration's paper, Mr LEUNG Yiu-chung asked how discretion was to be exercised by a judge and how consent was to be given by a prisoner.

12. PS for S responded that under the Administration's proposal, consent would have to be given by a prisoner before a judge of the Court of First

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Instance (CFI) exercised his discretion and decided whether to give a determinate sentence or a minimum term of imprisonment.

13. Mr LEUNG Yiu-chung said that under the Administration's proposal, a CFI judge might still impose a minimum term of imprisonment. He considered that all prisoners should be given a determinate sentence.

14. PS for S said that, as explained in paragraphs 4 to 8 of Appendix C of the Administration's paper, indeterminate sentences were necessary and justified.

15. Mr LEUNG Yiu-chung said that imposing a minimum term of imprisonment was inconsistent with the views of the European Court of Human Rights (the European Court), which had made the following comments in relation to a case in the United Kingdom (UK) -

- (a) a minimum term of imprisonment should be determined by an independent judicial body to safeguard the interest of prisoners;
- (b) the tariff period adopted in UK should be regarded as the ceiling rather than the lower limit of an imprisonment term; and
- (c) a tariff period should be determined by court.

16. PS for S responded that LTPSRB was an independent and professional body. In response to Mr LEUNG's points about the UK system, PS for S referred Members to paragraph 15 of Appendix C of the Administration's paper and pointed out that the average time served by UK prisoners after sentence had in fact been longer than the average minimum term. UK had in 2002 replaced the term "tariff" by "minimum term" given that the term "tariff" had been commonly misunderstood to mean a maximum sentence. The fact was that even where a prisoner had served his tariff period, whether the prisoner should be released would be considered by the Parole Board having regard to whether the prisoner would pose a threat to the safety of the community.

17. Senior Government Counsel (SGC) added that in the UK case concerned, the European Court took the view that imposing an indeterminate sentence on a young offender did not contravene human rights. A similar view was also taken by the House of Lords of UK on 25 November 2002. She added that in UK an indeterminate sentence comprised two parts. The first part was punitive in nature, while the second part involved the continued detention of a prisoner for the protection of the public. The United Nations Human Rights Committee (UNHRC) had taken the view in December 2003 that the second part of an indeterminate sentence was not in contravention of human rights so long as the individual prisoner's case was regularly reviewed by an independent body and the decision of the independent body was subject to judicial review. The Chairman requested the Administration to provide Members with the relevant

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opinions of UNHRC.

18. The Chairman considered that the court might impose a longer term of imprisonment, if it was forced to impose a determinate sentence in cases where it was unable to do so.

19. Referring to paragraph 3 of the Administration's paper, Ms Audrey EU asked how consent was to be given by a prisoner. She also asked whether similar arrangements would be made available to those prisoners who were affected by the September 2002 court judgment and were serving discretionary life sentences referred to in paragraph 5 of the Administration's paper.

20. PS for S responded that with the consent of a prisoner, the CFI judge would determine whether a determinate sentence should be imposed. Where a determinate sentence should not be imposed, CFI would impose a minimum term of imprisonment. He said that the Security Bureau (SB) was still discussing the implementation details with the Department of Justice and, if necessary, the Judiciary. Regarding the prisoners referred to in paragraph 5 of the Administration's paper, the court had already exercised the discretion when it decided on indeterminate sentence for the prisoners. Thus, the Administration's proposal would not apply to the prisoners concerned.

21. Ms Audrey EU said that she had recently requested PS for S to convey to LTPSRB her view that there should be transparency in the reviews conducted by LTPSRB on the sentences of prisoners. PS for S responded that the Administration had conveyed the view to LTPSRB.

22. Mr IP Kwok-him said that a balance should be struck between the interest of a prisoner and the feelings of the relatives of the victim concerned. He expressed reservations that the Administration's proposal would be no different from overturning a previous sentence and imposing a new sentence. He expressed concern that the Administration's proposal might trigger off other prisoners' requests for overturning the original sentence and imposing a new one.

23. PS for S responded that in accordance with the proposed arrangement, the court might or might not give a determinate sentence. The Administration's proposal would merely provide the court with the discretion of imposing a determinate sentence or a minimum term of imprisonment. This option was available under existing legislation to a "young murderer" convicted today. The Administration considered its proposal fair to prisoners as well as the relatives of victims.

24. Senior Assistant Solicitor General said that some prisoners might wish to have the opportunity of being given a determinate sentence. The Administration's proposal would provide the court with the option of imposing a determinate sentence. SGC added that Article 12 of the Hong Kong Bill of

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Rights provided that "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under Hong Kong or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby." As one of the prisoners affected by the present proposal to amend the Criminal Procedure Ordinance had lodged an application for leave to appeal against his sentence out of time and relied on Article 12 of the Hong Kong Bill of Rights as one of his grounds of appeal, she was not in a position to provide a detailed response.

25. Mr IP Kwok-him asked about the difference between a determinate sentence and a minimum term of imprisonment. PS for S responded that it might not be possible or appropriate to compare the length of determinate sentences and minimum terms.

26. Mr Albert HO asked whether the court could currently order that a person be detained at Executive discretion.

27. PS for S responded that convicted persons were no longer sentenced to detention at Executive discretion.

28. Mr Albert HO asked about the difference between LTPSRB and the Parole Board in UK. SGC responded that LTPSRB was analogous to the Parole Board in UK. In the judgment on the case of *Lai Hung Wai v Superintendent of Stanley Prison*, it was stated that LTPSRB was an independent and professional body.

29. Mr Albert HO said that some prisoners might seek the issue of a writ of *habeas corpus* on the ground that the minimum term determined by the Chief Executive (CE) was invalid. He asked whether such invalidity had created pressure on LTPSRB to order the early release of the prisoners concerned.

30. PS for S responded that the case of *Lai Hung Wai v Superintendent of Stanley Prison* was an example. As for early release mentioned in paragraph 7 of the Administration's paper for the meeting on 13 November 2003, LTPSRB could not under the law order the conditional release of a prisoner before the expiry of his minimum term. Since the minimum terms determined by CE were invalid, LTPSRB might order the early release of the prisoners concerned.

31. Mr Albert HO asked whether the early release of prisoners could be recommended by LTPSRB and determined by court. PS for S responded that LTPSRB was an independent statutory body that made professional decision on early releases. The Administration considered that the existing mechanism for early release of prisoners was appropriate.

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32. Miss Margaret NG said that the major issue was that certain provisions in CPO were inconsistent with the Basic Law and thus had to be amended. It was not a matter of balance between the benefits of prisoners and the feelings of relatives of victims. It was also not a matter of whether human right was contravened, as consistency with human rights was a requirement regardless of the type and length of sentence imposed. Where the court could not impose a determinate sentence, a discretionary sentence would have to be imposed. It would be imposing a restriction on the court, if a determinate sentence was made mandatory. She considered that it was more important for LTPSRB to maintain transparency and consistency in its work to ensure fairness.

33. Referring to paragraph 3 of the Administration's paper, the Chairman asked whether a prisoner's performance inside penal institutions was taken into consideration when determining the sentence to be imposed. He also asked whether a prisoner could choose to be given a determinate sentence at a later stage.

34. PS for S responded that it was established law that individual circumstances were factors considered by the court in the determination of the sentence. As to whether the prisoners should be given the option to choose the timing for the court to exercise the discretion of giving a determinate sentence instead of a minimum term, PS for S said that the Administration preferred to tackle the one-off problem of the 25 prisoners in question as early as possible, and in one go.

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