

For discussion on
12 February 2004

Legislative Council Panel on Security
Proposals to Amend the Criminal Procedure Ordinance
(Chapter 221)

Purpose

Further to the Security Panel meeting on 13 November 2003, this paper briefs Members on our revised proposals to amend the Criminal Procedure Ordinance (CPO).

Background

2. At the Security Panel meeting on 13 November 2003, Members were informed vide LC Paper No. CB(2)271/03-04(03), copy at **Appendix A**, of the Administration's proposals to amend the CPO to provide for a revised scheme for determination of minimum terms of imprisonment to be served by certain prisoners¹ in view of a judgment of the Court of First Instance (CFI) of September 2002. At the meeting, Members had reservation about the legislative proposals. It is understood that the main concern was that, despite the legislative proposals, the relevant group of "young murderers" (groups (a) and (b) in footnote 1) would still be faced with prolonged and open-ended uncertainty as to when they would be released. Views were expressed that these prisoners should be treated more leniently in view of their young age and immaturity at the time of committing murder.

Revised Legislative Proposals

3. The Administration has carefully considered the views expressed by Members in respect of the treatment of the young murderers affected by the court judgment of September 2002. We have come to the view that, while the original legislative proposal to provide for a revised scheme for determination

¹ These include (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.

of minimum terms of imprisonment to be served by the relevant prisoners is still necessary, it would be appropriate to add a new provision to give the CFI judge the discretion, subject to the consent of the concerned prisoner, to give a determinate sentence as an alternative to determining a minimum term for each of the 14 young murderers under groups (a) and (b) in footnote 1.

4. The above proposal is premised on section 2 of the Offences against the Person Ordinance, Cap. 212 (copy at **Appendix B**), which came into effect on 30 June 1997. Under that section, the court has the discretion to sentence young murderers to a discretionary life sentence or a determinate sentence. This discretion was not available to the courts when they decided on the sentences in respect of the 14 cases. Our present proposal would put these 14 prisoners on a par with their counterparts convicted of murder committed after 30 June 1997, in terms of the penalty to which they would be liable for committing murder at the age of under 18. The proposal will go a long way to minimizing the uncertainty faced by the young murderers. From the legal point of view, providing this discretion to the CFI by legislation will not pose any unacceptable implications. Further, this new proposal will have one-off and limited scope of application.

5. The new proposal would not apply to those prisoners who are affected by the September 2002 court judgment and are serving discretionary life sentences (group (c) in Footnote 1). Those prisoners will still benefit from the original proposal and have minimum terms given to them by the CFI, but the court would not have the discretion to substitute a determinate sentence for their discretionary life sentence. There is no basis for formulating a treatment for them which is different from any others (adults) who have been handed down discretionary life sentences by the court for the conviction of serious crimes after 30 June 1997.

Indeterminate Sentences, minimum terms, UK's systems, etc.

6. At the meeting, there were also discussions on the nature of and justifications for imposing indeterminate sentences, minimum terms, as well as the corresponding systems in the UK. We have prepared a note containing supplementary information on indeterminate sentences, including the UK's system of minimum terms. The note is attached at **Appendix C** for Members' reference.

Legislative Timeframe

7. We aim to introduce the Criminal Procedure (Amendment) Bill into the Legislative Council shortly in the current legislative session.

Advice Sought

8. Members are invited to comment on the proposal as outlined in paragraphs 3 – 5 above.

Security Bureau
February 2004

For discussion on
13 November 2003

Legislative Council Panel on Security

Legislative Proposals to Amend the Criminal Procedure Ordinance (Chapter 221)

Purpose

This note briefs members on the main legislative proposals to amend the Criminal Procedure Ordinance (CPO) to provide for a revised scheme for determination of minimum terms of imprisonment to be served by certain prisoners affected by a judgment of the Court of First Instance (CFI) in September 2002.

Background

2. Following certain amendments to the CPO on 30 June 1997, when imposing a discretionary life sentence under the section 67B(1) of the CPO (**Annex A**) on a person for an offence, the judge must specify, as part of the sentence, a minimum term¹ that the person must serve. As for the 29 prisoners who on 30 June 1997 were detained at Executive discretion or serving discretionary life sentences or mandatory life sentences (for murder committed under the age of 18), they were given their minimum terms in 1998 and 1999 by the Chief Executive (CE) acting in accordance with sections 67C and 67D of the CPO (**Annexes B and C**), and taking into account the Chief Justice's (CJ) recommendations on what the minimum terms should be. In fact, all the recommendations made by the CJ under sections 67C and 67D were accepted by the CE.

3. In the judicial review cases ref. HCAL 1595 and 1596 of

¹ "Minimum term" derives from the concept that an indeterminate sentence consists of two parts – a "tariff" period (the minimum term) to be served for punishment, and a subsequent "discretionary" or "protection" period during which the question of whether it would be safe to release the prisoner become the major consideration.

2001 heard in June/July 2002, two prisoners detained at Executive discretion challenged, inter alia, the constitutionality of the legislative provisions in the CPO which govern determination of their minimum terms. On 9 September 2002, the CFI ruled, inter alia, that section 67C(2), (4) and (6) were inconsistent with Article 80 of the Basic Law (BL 80) and thereby declared those provisions invalid. The reason was that the determination of minimum terms was an exercise of judicial power and should be vested in the Judiciary as required under BL80. As a result, prisoners detained at Executive discretion and those serving discretionary life sentences with minimum terms determined by the CE according to section 67C of the CPO are left with no lawfully determined minimum terms. By extension, similar provisions in section 67D of the CPO, i.e. 67D(2), (4) and (6) are also regarded as inconsistent with BL80 and the prisoners concerned are also left with no lawfully determined minimum terms.

Main Legislative Proposals

4. Legislative amendments are needed to provide for a revised scheme for determination of minimum terms of imprisonment to be served by the prisoners concerned. We propose that the power to determine the relevant minimum terms should be vested in a judge of the CFI. The proceedings will be done in open court. There will be a right of appeal to the Court of Appeal with leave of the Court of Appeal which should also be appealable to the Court of Final Appeal (CFA) with leave on the criteria laid down in the Court of Final Appeal Ordinance (Cap. 484).

5. The amendments should make it clear that the previous recommendation or determination in respect of minimum terms should not be taken into account by the CFI judge when deciding on the new minimum terms. Amendment will also be made to enable the prisoners to apply for legal aid. We consider, on compassionate and fairness grounds, a minimum term determined by the CFI which is longer than the minimum term recommended by the CJ would raise concern, especially for those prisoners who have already completed or will complete such minimum terms previously shortly. In view of this, we propose that any minimum term determined by the CFI independently which happens to be

longer than the minimum term previously recommended by the CJ should be treated as equal to the previously recommended minimum term.

6. As at end of October 2003, four of the 29 prisoners falling under the legislative provisions concerned have been given determinate sentences by the CE on the recommendation of the Long-term Prison Sentences Review Board (LTPSRB) which is an independent statutory body. They are no longer prisoners serving indeterminate sentences and the imposition of new minimum terms on these prisoners is neither appropriate nor necessary. These four prisoners should therefore not be subject to the determination of minimum terms by the CFI.

7. Separately, pursuant to section 12(2) of the Long-term Prison Sentences Review Ordinance (Cap. 524), the LTPSRB is not authorized to order early conditional release of a prisoner before any minimum term applicable to the prisoner has been served. Since the minimum terms determined by the CE are invalid, the LTPSRB may order early release of these prisoners without being subject to the restriction under section 12(2) of Cap.524. The LTPSRB has not so far ordered such early release, but we cannot rule out the possibility of such orders before minimum terms are determined by the CFI. In view of this, the amendments should make it clear that the minimum terms to be determined by the CFI should not affect any such conditional release order made.

Legislative Timeframe

8. We aim to introduce an amendment bill into the Legislative Council in the 2003/2004 legislative year.

Advice Sought

9. Members are invited to comment on the above proposals.

Security Bureau
November 2003

雙語法例資料系統 Bilingual Laws Information System

English 繁體 簡體 繁體 Gif 簡體 Gif

[Previous section of
enactment](#)

[Next section of
enactment](#)

[Switch language](#)

[Back to the List of
Laws](#)

Section of Enactment



Chapter:	221	Title:	CRIMINAL PROCEDURE ORDINANCE	Gazette Number:39 of 1999
Section:	67B	Heading:	Minimum term to be specified in respect of person sentenced to life imprisonment	Version Date: 01/07/1997

Remarks:

Adaptation amendments retroactively made - see 39 of 1999 s. 3

(1) When imposing a discretionary life sentence on a person for an offence, the judge must specify as part of the sentence a minimum term that the person must serve for the offence.

(2) If, when imposing an indeterminate sentence of imprisonment on a person for an offence, the judge is of the opinion that there are matters relating to the person or the offence which should be recorded for the purpose of reviewing the sentence in the future, the judge must make a report in writing to the Chief Executive specifying those matters. (Amended 39 of 1999 s. 3)

(Added 86 of 1997 s. 44)

[Previous section of
enactment](#)

[Next section of
enactment](#)

[Switch language](#)

[Back to the List of
Laws](#)

雙語法例資料系統 Bilingual Laws Information System

English 繁體 簡體 繁體 Gif 簡體 Gif

Previous section of
enactment

Next section of
enactment

Switch language

Back to the List of
Laws

Section of Enactment



Chapter:	221	Title:	CRIMINAL PROCEDURE ORDINANCE	Gazette Number: 6 of 1998
Section:	67C	Heading:	Minimum terms to be determined in respect of certain existing prisoners	Version Date: 06/03/1998

Remarks:

Adaptation amendments retroactively made - see 39 of 1999 s. 3

(1) This section applies to prisoners who, at the commencement of this section-

- (a) are serving discretionary life sentences; or (Amended 6 of 1998 s. 2)
- (b) are detained at Executive discretion.

(2) Within 6 months after the commencement of this section, the Chief Justice must, after taking into account any representations made under subsection (3), submit to the Chief Executive in respect of each prisoner to whom this section applies a recommendation specifying a minimum term that the prisoner should serve in relation to the offence for which the prisoner was sentenced to imprisonment or is detained at Executive discretion and the recommendation should include any special considerations or circumstances to be taken into account in any future review. (Amended 39 of 1999 s. 3)

(3) Before making a recommendation under subsection (2), the Chief Justice must-

- (a) give the prisoner an opportunity to make written representations to the Chief Justice for the Chief Justice to take into account in making the recommendation; and
- (b) as far as it is practicable to do so, consult with the judge who presided at the trial of the relevant offence.

(4) As soon as practicable after receiving a recommendation under subsection (2), the Chief Executive must determine a minimum term that the prisoner must serve for the offence, taking into account the recommendation of the Chief Justice and any representations made under subsection (5). (Amended 39 of 1999 s.3)

(5) The Chief Executive must not make a determination under subsection (4) in respect of a prisoner without having-

- (a) provided the prisoner with a copy of the Chief Justice's recommendation in respect of the prisoner's sentence or detention; and
- (b) given the prisoner an opportunity to make written representations to the Chief Executive with respect to that recommendation. (Amended 39 of 1999 s. 3)

(6) A determination under this section is final and not subject to appeal to any court.

(7) In this section, "Executive discretion" (行政酌情決定) has the same meaning as in the Long-term Prison Sentences Review Ordinance (Cap 524).

(Added 86 of 1997 s. 44)

**Previous section of
enactment**

**Next section of
enactment**

Switch language

**Back to the List of
Laws**

雙語法例資料系統 Bilingual Laws Information System

English 繁體 簡體 繁體 Gif 簡體 Gif

Previous section of
enactment

Next section of
enactment

Switch language

Back to the List of
Laws

Section of Enactment



Chapter:	221	Title:	CRIMINAL PROCEDURE	Gazette Number:6 of 1998 s. 3
			ORDINANCE	
Section:	67D	Heading:	Minimum terms to be determined in respect of certain prisoners serving mandatory life sentences	Version Date: 06/03/1998

(1) This section applies to prisoners who, at the commencement of this section, are serving mandatory life sentences in respect of the conviction of murder committed when they were under 18 years of age.

(2) Within 6 months after the commencement of this section, the Chief Justice must, after taking into account any representations made under subsection (3), submit to the Chief Executive in respect of each prisoner to whom this section applies a recommendation specifying a minimum term that the prisoner should serve in relation to the offence for which the prisoner was sentenced to imprisonment and the recommendation should include any special considerations or circumstances to be taken into account in any future review.

(3) Before making a recommendation under subsection (2), the Chief Justice must-

- (a) give the prisoner an opportunity to make written representations to the Chief Justice for the Chief Justice to take into account in making the recommendation; and
- (b) as far as it is practicable to do so, consult with the judge who presided at the trial of the relevant offence.

(4) As soon as practicable after receiving a recommendation under subsection (2), the Chief Executive must determine a minimum term that the prisoner must serve for the offence, taking into account the recommendation of the Chief Justice and any representations made under subsection (5).

(5) The Chief Executive must not make a determination under subsection (4) in respect of a prisoner without having-

- (a) provided the prisoner with a copy of the Chief Justice's recommendation in respect of the prisoner's sentence; and
- (b) given the prisoner an opportunity to make written representations to the Chief Executive with respect to that recommendation.

(6) A determination under this section is final and not subject to appeal to any court.

(Added 6 of 1998 s. 3)

Previous section of
enactment

Next section of
enactment

Switch language

Back to the List of
Laws

雙語法例資料系統
Bilingual Laws Information System

Appendix B

[English](#)[繁體](#)[簡體](#)[繁體](#)[Gif](#)[簡體](#)[Gif](#)[Previous section of enactment](#)[Next section of enactment](#)[Switch language](#)[Back to the List of Laws](#)

Section of Enactment



Chapter:	212	Title:	OFFENCES AGAINST THE PERSON ORDINANCE	Gazette Number:	
Section:	2	Heading:	Murder	Version Date:	30/06/1997

HOMICIDE

Any person who is convicted of murder shall be imprisoned for life. However, if it appears to the court that a person convicted of murder was under 18 years of age at the time of the offence, the court has a discretion as to whether the person should be sentenced to imprisonment for life or to imprisonment for a shorter term.

(Amended 50 of 1991 s. 4; 24 of 1993 s. 5; 86 of 1997 s. 44)
 [cf. 1861 c. 100 s. 1 U.K.]

[Previous section of enactment](#)[Next section of enactment](#)[Switch language](#)[Back to the List of Laws](#)

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
February 2004