

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 term<sup>1</sup> 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

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<sup>1</sup> "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

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### Section of Enactment



Chapter: 221 Title: CRIMINAL PROCEDURE Gazette Number: 39 of 1999  
ORDINANCE

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)

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**Section of Enactment**



Chapter:	221	Title:	CRIMINAL PROCEDURE	Gazette Number:	6 of 1998
			ORDINANCE		
Section:	<b>67C</b>	Heading:	<b>Minimum terms to be determined in respect of certain existing prisoners</b>	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)

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### Section of Enactment



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

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