Sentencing Academy Submission to the Justice Committee Inquiry into IPP Sentences

The Sentencing Academy is a charitable incorporated organisation, founded in 2019, dedicated to promoting the use of efficient and effective sentencing practices in England and Wales and to improving public understanding of sentencing.

We welcome this inquiry into IPP sentences. We will confine our response to the two areas within your terms of reference that relate directly to sentencing: *What options are available to reduce the size of the IPP prison population? What are the advantages and disadvantages of the different options?* and *What would be the options and implications of backdating the change to IPP legislation?*

Summary

We believe that it is now time for decisive action to remedy the injustices caused by the flawed implementation of the IPP sentencing regime in the Criminal Justice Act 2003. This is an intractable problem that is only being made more difficult by the passage of time. There are a range of available options to reduce the size of the IPP sentence prison population and our response is informed by an appreciation of the importance of managing the risk posed by IPP sentence prisoners as they transition from custody back into the community.

The options to reduce the size of the IPP sentence prison population we consider in this response are:

- A full re-sentencing exercise for all offenders subject to an IPP sentence;
- The automatic release of all IPP sentence prisoners when they have served the statutory maximum sentence for their offence;
- Amendments to release and/or recall arrangements; and
- Relying on greater support for IPP sentence prisoners in custody and upon release.

It must be noted at the outset that this is not an easily resolvable problem and all options that will be effective in reducing the IPP sentence prison population carry some risk to the public.

Parliament has long since acknowledged the legislative mistakes made in 2003 but has thus far acted only to partially remedy it, first by amending the sentencing regime in 2008, and then by abolishing the sentence altogether in 2012. The Sentencing Academy believes that now is the time to re-sentence IPP sentence prisoners. This is the only viable mechanism to ensure that no prisoner will spend the rest of their life in prison, not because of the gravity of their offending, but because of the flawed sentencing framework that was in place at the time of sentencing.

Options to reduce the size of the IPP sentence prison population

1. Conduct a re-sentencing exercise for all offenders still subject to an IPP sentence

The only available option to finally resolve this issue is to instigate a re-sentencing exercise, which would have the effect of backdating the 2008 and 2012 changes to the IPP sentence regime. All offenders subject to an IPP sentence would have their case referred to the High Court where the judge would re-consider the facts of the case, and apply the appropriate sentencing option from the range that Parliament has set out for sentencing judges to use today.[1]

There are, however, concerns around the issue of legal certainty if a life sentence is substituted for an IPP sentence. The practical effect for the prisoner would be negligible but this is a more severe penalty than that imposed by the original sentencing court and, so many years after the imposition of the sentence, an offender should be able to rely on the principle that their sentence will not later be amended to their detriment. For this reason, in any re-sentencing exercise, if the judge considers that a life sentence would today be imposed they should instead leave the IPP sentence in place rather than substitute it for a life sentence. This means that for the most serious offenders, their position will remain unaltered and the primary beneficiaries of the process will be those whose offending was at the less serious end of the spectrum for the imposition of an IPP sentence. An IPP sentence should only be left in place where the judge considers the appropriate sentence today would be life imprisonment.

Although it is likely that most IPP sentence prisoners would today receive a determinate or an extended determinate sentence, there is a cohort of IPP sentence prisoners who, due to the gravity of their offending, would almost certainly today receive a life sentence due to the unavailability of the IPP sentence. It is anticipated that almost all prisoners currently serving an IPP sentence who are re-sentenced to a determinate or extended determinate sentence would have served the requisite custodial period and should therefore be released on licence.

To protect the public, Parliament will be required to legislate to ensure a lengthy licence period for those receiving a determinate sentence or extended determinate sentence to manage the risk as they transition from custody to the community. This should be time-limited to draw to a close the indeterminate nature of the sentence and could be for a fixed period of up to a maximum of 10 years (to replicate the existing minimum licence period for IPP sentence prisoners). This would ensure that an appropriate licence period was in place to manage the risk upon release and, as an additional safeguard for this cohort of released prisoners, Parliament could introduce a more onerous licence period than is currently in place for those offenders today deemed to be dangerous and sentenced to an extended determinate sentence.

A re-sentencing exercise would finally remedy the issue with IPP sentence prisoners and is the only way to ensure that no one spends the rest of their life in prison despite having not been convicted of

[1] There is a precedent for a large-scale re-sentencing exercise conducted in the High Court. Schedule 22 to the Criminal Justice Act 2003 set out a process by which any prisoner serving a mandatory life sentence for murder could apply to the High Court to have a minimum term set to replace any tariff previously set by the Home Secretary. This largely unnoticed and uncontroversial process took place over many years for the purpose of a judge setting a minimum term that would have been the correct duration at the time of the original sentencing – in essence, a backdated sentencing exercise.

an offence of the gravity that would merit a sentence of life imprisonment. There is, however, a risk of further offences being committed by people released from custody only because their IPP sentence has been lifted. A re-sentencing process would involve releasing a mixed cohort of prisoners, most of whom have now spent very many years in prison and have yet to satisfy the Parole Board that they are safe to release. There are currently concerns about the high recall rate of IPP sentence prisoners who have been deemed safe to release by the Parole Board and it is to be assumed that the recall rate for those released without satisfying the Parole Board may be even higher. Some of these may now present a higher risk than when they entered custody as they will have spent a very long time in prison and this may have fractured any existing supportive ties in the community. Therefore, a re-sentencing process must be accompanied by greater support for these prisoners upon release to take into account the level of work required to reintegrate them into society.

2. Releasing IPP sentence prisoners who have served the statutory maximum sentence for their offence

If a full re-sentencing exercise is not desired, there is one category of IPP sentence prisoner for whom special provision might be made. Whilst at the time of its introduction it might have been considered that an IPP sentence was merely adding Parole Board involvement to the release of a determinate sentence prisoner, in reality the IPP sentence converted a determinate sentence into a life sentence.

It is arguable from a policy perspective that as it is now clear that these are, in effect, life sentences, they should not have been available for offences where Parliament has not set the statutory maximum at life imprisonment. The practical effect of introducing the IPP sentence has been a seemingly unintended - and, due to the abolition of the IPP sentence, time-limited - expansion of the availability of life imprisonment for a raft of offences that have a maximum sentence of as little as 10 years' imprisonment. It is likely that most offenders who received an IPP sentence for an offence with a statutory maximum that is not life imprisonment will have served the full statutory maximum for that offence by now (with only a couple of unusual exceptions, the longest statutory maximum for a non-life imprisonment offence is 14 years). It should scarcely need to be said that there is a strong principled argument that someone should not be imprisoned for longer that the statutory maximum sentence, laid down by Parliament, for the offence for which they have been convicted.

The automatic release of these prisoners as they reach the statutory maximum would remove some unreleased IPP sentence prisoners from custody. Either new legislative arrangements would have to be put in place to ensure a licence period for these people after release (for example, a fixed period of up to 10 years), or alternatively they could continue onto the existing IPP licence. Issues arise with both options if the individual is subsequently recalled to prison having already served the statutory maximum so careful consideration would need to be given to how such a reform is crafted. One further practical problem with this approach would be the ongoing injustice for those IPP sentence prisoners who committed relatively low level forms of an offence that has a maximum sentence of life imprisonment (e.g. robbery) who would not benefit from this option. Some of these IPP sentence prisoners will have committed a less serious offence – and accordingly received a shorter minimum term – than some of those released under this approach. It is for this reason that we favour a full re-sentencing process rather than relying on an arbitrary distinction premised on the statutory maximum sentence rather than the gravity of the offending of the particular offender.

3. Amending release and/or recall arrangements

There are two key issues that drive the post-tariff IPP sentence prisoner population: the difficulty of attaining release through the Parole Board and, once released, the apparent ease of being recalled by the Probation Service. However, simply seeking to alter the decision-making of either or both of the Parole Board and Probation Service is fraught with peril. The criminal justice system requires a properly functioning Parole Board and Probation Service as their roles go far beyond merely managing the risk posed by IPP sentence prisoners. Any requirement for a relaxation of approach by the Parole Board or the Probation Service brings a clear risk to these institutions that a serious offence committed by an individual who has benefitted from a more lenient approach will further erode public trust and confidence. Accordingly, we would have concerns about the resolution of this problem being outsourced to the Parole Board and Probation Service. It should also be noted that this would be a less comprehensive solution to the problem than a re-sentencing exercise as however the release and recall arrangements might be amended there may still be a sizable IPP sentence prisoner population who do not derive a benefit from the reforms.

4. Providing greater support for IPP sentence prisoners in custody and upon release

Whilst greater support for IPP sentence prisoners in custody and upon release would be welcome, it should be acknowledged that, in particular, issues with access to courses – and concerns around the effectiveness of the courses – have been known about almost since the inception of the IPP sentence. It is difficult to see why re-emphasising this issue alone will now make a significant difference. Others will be better placed to say whether it is possible that some of these prisoners will never be able to satisfy the Parole Board and will continue to make little progress towards release. If there are, then Parliament will eventually need to decide whether such prisoners should be destined to spend the rest of their lives in prison because they were sentenced for an offence in the window where the legislative framework for the imposition of IPP sentences was (as widely acknowledged) fundamentally flawed.

Overall, promoting greater support for IPP prisoners may be the easiest and most politically palatable option but there must be a question about its feasibility now that many IPP sentence prisoners still in custody have spent more than a decade in prison and are likely to require much greater work around reintegration than they would have done at the time of sentencing.

Concluding remarks

Ultimately this is an issue of Parliament's making and therefore the onus should be on Parliament to resolve it. These sentences were lawfully imposed by sentencing judges following, as they were obliged to do so, the legislation Parliament passed in 2003. A re-sentencing exercise brings with it the risk that someone who would otherwise still be in custody serving an IPP sentence is released into the community and commits a further offence. However, by not re-sentencing those who received an IPP sentence, it is almost certain that some people will spend the rest of their lives in

prison despite having never committed a particularly serious offence. Justice demands that this outcome is averted.

Under the current sentencing framework we accept that an offender who is deemed to pose a risk to the public but is convicted of an offence that does not merit a sentence of life imprisonment must eventually be released back into the community under the terms of their extended determinate sentence and the licence period is designed to manage that transition. The only difference between most IPP sentence prisoners and those who today receive an extended determinate sentence is the sentencing framework that applied at the date of sentencing. It is time to bring to an end this capricious injustice whereby someone's entire future is determined not by the gravity of their offending but by their date of conviction.

We conclude by making an appeal for the right lessons to be learned from the policy and legislative failure of the initial implementation of the IPP sentence. All too often, sentencing reform comes about in a piecemeal manner subsumed in a larger piece of legislation (as is currently the case with the Police, Crime, Sentencing and Courts Bill). This can mean that the individual provisions receive insufficient scrutiny and the complexity of the potential issues that the provisions may give rise to are not fully considered. The problems caused by this become very difficult to later rectify. A greater willingness by the Ministry of Justice and Parliament to engage with outside bodies *during* the policy and legislative making process may make the implications of proposed sentencing reform clear before rather than, as has been the case with the IPP sentence, after, it is too late.