

CRIMINAL PROCEDURE (AMENDMENT) BILL 2004**CONTENTS**

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A BILL

To

Amend the Criminal Procedure Ordinance to introduce a revised scheme applicable to prisoners who have been serving certain sentences (being discretionary life sentences, mandatory life sentences served in respect of the conviction of murder committed under 18 years of age, or detention at Executive discretion, within the meaning of the Long-term Prison Sentences Review Ordinance) since the commencement of, or any time before the commencement of, the provisions which previously provided for the determination of the minimum terms to be served by such prisoners, and to provide for related matters.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Criminal Procedure (Amendment) Ordinance 2004.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Sections substituted

Sections 67C to 67E of the Criminal Procedure Ordinance (Cap. 221) are repealed and the following substituted—

“67C. Determinations in respect of certain existing prisoners

(1) Within 6 months after the commencement of this section, the Secretary for Justice must, in respect of each prescribed prisoner, apply to the court for a determination by a judge under this section.

(2) Subject to subsection (3), the judge hearing an application under subsection (1) must determine the minimum term that the prescribed prisoner must serve for the relevant offence.

(3) Subject to subsection (4), where the prescribed prisoner is serving the relevant sentence in respect of the conviction of murder committed when the prescribed prisoner was under 18 years of age, 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.

(4) In any case where the prescribed prisoner is within the description of subsection (3), the judge does not have the discretion under that subsection without the consent of the prescribed prisoner to the application of that subsection to the prescribed prisoner.

(5) Notwithstanding subsections (2) and (3), in making a determination under this section, the judge may not take into account the previous recommendation or the previous determination.

(6) Notwithstanding subsections (2) and (5), if the term determined under subsection (2) (whether or not also by application of subsection (3)(a)) as the minimum term that the prescribed prisoner must serve for the relevant offence is longer than the term specified as the minimum term to be served by the prescribed prisoner for the relevant offence under the previous recommendation, the term so determined is, for all purposes, to be treated as equal to the term so specified.

(7) If, when making a determination under subsection (2) (whether or not also by application of subsection (3)(a)), the judge is of the opinion that there are any special considerations or circumstances relating to the prescribed prisoner or the relevant offence which should be taken into account in any future review of the relevant sentence, the judge must make a report in writing to the Chief Executive specifying details of those special considerations or circumstances.

**67D. Further provisions relating to applications
under section 67C(1) and related
procedural matters**

(1) Notwithstanding section 67C(1), on an application by the Secretary for Justice to the court, a judge may extend the period within which the Secretary for Justice must make any particular application under that section for such further period as the judge considers appropriate.

(2) An application by the Secretary for Justice under section 67C(1) or subsection (1) is to be—

- (a) in writing; and
- (b) signed by the Secretary for Justice or any person holding one of the offices in the Department of Justice mentioned in Schedule 1 to the Legal Officers Ordinance (Cap. 87).

(3) For the purposes of an application in respect of a prescribed prisoner under section 67C(1), the Registrar must, as soon as practicable after a request in writing has been made by the Secretary for Justice to him in that behalf, deliver to the Secretary for Justice—

- (a) a copy of the record, if available, of the whole of the proceedings concerning the prescribed prisoner which were before the court which passed the relevant sentence, other than the evidence given in any trial that took place in those proceedings; and
- (b) a copy of any report concerning the prescribed prisoner which was before the court which passed the relevant sentence.

(4) Without prejudice to section 123, all proceedings conducted before a judge for the purposes of an application under section 67C(1) (other than any proceedings conducted before a judge for the purposes of an application under subsection (1)) must be held in open court.

**67E. Sections 67C and 67D no longer to apply
if prescribed prisoners cease to serve
relevant sentence**

Where a prescribed prisoner ceases to serve the relevant sentence at any time after the commencement of section 67C but before any determination is made in respect of the prescribed prisoner under that section—

- (a) sections 67C and 67D then cease to apply to the prescribed prisoner; and
- (b) without limiting the generality of paragraph (a), any proceedings instituted under section 67C in relation to the prescribed prisoner and any appeal or other proceedings arising from or preliminary or incidental to such proceedings are, to the extent that they have not been completed, then to be treated as having been discontinued.

**67F. Effect of section 67C determinations
on previous orders under section
15(1)(b) of Long-term Prison
Sentences Review Ordinance**

(1) Where, before any determination is made under section 67C(2) (whether or not also by application of section 67C(3)(a)) in respect of a prescribed prisoner, any order has been made under section 15(1)(b) of the Long-term Prison Sentences Review Ordinance (Cap. 524) in respect of the prescribed prisoner (whether or not any such order has been renewed under section 15(4) of that Ordinance)—

- (a) the determination does not affect the validity or effect of the order or the order as renewed from time to time under section 15(4) of that Ordinance; and
- (b) sections 12(2) and 15(3) of that Ordinance are, for all purposes, not to be regarded as having application to and in relation to the order or the order as renewed from time to time under section 15(4) of that Ordinance.

(2) Where, before any determination is made under section 67C(3)(b) in respect of a prescribed prisoner, any order has been made under section 15(1)(b) of the Long-term Prison Sentences Review Ordinance (Cap. 524) in respect of the prescribed prisoner (whether or not any such order has been renewed under section 15(4) of that Ordinance), upon the making of the determination—

- (a) without prejudice to section 27 of that Ordinance, the order ceases to have effect; and
- (b) for the purpose of requiring the prescribed prisoner to serve the remainder (if any) of the sentence of imprisonment by which the relevant sentence is substituted under the determination—
 - (i) the Commissioner of Correctional Services must recall the prescribed prisoner to prison; and
 - (ii) section 26 of that Ordinance applies to and in relation to the prescribed prisoner as it applies to and in relation to a prisoner referred to in subsection (1) of that section.

67G. Interpretation

(1) In sections 67B, 67C, 67D, 67E and 67F and this section—
“discretionary life sentence” (酌情性終身監禁刑罰) has the same meaning as in the Long-term Prison Sentences Review Ordinance (Cap. 524);

“Executive discretion” (行政酌情決定) has the same meaning as in the Long-term Prison Sentences Review Ordinance (Cap. 524);

“mandatory life sentence” (強制性終身監禁刑罰) has the same meaning as in the Long-term Prison Sentences Review Ordinance (Cap. 524);

“prescribed prisoner” (訂明囚犯) means any prisoner—

- (a) to whom any of the relevant provisions applied at their commencement; and
- (b) who at all times between such commencement and the commencement of section 67C has been, and at the commencement of section 67C is still—
 - (i) serving a discretionary life sentence in respect of the conviction of any offence;
 - (ii) serving a mandatory life sentence in respect of the conviction of murder committed when the prisoner was under 18 years of age; or
 - (iii) detained at Executive discretion in respect of the conviction of any offence;

“previous determination” (原先裁定), in relation to a prescribed prisoner, means the determination of the Chief Executive specifying the minimum term to be served by the prescribed prisoner for the relevant offence and notified to the prescribed prisoner by letter dated 2 April 1998, 9 April 1998, 30 April 1998, 11 June 1998 or 16 July 1999, as the case may be;

“previous recommendation” (原先建議), in relation to a prescribed prisoner, means the recommendation of the Chief Justice to the Chief Executive specifying the minimum term to be served by the prescribed prisoner for the relevant offence and dated 15 December 1997, 28 August 1998 or 9 April 1999, as the case may be;

“relevant offence” (有關罪行), in relation to a prescribed prisoner, means—

- (a) where the prescribed prisoner is within the description of paragraph (b)(i) of the definition of “prescribed prisoner”, the offence described in that paragraph;
- (b) where the prescribed prisoner is within the description of paragraph (b)(ii) of the definition of “prescribed prisoner”, the offence of murder described in that paragraph; or
- (c) where the prescribed prisoner is within the description of paragraph (b)(iii) of the definition of “prescribed prisoner”, the offence described in that paragraph;

“relevant provisions” (有關條文) means—

- (a) section 67C as enacted by the Long-term Prison Sentences Review Ordinance (Cap. 524); and

- (b) section 67D as enacted by the Criminal Procedure (Amendment) Ordinance 1998 (6 of 1998);
“relevant sentence” (有關刑罰), in relation to a prescribed prisoner, means—
- (a) where the prescribed prisoner is within the description of paragraph (b)(i) of the definition of “prescribed prisoner”, the discretionary life sentence described in that paragraph;
 - (b) where the prescribed prisoner is within the description of paragraph (b)(ii) of the definition of “prescribed prisoner”, the mandatory life sentence described in that paragraph; or
 - (c) where the prescribed prisoner is within the description of paragraph (b)(iii) of the definition of “prescribed prisoner”, the detention at Executive discretion described in that paragraph.
- (2) In sections 67C and 67D, any reference to judge is a reference to a judge of the court, a recorder of the court or a deputy judge of the court.”.

Consequential Amendments

Legal Aid in Criminal Cases Rules

3. Interpretation

Rule 2 of the Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) is amended by adding—

- “(3) In these rules, in any case to which rule 4(1)(ca) applies—
- (a) the prescribed prisoner referred to in that rule shall be regarded as included in any reference to accused person or accused persons or to appellant or appellants, as the case may be; and
 - (b) the provisions of these rules shall apply to such case with such modifications as the circumstances require, and, without limiting the generality of the foregoing—
 - (i) rule 9(a) shall be read as if the reference to “convicted” were a reference to the subject of a determination under section 67C of the Ordinance, and the reference to “his conviction or sentence or both” were a reference to such determination under that section;

- (ii) rule 10(a) shall be read as if it referred also to the certificate of solicitor or counsel assigned to represent the prescribed prisoner in question in the proceedings instituted in relation to him under section 67C of the Ordinance as given under rule 9(a) (as read in accordance with sub-subparagraph (i)); and
- (iii) rule 21(1)(a) and (d), (2), (4)(a) and (5) shall be read as if any reference to “the trial”, “a trial” or “any trial” were a reference to the proceedings instituted under section 67C of the Ordinance, and the reference to “tried together” were a reference to the subjects of such proceedings instituted under that section that are conducted together.”.

4. Legal aid for accused persons and appellants

Rule 4(1) is amended by adding—

“(ca) a prescribed prisoner within the meaning of section 67C of the Ordinance may be granted legal aid under these rules for the purposes of any proceedings instituted in relation to him under that section and any appeal or other proceedings arising therefrom or preliminary or incidental thereto;”.

Post-Release Supervision of Prisoners Ordinance

5. Application

Section 3(2) of the Post-Release Supervision of Prisoners Ordinance (Cap. 475) is amended by adding “by the Chief Executive” after “converted”.

Long-term Prison Sentences Review Ordinance

6. Interpretation

Section 4(1) of the Long-term Prison Sentences Review Ordinance (Cap. 524) is amended, in the definition of “minimum term”, by repealing “, 67C or 67D” and substituting “or 67C”.

7. Duty of Commissioner to refer cases of prisoners to Board for review

Section 11(9) is amended by adding “by the Chief Executive” after “converted”.

8. Board may request reports

Section 14(1)(c)(ii) is amended by adding “or 67C” after “67B”.

9. Board may make recommendations relating to prisoners and orders for their release

Section 15 is amended—

- (a) in subsection (1)(b) and (c), by adding “by the Chief Executive” after “converted”;
- (b) in subsection (3), by repealing “, 67C or 67D” and substituting “or 67C”.

10. Recall of prisoner to serve remainder of sentence on expiry of conditional release order

Section 25(3) is amended by adding “by the Chief Executive” after “converted”.

Explanatory Memorandum

The main purpose of this Bill is to amend the Criminal Procedure Ordinance (Cap. 221), in order to put in place a revised scheme applicable to prisoners who have been serving discretionary life sentences or serving mandatory life sentences (for murder committed under 18 years of age) or detained at Executive discretion since the commencement of, or any time before the commencement of, the relevant provisions which previously provided for the determination of the minimum terms to be served by such prisoners.

2. Clause 2 introduces new sections 67C to 67G to provide for a revised scheme which—

- (a) applies to any prisoner who is covered by the definition of “prescribed prisoner” in new section 67G(1), unless the prisoner ceases to serve the relevant sentence at any time after the commencement of new section 67C (see new section 67E);

- (b) requires the Secretary for Justice to apply to the Court of First Instance for a determination by a judge of the Court in respect of the prisoner (see new section 67C(1));
- (c) requires the judge to determine the minimum term to be served by the prisoner, although in the event that the prisoner has been convicted of murder which has been committed under 18 years of age, the judge, with the consent of the prisoner, has the discretion instead to make a determination to quash the relevant sentence and to substitute for the relevant sentence a determinate sentence (see new section 67C(2) to (4));
- (d) provides that the judge, in making any such determination, may not take into account the previous recommendation or the previous determination, although any minimum term fixed by the judge that is longer than that fixed under the previous recommendation is to be treated as equal to the latter (see new section 67C(5) and (6));
- (e) requires the judge, when making a determination as to the minimum term to be served by the prisoner, to specify in a written report to the Chief Executive details of any special considerations or circumstances relating to the prisoner or the relevant offence for purposes of future review of the relevant sentence (see new section 67C(7));
- (f) provides for procedural matters, including those related to the application by the Secretary for Justice in respect of the prisoner (see new section 67D); and
- (g) provides for the effect of a determination made by the judge in respect of the prisoner on any previous conditional release orders made under section 15(1)(b) of the Long-term Prison Sentences Review Ordinance (Cap. 524)(see new section 67F).

3. Clauses 3 and 4 introduce consequential amendments to the Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D) to enable the prisoner to apply for legal aid in accordance with the rules and to update related references, and clauses 5 to 10 introduce consequential amendments to the Post-Release Supervision of Prisoners Ordinance (Cap. 475) and the Long-term Prison Sentences Review Ordinance (Cap. 524) also to update related references.