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**Paper for the House Committee meeting on 18 June 2004**

**Report of the Bills Committee on  
Criminal Procedure (Amendment) Bill 2004**

**Purpose**

This paper reports on the deliberations of the Bills Committee on Criminal Procedure (Amendment) Bill 2004.

**Background**

2. Under section 67C of the Criminal Procedure Ordinance (Cap. 221) (CPO), the Chief Executive (CE) has the power and duty to determine a minimum term to be served by a prisoner serving discretionary life sentence or detained at Executive discretion.

3. In *Yau Kwong Man and another v. Secretary for Security*, the Court of First Instance (CFI) held that section 67C(2), (4) and (6) of 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 CE the power to exercise what was an inherently judicial power. As a result of the case, prisoners serving discretionary life sentences 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 with minimum terms determined by CE under section 67D(2), (4) and (6) of CPO would also be in the same position. The Administration proposes to revise the scheme so that the determination would be made by a judge of CFI instead of by CE.

## **The Bill**

4. The Bill provides for a revised scheme for the determination of the minimum term to be served by a prisoner who is being detained at Executive discretion or serving mandatory life sentence in respect of the conviction of murder committed under 18 years of age or serving discretionary life sentence with minimum term previously determined by the CE. Under the revised scheme, the Secretary for Justice (S for J) is required to apply to CFI for a determination by a judge, and the judge must determine the minimum term. In respect of the prisoners who are being detained at Executive discretion or serving mandatory life sentence in respect of the conviction of murder committed under 18 years of age, subject to the consent of the concerned prisoners, the judge would have a discretion whether to determine the minimum terms or to quash the original sentence and substitute a fixed term sentence of imprisonment. The judge is required not to take into account the previous recommendation made by the Chief Justice to CE, or the previous determination made by the CE, under the existing sections 67C and 67D.

## **The Bills Committee**

5. At the House Committee meeting on 19 March 2004, Members formed a Bills Committee to study the Bill. The Bills Committee was activated on 28 May 2004. The membership list of the Bills Committee is in **Appendix I**.

6. Under the chairmanship of Hon Margaret NG, the Bills Committee has held three meetings with the Administration. The Bill Committee has received a written submission from a prisoner.

## **Deliberations of the Bills Committee**

### Application to the court for determinations of sentence in respect of certain existing prisoners

7. The proposed section 67C(1) requires S for J to apply to CFI for a determination by a judge in respect of each prescribed prisoner within six months after the commencement of the section. However, under the proposed section 67D(1), the judge may extend the period on an application by S for J.

8. Members have queried the need for the proposed section 67D(1). Members are concerned that by providing the right of S for J to apply for an extension, the requirement under the proposed section 67C(1) that S for J must apply to the court for a determination in respect of the prescribed prisoners within six months after the commencement of the Bill would be meaningless.

9. The Administration has explained that it is its policy intent that S for J must apply to the court for a determination in respect of each prescribed prisoner as soon as practicable, but in any event not exceeding six months after the commencement of the Bill. The proposed section 67D(1) is to provide a fallback mechanism for S for J to apply to a judge for extension of the period within which she must make an application to the court for a determination in respect of each prescribed prisoner by a judge. This is to cater for unforeseen circumstances, for instance, where the Registrar of the court may not be able to deliver the record of the proceedings concerning the prisoner to S for J within the period.

10. The Administration has informed members that the prescribed prisoners affected by the case referred to in paragraph 2 above comprise -

- (a) 12 prisoners detained at Executive discretion for having committed murder under the age of 18;
- (b) two prisoners serving mandatory life sentences for having committed murder under the age of 18; and
- (c) 11 prisoners serving discretionary life sentences.

11. To safeguard the rights of prisoners, members have suggested that the prisoners concerned should be given the right to compensation should delay be caused to the hearing of their cases as a result of S for J applying for an extension under the proposed section 67D(1), or alternatively, they should be allowed to apply, at public expense, to the court for a determination if S for J does not comply with her obligation under the proposed section 67C(1).

12. To clearly reflect its policy intent and to address members' concern, the Administration has agreed to move amendments to the effect that S for J must apply to the court for a determination under the proposed section 67C(1) as soon as practicable and in any event within six months after the commencement of the Bill. The Administration has also agreed to delete the provision in the proposed section 67D(1). Amendments will be made by the Administration to provide that a prescribed prisoner may apply to the court for a determination by a judge if S for J does not make an application in respect of the prisoner under section 67C(1) within six months after the commencement of the Bill. The Administration has advised that payment of fees is not required for such an application.

13. At the request of members, the Administration has undertaken to state in its speech to be made during the resumption of the Second Reading debate on the Bill that S for J will apply to the court for a determination in respect of each prescribed prisoner as soon as practicable and in any event within six months after the Bill comes into operation.

Relevance of previous recommendation or previous determination

14. Under the proposed section 67C(5), the judge, in making a determination under section 67C, is required not to take into account the previous recommendation or the previous determination. Members have queried the policy intent of the proposed provision and why such a provision has to be made to limit the judge's power on matters to be considered when making a determination on the minimum term of imprisonment or sentence.

15. The Administration has explained that the proposed provision is to make it clear that any previous minimum term should not be taken into account by the judge when he makes a determination under the proposed section 67C, so that the judge can form a fresh and independent view as to the length of minimum term or sentence. Given that the previous determination was made on the recommendation of the Chief Justice, this is to avoid any perception that the new determination might be biased.

Right to apply for the provision of documents

16. The proposed section 67D(3) requires the Registrar, on request by S for J for the purposes of making an application under the proposed section 67C(1), to deliver to S for J the record of proceedings relating to the prescribed prisoner's sentence and any report concerning the prisoner which was before the court which passed the relevant sentence. Members have queried whether such documents would be made available to the prescribed prisoner concerned.

17. The Administration has explained that the proposed provision is to enable S for J to put together the basic documents to make the applications to the court. These documents would be made available to the judge that hears the case and, as a matter of practice, copies would also be served on the prescribed prisoner concerned. The Administration will introduce an amendment to require S for J to serve a copy of the application on the prescribed prisoner.

18. Regarding members' suggestion that the prescribed prisoners should be allowed to request the provision of additional relevant documents to the court, the Administration considers that the right to apply to the judge for further records or documents after the case has been listed for hearing should be given to both the prescribed prisoners and S for J. The Administration will add a provision to this effect.

19. The Administration also considers that the judge should be allowed to take into account any relevant materials submitted to him by S for J or the prescribed prisoner when making a determination. A provision to this effect will be made by the Administration.

20. At the suggestion of members, the Administration will also introduce an amendment to require the Registrar to provide the documents referred to in the proposed section 67D(3) to the prescribed prisoner where the application is made by the prisoner.

Effect of determinations made under the proposed section 67C on previous conditional release order made by the Long-term Prison Sentences Review Board

21. The proposed section 67F(1) of CPO provides that the minimum terms to be determined by the judge under the proposed section 67C(2) and (3)(a) will not affect the validity of the conditional release order made under section 15(1)(b) of the Long-term Prison Sentences Review Ordinance (Cap. 524) (LTPSRO) by the Long-term Prison Sentences Review Board (the Board). However, under the proposed section 67F(2), the previous conditional release order made by the Board will cease to have effect when the judge has given a fixed term sentence for the prescribed prisoner under the proposed section 67C(3)(b), and the prisoner concerned will be recalled to prison to serve the remainder of the sentence, if any. The proposed section 67C(3)(b) of CPO provides the judge a discretion, subject to the consent of the prescribed prisoner, to quash the original sentence and substitute a fixed term sentence of imprisonment.

22. Members have expressed doubt about the need for the proposed section 67F(2). Members have pointed out that the purpose of the proposed section 67C(3)(b) is to address the concern that the prescribed prisoners referred to in paragraph 10(a) and 10(b) above would be faced with prolonged and open-ended uncertainty as to when they could be released. However, if a prisoner who has been released on conditions consents to a determination by a judge under the proposed section and the judge has imposed a fixed term sentence, he may be recalled to prison to serve the remainder of the sentence. Members are concerned about the adverse consequence on prisoners.

23. The Administration has explained that under section 15(1)(b) of LTPSRO, when reviewing the sentence of a prisoner, the Board may order a prisoner serving an indeterminate sentence to be released conditionally under supervision when it considers it appropriate to defer making a recommendation for a determinate sentence. Under section 27 of LTPSRO, the period of release under conditional release order will be treated as part of the indeterminate sentence that the prisoner is serving. A prisoner on conditional release may be recalled to prison if he breaches any conditions on the order. So far, the Board has not made any such conditional release order in respect of the prescribed prisoners. However, the possibility for such orders to be made by the Board before the judge makes a determination under the proposed section 67C(3)(b) could not be completely ruled out.

24. Since no such conditional release order has been granted by the Board, members have asked the Administration to consider, as a transitional arrangement, suspending the power of the Board to order conditional release, or alternatively allowing a conditional release order to remain valid even after determinate sentence is imposed by the judge.

25. The Administration considers that it is not appropriate to suspend the power of the Board to order the conditional release of the prescribed prisoners upon the commencement of the Bill. The Administration explains that a prescribed prisoner is entitled to have his sentence reviewed by the Board periodically and to be given conditional release if the Board considers appropriate. The proposed suspension of the Board's power to order conditional release 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. It may contravene the prisoner's right to liberty protected by Article 5 of the Hong Kong Bill of Rights.

26. The Administration has pointed out that the conditional release arrangement is premised on an indeterminate sentence being in force. It follows that if the court decides to quash the indeterminate sentence and substitute it with a fixed term of imprisonment, the indeterminate sentence and the conditional release order would fall away. Moreover, the purpose of the conditional release order, which is to facilitate the Board 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.

27. In the view of the Administration, 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. The Administration explains that 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 to impose a determinate sentence despite the existence of a conditional release order, the suggestion to provide for the release order to remain valid nevertheless would amount to a direct interference in the sentencing process. In effect, the prisoner would be granted a remission of sentence in advance, even though the judge considered that the length of sentence should extend into or beyond the duration of the conditional release order.

28. The Administration considers that there are sufficient safeguards in the Bill to protect the interests of the prescribed prisoners. The Administration has pointed out that a prescribed prisoner on conditional release order can have the choice of whether he would like to be subject to the discretion of the judge to give a determinate sentence instead of a minimum term. Even if the prisoner consents, the judge will still retain the discretion to fix a minimum term. The prisoner will be legally advised and will be able to make an informed choice regarding the risk of giving the consent. The prisoner, if aggrieved by the decision of the judge, can appeal against the sentence passed. The Administration therefore considers that the proposed section 67F(2) should be retained.

29. Although members disagree with the argument put forward by the Administration in paragraph 27 above, members in general accept that there are sufficient safeguards to protect the interests of prisoners, and agree to the retention of the proposed section.

Guidelines on the release of a prisoner after serving his minimum term

30. Members have suggested that the Board should lay down rules or guidelines on the circumstances of early release of prisoners.

31. The Administration has explained that the principle function of the Board is to conduct regular reviews of the cases of prisoners serving indeterminate sentences or long sentences of over 10 years. The Board may, when conducting a sentence review, recommend to CE that a prisoner's indeterminate sentence be substituted by a determinate one or that a prisoner's determinate sentence be remitted. The Board may also order a prisoner serving an indeterminate sentence to be released conditionally under supervision when it considers it appropriate to defer making a recommendation for a determinate sentence. However, the Board is not authorised to order the early conditional release of a prisoner before his minimum term of imprisonment has been served.

32. When performing its function and duties, the Board is obliged to have primary regard to specified principles set out in section 8 of LTPSRO. In reviewing a prisoner's sentence, the Board may take into account the matters mentioned in Schedule 1 of the Long-term Prison Sentences Review Regulation (Cap. 524, sub. leg. A), such as the nature of the offence, the progress of the prisoner's rehabilitation, the safety of the public, and the prisoner's age.

33. The Administration has pointed out that prisoners have different background and different reasons to be imprisoned. Their institutional behaviour and response to programmes for their rehabilitation vary from case to case. The Board has to consider the merits of each individual case in order to make recommendations to CE. It would not be desirable for the Board to lay down its own rules or guidelines, over and above the statutory factors listed in section 8 of LTPSRO, on how a prisoner may behave so that they will get an early release.

Commencement date

34. Clause 1 of the Bill provides that the Bill, if enacted, shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette. To allow the prescribed prisoners to have their minimum term or determinate sentence, as the case may be, determined by the court as soon as possible, the Administration will make an amendment to bring the Bill, when enacted, into operation upon its gazettal.

### **Committee Stage amendments**

35. Apart from the Committee Stage amendments (CSAs) referred to in the above paragraphs, the Administration will move other textual amendments for the purpose of clarity and consistency. A copy of the draft CSAs is in **Appendix II**.

### **Follow-up action to be taken by the Administration**

36. The Administration has undertaken to state in its speech to be made during the resumption of the Second Reading debate on the Bill that S for J will apply to the court for a determination in respect of each prescribed prisoner as soon as practicable and in any event within six months after the Bill comes into operation (paragraph 13 refers).

### **Recommendation**

37. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting on 7 July 2004, subject to the CSAs to be moved by the Administration.

### **Advice Sought**

38. Members are invited to note the deliberations of the Bills Committee and the recommendation of the Bills Committee in paragraph 37 above.

Council Business Division 2  
Legislative Council Secretariat

17 June 2004



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

**Membership list**

<b>Chairman</b>	Hon Margaret NG
<b>Members</b>	Hon Martin LEE Chu-ming, SC, JP Hon James TO Kun-sun Hon CHAN Yuen-han, JP Hon LEUNG Yiu-chung Hon Andrew WONG Wang-fat, JP Hon WONG Yung-kan Hon Ambrose LAU Hon-chuen, GBS, JP Hon Michael MAK Kwok-fung Hon Audrey EU Yuet-mee, SC, JP

Total: 10 Members

**Clerk** Mrs Sharon TONG LEE Yin-ping

**Legal Adviser** Mr LEE Yu-sung

**Date** 2 June 2004

CRIMINAL PROCEDURE (AMENDMENT) BILL 2004

COMMITTEE STAGE

Amendments to be moved by the Secretary for Security

<u>Clause</u>	<u>Amendment Proposed</u>
1	(a) In the heading, by deleting " <b>and commencement</b> ". (b) By deleting subclause (2).
2	(a) In the proposed section 67C - (i) in subsection (1), by deleting "Within 6 months after the commencement of this section" and substituting "As soon as practicable after the commencement of this section and in any event within 6 months after such commencement"; (ii) by adding - "(1A) If, within 6 months after the commencement of this section, the Secretary for Justice does not make any application in respect of any prescribed prisoner under subsection (1), the prescribed prisoner may also apply to the

court for a determination by a  
judge under this section.";

(iii) in subsection (2), by adding "or  
(1A)" after "(1)";

(iv) in subsection (3) -

(A) by deleting "Subject to  
subsection (4), where" and  
substituting "Where";

(B) by deleting "the prescribed  
prisoner was under 18 years of  
age" and substituting "he was  
under 18 years of age, then,  
subject to the consent of the  
prescribed prisoner to the  
application of this subsection  
to him";

(v) by deleting subsection (4);

(vi) by deleting subsection (5) and  
substituting -

"(5) In making a  
determination under this  
section -

(a) subject to  
paragraph (b),  
the judge may

take into account  
any material  
submitted to him  
by the Secretary  
for Justice or  
the prescribed  
prisoner that is,  
in his opinion,  
relevant to the  
determination;  
and

(b) the judge must  
not take into  
account the  
previous  
recommendation or  
the previous  
determination."

(b) In the proposed section 67D -

- (i) in the heading, by deleting "(1)";
- (ii) by deleting subsection (1);
- (iii) in subsection (2) -
  - (A) by deleting "under section  
67C(1) or subsection (1)" and  
substituting "or a prescribed

prisoner under section 67C(1) or  
(1A)";

(B) in paragraph (b) -

(I) by adding after "signed" -

"-

(i) in the case  
of an  
application  
under  
section  
67C(1),";

(II) by deleting the full stop  
at the end and  
substituting -

"; or

(ii) in the case of an  
application under  
section 67C(1A),  
by the prescribed  
prisoner.";

(iv) by adding -

"(2A) No charge is to be  
payable for any application  
under section 67C(1) or (1A).

(2B) As soon as practicable

after the Secretary for Justice has made an application in respect of a prescribed prisoner under section 67C(1), the Secretary for Justice must serve a copy of the application on the prescribed prisoner.";

(v) in subsection (3) -

(A) by adding "or (1A)" after "67C(1)";

(B) by deleting "by the Secretary for Justice to him in that behalf, deliver to the Secretary for Justice" and substituting "to him by the Secretary for Justice or the prescribed prisoner, as the case may be, as the person by whom the application is to be made, deliver to the Secretary for Justice or the prescribed prisoner, as the case may be";

(C) in paragraph (a), by deleting everything after ", of the" and substituting "proceedings

relating to the relevant  
sentence; and";

(vi) by adding -

"(3A) Where an application  
has been made in respect of a  
prescribed prisoner under section  
67C(1) or (1A), the Secretary for  
Justice or the prescribed  
prisoner may apply to a judge  
for -

- (a) a copy of the  
record, if  
available, of the  
proceedings  
concerning the  
prescribed  
prisoner (whether  
relating to the  
relevant offence  
or the relevant  
sentence) or any  
part or parts of  
the record; and
- (b) a copy of any  
document in the

possession of the  
Registrar,

and if the judge is satisfied  
that it is necessary and  
practicable to do so, the judge  
must direct the Registrar to  
deliver the copy to both the  
Secretary for Justice and the  
prescribed prisoner.";

(vii) in subsection (4) -

(A) by adding "or (1A)" after  
"67C(1)";

(B) by deleting "subsection (1)" and  
substituting "subsection (3A)".

(c) In the proposed section 67E(b), by deleting  
"instituted under section 67C in relation to  
the prescribed prisoner" and substituting  
"relating to the prescribed prisoner under  
section 67C".

(d) In the proposed section 67G(1), in the  
definition of "relevant provisions", in  
paragraphs (a) and (b), by adding "originally"  
after "as".



relation to him".

4           In the proposed rule 4(1)(ca), by deleting "in  
relation to him".