

**立法會**  
**Legislative Council**

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**Paper for the House Committee Meeting  
on 19 March 2004**

**Legal Service Division Report on  
Criminal Procedure (Amendment) Bill 2004**

**I. SUMMARY**

- 1. Objects of the Bill**      To provide for a revised scheme for the determination of the minimum term that a prisoner serving a discretionary life sentence or mandatory life sentence, or detained at Executive discretion, must serve.
  
- 2. Comments**              Section 67C of the Criminal Procedure Ordinance (Cap. 221) provides for a scheme in which the Chief Executive determines the minimum term that prisoners serving discretionary life sentence or detained at Executive discretion must serve. In a case, the court held that the section was inconsistent with Article 80 of the Basic Law and therefore invalid. As a result prisoners serving discretionary life sentence or mandatory life sentences, or detained at Executive discretion, are left with no lawfully determined minimum terms.

By this Bill, the Administration proposes to revise the scheme so that the determination would be made by a judge of the Court of First Instance instead of by the Chief Executive.
  
- 3. Consultation with LegCo Panel**      The Administration first consulted the Panel on Security on 13 November 2003. Having considered members' views the Administration revised its proposals and consulted the Panel again on 12 February 2004. Members raised various questions and concerns in both meetings.
  
- 4. Conclusion**              The Bill concerns various policy issues which merit detailed consideration by a Bills Committee.

## II. REPORT

### Objects of the Bill

To provide for a revised scheme for the determination of the minimum term that a prisoner serving discretionary life sentence or mandatory life sentence, or detained at Executive discretion, must serve.

### LegCo Brief Reference

2. SBCR 1/2/5691/89 dated 5 March 2004 issued by the Security Bureau.

### Date of First Reading

3. 17 March 2004.

### Comments

4. Under the existing section 67C of the Criminal Procedure Ordinance (Cap. 221) ("CPO"), the Chief Executive has the power and duty to determine a minimum term that a prisoner serving discretionary life sentence<sup>1</sup> or detained at Executive discretion<sup>2</sup> must serve.

5. In *Yau Kwong Man and another v. Secretary for Security* [2002] 3HKC 457, the Court of First Instance held that section 67C(2), (4) and (6) of the CPO was inconsistent with Article 80 of the Basic Law and therefore invalid. The reason was essentially that Article 80 provides that judicial power shall be exercised by the judiciary, but section 67C gave the Chief Executive the power to exercise what was an inherently judicial power. As a result of the case, prisoners serving discretionary life sentence or detained at Executive discretion are left with no lawfully determined minimum terms. By extension of this principle, the Administration considers that prisoners serving mandatory life sentences<sup>3</sup> with minimum terms determined by the Chief Executive under section 67D(2), (4) and (6) of the CPO would also be in the same position.

6. By this Bill, the Administration proposes to revise the scheme so that the determination of minimum terms of prisoners serving discretionary life sentence or mandatory life sentence, or detained at Executive discretion, would be made by a judge of the Court of First Instance. Under the proposed new section 67C, the Secretary for Justice is required to apply to the Court of First Instance for a determination by a judge, and the judge must determine the minimum term. It is also proposed that the judge

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<sup>1</sup> In the CPO and the Bill, "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 in respect of a person convicted of murder who was under 18 years of age at the time of the offence.

<sup>2</sup> In the CPO and the Bill, "detained at Executive discretion" means (a) before 30 June 1997 - Her Majesty's pleasure; and (b) on and after 1 July 1997- the discretion of the Chief Executive.

<sup>3</sup> In the CPO and the Bill, "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.

would have a discretion to quash the original sentence and substitute a fixed term sentence of imprisonment if the prisoner consents. The judge is required not to take into account the previous recommendation made by the Chief Justice to the Chief Executive for the previous determination made under the existing section 67C.

7. Under the existing section 67C(6), a determination is final and not subject to appeal to any court. A determination by a judge under the proposed new scheme could be appealed to the Court of Appeal and the Court of Final Appeal under existing legislation. There are also proposals in the Bill enabling the relevant prisoners to apply for legal aid in respect of such appeals.

### **Consultation with LegCo Panel**

8. The Administration first consulted the Panel on Security on 13 November 2003 on the proposed scheme. The Panel expressed various concerns.

9. Having considered members' views, the Administration revised its proposals and consulted the Panel again on 12 February 2004. Some members considered that the Long-term Prison Sentences Review Board should be more transparent in its reviews on the sentences of prisoners. Individual members also pointed out that -

- (a) There should be rules or guidelines providing for the circumstances for early release, and information relating to 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. Under the revised proposal, a judge of the Court of First Instance might still impose a minimum term, but all prisoners should be given a determinate sentence; and
- (c) The Administration's revised proposal was 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.

### **Conclusion**

10. As indicated by members' concerns expressed in the meetings of the Panel on Security, and representations from affected prisoners as well as crime victims, the scheme for the determination of minimum terms of imprisonment touches on various policy issues which merit detailed consideration by a Bills Committee. While the Legal Service Division is still scrutinizing the Bill, Members may wish to consider forming a Bills Committee.

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