

Written evidence from APPEAL

About APPEAL's Women's Justice Initiative

1. APPEAL is a non-profit law practice committed to fighting miscarriages of justice and demanding reform. We provide investigation and legal advocacy for victims of unsafe convictions and unfair sentences who cannot afford to pay for a lawyer themselves. We use individual cases as leverage for system-wide criminal justice reform by educating the media, parliament, criminal justice policy makers, the legal profession and the public about how and why miscarriages of justice occur and what needs to change to stop them.
2. APPEAL's Women's Justice Initiative (WJI) uses strategic litigation to appeal sentences and convictions for women experiencing severe disadvantage in the criminal justice system; women who are victims of domestic abuse, whose mental health has been ill considered, and who are given damaging short sentences. We empower women to become advocates for reform and use casework to campaign for changes to the law.
3. The Women's Justice Initiative represents:
 - a. Women imprisoned for minor, non-violent offences when non-custodial options might have been more appropriate
 - b. Women sent to prison in cases where mental health or learning disabilities were not adequately considered in court
 - c. Women who are victims of domestic abuse/coercive control/exploitation, where this was relevant to the offence but not adequately explored at trial
 - d. Innocent women prisoners, especially those whose 'crime' was in fact accidental or the result of natural causes.
4. One area of particular interest to APPEAL's Women's Justice Initiative is exploring appeals of IPP sentences. It should be noted that APPEAL's experience with IPP sentenced prisoners only relates to female prisoners, but all of the recommendations suggested here are applicable to both male and female IPP sentenced prisoners.

Summary of APPEAL's consultation response

5. This consultation response is split into three parts, each addressing a different term of reference;

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- a. Firstly, we examine the various **options available to reduce the size of the IPP prison population**. Looking at the existing processes through which an IPP sentenced prisoner can be released, namely via the Parole Board or the Court of Appeal through a successful sentencing appeal, we conclude that these measures have proven to be ineffective in meaningfully reducing the number of IPP sentenced prisoners. Thus, we recommend that Parliament legislate for the retrospective abolition of the IPP sentence and the re-sentencing of all remaining IPP sentenced individuals, both in and out of prison.
- b. Secondly, we analyse the **current barriers preventing release and the measures needed to overcome those barriers**. As various academic and practical studies have shown, IPP prisoners face particular issues of institutionalisation and mental health problems, exacerbating feelings of hopelessness and unwillingness to engage in the limited programmes available to secure their release by the Parole Board. We recommend increased access to tailored mental health support in prison and increased use of ROTLs to counteract institutionalisation and to put IPP sentenced prisoners in a better position to secure release pending legislative change by Parliament.
- c. Finally, we look at the **experience of people on IPP sentences in prison and the additional mental health challenges they face**. We put forward as a case study the experience of one of APPEAL's clients, who speaks to the additional difficulties she has faced as an IPP prisoner who has spent nearly 13 years over her tariff in prison.

What options are available to reduce the size of the IPP prison population? What are the advantages and disadvantages of the different options? (Question 1)

6. Currently, there are two main ways in which the IPP prison population could be reduced through existing mechanisms. As legislated for at its inception, the Parole Board is the main way in which IPP sentenced prisoners can be released from prison. For a limited few, there is also the possibility of appealing the IPP sentence in the Court of Appeal, arguing it is manifestly excessive or wrong in principle, and asking the Court to substitute a determinate sentence. These processes, however, are not capable of meaningfully reducing the population of IPP sentenced prisoners. Despite the abolition of the sentence in 2012, over 20% of IPP sentenced prisoners have never been released.¹ A more widely available, IPP-specific approach needs to

¹ Prison Reform Trust, *No life, no freedom, no future: The experiences of prisoners recalled under the sentence of Imprisonment for Public Protection* Dr Kimmet Edgar, Dr Mia Harris and Russell Webster (December 2020). Figures obtained from Ministry of Justice. (2020). Offender management statistics bulletin, England and Wales. Quarterly: April to June 2020. Prison population: 30 September 2020.

be implemented to allow all IPP sentenced prisoners to replace their indeterminate sentence with a determinate one.

Parole Process

7. The main benefit of using the current parole process to reduce the IPP prisoner population is that it is a procedure that is already in place and one with which many prisoners are familiar. However, research has shown that the process can be particularly difficult and stressful for IPP sentenced prisoners and that, due to high rates of recall, it has not proven effective in a long-term reduction of IPP sentenced prisoners.
8. A recent report from the Prison Reform Trust (“PRT”)² has demonstrated that while nearly half of the 8,711 IPP sentenced prisoners were released between 2015 and 30 September 2019, 42% of those were subsequently recalled. Importantly, many of those recalled were recalled more than once, which has led to the IPP sentenced prisoner population almost tripling over a five-year period. The reasons for this are explored in depth in the PRT report but common reasons for recall include minor noncompliance with licence conditions and lack of support for mental health issues on release. As an IPP sentenced prisoner’s licence remains in place for a minimum of ten years after release, there is long opportunity for recall, increasing the incarcerated population. The ‘yo-yo’ effect of being released and recalled is not only damaging to prisoners’ mental health and efforts to regain some level stability in life but is also an ineffective way of managing the release of a group of particularly vulnerable prisoners.
9. There are also a number of practical barriers to using the parole process which IPP prisoners have routinely reported as stymying their release. These will be discussed further in the following section of this report.
10. In summary, retaining the parole process as the status quo for reducing the IPP prisoner population will not provide effective and long-lasting results. The IPP sentence is one which has repeatedly been criticised by legal practitioners,³ the charity sector⁴ and politicians⁵ and it calls for a tailored solution, which the parole process cannot provide.

London: Ministry of Justice.

² *ibid*

³ See for example, Philip Rule, ‘Court of Appeal turns its back on IPP prisoners stuck in the system’ (<https://www.thejusticegap.com/court-appeal-turns-back-ipp-prisoners-stuck-system/>) accessed 19 October 2021

⁴ See for example, Prison Reform Trust, *Imprisonment for Public Protection*, (<http://www.prisonreformtrust.org.uk/WhatWeDo/Projectsresearch/IPPsentences>) accessed 19 October 2021

⁵ For example, Lord Charlie Falconer (<https://www.parliament.co.uk/lord/lord-falconer-of-thoroton/debate/Lords/2021-09-14/debates/4D726E25-3924-4BB5-B399->

Sentencing Appeals

11. Each individual convicted at the Crown Court has 28 days from their sentence to appeal to the Court of Appeal (Criminal Division).⁶ In order to do so, an applicant must show that their sentence is manifestly excessive or wrong in principle. If the Court of Appeal agrees that the sentence has been unlawfully applied, they may replace the IPP with a more appropriate penalty, such as a determinate sentence or a hospital order. However, even post the abolition of the IPP sentence, the Court of Appeal has shown strong reluctance to ‘interfere’, expressing that it is an area for Parliamentary intervention.
12. In the case of *R v Roberts and others* [2016] EWCA Crim 71, 13 IPP sentenced applicants had their appeals rejected. The Court explained that the sentences were within the bounds of the law at the time they were imposed and that it was up to Parliament to remedy the problem:

“It was Parliament which legislated to establish a regime of sentences of IPP in terms which the courts have faithfully and properly applied. It must, in our democracy and in accordance with the rule of law, be for Parliament to provide a correction for the outcome if it so wishes. Such a correction will in the circumstances not in any way interfere with the fundamental constitutional principle that the independent decision of the court must be respected, because the sentences were premised on the condition that it would be for the Parole Board to determine the terms of release”⁷

13. As the Court has indicated that it is not an area where the common law has taken a wrong turn, and thus within their jurisdiction, it is not for the Court to correct. The injustice of having 1,722 individuals still living with a sentence which has been subject to “universal criticism” as noted by the European Court of Human Rights,⁸ and which was abolished in 2012 due to that criticism, falls squarely within Parliament’s remit to rectify.
14. Further, research has shown that the number of appeals against sentence has dropped dramatically in recent years, and that there are many barriers to

[4C839D773815/PoliceCrimeSentencingAndCourtsBill](https://www.yorkshirepost.co.uk/news/mps-calls-urgent-review-ipp-cases-yorkshire-prisons-1769183)), ‘MPs calls for urgent review of IPP cases in Yorkshire prisons’ (Yorkshire Post 18 September 2017) <https://www.yorkshirepost.co.uk/news/mps-calls-urgent-review-ipp-cases-yorkshire-prisons-1769183> (accessed 22 October 2021)

⁶ If an individual wishes to appeal after this period time, as would be the case with all IPP sentenced prisoners applying to the Court of Appeal now, they would have to apply for an extension of time for leave to appeal, only granted at the Court of Appeal’s discretion.

⁷ *R v Roberts and others* [2016] EWCA Crim 71 [47]

⁸ *James, Wells and Lee v UK* (Applications nos. 25119/09, 57715/09 and 57877/09) European Court of Human Rights 18 September 2012 [218]

accessing the Court of Appeal.⁹ This means the appellate system provides an increasingly vanishing chance of rectifying the injustice of an IPP.

Re-sentencing through Statutory Intervention

15. The most just and effective way to reduce the size of the IPP prison population is the retrospective application of the abolition of the sentence. This would involve legislating for a unique judicial process whereby individuals can apply to be re-sentenced. This approach has been suggested by many campaigning organisations and individuals,¹⁰ and would be the fairest way to rectify the injustice and inequities experienced by those living with a sentence now outlawed.¹¹
16. Such a process would not be the first of its kind. Following the case of *Anderson v Secretary of State* [2003] 1 AC 837 which declared unlawful the power of the Secretary of State to sentence an individual to life, the Government introduced a new procedure via Schedule 22 of the Criminal Justice Act 2003 which allowed for the re-sentencing of those sentenced under the old system. Though there were fewer individuals who may have been eligible to apply under that scheme¹² than there would be under an IPP re-sentencing scheme, the Schedule 22 process acts as a blueprint for how a comprehensive review of IPP sentences could take place.
17. The opportunity to apply under a new sentence review scheme should be open to all IPP sentenced prisoners. In order to allow individuals to put their best case forward in such a process, it is essential that funding is provided for legal assistance for all applicants under such a scheme. Other legislative measures have been proposed such as sunset clauses,¹³ reducing licence lengths¹⁴ and changing the tests for release and recall.¹⁵ These are measures that can be put in place in the interim but in order to end the injustice of the IPP sentence, a route for re-sentencing must be instituted without delay.

⁹ See Naima Sakande, *Righting Wrongs: What are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)?* (The Griffins Society, 2020), at Chapter 5 (https://www.thegriffinsociety.org/system/files/papers/fullreport/griffins_research_paper_2019-02_final.pdf)

¹⁰ Sarah Smart, *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?* (The Griffins Society, 2018) 61; PRT, *Too many bends in the tunnel* (at n XXX) 62.

¹¹ Indeed, an interviewee in Smart's research astutely noted the injustice of a non-retroactive abolition of the sentence: "When they stopped giving the death penalty, they didn't then kill all the people that were awaiting death." [4.4.4]

¹² 225 according to http://news.bbc.co.uk/1/hi/uk_politics/2509561.stm

¹³ See *Too many bends in the tunnel?* at n 10

¹⁴ See *No life, no freedom no future* at n 1

¹⁵ See *Too many bends in the tunnel?* at n 10

What are the current barriers preventing release? What measures would need to be taken to overcome these barriers, and what would be the operational and resource implications for HMPPS? (Question 2)

18. There exists a mixture of practical and psychological barriers that continue to stymie an individual's ability to effectively engage in the parole process and secure release into the community.

Practical barriers

19. IPP sentenced prisoners continue to report a lack of access to offending behaviour programmes as an obstacle to their release. This is despite the European Court of Human Rights in 2012 finding the sentences of three IPP sentenced prisoners to be “arbitrary and unlawful” where they had not been given access to such programmes required by the Parole Board for their release.¹⁶
20. IPP sentenced prisoners are generally required to complete offending behaviour programmes in order to demonstrate a reduction in risk to the Parole Board. However, recent statistics show that the number of accredited programmes offered in prisons has drastically reduced in the last decade, from 17,099 in 2011/12 to 7,968 in 2015/16.¹⁷ We have heard from an IPP sentenced client that prisoners with a set release date were often prioritised over her for places on these courses, leaving her with little opportunity to show her reduced risk to the Parole Board.
21. The parole process has also been described as particularly confusing to individuals, with dates frequently changing and ill-prepared or unavailable offender managers and professionals.¹⁸ Griffins Fellow Sarah Smart has extensively reported through her research the frustration and confusion felt by IPP sentenced prisoners engaging with the parole process.¹⁹ She has commented on how the general feeling of futility amongst the IPP sentenced prisoners has led to many opting for a paper hearing as they do not see the point of an oral one.

¹⁶ *James, Wells and Lee v UK* (Applications nos. 25119/09, 57715/09 and 57877/09) European Court of Human Rights 18 September 2012 [221]

¹⁷ Letter to Bob Neil Chairman of the Justice Committee from The Right Honourable Elizabeth Truss MP Lord Chancellor & Secretary of State for Justice (2016) ‘Prison estate transformation and IPP sentences’ (<https://www.justiceinspectorates.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2016/11/Unintended-consequences-Web-2016.pdf>) as cited in HM Inspectorate of Prisons, *Unintended consequences: Finding a way forward for prisoners serving sentences of imprisonment for public protection* (2016) [5.33]

¹⁸ Padfield N., (November 2017) *Parole Board Oral Hearings 2016 – Exploring the Barriers to Release - Avoiding or managing risks? Report of a Pilot Study, Legal Studies Research Papers Series*, University of Cambridge as cited in *Too many bends in the tunnel?* At n 9

¹⁹ See *Too many bends in the tunnel?* At n 9 41

Internal barriers

22. IPP sentenced prisoners' unique situation has also led to the cohort facing particularly severe mental health problems. A group that is disproportionately likely to have pre-existing mental health problems,²⁰ the indeterminate nature of their sentence has frequently been reported to lead to heightened anxiety, depression, feelings of hopelessness and self-harm.²¹ In 2016, PRT reported that incidents of self-harm amongst IPP sentenced prisoners were far higher than those with a determinate sentence and more than twice the rate of those serving a life sentence.²² With such a vulnerable population and with Mental Health In-Reach teams often not able to deliver specialised care,²³ engaging in a complex process such as parole or any of the courses needed to secure release is extremely difficult.
23. Smart has also reviewed the serious issue of institutionalisation faced by those on indeterminate sentences and how it can lead to IPP sentenced prisoners both longing for and fearing release.²⁴ With such high numbers of IPP sentenced prisoners spending years over their tariff in prison,²⁵ many feel like they may be unable to cope with life outside. The use of open condition prisons for IPP sentenced prisoners, while perhaps intended to combat institutionalisation, can feel more like a 'test' for IPP sentenced prisoners; one that adds more time over tariff and does not adequately reflect what life on the outside would be like.²⁶

Overcoming barriers

24. As outlined in response to the first question, APPEAL takes the position that the only just and effective way forward is the retrospective abolition of the IPP sentence. In the interim, the Parole Board needs to be particularly mindful of the practical and psychological barriers facing IPP sentenced prisoners. They must examine an individual's prison record in greater depth, looking beyond the number of offending behaviour courses they have taken and thinking about the reasons why the prisoner may not have been able to engage more effectively with the process.

²⁰ Sainsbury Centre for Mental health, *In the dark – the mental health implications of Imprisonment for Public Protection* (2008) 39.

²¹ Independent Advisory Panel on Deaths in Custody briefing paper, *Indeterminate sentences for public protection (IPPs): preventing self-harm and deaths in custody* (June 2019)

²² 'Rising self-harm rates show growing despair amongst IPP prisoners still stuck behind bars' (Prison Reform Trust) <http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/335> accessed 20 October 2021

²³ See *Too many bends in the tunnel?* At n 10 50

²⁴ See *Too many bends in the tunnel?* At n 10 53

²⁵ For example, in a 2020 study by PRT involving 31 IPP sentenced prisoners, the average time spent over tariff was four years, 10 months (*No life, no freedom no future* at n 1). In Smart's study in 2019, all women interviewed had served between twice and thirteen times their original tariff (*Too many bends in the tunnel?* At n 10).

²⁶ *Too many bends in the tunnel?* At n 10 54

25. It is also crucial that IPP sentenced prisoners are given equal access to the specialised courses required to show reduced risk to the Parole Board. Comprehensive release plans, with extensive input from both the prisoner and offender managers, are essential to helping the prisoner prepare for life in the community and to understand where they can go for support if struggling on licence.
26. Providing tailored mental health support for IPP prisoners to tackle both pre-existing issues and institutionalisation is essential. Greater use of Release on Temporary Licence (ROTL) is frequently recommended as a practical way to re-integrate prisoners into the community, provide purpose and hope to individuals and to demonstrate reduced risk to the Parole Board.²⁷

The above measures would require increased resources to be channelled to specialised services and tailored for IPP prisoners. However, these must not be implemented as a smokescreen to obscure what must remain the primary aim: legislative retroactive abolition of the IPP sentence.

What is the experience of people on IPP sentences in prison? What additional mental health challenges do people serving IPP sentences face because of the nature of their indeterminate sentence? (Question 4)

27. It is crucial for the Committee to listen to and take on board the submissions made directly by individuals serving an IPP sentence. They know better than anyone the mental toll that not having a sentence end date can have on an individual. As mentioned above, IPP sentenced prisoners had higher rates of mental health issues than non-IPP sentenced prisoners, often exacerbated by feelings of anxiety and hopelessness surrounding their sentence and lack of potential end date. Rather than go further into the research on this topic, for which ample further resources have already been referenced, we will use this opportunity to highlight the story of one of our clients, Rachel, and her experiences as an IPP sentenced prisoner.

Case Study: Rachel

Rachel was convicted in 2005, only one month after IPP's introduction, and was given an IPP sentence with a minimum tariff of 2 years. She was released for the first time in 2020, 13 years over tariff. She was out of prison for just one week before she was recalled.

Rachel was in and out of care homes throughout her childhood, suffered extensive abuse from both family and male intimate partners and had a

²⁷ *Too many bends in the tunnel?* At n 10 54

learning disability diagnosis. While she had previous convictions, this was her first time serving a custodial sentence.

Rachel really struggled in custody as an IPP sentenced prisoner. She found the indeterminacy of her sentence particularly hard to deal with:

“It’s horrible not knowing when you’re getting out. You don’t know what’s going on in life – both on the inside and on the outside. You don’t know where you stand as an IPP prisoner in prison and everyone on the outside is getting on with life.”

She has said that she felt her time in prison would have been spent completely differently had she had a set release date. She felt a real sense of pointlessness to her time in prison without having a release date to work towards:

“I would have sorted my shit out at the very beginning if I had a release date. I would have gotten my head down, done my time. It was just crazy every day. I didn’t know if I was coming or going. I just didn’t care. What’s the point?”

Rachel was also required to complete a number of offending behaviour courses in order to demonstrate reduced risk to the Parole Board. Like many IPP sentenced prisoners, however, she struggled to secure a place on the appropriate course:

“We always got pushed aside when we wanted to do courses. We were only allowed to do them at a later date, but others who had a release date were prioritised over us because they needed to do them before their date.”

Rachel was released for the first time in 2020. She was released in the middle of the Coronavirus pandemic and felt completely unprepared and unsupported for life on the outside. She was recalled a week after her release and has described her frustration at being sent back to prison:

“I was fuming. How can they recall you for something so petty? I got no support on release for practical things like budgeting, being shown around the area, shopping. I didn’t feel like I got any mental health support either. It was really overwhelming.”

Rachel returned to prison for almost a year before being re-released in 2021. She now feels she has a much better idea of what life is like on the outside and that she knows where to go for support, but the beginning was tough:

“At the beginning, in some ways I wanted to be recalled again. I just didn’t know what was going on, I wasn’t getting any support. But now I am more screwed on and know where to go to for support”

Rachel is now adapting well to life in the community but the possibility of recall is a constant worry. She wants an end to her indeterminate licence and thinks that IPP sentenced prisoners need more support to prepare them for life on the outside, especially when they are significantly over-tariff as she was:

“ROTLs would help. They can’t expect you to be thrown out at the deep end. You need a proper release plan with practical support and mental health support, particularly around self-harm among IPPs”.

Rachel’s story is only one amongst thousands, many of whom have still not had the opportunity to experience life outside of prison after their IPP offence. They live with their sentence, the fear of coping with life on the outside and threat of recall hanging over their heads. In recognition of the mental anguish and torment these sentences have caused, it is time for the total and retrospective abolition of IPP sentences.

Conclusion

As has been made clear throughout this submission, APPEAL takes the view that the IPP sentence is outdated, inhumane and in need of immediate retrospective abolition. While there are some interim measures that can be put in place to better support IPP sentenced prisoners’ mental health and to counteract institutionalisation, the Government’s priority must be implementing a new statutory scheme to resentence all IPP prisoners, granting them the mercy of hope.

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