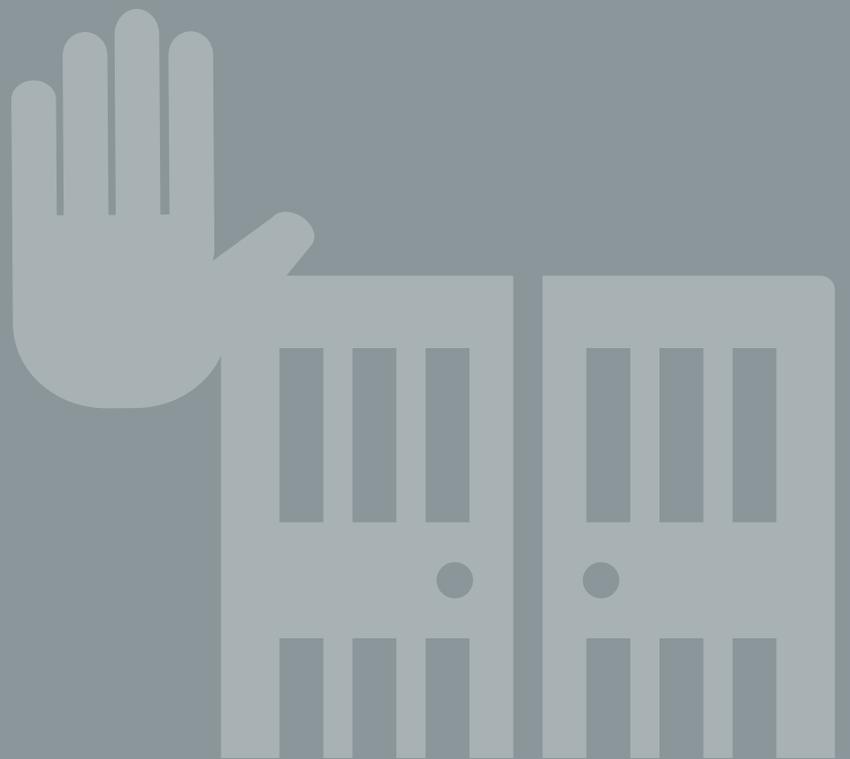


How to resolve the IPP crisis for good

by Roger Grimshaw



CENTRE FOR CRIME
AND JUSTICE STUDIES

About the author

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Acknowledgments

Scrutiny of Imprisonment for Public Protection is thankfully rising and my analytical task has been encouraged by the efforts of law-makers and campaigners to ask questions and put information in the public realm. In addition, two distinguished reviewers kindly made comments on the draft.

I would like to give warm thanks to colleagues at the Centre for Crime and Justice Studies and The Institute of Now for their continuing dialogue and support; I remain responsible for any errors in the publication.

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ISBN: 978-1-906003-84-5

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Executive Summary

In September 2022 the House of Commons Justice Committee recommended a series of measures to address the ongoing problems of the Imprisonment for Public Protection (IPP) sentence. These included reducing the licence termination period for Imprisonment for Public Protection (IPP) and the setting up of a Committee to explore the resentencing of the IPP population.

In its response, the Government has moved towards a significant reduction of the licence termination period, affecting many individuals retrospectively as well as prospectively, but otherwise it is proposing only more tailored refinements to the existing measures.

The Government's misnamed and underpowered 'Action Plan' sets out a managerial prospectus, which will be threatened by lack of resources in the system, and fails to take proper account of the mental health and psychological challenges starkly revealed by the Committee. Given the Government's resistance to reforms of the release procedures, the statistical projections for the future IPP prison population suggest that change over the coming years will be slow.

The criteria for an IPP sentence were very broad and deeply flawed from the outset, leading to many different people being caught in its net, while the sentence itself offered few effective remedies against widespread interpersonal violence in society.

.....
The Secretary of State should release on compassionate grounds the most distressed prisoners and advise the Parole Board to facilitate release of those serving the longest periods beyond their tariffs
.....

The original attribution of 'dangerousness' to the IPP population was overlaid upon a roughly constructed sequencing of the current offence and a previous one, which led to an unreasonable and persistent labelling. Prisoners are unable to resolve the incongruities of indefinite future detention and restriction while serving alongside others whose continued imprisonment appears to be justified by considerations of more serious actions in the past.

The UN Special Rapporteur on Torture has recently added her voice to the chorus of criticism.

A five-point plan to resolve the IPP crisis for good

1. As an immediate measure, the standard regime restrictions placed on those over tariff should be eased, so that they enjoy greater access to visits and better cell conditions.
2. The Secretary of State should release on compassionate grounds the most distressed prisoners and advise the Parole Board to facilitate release of those serving the longest periods beyond their tariffs; it would be for the Parole Board after a fair hearing to impose such community restrictions as it sees fit in individual cases for specific periods.
3. Following expert advice and review of resentencing options, Parliament should legislate for the systematic commutation of IPP cases in broad categories, where necessary authorising referrals to mental health tribunals, and reserving fresh judicial examination for any complex cases.
4. A Recovery and Reparations programme to address the disastrous personal consequences of the sentence should be designed with urgency and due scope.
5. A fundamental legislative review of all forms of preventive detention in the UK should be set in motion.

Introduction

The aims of this report are:

1. to highlight the depth of the crisis caused by the failures of the Government to give due weight to evidence about the toxic impacts of the Imprisonment for Public Protection (IPP) sentence;
2. to analyse and review the Government's Action Plan and more recent announcements;
3. to show how the label of dangerousness applied to the sentenced population is too problematic to sustain;
4. to argue that preventive detention on the basis of risk has led to confusion and despair; and
5. to propose an agenda for action which can bring effective and appropriate change.

The report sets out reasons for believing that the Government's responses to the Justice Committee recommendations still fail to answer its critics, cling to a discredited and arbitrary policy of preventive detention and will likely compound the resulting psychological harms to individuals and families.

All grounds for any form of preventive detention should be rigorously established but IPP was a roughly constructed invention, largely based on an assortment of loosely linked criminal records. In addition, while a number subject to other indeterminate sentences have

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.....

been punished for seriously harmful actions in the past, the IPP population is subject to the same regime during a period of preventive detention and supervision based on the label, not necessarily on what they have done. The indiscriminate nature of the sentence has from the outset compounded a sentencing disparity which has undermined not just its legitimacy but its credibility.

Since the grounds for the Government's hesitant changes to the IPP sentence are clearly flawed, a range of options for urgent reform can be judged practical and acceptable. In addition to supervised release for those in distress and those who have served well beyond the tariff, a constructive commutation of the sentences is called for alongside a wholesale recovery programme for individuals and families.

Profile of the crisis

In February 2023, the Government rejected some key recommendations of the Justice Committee’s report on IPP (Justice Committee, 2022a, 2023). The Committee had provided clear evidence of historical policy catastrophe, system failure and a massive crisis, which was impacting on mental health and well-being as well as generating extended levels of punishment that go far beyond the original tariffs.

The Committee recounted the initial disaster, when the IPP population suddenly boomed, and traced the unsuccessful attempts to address it, leading to abolition. It identified recent gaps in provision for those seeking release and criticized the then Action Plan for its failings. The despair generated among prisoners was clearly identified.

The IPP population has suffered from Adverse Childhood Experiences, made worse by impoverished environments, and rendering them vulnerable to the stress caused by the sentence (Grimshaw, 2022). Psychological survival in long-term imprisonment is normally difficult, yet under IPP conditions, prisoners become stuck, threatened by prospects of lifelong

imprisonment, unable to cope with disappointments and liable to lose hope.

In 2022, there were nine self-inflicted deaths of IPP prisoners, the highest number of self-inflicted deaths among this population since the sentence came into operation (Prisons and Probation Ombudsman, 2023).

Among its recommendations, the Committee’s report called for all prisoners currently serving IPP sentences to be re-sentenced, with an independent panel appointed to advise on how it might be undertaken. The Committee also called for the current time period after which prisoners can be considered for the termination of their licence following release to be halved, from ten years to five.

A consensus of opinion among the large numbers who submitted evidence was in favour of substantial reform, urging fundamental changes to provide relief, recovery and justice. Yet the Government repeated its claims that the IPP – though abolished prospectively, but not retrospectively in 2012 – and the system for release, which it maintained, were still appropriate and necessary to ensure public protection. Campaigners were adamant that the Government response had been seriously inadequate, to say the least.

More pressure has come from those proposing amendments to current legislation that would oblige the Secretary of State to begin a resentencing exercise or to introduce independent advocates and mentors for IPP prisoners (Hackett and Horne, 2023).

There was a possible reason for renewed hopes of change, when a new Secretary of State, Alex Chalk MP, was appointed. He was on record as stating that the IPP situation left a ‘toxic legacy’ after its abolition (Inside Time Reports, 2021). Initially he stated an intention to reduce the licence termination period ‘in line with’ the recommendation of the Justice

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Committee, which would have implied a reduction of the period to five years (HC Deb, 16 October 2023, c58). On 28 November 2023, he went further, proposing to reduce that period to three years after release. Even if the Parole Board denies the referral, the post-release licence period would automatically be terminated after a further two years if they are not recalled to prison in that time. The retrospective application of the new provision is estimated to benefit 1,800 individuals immediately (Ministry of Justice, 2023b).

The fact that any further progress in dealing with the Justice Committee's main recommendation on resentencing has stalled raises deeper questions about the reasons for the ongoing impasse. Major assumptions about imprisonment as a way of keeping the public safe are at stake: there appears to be an underlying political consensus that any change leading to the more rapid release of prisoners labelled as 'dangerous' would be politically risky, regardless of considerations about effective sentencing, simple justice, or whether those prisoners refused release really are dangerous in the way that is claimed.

Before we examine the underlying assumptions about danger, it is important to analyse the adequacy of the Government's own answer to the current problems.

Government response to the Justice Committee recommendations

The revised Action Plan

The Committee concluded that the then Ministry of Justice Action Plan for enabling prisoners to achieve release ‘lacks a clear strategic priority and ownership, as well as operational detail and performance measures.’

It identified three main challenges to prisoners’ progression: access to mental health services; the availability of places on offending behaviour courses; and gaps in knowledge about programme effects.

The parole process, and the role of the probation service in it, were judged to have been ‘a significant barrier to progress for IPP offenders.’

The Government, in response, promised a revised Action Plan, yet what the Plan has proposed is unlikely to bring adequate relief to prisoners in need of immediate attention and services.

The Government also accepted only partially the Committee’s view that the sentence is harmful, describing uncertainty about release as ‘unsettling’: a term that minimises the known effects of the process.

The Action Plan published in April 2023 (Chalk, 2023) appears to offer a catalogue of changes in terms of tighter management arrangements and increased accountability but it is often either circumscribed or vague about any fundamental changes that would reduce psychological pressure on individuals and hasten release. It takes for granted that IPP prisoners are a risky population to be managed, implying that unsuccessful interventions simply mean unreduced risk. There is scant reference to funding, or to the implications for workloads, which should increase if the plan is to make significant changes. The input of civil society and other agencies is represented by an

external stakeholder group, which will meet quarterly. Despite the evidence showing the dire impacts of the sentence on families (e.g. Annison and Straub, 2019) the Action Plan gives insufficient attention to their possible role in supporting their loved ones.

Mental health services

The Government has committed to improving mental health service services, having formed a Mental Health Working Group, involving the Department for Health and Social Care, Ministry of Justice, HM Prison and Probation Service, the Home Office, the National Police Chiefs Council, and the Welsh Government. Indeed, as a briefing by the Royal College of Psychiatrists points out, there are fundamental and persistent challenges in delivering the services that IPP prisoners need.

‘Mental Health services in prison are not equipped to manage the complexities of many of those subject to IPP in prison and additional resource and development of expertise is needed.’

Royal College of Psychiatrists, 2023

Prison regimes often lead to the misinterpretation of the underlying experiences of trauma, and insensitive interventions only serve to re-traumatise.

‘Once in the criminal justice system, trauma-based behaviours are often misinterpreted and wrongly attributed to purely criminogenic factors, leading to improper or inadequate treatment interventions, power struggles with staff, and ultimately re-traumatization.’

Thordarson and Rector, 2020

The promises about improved mental health services do not take into account the fact that the prisoners most in need of support have experienced years of service failure and must endure further periods of

despair while services are belatedly rebuilt. Every day of delay in improving services is a day lost for prisoners.

Indeed, the Government's own assessment of psychological needs implies a far more intensive and long-term approach to health services, while also taking into consideration the reasons for individuals' behaviour prior to imprisonment.

'As identified in wider evidence, many IPP prisoners have issues related to high levels of psychological challenge, including neurodivergence, and complex childhood trauma that can present a barrier to engagement and learning in a group context. Hence, as HMPPS evidence stated, we are working with individual IPP prisoners to identify the most appropriate pathway and to provide bespoke sentence planning. This is an area of growth which will form part of the IPP Action Plan review.'

Justice Committee (2023)

The Action Plan published in April 2023 provides for some assessment of psychological needs, focused on those never released and over five years over tariff and on some other categories, excluding those convicted of violence, sexual offences or robbery.

A much more comprehensive investigation than this is long overdue. Our understanding of specific population needs is considerably out of date, the main empirical studies dating back to the period before abolition of the sentence in 2012 (Sainsbury Centre for Mental Health, 2008). A thorough clinical investigation would not only help to improve services but also enlighten a much more informed policy debate.

As things stand, however, it is by no means clear that the assessment will have the clinical focus and resources to engage fully with prisoners' needs, identify the harms of imprisonment, or prompt

sufficient action to enable treatment in more appropriate settings. We would hope for significant early results from an adequate assessment, giving assurances that a real change is on its way.

The Action Plan further promises, in a dismally repetitive manoeuvre, 'an action plan' on personality disorder:

'Develop an action plan, in partnership with the Public Protection Group, to set out how the OPD Pathway can better engage with the IPP population, and appropriately prioritise access to services.'

In reply to concerns and evidence about suicide, the Government referred to its partnership with Samaritans, supporting trained prisoner Listeners. Whatever the merits of the Samaritan service, it falls a long way short of being a sufficient response to the causes and consequences of suicidal thoughts and actions. Indeed, the Action Plan does address a need to identify ways of continuing support to prisoners, who again are considered to be at risk, this time of suicide.

'Produce IPP safety guidance for staff, including sharing any promising practice, to increase understanding of risks posed by IPP prisoners and how they can support.' (emphasis added)

More recently, the Prisons and Probation Ombudsman has intervened with a remarkable analysis, calling the sentence itself a potential risk factor for suicide and self-harm.

'An IPP sentence should be considered as a potential risk factor for suicide and self-harm. IPP prisoners struggle with their uncertain status leading to feelings of hopelessness and frustration.'

Prisons and Probation Ombudsman, 2023

At its heart, the psychological work currently undertaken in prisons with IPP prisoners has been shown to be ruinously compromised (Group of Psy Professionals, 2021). The dominance of risk assessments, and the uncertainty it brings, have led to discouragement and withdrawal on the part of many prisoners.

A new needs assessment must also treat prisoners as full human beings, with a holistic focus on their general mental health and well-being rather than as containers of risk. A large-scale investment in services is called for, if the likely level of need – both in prison and in the community – is to be adequately met.

Courses

Current information suggests that delivery of accredited programmes has barely recovered from the pandemic shutdown, hampered by staffing shortages (Institute of Government, 2023).

However, the Government seems to have accepted that existing courses are not capable of addressing psychological needs satisfactorily. Neurodivergence and complex trauma make course learning very difficult.

The inference must be that completing approved courses does not have any significant effect on prisoners' prospects of avoiding future recriminalisation. If so, there must be grave doubts about their utility.

Given that it is ten years since the abolition of IPP, it is a remarkable admission of the failure so far to install credible means by which IPP prisoners could progress towards stable and successful lives outside prison.

The latest Action Plan also seems to accept that a more concentrated focus should be on individual rather than

group work; it refers, in an aspirational phrase, to 'innovative and bespoke services by PSG, Health and OPD pathway Leads.' Clearly, there remains much work to be done before the needs can, at last, start to be addressed.

Resettlement

The Action Plan is also threatened by the failings of resettlement services over many years, manifested in a range of problems, including operational misunderstandings and staff shortages, documented by the National Audit Office in 2023.

'In November 2022, the Inspectorates found that HMPPS's Offender Management in Custody model, an approach intended to improve coordination during prisoners' sentences and resettlement in the community, was complex and poorly understood by staff. It also found that staff shortages were undermining public protection work, information-sharing and relationship-building.'

NAO, 2023

Recalls

The Chief Inspector of Probation thematic inspection on IPP recalls concluded that policy on recall decisions was generally being followed. However the support needs of individuals were not being met.

'Overall, only a minority of people were provided with adequate and appropriate support during their period on licence. During the period on licence, the risk of harm to other people was adequately managed in less than half of the cases we reviewed. Over half of those interviewed by User Voice rated the quality of support they received in the community as 'poor' or 'very poor'.

HMIP, 2023

If there is to be real progress, the focus should be placed squarely on a target for change. For example, halving the recall rate would reduce the number in prison in 2030 to 1,310 according to calculations made by Justice Episteme and submitted by the Centre for Crime and Justice Studies in evidence to the Justice Committee (CCJS, 2021). Changes to recall practice could include requiring probation to prioritise and escalate measures other than recall when faced with risks of harm to the public.

The Government has recognized the case for qualified community offender managers to be more available throughout sentence planning but its efforts to increase the numbers are still making only limited progress, after years in which probation staffing has suffered huge cutbacks (NAO, 2023). The Government has also acknowledged that more work is required to enable prisoners leaving prison to be placed in accommodation close to their own communities. The Action Plan seeks to improve community management by refreshing and developing psychological services, including for Approved Premises.

Though the Government response to the Committee's report refers to electronic monitoring options, these can often be a source of stress on individuals unless carefully managed by experienced supervisors. Moreover, it is not clear, according to an audit and inspection in 2022, that the support and monitoring systems are yet in place to ensure effective work with 'tagged' individuals (NAO, 2022; HMIP, 2022).

In sum, experience suggests that reducing recalls will require determination.

Licence termination

IPP offenders on licence in the community are currently eligible to have their licence terminated by the Parole Board once 10 years has elapsed since they were first

released. As stated previously, the Government is proposing to bring forward the point of eligibility to three years following first release with automatic termination after five years, subject to not being recalled.

Analysis of trends by Justice Episteme, in collaboration with the Centre for Crime and Justice Studies, in 2021 showed the estimated effects of various reforms to the process over the long term, up to 2030.

- Reducing the licence period to five years, from the current ten, would reduce the IPP prisoner population to an estimated 1,530 by 2030.
- However, reducing it to two years would reduce the population to an estimated 930.
- Even a combination of halving the recall rate and reducing the licence period would result in an estimated IPP prisoner population of between 600 and 1,000 IPP prisoners in 2030.
- Halving the recall rate and reducing the licence period would result in an estimated number on license ranging from 940 to 340 by 2030.

On these estimates, the results of the latest proposal, to reduce the licence period to between three and five years, might appear to lie between the two- and five-year estimates above: it could therefore still mean a population of over 1,000 people in prison by 2030.

Under a proposed amendment to the Victims and Prisoners Bill, the cases of IPP offenders where three years has elapsed since their first release will be automatically referred to the Parole Board. There is to be a statutory presumption that the IPP licence will be terminated by the Parole Board at the end of the three-year qualifying period unless it is still required to protect the public. Under existing provisions it would be expected that they would be then reviewed annually when the Parole Board has opted to keep the licence in place. Automatic termination could follow at

the five-year point, provided no recalls have occurred. Such a measure keeps the machinery moving but its effect must be placed in context. Under the current rules, in September 2022, only 502 persons under IPP licence were eligible to have the Parole Board consider lifting their licence, in England and Wales (HC Deb, 17 March 2023, cW, UIN 162324). With a reduction in the licence termination period, that number should increase. 'Around 800 will become newly eligible for Parole Board consideration by March 2025,' according to Government estimates (Ministry of Justice, 2023b).

However, on current figures, the risk of recall for those who remain on licence for five years would likely remain high. At the end of September 2022, out of 4,847 IPP offenders who have ever been released, about half (2,463) were recalled less than five years after their first release (HC Deb, 17 March 2023, cW, UIN 162324). Other data show how risks of recall are concentrated among those in the early stage of their licence: only six per cent of first recall incidents occur amongst those who are five years or more after first release (Justice Committee, 2022b).

The next hurdle before release is approval of a licence termination referral. Unfortunately, recent data indicate that, out of 196 cases, just over half (53 per cent) are not successful (HC Deb, 17 March 2023, cW, UIN 162324). The effect of a statutory presumption at the three-year mark remains to be seen.

Though the Government's position appears to be evolving, a few important qualifications should therefore be made about the potential impact of its licence termination proposals.

- The high risk of recall in the first five years for those released could remain an obstacle to reduction of the IPP prison population unless countervailing measures are taken.

- By itself, the licence termination concession by the government does not necessarily mean that licenses will simply be terminated once the qualifying periods have elapsed.
- Some additional regulation to increase the rate of approvals will be required if the licence termination is to have a substantial effect.

Therefore, such adjustments to the parole system, etc. are unlikely to have far-reaching effects without purposeful refinements.

IPP prisoner numbers not expected to fall quickly

The forecasts for releases and recalls published by the Justice Committee showed that continuing without significant changes would mean that recalls would exceed releases in every year by a large margin up to 2025/26.

There were, in total, 2,890 IPP prisoners in September 2022 (Ministry of Justice, 2022). These forecast figures gave little hope of change.

Recent projections of the prison population are founded on assumptions of a significant rise in the overall population through to March 2027. The indeterminately sentenced population, made up of those on life sentences and IPP, is projected to drop by less than 500, from 2022 to 2026 (Ministry of Justice, 2023a). Official projections for unreleased IPP prisoners have been made available: by 2026, the unreleased population may fall to 800, a reduction of over 40 per cent. However, this remaining group will still be incarcerated, approaching 14 years after their sentence was abolished.

The figures given in the table 2 overleaf only relate to IPP prisoners who have never been released. At the end of December 2022, there were an additional 1,498

Table 1: Estimated number of prisoners serving an IPP sentence who will be released and recalled in each year in the prison projections forecast period

Projection year	Total estimated prisoners released after IPP sentence	Total estimated prisoners recalled after IPP sentence
July 21 to June 22	200	500
July 22 to June 23	200	700
July 23 to June 24	200	700
July 24 to June 25	100	700
July 25 to June 26	100	500

Source: Justice Committee, 2022a

Table 2: Projected IPP and Life sentence prison population (end of November figures)

Date	IPP	Life	Total: IPP and Life
Central			
November 2022	1,400	7,100	8,500
November 2023	1,200	7,100	8,300
November 2024	1,000	7,200	8,200
Low			
November 2023	1,200	7,100	8,300
November 2024	1,000	7,200	8,200
November 2025	900	7,200	8,100
November 2026	800	7,200	8,000
High			
November 2023	1,200	7,100	8,300
November 2024	1,000	7,200	8,200
November 2025	900	7,200	8,100
November 2026	800	7,300	8,100

Source: Freedom of Information Act (FOIA) Request 230711001, Ministry of Justice, 7 August 2023. All numbers are rounded to the nearest hundred; numbers below a hundred have been rounded to the nearest 50. Components may not sum due to rounding.

IPP prisoners in custody who had been recalled to prison following release (for trend data, see Beard, 2023). While a reduction of the licence termination period should have an effect on the number of recalls, currently available information, cited earlier, suggests that reducing recalls in the first five years after release will pose a major challenge.

.....
By 2026, the unreleased population may fall to 800, a reduction of over 40 per cent. However, this remaining group will still be incarcerated, approaching 14 years after their sentence was abolished

Government policy must be more ambitious if it is to reduce the IPP population with significant effect over an acceptable and reasonable timeframe.

Parole Board changes

Over the years since the abolition of the IPP sentence, concerns about the rigidity of the system have been expressed. Indeed, in 2016, the former Justice Secretary Michael Gove proposed executive release for those who had already served more than the usual maximum sentences for their offences (Travis and Bowcott, 2016). However, no significant change followed.

Unfortunately, the Government has also taken steps to assert greater influence over Parole Board decisions. Its criteria governing the movement of indeterminate sentence prisoners to open conditions, though recently revised, would benefit from clarification (Jarman and Vince, 2022; Prison Reform Trust, 2023). As of December 2021, 292 people were serving an IPP sentence in a secure hospital, in England and Wales (HC Deb, 17 March 2023, cW, UIN 162324). A new streamlined parole process for IPPs remitted to prison from secure health care is promised, but how far it can

affect the number of the unreleased population as a whole must be doubtful.

The Government should consider more proactive steps in conjunction with the Parole Board to release prisoners on compassionate grounds and take account of extended prison time beyond the tariff.

The rejection of resentencing

The Committee advocated the appointment of an expert committee to advise on resentencing, a reform which was supported by UNGRIPP, the Centre for Crime and Justice Studies, and many others as the most appropriate and coherent solution. A proposal for a commission was broached by Lord Thomas, former Lord Chief Justice of England and Wales, in oral evidence to the Committee.¹

Rejecting the recommendation, the Government cited its commitment to public protection, which in its view required a Parole Board judgement that the prisoner was safe to be released. In so doing the Government has relied on the flawed original justification for the sentence.

1 Oral evidence: Imprisonment for Public Protection (IPP) sentences, HC 678, Tuesday 7 December 2021

Beyond ‘dangerousness’: the arbitrary foundation of preventive detention under the IPP

In order to understand the arbitrariness of the Government’s position, we have to go back to the principles and practice of the original legislation, which still affects the current IPP population.

The concept of ‘dangerousness’ had emerged into prominence as the idea was spread that society was threatened by individuals whose rampant criminality could not be restrained by existing criminal justice measures. At first sight there is plausible basis for concern about the subsequent offences of people imprisoned for violence. Analysis of a violent offender cohort in England and Wales found that 30 per cent were reconvicted of a further violence offence within four years of release from prison (Lui *et al*, 2011). Over a number of years, policymakers were strongly exercised by the prospect of repeat offences (Annisson, 2014).

Yet preventive imprisonment of whole classes of offenders under IPP has proved that there are many objections and pitfalls to consider, not least concerning the efficacy and appropriateness of prison as a place of reform and risk reduction.

The White Paper which introduced the IPP proposals boldly staked out the new ground for assessing dangerousness:

‘We want to ensure that the public are adequately protected from those offenders whose offences do not currently attract a maximum penalty of life imprisonment but who are nevertheless assessed as dangerous’ (emphasis added).

HM Government, 2002

Hence the presumption of dangerousness in IPP went beyond the standard legal parameters for serious offences previously set. The effect was to create an arbitrary threshold, which undermined any sense of proportionality or justice.

How the ‘dangerous’ were to be ‘assessed’ with assurance was, to say the least, a complex task which the IPP legislation drastically simplified, by linking offences from designated lists.

In effect, the attribution of dangerousness was largely determined by a legal construction based on convictions for two, not necessarily connected, offences. In order to qualify for an IPP, the maximum term for the offence before the sentencing court was 10 years or more. In addition, a previous conviction was necessary for an offence with a maximum of either 10 years or more, or from two to seven years. The sentencing judge only had to consider whether the offender posed ‘a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.’ Judicial discretion was deliberately minimised (Annisson, 2018). To describe this sorting exercise as a catch-all would be to dignify it. The results were a large-scale widening of the preventive detention net. In 2008, as the emerging problems with the existing system were becoming abundantly clear, the law was modified to permit some judicial discretion. Henceforth the notional minimum term (i.e. the term the prisoner would have served on a determinate sentence) would have been at least two years (Justice Committee, 2022a).

The use of broadly-drawn criteria to capture groups of offenders has been described by the criminologist, Thomas Mathiesen, as ‘collective incapacitation’, with modest gains in terms of public protection, yet exposing large numbers to the impact of imprisonment (Mathiesen, 1998).

.....
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As well as tarring whole groups with the label of dangerousness, the attribution of threat and risk to individuals completely obscures the situational and environmental conditions which influence the likelihood of reconviction, including social exclusion and lack of access to employment, etc, following imprisonment (Binder and Notterman, 2017).

Commenting on the social profile of prisoners, repeatedly emerging from a depressing array of social conditions, Andrew Ashworth concluded:

'The constant renewal of the stock of repeat offenders is a well-known explanation of why incapacitative sentencing policies are less effective than some expect.'

Ashworth, 2010

Difficulties in assessing whether or not someone is truly dangerous have a significant history. IPP was a particularly blatant example.

'There was no clear rationale for the threshold of dangerousness originally established by the IPP sentence'

Jacobson and Hough, 2010

Jacobson and Hough pointed out that no analysis of the group reconviction rates for the offences that would attract an IPP was available when the sentence was introduced.

In addition, the judicial challenge of predicting which individual in a group classification will be reconvicted over a period of time remains impossible to meet.

'The ability to state with any confidence that there is a 40 per cent risk of future violence in a given population group is clearly better than no knowledge, but it is questionable whether it

suffices to underwrite the decision to deprive an individual of liberty indefinitely.'

Ashworth and Zedner, 2014

In such a case, 40 out of 100 will be found to be violent, but a system imposing a standard deprivation of liberty on the whole group would imprison the majority who would otherwise not be reconvicted. In addition, in exploring mitigation of risk, it is important to take account of access to services and resources before and after imprisonment, which affect the likelihood of reconviction (Brunton-Smith and Hopkins, 2013).

In 2008 the Justice Committee commented on the flawed logic of linking two comparatively minor offences and then imposing an indefinite sentence.

'It is difficult to understand why an offender who might only receive a short determinate sentence should be given an Imprisonment for Public Protection sentence for having a previous conviction for a comparatively minor offence and be considered as "dangerous" and thus merit an indefinite custodial sentence.'

Justice Committee, 2008

By 2010, even the Government had lost its confidence in the IPP system as a method of preventing harm.

'The limitations in our ability to predict future serious offending also calls into question the whole basis on which many offenders are sentenced to IPPs and, among those who are already serving these sentences, which of them are suitable for release.'

Ministry of Justice, 2010, Para 186

The second part of the Government statement, regarding suitability for release, was a remarkable

admission of a failed system. The path towards abolition in 2012 was therefore set once fundamental assumptions about the sentence began to be questioned. 'Collective incapacitation', as Mathiesen defined it, had proved again to be a costly and arbitrary stratagem. But for those already captured by the system, its effects would persist. It is this legacy of inappropriate sentencing policy which the Justice Committee has recently sought to bring to book. For these reasons the original sentences, like the legislation, must be regarded as flawed and in need of drastic reassessment by the judiciary and indeed the legislature.

.....
...a system imposing a standard deprivation of
liberty on the whole group would imprison the
majority who would otherwise not be reconvicted
.....

A prison system with fatal sentencing ambiguities

Even within the prison system, the IPP sentence has struggled to be understood. How far did it reasonably equate to indeterminate life sentences in terms of structure and purpose? To the Prisoners' Advice Service, a discrepancy was clear.

'IPP prisoners are in the same position as other indeterminate sentenced prisoners as regards their release and resettlement, but for the fact that their index offence could be one that attracted a 4 month or 3 year period in custody. Lumping such prisoners into the system for releasing people usually convicted of murder or multiple rapes or armed robberies makes for a mockery of the risk assessment process.'

Prisoners' Advice Service, 2021

Indeed, in the case of a grave offence, sentencing often contains a strong retributive element. The mandatory life sentence for murder is therefore retrospectively legitimated, by reference to past actions, whereas the expiry of the tariffs in so many IPP cases has meant that the reason for detention becomes increasingly prospective, based on the presumption of elevated future risk. The idea of prolonged imprisonment owing to a future hypothesised risk creates a cognitive dissonance for the prisoners and poses a danger to their self-concepts. In particular, the yoking of minor offences undermined the cogency of the sentencing. The multiplication of different life sentences (such as discretionary and automatic life sentences) has arguably added to the complications in understanding the purposes of various forms of detention (Padfield, 2016).

One small, but important, step that could be taken – an approach implied by a judgement of the European Court of Human Rights (M v Germany (2010) 51 EHRR 976; Albrecht, 2012) – would be to move IPP prisoners still in custody after the expiry of their initial tariff onto a less restrictive regime. This would reflect the fact that their ongoing detention was of a preventative

(regardless of the merits of this stage) rather than punitive nature.

Psychological assessment and intervention were touted as the route to enable a prisoner to progress towards supervised release; however, the assessments remained tied to the dangerousness criterion within the legislation. It is clear that psychological considerations were not fully explored and applied in the selection of criteria for IPP, nor were they properly appreciated in the design of the system to allow progress towards release (Annison, 2015).

The effectiveness of standard risk assessments in forecasting further offences in individual cases is known to be low enough to rule out their sole use in decisions about criminal justice cases (Fazel *et al*, 2012). The responsibility of psychological risk assessment is to determine not just a group risk, with all the uncertainties attached, but a concrete individual risk, assessed in a timely manner using a well-chosen combination of evidence-gathering instruments.

'Structured professional judgement' involves a systematic approach to individual risk assessment, but it is still vulnerable to biases and, even with a well-structured instrument, results should be considered only as relevant over the short term, not the long term (de Vogel *et al*, 2020).

For example, an assessment protocol focused on Risk of Serious Harm (RoSH) may appear to be highly relevant, but can be biased and unreliable.

'It should also be clear that RoSH assessments, while an important and necessary addition to actuarial scores, contain the potential for unclear, confused thinking about risk, and for the conflation of distinct kinds of risk.'

Jarman and Vince, 2022

Under these conditions, the sifting of cases for continued incarceration or possible release is fraught with problems. The assessment of those individuals worthy of ongoing 'selective incapacitation', as Mathiesen termed it, tends to lead to the capture of a far wider group than is strictly justifiable.

'What the studies, taken as a totality, actually show very clearly is that you have to detain a much larger number of people than those who are actually dangerous in order to reach the dangerous.'

Mathiesen, 1998

The requirement to place interventions inside prison meant that there was no freedom for psychologists to propose community-based interventions from the outset of the sentence. The challenges of combining future risk assessment with credible and supportive psychological interventions in the here and now have led a group of psychological professionals to describe their role in IPP as distorted (Group of Psy Professionals, 2021).

Such findings serve to expose the arbitrariness of imposing a severe sanction of imprisonment on individuals whose concrete likelihood of being reconvicted of a serious offence is very difficult to predict. In a more profound sense, they also challenge the use of general risk assessment tools as a ground for individual sentencing, rather than one guide, among several, useful for framing sentencing policy (Ashworth and Zedner, 2014).

Hence the dangerousness threshold underpinning the IPP sentence was based on highly questionable foundations. The attribution of danger was an arbitrary construction, applied in a broad-brush manner with no reference to psychological evidence or procedures. The remaining imprisoned IPP prisoners who have never

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been released evidently consist of heterogeneous groups: a few still serving their tariff, many far beyond their individual tariffs. It is hard to understand the differences without calling into question not simply the reasoning behind the sentencing, as many have done, but also the framework of psychological practice and judgement governing their fates.

Yet psychology was proposed as the answer with no reference to the sentencing incongruities. The use of incapacitation on this flimsy basis created a contradiction which psychology was unable to resolve. Unfortunately, unless good services are in place, the risk of release is not that prisoners will run amok but that they will be so distressed and institutionalised that they will be unable to cope with living under the conditions of supervision.

What would be relevant and timely, in the case of people sentenced to IPP, is an assessment of the harms of the sentence itself. The result would be far more holistic assessments enabling interventions to build up psychological strengths, solidify positive relationships and provide resources that can help families as well as individuals to progress beyond the stresses of incarceration (Vandeveldel *et al*, 2017; Mallion *et al*, 2020).

A genuine programme of recovery for the whole IPP population should be designed on such fresh principles, in consultation with them and their families.

A long-term strategy must reject the assumption that prison enhances public safety and instead emphasise holistic opportunities for rehabilitation.

'...policies that equate continued imprisonment with public safety fail to recognise the centrality of family relationships, employment and, put simply, hope to the likelihood that prisoners will successfully construct a crime-free life for themselves.'

Annison, 2018

A clear recognition of past suffering, in the form of reparations for injustices and official failures, would help to encourage greater empowerment, confidence and trust. The prospects of transitioning the IPP population towards positive futures will be enhanced if radical therapeutic ideas are applied to the fashioning of support and recovery, with genuine accountability to individuals, families and organisations advocating for them. A clear-cut reorientation should be a prelude to forming definitively new relationships between services and users (Klukoff and Kanani, 2020).

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United Nations review of psychological torture

In a previous briefing, on indeterminate sentencing across the UK, the remarks of the former UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, about psychological torture were set out in detail (Grimshaw, 2023).

The Rapporteur acknowledged that arbitrariness and uncertainty can lead to psychological stress, which may, in a particular case, 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.’

UN Special Rapporteur, 2020.

In that vein, the recent report of the Independent Monitoring Boards, across some 24 prisons, contains chilling indications. The announcement that the Government had rejected the resentencing recommendation was followed by more evidence of suicidal tendencies and increasing uncertainty and hopelessness among IPP prisoners.

‘Progression pathways were poor and unclear to prisoners, which meant many prisoners questioned whether they would ever be released following the announcement.’

Independent Monitoring Boards, 2023

The UN Rapporteur warned that even if criminal justice sanctions were lawful, they might still be considered to become torture unless they were proportional and determinate. The conditions confronted by IPP subjects have resembled the conditions judged unlawful by the ECHR in a landmark ruling, because opportunities for rehabilitation have been denied to prisoners (Padfield,

2016). But these effects can be traced back to the design of the sentence, which created a questionable presumption of dangerousness that labelled all its subjects as such, far into an indefinite future.

More recently, the current Special Rapporteur has intervened, calling for a review of IPP by the Government on the grounds that the treatment of IPP resembles torture.

“For many these sentences have become cruel, inhuman and degrading. They have been acknowledged by successive UK Governments and even described as indefensible by a justice minister – yet they persist.”

Office of the High Commissioner for Human Rights, 2023

The language of the Rapporteur emphasises the seriousness of the crisis facing prisoners, and indeed their families, and raises important questions about the adequacy of the Action Plan. Indeed, a recent communication from the Special Rapporteur and a number of similar UN experts, addressed to the UK Government, explicitly calls for resentencing of all remaining IPP prisoners (UN Special Rapporteurs and Independent Expert, 2023).

In December 2023 the Government issued a detailed response. It denied that there has been any breach of human rights, sought to provide assurances about the Action Plan, including on mental health and self-harm, and repeated the claim that resentencing would entail unacceptable risks to the public (UK Mission Geneva, 2023). Now that IPP has become a matter of international controversy, it seems that pressure will mount for further answers and for more vigorous action. It is surely time for all legislators and policymakers to engage comprehensively with the fundamental questions raised by an international body.

A new agenda for action

Unpicking the numerous intertwined problems associated with IPP and resolving them fully will demand a set of interlocking steps, with financial, legal and organisational implications. The proposals set out here are meant to stimulate a thorough-going discussion among policymakers, opinion-influencers and audiences.

Easing standard regime restrictions

As an immediate measure, the standard regime restrictions placed on those past the tariff should be eased, so that they enjoy greater access to visits and better cell conditions.

Compassionate release

Under section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the Secretary of State possesses the power to change the test for release on licence of IPP prisoners by order. Hence an alteration in the conditions for release could discharge more prisoners without further legislation. Going beyond the current plans, a major step would be for the Secretary of State to take action to release distressed prisoners on compassionate grounds, and in addition, to advise the Parole Board that the number of years that a prisoner has served over tariff should be considered as a factor favouring release; after a fair hearing, it would be for the Board to impose such community restrictions as it sees fit in individual cases for specific periods. The imposition of preventive detention, which has so many fundamental flaws, would be ended and replaced with supervision. The system of recalls to prison should also be changed so that only serious and harmful breaches of supervision conditions following escalating preventive measures can lead to recall.

Resentencing

The Justice Committee's recommendation for an expert committee to explore options for resentencing creates an agenda for legislators and campaigners to take up and expand.

Resentencing proposals have generally been understood to involve ending the indefinite period of detention and calculating a determinate sentence to replace it, based on standard criteria, like the maximum for the offence at the time of sentencing. Following expert advice and review on resentencing, Parliament could then legislate for the systematic commutation of IPP cases in broad categories, where necessary setting out procedures for referring cases to mental health tribunals, and reserving fresh judicial examination for any complex cases.

Recovery and reparations

The challenge for policymakers as a strategy is how far it can deal with the poisonous legacy of IPP for individuals and families and, in the process, prevent collateral harms arising from past neglect and maltreatment. An investment in better support and supervision will require positive funding commitments, which have not been seen so far.

There is a clear case for a renovated and expanded mental health programme which assesses current needs and scales up services, linked to a broader psychological and social recovery initiative that can instil hope and raise expectations. An IPP recovery strategy should be formulated with all those delivery arms in place.

Realistic reparations should be issued for all those subjected to the IPP sentence, proportionate to the harm and distress it has caused to individual prisoners. A scheme for systematic reparations should be devised

in consultation with advocacy organisations, prisoners and their families, focused on failures in health care, Parole Board inefficiency and offender mismanagement.

Review of all forms of preventive detention

The intervention by the UN Special Rapporteur should be a call to concerted action across Government, and indeed all the legislative bodies within the UK. Given the differences among the UK jurisdictions in their approaches to preventive detention (Grimshaw, 2023), there is a strong case for a fundamental review of all forms of preventive detention in the UK, under any lawful sanction, in order to eliminate arbitrary definitions, establish legitimate limits and create safeguards of constitutional significance.

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