Bills Committee on
Criminal Procedure (Amendment) Bill 2004

Administration's Response to
Issues raised at the 2nd Bills Committee meeting

Purpose

This paper sets out the Administration's response to the issues raised by the Bills Committee at its meeting held on 10 June 2004.

Administration's response

(a) to consider providing in the proposed section 67C(1) of the Criminal Procedure Ordinance (CPO) that the prescribed prisoners could apply to the court at public expense for a determination under the section, if the Secretary for Justice failed to submit an application within six months

We have no objection to allowing prisoners to apply to the court for a determination if the Secretary for Justice failed to apply within six months after commencement of the Bill. Please refer to the proposed section 67C(1A) of the Committee Stage Amendments. (CSAs)

An application by the prisoner under this proposed subsection is simple, and no payment of fees is necessary.

(b) to consider amending the expression "when the prescribed prisoner was under 18 years of age, then, subject to the consent of the prescribed prisoner to the application of this subsection to the prescribed prisoner, the judge has the discretion as to" in the proposed section 67C(3) of CPO to "when he was under 18 years of age, then, subject to the prisoner's consent, the judge may in his discretion decide";

We set out below our proposed amended version as follows –

"Where the prescribed prisoner is serving the relevant sentence in respect of the conviction of murder committed when he was under 18 years of age,

then, subject to the consent of the prescribed prisoner to the application of this subsection to him, the judge has the discretion as to whether –

(a) to make a determination under subsection (2); or
(b) to determine instead that the relevant sentence be quashed, and be substituted by a sentence of imprisonment for a fixed term of such duration as the judge considers appropriate."

(c) to consider amending the expression "be substituted by" in the proposed section 67C(3)(b) of CPO as "substituted with";

In view of Members' concern, we have considered the use of "substituted by". We note that the use of "substituted by" is used in local legislation and in legal references such as Stroud's Judicial Dictionary. Thus, we propose to retain "substituted by" in the provision.

(d) to consider specifying in the proposed section 67C(5) of CPO that the judge should in particular take into account any conditional release order in force in respect of a prescribed prisoner;

The proposed section 67C(5)(a) provides that the judge may take into account any material relevant to his determination under the section. Its scope is wide enough to cover any conditional release order in force. It would not be necessary to specify the "conditional release order" nor to accord priority to such order over other materials that the judge may consider relevant. Indeed, such a provision would interfere with the exercise of discretion by the judge.

(e) to consider amending the expression "previous determination" in the proposed section 67C(5)(b) of CPO as "previous determination by the Chief Executive";

(j) to consider capitalizing the terms "previous determination" and "previous recommendation" in the proposed section 67G of CPO;

It would be preferable to keep a shorter defined term, and leave the details to be explained in the definition. Thus, we prefer not to add "by the Chief Executive" after "previous determination". It is also not consistent with usual drafting practice to capitalize a defined term.

(f) To consider deleting the proposed section 67D(1) of CPO

We agree to delete the proposed section 67D(1).

(g) to consider adding a new subsection to the proposed section 67D(2) of CPO to require the Secretary for Justice to serve upon the prescribed prisoners copies of the application and accompanying documents

No objection. Please refer to the proposed section 67D(2A) of the CSAs.

(h) to consider deleting ", other than the evidence given in those proceedings" in the proposed section 67D(3)(a) of CPO;

No objection. Please refer to the proposed section 67D(3)(a) of the CSAs.

(i) in the proposed section 67F of CPO, to consider –

(i) suspending the power of the Long-term Prison Sentences Review Board to direct conditional release of the prescribed prisoners upon the commencement of the Bill until a determination had been made under the Bill; or

(ii) allowing a conditional release order to remain valid even after determinate sentence was imposed;

(i) We consider that it is not appropriate to suspend the power of the Long-term Prison Sentences Review Board (LTPSRB) to direct the conditional release of the prescribed prisoners upon the commencement of the Bill.

A prescribed prisoner is entitled to have his sentence reviewed by the Long-term Prison Sentences Review Board (LTPSRB) periodically and to be given conditional release if the Board considered appropriate. The suggestion to suspend the power of the LTPSRB is likely to be considered as arbitrary because it

might have caused the prisoner to be detained in prison in order to overcome a technical problem created by the Bill. The proposed suspension may contravene the prisoner's right to liberty protected by Art.5 of the HKBOR.

(ii) S.15(1)(b) of the Long-term Prison Sentences Review Ordinance, Cap 524 (LTPSRO) provides that **in the case of a prisoner who is serving an indeterminate sentence** and in respect of whom the LTPSRB wished to **defer making a recommendation that the sentence should be converted to a determinate one**, LTPSRB can make an order directing the prisoner to be conditionally released under supervision. S.27 of LTPSRO also provides that the period of release under conditional release order is to be treated as part of the indeterminate sentence the prisoner is serving. In other words, the whole conditional release arrangement is premised on an indeterminate sentence being in force, and has a clearly defined purpose. It follows, therefore, that if the court decided to quash the indeterminate sentence and substitute it with a determinate one, the indeterminate sentence, as well as the conditional release order, would fall away. Moreover, the purpose of the conditional release order, which is to facilitate the LTPSRB to decide whether a recommendation should be made for the indeterminate sentence of a prisoner to be converted to a determinate one, would have been fulfilled once the court passed a determinate sentence.

Providing for the conditional release order to remain valid even after a determinate sentence has been imposed would amount to legislative interference in the role of the judiciary, inclusive of an assumption that the judge will not exercise his discretion in a way which takes all relevant factual considerations and sentencing principles into account. The reasoning is as follows. The judge is given the power to consider all relevant materials when making a determination. The conditional release order in force, if any, will be taken into account by the judge if he considers it relevant to his determination. If the judge decides, after the proper exercise of his discretion, to impose a determinate sentence despite the existence of a conditional release order, the amendment as suggested by Members would amount to a direct interference in the

sentencing process contrary to the interests of the public. In effect, the legislature would be granting the prisoner a remission of sentence in advance despite the fact that the judge considered that, in all the circumstances, the length of sentence should extend into or beyond the duration of the conditional release order.

Apart from the above legal policy considerations, there are sufficient safeguards under the Bill to protect the interests of the prescribed prisoners. First, the consent of the prescribed prisoner is necessary before the judge has the discretion to give a determinate sentence instead of a minimum term. A prescribed prisoner on conditional release would be able to choose, like any other prescribed prisoners, whether he would like to be subject to such discretion of the judge. And even with the prisoner's consent, the judge will still retain the discretion to fix a minimum term, should he consider that that would be fairer to the prisoner on conditional release, having regard to the features of the conditional release order regime and what it might mean to the prisoner if he gave the prisoner a determinate sentence instead. Secondly, the prisoner will be legally advised and will be able to make an informed choice regarding the risks of giving the consent. Lastly, the appeal channel is available for the prisoner, if aggrieved by the decision of the judge, to appeal against the sentence passed.

In view of all the above, we consider it appropriate to retain the provision as originally proposed by the Administration.

(k) to consider revising the expression "as enacted by the Long-term Prison Sentences Review Ordinance" in the proposed section 67G(1) of CPO;

The use of "enacted by [certain provisions or certain legislation]" is not uncommon in our laws (for example, s.2(1) of the Occupiers Liability Ordinance (Cap.314), ss. 3 and 12A of the Pensions Ordinance (Cap.89), s.31A of the Pension Benefits Ordinance (Cap.99), s.8G of the Buildings Ordinance (Cap.123)). This usage is also adopted in legal references such as Stroud's Judicial Dictionary. However, we accept Members' suggestion to add "originally" in the description of the provisions. Please refer to the proposed section 67G(1) of the CSAs.

(l) to consider simplifying the proposed Rule 2(3) of the Legal Aid in Criminal Cases Rules (LACCR);

The proposed provision in Rule 2(3)(b)(i) to (iii) would provide greater clarity and certainty to the interpretation of the Legal Aid in Criminal Cases Rules in respect of granting legal aid to the prescribed prisoners, which would be to their interests. For example, if the proposed provisions were to be deleted, there might be doubt as to how the words "convicted", "conviction", "tried" and "trial" appearing in the relevant rules should be construed in relation to the prescribed prisoners. In view of this, we propose to retain the proposed provisions, unless Members feel strongly otherwise.

(m) to consider deleting "instituted in relation to him" in the proposed Rule 4(1)(ca) of LACCR;

We agree to the deletion of "in relation to him". Please refer to the proposed Rule 4(1)(ca) of the CSAs.

(n) to provide the draft Committee Stage amendments to be proposed by the Administration.

The Committee Stage amendments is attached.

Security Bureau
12 June 2004