

**Bills Committee on
Criminal Procedure (Amendment) Bill 2004**

**Administration's Response to
the submission from Mr LAI Hung-wai**

Purpose

This paper sets out the Administration's response to issues raised in the submission from Mr LAI Hung-wai dated 10 May 2004.

Administration's response

2. The issues and the arguments raised in Mr LAI's letter are in substance much the same as those we have discussed in our previous meetings with the Panel on Security leading up to the introduction of the Criminal Procedure (Amendment) Bill. In the process, we have provided an information note on Indeterminate Sentences, which was attached to the discussing paper issued to the Panel on Security for the meeting of 12 February (LC Paper No. CB(2) 1229/03-04(03)). The views given therein are relevant, and we reproduce a copy at Annex for Members' reference.

3. In his letter, Mr LAI has argued that the sentence of detention at Her Majesty's pleasure ("HMP") authorized the detention of juvenile offenders for an indeterminate term, and that the only justification for it was to protect the public. Accordingly, the justification for continued detention would end when the offender no longer presents a danger to the public.

4. Under established sentencing principles, however, the protection of the public is not the only justification for indefinite detention. Whether or not a minimum term has been fixed, an indeterminate sentence inherently incorporates considerations of both the period that the prisoner should serve as punishment or retribution, according to the nature of crime and other circumstances, and the period which relates to the need to protect the public and the rehabilitation of the offender.

5. The above principles also answer Mr LAI's second argument, which is that the imposition of a minimum term on persons originally sentenced to detention

at HMP amounts to sentencing to a heavier penalty. In fact, all that the fixing of a minimum term does is to quantify the period which inherently the prisoner must serve as retribution or punishment. This is to the prisoner's benefit since it gives certainty to this aspect of an indeterminate sentence.

6. Mr LAI's third argument is that, in HMP cases, a "maximum" term should be imposed instead of a minimum term. Our general observations on the setting of a "maximum" term within an indeterminate sentence have been set out before, as in paras. 10 and 11 of the paper attached. As to the factors that should be taken into account to justify continued detention of a prisoner after expiry of the minimum term (which Mr Lai suggests referring to as an open-ended "maximum" term), there are clear provisions in the Long-term Prison Sentences Review Ordinance, Cap 524 (the Ordinance) to this effect. The Long-term Prison Sentences Review Board (LTPSRB), established under the Ordinance, will conduct regular reviews of the cases of prisoners detained at Executive discretion, having regard to specific principles that are set out in section 8 of the Ordinance. These principles and factors are, in short, rehabilitation, reintegration into society, sufficiency of sentence and protection of the community. In the case LAI Hung Wai and Superintendent of Stanley Prison, HCAL 24/2003, 14 August 2003, Hon Hartmann J said:

"The indeterminate sentences of detention at Executive discretion imposed in Hong Kong on young offenders is monitored, as I will show later in this judgment, by a statutory system that looks to three fundamentals: first, service of a period of time to expiate the punitive elements of the offence; second, the rehabilitation of the offender and, third, the question of on-going risk to society. Those three fundamentals, it seems to me, are recognized internationally not only as being lawful but also in full compliance with evolving norms of what lies within the boundaries of just, rational and humane punishment.....Hong Kong's statutory system for monitoring the duration of the applicant's detention aims to balance the legitimate requirement to punish a serious offence with the need to seek the applicant's rehabilitation while at the same time protecting the community. That system encompasses internationally recognized ideals"

In short, we consider that the present statutory sentence review system to be fair and appropriate.

7. Fourthly, Mr LAI has referred to *DPP of Jamaica v Mollison* [2003] 2 WLR 1160 and has suggested that “detention at Executive discretion” should be replaced with “detention during the court’s pleasure” in order to comply with the doctrine of separation of powers. The context of the *Mollison* case, however, is different from that in Hong Kong. In Jamaica, the decision to release was entrusted to the Governor General. In Hong Kong, conditional release may be ordered by the Long-term Prison Sentences Review Board under section 15(1)(b) of the Long-term Prison Sentences Review Ordinance (Cap. 524) rather than by the Chief Executive. Further it was observed in *Yau Kwong Man* [2002] 3 HKC 457, 481C that the Board is independent of the government (Cap. 524, section 5(3)) and therefore is not part of the executive.

Security Bureau
12 June 2004

Information paper on indeterminate sentences

Definitions of Indeterminate Sentence

Broadly, an indeterminate sentence is a sentence of life imprisonment. There is by definition an element of uncertainty regarding the time of release inherent in an indeterminate sentence.

2. In Hong Kong, if the offence is murder and the accused is an adult, it is mandatory for the court to impose a life term under section 2 of the Offences against the Person Ordinance (Cap. 212). If the offence is murder and the accused is under 18 years of age at the time of the offence, the court has discretion as to whether the person should be sentenced to imprisonment for life or to imprisonment for a shorter (determinate) term. There are also other serious offences, such as manslaughter, rape, arson, manufacture/trafficking of dangerous drugs and robbery for which the court has a discretion to impose a life term (see paragraph 6 below for details of the conditions precedent to imposing an indeterminate sentence).

3. The following definitions are provided by section 4(1) of the Long-term Prison Sentences Review Ordinance (Cap. 524) –

“indeterminate sentence” means –

- (a) a mandatory life sentence or a discretionary life sentence; or
- (b) detention at Executive discretion.

“mandatory life sentence” means a sentence of imprisonment for life where the only sentence that could be imposed for the relevant offence was life imprisonment.

“discretionary life sentence” means –

- (a) a sentence of imprisonment for life where the maximum sentence that could be imposed for the relevant offence was life imprisonment; and

- (b) a sentence of imprisonment for life under section 2 of the Offences against the Person Ordinance (Cap. 212) in respect of a person convicted of murder who was under 18 years of age at the time of the offence.

“Executive discretion” means –

- (a) for the period beginning on the date of commencement of section 4 and ending on 30 June 1997 – Her Majesty’s pleasure; and
- (b) on and after 1 July 1997 – the discretion of the Chief Executive.

When an indeterminate sentence is justifiable

4. In *R v Hodgson* (1968) 52 Cr App R 113 (Cross & Cheung, Sentencing in Hong Kong, 3rd Ed., p.278), an indeterminate sentence was considered to be justifiable provided three criteria were met –

- (a) The offence or offences were in themselves grave enough to require a very long sentence.
- (b) Where it appeared from the nature of the offences or from the accused’s history that he was a person of unstable character likely to commit such offences in the future.
- (c) If the offences were committed, the consequences to others might be specially injurious, as in the case of sexual offences or crimes of violence.

5. The *Hodgson* criteria were adopted in Hong Kong in *R v Fong Lung-fai* [1968] HKLR 249, 252 –

“Where you have an offence sufficiently serious in itself to justify the lengthy sentence of life imprisonment, then it is appropriate to impose that sentence in two classes of circumstances, one, when it is necessary to protect society from the individual in question, and the other where there are indications that the accused will benefit from treatment which he can receive or may receive either in prison or in hospital under secure conditions, and that it is necessary or desirable

to review from time to time the effects of that treatment so that the appropriate moment for the accused's release may be determined in the light of any improvement which may have set in."

Under our law, for prisoners serving indeterminate sentences and other long-term sentences, the Long-term Prison Sentences Review Board (LTPSRB) reviews the individual cases regularly in accordance with the provisions of the Long-term Prison Sentences Review Ordinance (Cap. 524).

The need for indeterminate sentences

6. In *R v Wilkinson* (1983) 5 Cr App R(S) 105, 108, (Cross & Cheung, p. 271) Lord Lane CJ said that an indeterminate sentence is appropriate in respect of offenders who cannot be dealt with under the Mental Health Act –

“yet who are in a mental state which makes them dangerous to the life or limb of members of the public. It is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required, so that the prisoner's progress may be monitored by those who have him under their supervision in prison so that he will be kept in custody only so long as public safety may be jeopardised by his being let loose at large.”

7. The House of Lords in *R v Lichniak* [2002] 4 All ER 1122 considered the European Court of Human Rights (E Ct HR) judgment in respect of the case of *V v UK* ((2000) 30 EHRR 121) and noted that the E Ct HR recognised that an indeterminate sentence, in practice, did not constitute an arbitrary and disproportionate punishment.

8. The courts recognise that it is justifiable to impose indeterminate sentences for grave offences, particularly in cases where the sentencing court is unable to determine any specific term of imprisonment that is required to protect the public. The following articulation by Lord Hutton in *R v Lichniak* provides useful reference –

“In my opinion it is not arbitrary to postpone to the end of the tariff period the decision whether a person who has committed a murder would be a danger to the public if released, rather than decide this at the time of his trial. It will not infrequently be the case that the behaviour of a prisoner during the time he is serving the tariff period, and his

behaviour on home leave, will give clear indications whether or not he would be a danger to others if released on licence. ... There is bound to be some uncertainty in respect of some prisoners as to whether they will be released at the end of the tariff period, and the degree of uncertainty will clearly vary depending on the circumstance of the murder and the background and personality of the prisoner, but I **do not consider that such uncertainty can constitute treatment of such severity as to come within the ambit of inhuman punishment forbidden by art. 3 [of the European Convention on Human Rights] or can make the sentence of life imprisonment an arbitrary one.**" (At para 35)
[Emphasis added]

9. As far as we know, the majority, if not all, of the common law jurisdictions have provisions for the imposition of indeterminate sentence in their statute books.

Maximum term

10. A requirement to set a maximum or determinate term (as opposed to a minimum term) within an indeterminate sentence would undermine the general welfare need to protect members of the public and may lead to the release of prisoners when the monitoring of their progress towards rehabilitation shows that they remain a threat to public safety. A legislative requirement for setting maximum terms within indeterminate sentences from the outset would pre-empt both the court's view in individual cases that the time when the danger posed to public safety could not be foreseen and the post-sentencing monitoring of a prisoner's progress which is essential to protecting members of the public.

11. A legislative requirement for setting maximum terms within existing indeterminate sentences or in substitution for existing indeterminate sentences would amount to a second-guessing of a function already carried out by the judiciary and a review of the criminal process beyond the formal appeal system. The legal policy interest in finality of the criminal process must not be overlooked. Public confidence in the criminal judicial process would be undermined if, for example, general reviews of the original sentences imposed by the judiciary were to be required by legislation.

Release in the UK upon expiry of "tariff" (now minimum term) not automatic

12. Under section 28 of the Crimes (Sentences) Act 1997, as soon as a

prisoner who is serving a discretionary life sentence or a prisoner who is detained at Her Majesty's pleasure has served the punitive part of his sentence *and the Parole Board has directed his release*, the Secretary of State must release him on licence [emphasis added]. The Parole Board, however, cannot direct that a prisoner be released unless –

- (a) the Secretary of State has referred the prisoner's case to the Board; and
- (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

13. Accordingly, under the UK system, no “maximum term” would be determined in respect of a prisoner who is serving an indeterminate sentence.

14. In fact, in the UK the term “tariff” was replaced with “minimum term” in *Practice Statement* [2002] 3 All ER 412, paragraph 2, issued by Lord Woolf CJ. This was because the former term “[had] commonly been misunderstood. The present Statement [referred] instead to ‘minimum term’ to make it clearer that, even when released, the offender [had] not served his sentence which [continued] for the remainder of his life”.

15. The *Practice Statement* further emphasised that the UK “tariff” or minimum term was not a maximum sentence, at paragraph 3 –

- “3. In fact, an offender is most unlikely to be released on the expiry of the minimum term.....”

In respect of murder cases in the UK, the Sentencing Advisory Panel reported (April 2002), that among the detainees at Her Majesty's pleasure who were released on licence in 2000, the average time served in prison after sentence (excluding the remand period) was 29% longer than the average minimum term of these detainees. As for adult offenders who were released from mandatory life sentences during 2000, the average time served from the date of sentence (excluding the remand period) was 13% longer than the average minimum term.

Conclusion

16. In gist, we wish to point out that indeterminate sentences are necessary and justifiable for certain offences and circumstances as prescribed by

legislation or determined by the court, and that many of other common law jurisdictions have it. None of these jurisdictions provide for “maximum terms” within indeterminate sentences. “Minimum terms” are provided for instead which inevitably carry with them a certain degree of uncertainty as to the timing of eventual release. In the UK, the term “tariff” has been changed to “minimum term” in order to reflect better the actual meaning of the relevant part of the sentence.

Department of Justice
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