

“A death row of sorts”

Indeterminate custodial sentences in the UK

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Foreword

Across the UK, an individual can find themselves detained, with no clear sense of when they might be released, under a number of different powers, laws and regulations. In the case of criminal justice detention, indeterminate detention takes three main forms.

An unconvicted individual can be remanded in prison while awaiting trial. Given the current backlog of cases in the criminal courts, an individual can be left languishing in prison awaiting trial for months, in some cases years.

Life imprisonment – mandatory in the case of a murder conviction – is the second form of indeterminate criminal justice detention. An individual subject to a life sentence has to serve a minimum period in custody (the so-called ‘tariff’) before they can be considered for release. Ongoing detention at the end of the tariff period is common. On release, a life sentence prisoner is subject to lifelong supervision, with recall to prison at any point a real possibility.

The third form of indeterminate criminal justice detention are the three life sentence-like sentences: in England and Wales, the imprisonment for public protection (IPP) sentence; in Northern Ireland, the indeterminate custodial sentence (ICS); and in Scotland, the order for lifelong restriction (OLR).

The IPP, ICS and OLR sentences work in a way similar to the life sentence: an indeterminate period in custody, followed by ongoing supervision on release in the community, if the prisoner manages to secure release. They can, though, be imposed for a far wider range of offences than is allowed for by the relatively narrow set of offences in the case of a life sentence.

The subject of this briefing is the IPP, ICS and OLR sentences. The main conclusion it draws relates to the question of whether such sentences should be considered a form of psychological torture. With the failed abolition of the IPP sentences in England and Wales, and the ongoing operation of the ICS and OLR sentences in Northern Ireland and Scotland, the torturous and unfair aspects of these indeterminate sentences are likely to become ever more apparent.

Richard Garside
Director

Introduction

A sentence of indeterminate detention poses many challenges, in principle, to a number of key parties: to the legislature responsible for its imposition; to the prisoner waiting for a release that may not come; and to the prison authorities designing regimes and services appropriate to that uncertainty. While indeterminate sentences include discretionary life sentences, there are three indeterminate custodial sentences in the UK which raise particular questions.

Based on an overview of the evidence, this briefing proposes that the adverse management of indeterminate sentences, leading to patterns of distress, could amount to maltreatment. In their latest Annual Report, the Independent Monitoring Boards (IMBs) make clear their longstanding dismay about the ‘inhumanity’ with which Imprisonment for Public Protection (IPP) prisoners are treated (Independent Monitoring Boards, 2022). Moreover, an extensive recent inquiry by the cross-party Justice Committee into IPP has highlighted a series of concerns that go to the heart of the legitimacy of a sentence which it described as “irredeemably flawed” (Justice Committee, 2022, para 150).

In its formal response, the UK government rejected the case for resentencing of those currently subject to the IPP sentence, made by the Committee. It has partially accepted several key points, which indicate the strength of the evidence assembled by the inquiry. With a change in the senior leadership of the Ministry of Justice, there is renewed hope among campaigners that a more ambitious agenda from government might be forthcoming.

This paper outlines the three different indeterminate sentences arrangements that operate across the three main UK criminal justice jurisdictions: England and Wales, Scotland, and Northern Ireland. It also sets out the several risks of possible maltreatment, based on evidence, and their implications for human rights standards and torture prevention networks.

Three indeterminate sentences

In the UK, there are three similar but distinct indeterminate sentences.

Imprisonment for Public Protection (England and Wales)

From 2005 the IPP sentence was to be available in cases where one of several serious offences had been committed following another similar conviction. A tariff period of punishment was to be served in prison, after which the prisoner could apply to the Parole Board for supervised release.

Though abolished in 2012, the strictures of the sentence remain upon those sentenced before that date. Many are still in prison more than ten years later.

Evidence has suggested that the period after the tariff has expired is a time of unusual stress because the prisoner faces a period of preventive detention, instead of punishment, in contrast to those subject to determinate sentences; proving that they are safe to release is felt to be a weighty burden.

Order for Lifelong Restriction (Scotland)

Under the Criminal Justice (Scotland) Act, 2003, an Order for Lifelong Restriction (OLR) can be made once a court has ruled that an offender poses a risk of serious harm to the public. The OLR may be given for any offence with the exception of Murder, which requires a mandatory life sentence.

A Risk Assessment Report is required in order to inform the court’s decision. A defence report can also be commissioned.

The Risk Management Authority is a Non-Departmental Public Body (NDPB) established in 2005 by the Criminal Justice (Scotland) Act 2003. It has a broad role in framing risk assessment and management practices across several agencies in Scotland. It has specific responsibilities for the administration of the Order for Lifelong Restriction, including the approval of Risk Management Plans.

The sentence has a period of detention, after which the prisoner can apply for Parole.

Indeterminate Custodial Sentence (Northern Ireland)

Under the Criminal Justice Order 2008, the Indeterminate Custodial Sentence (ICS) is currently available when a serious violent or sexual offence has been committed and it is believed that similar offences could be committed in the future. A tariff is set, which must be a minimum of two years, after which the prisoner can apply for parole.

It should be noted that the Northern Ireland Court of Appeal has described the ICS as “the most draconic sentence the court can impose apart from a discretionary life sentence and that it should not be imposed without full consideration of whether alternative and cumulative methods might provide the necessary public protection against the risk posed by the individual offender”. In a case reported in 2017, the court substituted an ICS with an extended determinate sentence (Irish Legal News 2017).

Risks of indeterminate sentences

There are a number of documented risks that have emerged, especially from evidence submitted to the Justice Committee, including by the national chair of the IMBs (Dame Anne Owers, 2021). The potential threats to health, well-being and prospects for rehabilitation were analysed in a recent report on IPP published by the Centre for Crime and Justice Studies (Grimshaw, 2022).

Failure to manage the period of uncertainty beyond the tariff

The division of the sentences into a period of compulsory imprisonment and a period with the possibility of release raises important questions about conditions and expectations.

The European Court of Human Rights (ECHR) has posed the question of whether or not the conditions under which prisoners serve the preventive part of such a sentence should rightfully differ from the standard ones, because the period of punishment has ended.¹ In that context, what kind of expectations are reasonable, in the extensive period of uncertainty, about

sentence planning, access to courses, treatment and support?

In 2016, HM Chief Inspector of Prisons conducted a thematic review of IPP which informed an Action Plan designed to overcome obstacles to release. Yet outcomes were disappointing (HMCIP, 2016).

By 2022, three quarters (75 per cent) of unreleased IPP prisoners had been in custody for over twice their original tariff length (Beard, 2023). With slow increases in the numbers released, the Justice Committee called for an overhaul of the Action Plan, aimed at accelerating sentence progression; a recommendation accepted by the government. How soon any practical changes will take effect remains an open question.

During the year 2021-22, 151 active cases were past the punishment part of the OLR sentence and still in prison, compared with five being supervised in the community; a further six cases were in NHS care settings (RMA, 2022). Currently, there are 233 individuals serving an OLR sentence, but only 17 have ever been released (RMA, 2023).

The numbers suggest that progression towards release from prison has been far from straightforward, creating potential scope for prisoners to be warehoused, rather than moved towards a positive future.

Risk assessments that are not individualized or contextualised

Assessments concerning the risks of release are performed in various ways. There are well-known limitations on the scope and validity of assessment instruments, which are based on group data, and therefore have an uncertain bearing on individual cases (Justice Committee, 2022, para. 90).

In Scotland, the Risk Management Authority issues guidance on relevant instruments as part of its role in framing administration of the OLR.

The passage of years in prison introduces increasing uncertainty in relation to the original offences and spotlights instead signs of behaviour and attitudes that relate to the prison context.

¹ M v Germany (2010) 51 EHRR 976.

A realistic assessment becomes very challenging, unless there is positive work to motivate and empower the individual. It is all too easy therefore to fall back on an original attribution of 'dangerousness', and take a negative view of the prospects of release.

Lack of access to effective courses and programmes

Evidence around the IPP sentence indicates that courses and programmes are not being sufficiently provided.

“ We are concerned to hear that the availability of appropriate courses for IPP prisoners is limited.”

(Justice Committee, 2022, para 71)

“ Dame Anne Owers, National Chair, Independent Monitoring Boards, noted that ‘IPP prisoners should be held in an establishment that is able to provide the necessary courses and programmes for them to progress and eventually apply for parole. Local prisons are wholly unsuitable for those prisoners serving IPP sentences due to the limited access to such courses; however, they continue to be held there in some cases’.”

(Justice Committee, 2022, para 70)

In addition, mental health needs are not well-served in the prison system, and even well-funded specialist services have had only qualified success (Moran et al., 2022).

The government has accepted that many IPP prisoners have “high levels of psychological challenge, including neurodivergence, and complex childhood trauma” which demand particular and specialist attention (Justice Committee, 2023).

The Justice Committee also heard that uncertainty and tensions which surround psychological work with prisoners on an indeterminate sentence can lead to breakdowns in trust between practitioners and the prisoner (Justice Committee, 2022, paras 43 and 58).

Interviews with a number of OLR prisoners who had been released produced similar findings.

“ Participants were critical of prison based professionals who they felt were not treating them fairly in comparison to individuals with different sentence types, for example by viewing them as more ‘risky’ and limiting opportunities to progress.” (RMA, 2023)

A report by Criminal Justice Inspection Northern Ireland in 2016 reviewed both life and indeterminate sentence provision, suggesting that the lessons of IPP were being heeded.

“ The legislative basis for managing indeterminate sentences had been informed by the problems experienced in England and Wales. The NIPS [Northern Ireland Prison Service] had improved arrangements for Indeterminate Custodial Sentence (ICS) prisoners to progress within the prison system.” (CJINI, 2016)

However, it also commented on a shortage of psychologists that might aid with progression arrangements.

Grappling with a high bar for release

In England and Wales, the statutory test applied by the Parole Board is that the prisoner must be assessed as ‘safe to release’. Yet too often the process has been fraught with failings.

“ We have heard about frequent delays, untrained Parole Board members, frequent changes in professionals essential to the parole process, uncertainty following a negative parole decision and issues with the probation service.”

(Justice Committee, 2022, Conclusions and Recommendations, para 8)

In Scotland, research suggests that Parole decisions in OLR cases have also been affected by inefficiencies.

“ A reason for the recent decline in releases has been an increase in numbers of cases adjourned as part heard or postponed without being heard, indicating problems around efficiency and management in the system.” (van Zyl Smit and Morrison, 2020)

In 2010, HM Inspectorate of Prisons in Scotland had been aware of the resourcing issues posed by the OLR and, in 2019, noted the difficulties in obtaining parole (HMIPS, 2010 and 2019).

In a judgement on an appeal, it has been made clear that the grounds for continuing imprisonment under an OLR must be subject to regular reviews.² Currently, this requirement does not seem to be properly fulfilled.

Lack of adequate post-release support and the frequency of recall

The Justice Committee also noted concerns about support for released prisoners in the community, leading to frequent recalls to prison.

“ Dame Anne Owers, National Chair of the Independent Monitoring Boards, cited concerns that, at Buckley Hall, there was an insufficient number of probation prison offender managers to properly manage complex prisoners, including IPP sentenced prisoners.”

(Justice Committee, 2022, para 124)

The number of IPP recalls prompted the Committee to recommend action and, in response, the Government has confirmed that an inspection is due to be undertaken.

Mental health decline and crisis: the impact of psychological torture?

One or more of these adversities may have little impact: it is the cumulative experience of disappointments and rejections over long periods that is likely to lead to despair and a sense of helplessness.

Various Independent Monitoring Boards have reported on the negative treatment of IPP prisoners.

“ The Board at Erlestoke reported that these prisoners ‘are left without hope and are in danger of becoming institutionalised and dehumanized’. At The Mount, the Board considered that the 46 IPP prisoners held there were essentially ‘warehoused’.”

(Independent Monitoring Boards, 2022)

Moreover, the Justice Committee heard that such outcomes are systematic.

“ People function better when they have some controls over their lives. This is a group where we have systematically prevented that at a structural level.”

(Professor Graham Towl, former head of HMPPS Psychology Services. Quoted in Justice Committee, 2022, para 50)

Mental health decline forms the bleak backdrop to self-harm and suicide.

“ The emotional and mental deterioration of those serving IPP sentences is further evidenced by the high levels of self-harm and suicide rates among this group.”

(Justice Committee, 2022, para 44)

Unfortunately, the evidence shows that signs of disturbance and distress, instead of bringing positive attention to underlying needs, lead to setbacks on the path to release, meaning that all the above risks are reinforced – ultimately presaging a dispiriting return to square one (Grimshaw, 2022).

After the government had rejected the Justice Committee’s resentencing recommendation, a report by the Independent Monitoring Boards noted subsequent suicides, amidst general dismay among prisoners at the news.

“ When asked what confidence he now had regarding his progression towards release, a prisoner at Oakwood responded, ‘Six years over tariff. Hoping for the death penalty. No point.’ Another prisoner at Coldingley commented that ‘a mandatory life sentence would have been kinder’”

(Independent Monitoring Boards, 2023)

For this prisoner subject to an OLR, progression towards release seemed a very distant prospect, and no one was listening to their concerns.

“ No one out there cares, look at the stats on OLRs progressing, they have made it almost impossible to get movement. We have no-one to be a voice for us, it’s the IPP situation but no-one’s making a fuss, it’s a death row of sorts.”

(Prisoner in HMP Greenock, quoted in Jarman and Vince, 2022)

² J.R. v Her Majesty’s Advocate [2017] HCJAC 49.

Another, following release from prison, observed:

“ when you get told you don’t really know how long you’re gonna be in the jail for, that has a massive impact on you... that’s like... it’s... it’s mental torture.”

(Person subject to OLR, quoted in RMA, 2023)

In this context, the recent report of the UN Special Rapporteur (2020) on psychological torture holds considerable relevance, as it identifies how, depending on the particular case, arbitrariness and uncertainty can lead to adverse psychological consequences, which can amount to torture.

“ Whether arbitrary detention and related judicial or administrative arbitrariness amount to psychological torture must be determined on a case-by-case basis. As a general rule, the longer a situation of arbitrary detention lasts and the less detainees can do to influence their own situation, the more severe their suffering and desperation will become. Victims of prolonged arbitrary confinement have demonstrated post-traumatic symptoms and other severe and persistent mental and physical health consequences. In particular, the constant exposure to uncertainty and judicial arbitrariness and the lack of restrained or insufficient communication with lawyers, doctors, relatives and friends induces a growing sense of helplessness and hopelessness and, over time, may lead to chronic anxiety and depression.” (UN Special Rapporteur, 2020)

The Rapporteur issues warnings that the “lawful sanctions” exceptions to the torture prevention framework are not unqualified and must be considered against criteria of proportionality and determinateness.

“ Importantly, in order to be ‘lawful’, sanctions cannot be open-ended, indefinite or grossly excessive to their purpose, but must be clearly defined, circumscribed and proportionate.”

Conclusion

Reviewing the three indeterminate sentences, it appears that there are some common features, in particular, the incorporation of preventive detention in the latter part of a prison sentence. That important change of status calls for appropriate detention conditions, different from the normally sentenced. Crucially, the determination of risk, and decision-making about release, are subject to influences which can slow and complicate progress towards release. In the case of IPP, the system has rightly been judged by a parliamentary committee to be “irredeemably flawed”.

The remarks of the UN Special Rapporteur should put the government on notice that its refusal to change tack on the resentencing of IPP cases will attract well-deserved scrutiny from lawyers and observers in the torture prevention framework, not just in the UK but internationally. If cases of distress and despair continue to emerge, there must be increasing concern about the effects of the system. How is it that the IPP sentence, abolished by Parliament over ten years ago can be allowed to inflict more despair? Meanwhile, the OLR and ICS sentences remain in force.

It is certainly time for change. Whatever the changes envisaged, they should be framed by UK law, informed by the sharing of experience from all parts of the UK.

About the author

Dr Roger Grimshaw is Research Director at the Centre for Crime and Justice Studies.

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