

## Written evidence from the Centre for Crime and Justice Studies

### Introduction

1. The Centre for Crime and Justice Studies, in fulfilment of its public education mission, welcomes the opportunity to present evidence about reform of Imprisonment for Public Protection (IPP).
2. This evidence submission has been written by Dr. Roger Grimshaw (Research Director), in consultation with Dr. Savas Hadjipavlou (Justice Episteme). A range of statistical forecasts of the IPP populations, in custody and on licence, under various reform scenarios leading up to 2030, is now available on the Justice Episteme website.<sup>1</sup>

### Outline

3. Options for reducing the IPP population are manifold: however, simplifications and easing of the licencing system will still leave up to 1500 cases in prison by 2030; on the other hand, re-sentencing the prisoners to proportional terms would help correct the injustices inflicted. Equally important is a review of the systematic failures of law and policy which led to this situation, and which should never be repeated. Retrospective action is justified to redress the underlying failures of law, state administration and oversight which have led to the unacceptable treatment of IPP prisoners. In the rare circumstances where it may be reasonable, preventive detention can only be maintained legitimately by rigorous, continuous assessment by properly resourced state agencies responsible to the law and overseen by legislators. The tortuous system for accessing, retaining and ending a licence has increased the vulnerability of prisoners, damaged their mental health and undermined their prospects.

### Term of Reference 1. Options for reducing the IPP population

4. Several reform options have been mooted, some more likely to address the fundamental problems than others. They are framed by different assumptions about how risk should be considered and how far prisoners have been unjustly treated.
5. Reforms to the options available to the Parole Board could mean strengthening its powers to grant earlier licences subject to review. Reforms would also make it possible to ensure that prisoners had more secure and regular access to the Parole Board review system. Thus more frequent and automatic procedures for Parole Board consideration would sustain the process of assessment. Reducing the licence period to say, 5 years or less, might be seen as a positive step. Earlier opportunities to bring the licence to an end would reduce the likelihood of recall.
6. However, licence reforms will have a limited impact, with prisoners still facing prolonged and painful uncertainty. Evidence about the causes of failure to progress within the system suggests that relationship problems between prisoners and staff

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<sup>1</sup> Hadjipavlou, S. (2021) *What impact will changes to the management of IPP sentences have on the number of IPPs in custody? The results from a system dynamics model* Justice Episteme. [https://www.justice-episteme.com/ResearchExamples/20211117\\_Impact%20of%20changes%20to%20the%20management%20of%20IPPs-%20November%202021.pdf](https://www.justice-episteme.com/ResearchExamples/20211117_Impact%20of%20changes%20to%20the%20management%20of%20IPPs-%20November%202021.pdf)

hinder attempts to overcome the obstacles. The completion of programmes may not itself be the most important factor in the process.<sup>2</sup> Psychologists are facing resource pressures in delivering crucial assessments.<sup>3</sup> Hence if the current system is to be tenable in any sense, the whole quality and direction of work with IPP prisoners must be radically improved.

7. The label of ‘dangerousness’ overshadows the supervision of those released on IPP. Recalls are largely based on failing to comply with administrative rules, rather than proven offences. Too often, liberty is subject to a web of administrative discipline disconnected from actual risk of offending.
8. Evidence gathered by the Prison Reform Trust also shows that serious mental health issues have been triggering recall, instead of appropriate referrals to hospital settings. Access to mental health services was insufficiently facilitated by probation.<sup>4</sup>
9. The support required to cope with the multiple demands of liberty after a long period of imprisonment is insufficient.
10. Of more long term concern, a statistical forecast of patterns of release and recall by Justice Episteme, in collaboration with the Centre for Crime and Justice Studies,<sup>5</sup> suggests that reforms of the formal process will still leave many cases languishing in prison by 2030.
11. Assuming no reforms, current trends will lead to 1,900 prisoners being in custody in 2030.
  - Halving the recall rate would reduce the number in prison in 2030 to 1,310.
  - Reducing the licence period to 5 years would result in a prisoner population of 1,530; reducing it to 2 years would mean a population of 930.
  - Even a combination of such measures could mean that up to 1,000 prisoners will still be detained in custody in 2030.
  - This range of scenarios would deliver various numbers on licence ranging from 1,120 (no changes) to, at the very best, 340 (combined measures).The implications for HMPPS management and costs, and, importantly, the human rights of those subject to the IPP sentence, are stark.
12. Measures of this kind do not go far enough: the unjust and oppressive failings of the system for review of detention have been so extensive that a resentencing process is the least that can be reasonably expected.
13. Those beyond their tariff should be resentenced to a definite and proportional term, taking into account time already served. It would be open to officials to consider

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<sup>2</sup> Crosswaite, S., Freestone, M., and Ramsden, J. (2020) ‘Indefinite detention or supervision for public protection when a life sentence is not available: Pathway outcomes among prisoners in one region’ *Crim Behav Ment Health*. 30:95–104

<sup>3</sup> Shingler, J., Sonnenberg, S. and Needs, A. (2020) ‘“Their life in your hands”: the experiences of prison-based psychologists conducting risk assessments with indeterminate sentenced prisoners in the United Kingdom’ *Psychology, Crime & Law* 2020, Vol. 26, No. 4, 311–326

<sup>4</sup> Edgar, K., Harris, M. and Webster, R. (2020) *No life, no freedom, no future. The experiences of prisoners recalled under the sentence of Imprisonment for Public Protection* Prison Reform Trust

<sup>5</sup> Hadjipavlou, S. (2021) op. cit.

further preventative or ameliorative measures under other legislation, such as for mental health reasons. It is vital that the courts are able to mandate suitable providers to give expert assessment and guaranteed provision for mental health needs, alongside other key resettlement services.

14. Proceedings for maladministration should also be placed on the agenda, given the documented injustices: however, unless Legal Aid is made available to complainants, the prospects for individual remedies to be pursued will be blighted. Hence Parliament should consider a generous scheme of reparation which relieves individual and family distress.

### **Term of Reference 3. Options and implications of backdating the change to IPP legislation**

15. Options for backdating the change to IPP legislation should be framed within an understanding of how preventive detention has been fundamentally misapplied in the original legislation and in its history since its incomplete abolition in 2012. As long ago as 2008, the Justice Committee correctly and concisely identified powerful arguments against its continuance.
16. The justification for preventive detention after serving a tariff is distinctly questionable. It suggests that the state is entitled both to exact retribution and to impose a further restriction of liberty based on a prediction of risk. Only if the circumstances of the case are very alarming, amounting to the likely prospect of severe and multiple harms, can such measures be conceivably applied. The Justice Committee recommended the same judicious parsimony.

‘We believe that such preventive detention has to be a rare exception.’<sup>6</sup>

Yet as the Committee acknowledged, the breadth of offence categories swept under consideration by the IPP legislation infringed that essential principle.

17. Assessment of future risk by the criminal court is inherently challenging and can only proceed on a firm basis if there is an adequate and contestable process, drawing on a wide range of witness evidence and supported by experts deploying a set of reliable skills and validated tools. Yet when confronted by questions, the Court of Appeal was unable to conclude that the system of assessment for IPP was satisfactory, with the word ‘labyrinthine’ cropping up.<sup>7</sup> The label of ‘dangerousness’ has proved difficult to apply. In this respect, the ‘either/or’ judgements of the courts have in no way corresponded to the inherently graduated measurement of future risk; indeed, a report by the Inspectorates found evidence that a significant proportion of pre-sentence reports had inflated the risk.<sup>8</sup> Again, the Justice Committee recommended better, more thorough-going assessments.
18. The longer the period of preventive detention and supervision, compared with the tariff, the greater is the ethical responsibility of the state to justify its assessment of

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<sup>6</sup> House of Commons Justice Committee (2008) *Towards Effective Sentencing*. Fifth Report of Session 2007–08

<sup>7</sup> R. v Lang [2005] EWCA Crim 2864.

<sup>8</sup> HM Chief Inspector of Prisons/ HM Chief Inspector of Probation (2008) *The indeterminate sentence for public protection. A thematic review*

risk repeatedly, and to re-examine why particular forms of restriction are necessary: to what extent will forms of restriction other than imprisonment serve to contain the current level of risk?

19. Because the risk assessment is by its nature speculative, the grounds for preventive detention can only be sustained on the basis of regular and thorough reassessment by the state. The concept of regular review is at the heart of Human Rights jurisprudence on preventive detention. Denying proper access to review procedures was a basic ground for the ECHR judgement that IPP cases were forms of arbitrary detention.<sup>9</sup> The state was held to bear a responsibility for assisting the individual to reduce their risk of dangerousness.<sup>10</sup>
20. However, regular access to the process of licence approval has been constrained. The Parole Board is enjoined to take a conservative view of risk before allowing release of IPP prisoners. An onus on the individual to prove that the risks have virtually disappeared lies in contradiction with the paramount obligation on the state, not the individual, to justify its restrictions. In a thematic review HM Inspectorate of Prisons have referred to ‘significant failings in the prison, probation and parole systems’ which have delayed release long beyond the tariff period.<sup>11</sup>
21. The pragmatic argument that, regardless of their justification, long sentences protect the public has also been challenged. In considering the possible justifications of such detention, Professors Ashworth and Zedner cite evidence that longer sentences do not have the desired crime prevention consequences.<sup>12</sup>
22. The continuation of the IPP system constitutes not merely an illogicality, it is positively dangerous to the relationship between the state and the citizens. It implies that a citizen who has been punished must still justify their claim to liberty before the agencies of the state which enjoy a considerable discretion to establish their risk criteria, their procedures and accessibility. It was the failure of the state to fulfil its responsibilities that fatally undermined the rationale of the IPP; if so, why did legislators expect any better outcome for those they decided should remain under its regimen?
23. The pragmatic case for abolition was secured by reference to the potentially exponential rise in prisoners subjected to a failing system acknowledged not to be ‘defensible’, as the Prisons Minister himself put it;<sup>13</sup> less consideration seems to have been given to the fate of existing prisoners who had struggled under the restrictions. The logic of abolition was therefore compromised; the injustice of their treatment prior to abolition<sup>14</sup> was never satisfactorily addressed. Had capital punishment been abolished in the same fashion, would the previously sentenced have been hanged nonetheless?

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<sup>9</sup> James, Wells and Lee v United Kingdom (2013) 56 EHRR 399, [221].

<sup>10</sup> See also United Kingdom Supreme Court (2014) Haney, Kaiyam, Massey and Robinson v. Secretary of State for Justice [2014] UKSC 66 (10 December 2014)

<sup>11</sup> HM Inspectorate of Prisons (2016) *Unintended consequences: Finding a way forward for prisoners serving sentences of imprisonment for public protection. A thematic review*

<sup>12</sup> Ashworth, A. and Zedner, L. (2014) *Preventive Justice* Oxford: Oxford University Press

<sup>13</sup> House of Commons. (2010). *Prison Places*. 15th June 2010. Volume 511

<sup>14</sup> Jacobson, J. and Hough, M. (2010) *Unjust Deserts: imprisonment for public protection* London: Prison Reform Trust

24. Options for change must therefore bear down strongly on the failure of legislators to relieve the plight of the unjustly treated and should accord them better opportunities to attain a liberty which for years has been denied to them.
25. The state's accumulation of power over the fate of those in preventive detention should be matched by extensive oversight. The failure of legislators hitherto to exercise responsible supervision over the state's administration of IPP is one of the signal constitutional debacles of this past decade. The Justice Committee now has the opportunity to begin to right this wrong.
26. Most importantly, a high-level review of all preventive detention legislation should put forward consistent principles, compatible with Human Rights, capable of shaping any particular legislation. There should be a clear onus on the state to maintain open, contestable and continuous reviews of its case for detention. Any pretence that a single judgement at one point in time could legitimately impose years of preventive detention must be cast out. In a memorable phrase, Lord Brown of Heywood has urged eradicating the 'stain' of IPP. A visible stain will remain on the legislature if it ignores the lessons of IPP.

#### **Term of Reference 4. Experiences in prison and challenges to prisoners' mental health**

27. In formulating its excellent recent report, the Justice Committee heard evidence from authoritative sources indicating the high prevalence of unmet mental health and neurodiversity needs among the prison population as a whole, and among the IPP population in particular.
28. Studies prior to abolition concurred in demonstrating substantial rates of poor mental health, both at the time of the offence and in prison. A thematic review by HM Chief Inspectors of Prison and Probation identified disproportionate mental health problems at the time of the offence and subsequently, compared with the whole population (excluding lifers and IPP). It was found that 37 per cent of IPPs and lifers had a raised risk of self-harm and suicidal behaviour, compared with 23 per cent of the general prison population.<sup>15</sup> Mental health needs were clearly identifiable among most of the women prisoners.
29. The Sainsbury Centre for Mental Health revealed the damaging impacts of sentence indeterminacy on IPP prisoners' mental health.<sup>16</sup> In addition to their concerns about a release date, they were anxious that engagement with mental health services would hinder access to the courses necessary to qualify them for an assessment of reduced risk:

‘More than half of IPP prisoners had an emotional wellbeing criminogenic need, compared to four in ten lifers, and three in ten of the general prison population group’.<sup>17</sup>

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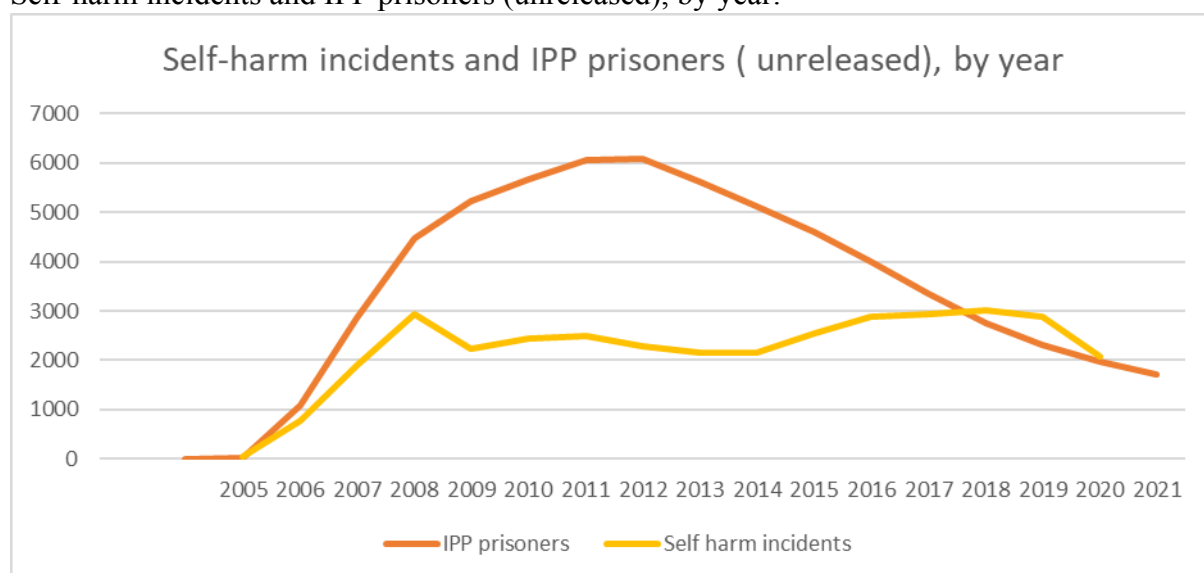
<sup>15</sup> HM Chief Inspector of Prisons/ HM Chief Inspector of Probation (2008) op.cit.; Rutherford, M. (2009) "Imprisonment for public protection: an example of 'reverse diversion'" *The Journal of Forensic Psychiatry & Psychology* Vol. 20, No. 51, April, S46–S55

<sup>16</sup> Sainsbury Centre for Mental Health (2008) *In the dark. The mental health implications of Imprisonment for Public Protection*

<sup>17</sup> Sainsbury Centre for Mental Health (2008) Op. cit.

A fifth were receiving medication while in prison.

30. Recent evidence has been mounting to show the vulnerability of IPP prisoners to self-harm and suicide. The number of recorded self-harm incidents has remained stubbornly high despite a significant drop in the unreleased population since 2012. There were 1969 unreleased prisoners in 2020, but the number of self-harm incidents stood at 2066. Unfortunately, as UNGRIPP's evidence to the Justice Committee Inquiry on Mental Health in Prison showed, data about self-harm among recalled IPPs are not clearly reported.<sup>18</sup>
31. Self-harm incidents and IPP prisoners (unreleased), by year:



32. According to ONS, male prisoners are 3.7 times more likely to die from suicide than men in the general population.<sup>19</sup> In 2019 the Independent Advisory Panel on Deaths in Custody reported a wide range of concerning evidence about the risks of suicide and self-harm among the IPP population.<sup>20</sup> It cited findings by HM Inspectorate of Prisons about the high rate of depression and suicidal thoughts at induction, among both male and female IPP prisoners, compared with lifers and prisoners on fixed term sentences.<sup>21</sup> Indeed women interviewed about their IPP sentences have described their multiple suicide attempts.<sup>22</sup>
33. The impact of the sentence has been described as ‘exacerbation of learned helplessness and distress associated with imprisonment’.<sup>23</sup> The true level of mental

<sup>18</sup> Mooney, D. and Ellis, S. (2021) *Written Evidence from UNGRIPP*. Justice Committee *Mental health in prison. Fifth Report of Session 2021–22*

<sup>19</sup> Office for National Statistics (2019) *Drug-related deaths and suicide in prison custody in England and Wales: 2008 to 2016*

<sup>20</sup> Independent Advisory Panel on Deaths in Custody (2019) *Indeterminate sentences for public protection (IPPs): preventing self-harm and deaths in custody*

<sup>21</sup> HM Inspectorate of Prisons (2016). *Op. cit.*

<sup>22</sup> Smart, S. (2018) *Too many bends in the tunnel? Women serving Indeterminate Sentences of Imprisonment for Public Protection – what are the barriers to risk reduction, release and resettlement?* Griffins Society Research Paper: 2018/02 Findings

<sup>23</sup> McRae, L. (2013) ‘Rehabilitating antisocial personalities: treatment through self-governance strategies’ *The Journal of Forensic Psychiatry & Psychology*, Vol. 24, No. 1, 48–70

health distress may well be concealed by the fear that disclosure could lead to an adverse risk assessment. In research interviews, it was reported that a mental health condition could be regarded as a risk factor affecting progress towards release:

‘They said the anti-depressants I was on were too serious for me to be in open conditions.’<sup>24</sup>

34. Prison Reform Trust research indicates a deep vein of fatalism among recalled prisoners which reflects the discouraging and disempowering effects of their experience. By the same token, families of IPP prisoners suffer ‘severe strain’ upon their mental health.<sup>25</sup>
35. Despite ample evidence of problems, there is a striking gap in robust longitudinal research on the mental health of IPP prisoners, which means that greater public resources should be invested in assessment of their responses to the uncertainties and obstacles they currently confront.

**17 November 2021**

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<sup>24</sup> Edgar.K., Harris, M. and Webster, R. (2020) *No life, no freedom, no future. The experiences of prisoners recalled under the sentence of Imprisonment for Public Protection* Prison Reform Trust

<sup>25</sup> Straub, C. and Annison, H. (2020) ‘The mental health impact of parole on families of indeterminate-sentenced prisoners in England and Wales’ *Crim Behav Ment Health.*;30:341–349.