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As the Committee is aware, the statutory regime for sentences of Imprisonment for Public Protection (IPP) went through two main iterations. As originally enacted in Chapter 5 of the Criminal Justice Act ("CJA") 2003, for certain "serious" offences[1] committed after 4 April 2005, the imposition of a Life Sentence or an IPP was mandatory if an offender was "dangerous", that is, if he was found to pose a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.[2] There was an assumption that the offender was dangerous[3] if the following applied:

(i) The defendant was aged over 18; and

(ii) Had a previous conviction for a "specified" offence; [4]

The combination of an assumption of dangerousness and the mandatory nature of the indeterminate sentence that followed (an IPP having to be imposed if a Life Sentence was not imposed) meant that sentencing judges had very little if any discretion over the imposition of indeterminate sentences. This problem was exacerbated by the fact that the list of "specified" offences was extremely broad.[5]

Specified violent offences included a number of offences that can be described as "low-level" offences triable either in the Magistrates' Court or the Crown Court. Examples are Assault with intent to resist arrest[6], assault occasioning actual bodily harm ("ABH")[7], and affray[8].

The combination of the above factors meant that offenders qualified for an IPP sentence having committed crimes which would have attracted determinate sentences measured in weeks or months as well as years.

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[1] Defined by s. 224(2) CJA 2003 as specified offences punishable by either imprisonment for life, or imprisonment for a determinate period of ten years or more.
[2] Section 225 CJA 2003.
[3] Section 229(3) CJA 2003.
[4] By virtue of section 224(1) CJA 2003 a "specified offence" was a specified violent or specified sexual offence. Specified violent and sexual offences were set out in Schedule 15 to the CJA 2003.
[5] See Part 1 of Schedule 15 to the CJA 2003 Criminal Justice Act 2003 (legislation.gov.uk)
[6] Contrary to s. 38 of the Offences Against the Person Act 1861. This carries a maximum of two years' imprisonment.
[7] Contrary to s. 47 of the Offences Against the Person Act 1861. This carries a maximum of five years' imprisonment.
[8] Contrary to s. 1 of the Public Order Act 1986. This carries a maximum term of three years' imprisonment.

The restrictive nature of the statutory regime as originally enacted resulted in very many indeterminate sentences being imposed. As a result, changes were introduced to the legislation in 2008 by the Criminal Justice and Immigration Act 2008. Those changes came into force on 14 July 2008 but applied only to those sentenced on or after that date (who had committed offences after 4 April 2005). The key changes introduced were that (i) there was no longer an assumption of dangerousness, (ii) the sentence of IPP was only available if either, at the time the offence was committed the defendant had a previous conviction for an offence specified in Schedule 15A[9] or, if the notional minimum term was two years[10] and (iii) even if an offender were found dangerous, no mandatory sentence followed. It was open to the sentencing judge to impose IPP, an extended sentence[11] or in fact, a determinate sentence[12] .

In both iterations, the sentencing judge would have to identify a minimum term. The minimum term was usually half of the appropriate determinate term. After expiry of the minimum term the offender would be eligible for consideration for release by the Parole Board.

Section 123 of the Legal Aid, Sentencing and Punishment of Offenders Act ("LASPO") 2012 abolished IPP sentences from 3 December 2012[13] for those ***convicted*** after that date[14]. However, the abolition was not of retrospective effect – the sentence remained for those already sentenced to IPPs.

The Parole Process

[9] s. 225 (3A) CJA 2003. Schedule 15A differed from Schedule 15 in that it was more limited and confined to more serious offences.
[10] s. 225(3B) CJA 2003.
[11] Which under the provisions as originally enacted had only been available to those over 18 if the index offence was specified but not serious and to those aged under 18.
[12] Guidance as to how to approach the choice of sentences was set out in Att-Gen's Reference (No. 55 of 2008) (R v C) [2009] 2 Cr App R (S).
[13] IPPs were replaced by a new life sentence the imposition of which was obligatory (unless unjust) following conviction for a second time of one of a defined group of violent or sexual offences where both previous and current offences have been met by or would call for, determinate sentences of 10 years or more: see Schedule 15B of the 2003 Act as inserted by Schedule 18 of LASPO. There is also a new form of extended sentence: see s. 226A of the 2003 Act inserted by s 124 of LASPO.
[14] Therefore, if the offence was committed before 3 December 2012 but the sentence took place after the 3 December 2012, the sentencing regime in force at the date of the conviction applied and the IPP sentence remained available – ***R v Saunders (Red)*** **[2013] EWCA Crim 1027**.

A prisoner subject to IPP was only entitled to release from an IPP sentence if the Parole Board was satisfied that his detention was no longer necessary for the protection of the public and directed the Secretary of State to release him on licence[15]. The Parole process is the same irrespective of whether an offender was sentenced under the IPP regime as originally enacted or under the amended provisions. Once the offender has served the minimum term his case is put forward to the Parole Board. The Parole Board can only direct the release of a prisoner if it is of the view that "it is no longer necessary for the protection of the public that the prisoner should be confined."[16]

The inability of the Prison Estate to cope with the influx of indeterminate sentence prisoners is well-documented. Amongst other problems, insufficient rehabilitative courses were provided for those with short tariffs and there were insufficient places at lifer prisons. In ***Secretary of State for Justice v James***[17] Lord Hope of Craighead described the SSJ as having, "failed deplorably in the public law duty that he must be taken to have accepted when he persuaded Parliament to introduce indeterminate sentences for public protection ("IPPs") by section 225 of the Criminal Justice Act 2003. He failed to provide the systems and resources that prisoners serving those sentences needed to demonstrate to the Parole Board by the time of the expiry of their tariff periods, or reasonably soon thereafter, that it was no longer necessary for the protection of the public that they should remain in detention."

In ***James v United Kingdom*** **[2012] 9 WLUK 278** the European Court of Human Rights held that a prisoner's continued detention beyond the expiry of the minimum term of his sentence of Imprisonment for Public Protection without access to rehabilitative courses violated article 5(1) of the European Convention on Human Rights 1950.

Despite numerous specific commitments by the governments of the day to provide these resources, this egregious failure continues. Other agencies are better placed to give evidence on the failure to provide sufficient resources within Prison to ensure indeterminate sentence prisoners are supported and progressed through their sentences but experience of the Parole process shows that many indeterminate prisoners would not have access to Rehabilitative

[15] s. 28(5) of the Crime (Sentences) Act 1997.
[16] s. 28(6) of the Crime (Sentences) Act 1997.
[17] [2009] UKHL 22 @ para 3 of the judgment.

courses before their minimum term had expired and many would not see their Offender Managers until shortly before their Parole hearing.

Appellate procedure

The authors' experience lies in both representing defendants who have been sentenced to IPPs at first instance and representing defendants upon appeal against IPP sentences to the Court of Appeal, Criminal Division ("CACD"). There have been a number of key decisions by the CACD in respect of both iterations of the IPP regime.[18]

What is clear from consideration of the numerous appeal decisions there have been in respect of IPPs is that the Court of Appeal feel constrained (i) to give the sentencing judge a wide arena of discretion; (ii) focus only on the decision to impose the IPP sentence rather than take into account what has happened subsequently and in particular the length of time beyond the often very short minimum term that the defendant has served. An example of the Court of Appeal's limited approach to IPP sentences is ***R v Roberts*** [19] heard in 2016. There the Court, presided over by the then Lord Chief Justice, Lord Thomas of Cwmgiedd, heard 13 applications for an extension of time to apply for leave to appeal against sentences of imprisonment or detention for public protection which had been imposed between 2005 and 2008. In 12 of the 13 cases the sentences were imposed under the regime as originally enacted. In each case, the minimum term to be served before consideration for release by the Parole Board had expired. It was submitted on the applicants' behalf that because of the position the applicants found themselves in – remaining in prison many years after their minimum term had expired - the CACD should look again at their sentences even if at the time they were imposed, no-one would have considered that they were wrong in principle or manifestly excessive. It was argued on the applicants' behalf that the CACD had the power to pass sentences that, in the light of what had happened over the intervening years, now would be proper sentences; the court should reconsider the assessments made by sentencing judges in the light of ***R v Lang***. It was submitted that a time could be, and had been, reached when the length of the imprisonment was so excessive and disproportionate compared to the

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[18] The earliest Guideline case was ***R v Lang*** **[2006] 2 Cr App R (S) 3.** Other key decisions (but by no means an exhaustive list) are: ***R v Johnson*** **[2007] 1 Cr App R (S) 112;** ***R v Islam*** **[2007] 1 Cr App R (S) 43;** ***R v Terrell*** **[2008] 2 Cr App R (S) 49;** ***Att-Gen's Reference (No. 55 of 2008) (R v C)*** **[2009] 2 Cr App R (s) 22;** ***R v Kehoe [2009]*** **1 Cr App R (S) 9;** ***R v JW [2009*****] 2 Cr App R (S) 94**); ***R v Pedley*** **[2010] 1 Cr App R (S) 24.**

[19] **[2016] 2 Cr App R (S) 14**

index criminal offence that it could amount to inhuman treatment under art. 3 or arbitrary detention under article 5 of the ECHR.

The CACD refused the appeals and refused these submissions. It held that it was a Court of review and there was no basis for departing from that principle. The court could only consider the material before the sentencing court and any further material admitted before it under well established principles and consider whether, on the basis of that information, the sentence was wrong in principle or manifestly excessive. The Court could not reconsider the sentence in light of the fact that the applicant had not been released following the expiry of the tariff.[20] If the sentence had been passed in accordance with the statutory criteria as interpreted in the case law of the CACD the CACD would not interfere.[21]

It is of note that in the CACD's view[22], the available means to rectify any injustice in the way in which the operation of these sentences had in fact eventuated was either by review by the Parole Board or, if a change was required for release, for the Executive and Parliament under the powers granted under s. 128 of LASPO 2012.[23] In the CACD's view the likely solutions were either (i) For significant resources to be provided to enable those detained to meet the current test for release which the Parole Board must apply; or (ii) for Parliament[24] to use the power contained in s. 128 of LASPO 2012 to alter the test for release which the Parole Board must apply; or (iii) for those in custody to be re-sentenced on defined principles specially enacted by Parliament.[25]

The Questions

Turning then to some of the questions posed by the terms of reference:

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

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[20] See paragraphs 19 and 20 of the judgment.
[21] See para 23 of the judgment.
[22] See para 21 of the judgment.
[23] s. 128 gives the SSJ a power to set a release test(s) that the Parole Board must apply when considering the release of prisoners serving indeterminate sentences under ss 225 or 226 of the CJA 2003 (IPP prisoners) and extended sentence prisoners.
[24] The CACD's wording, albeit the s128 power is one exercisable by the SSJ.
[25] See para 46 of judgment.

One option would be to re-visit all existing IPP sentences, a power to be enacted by Parliament. It has been repeatedly acknowledged that in both its main iterations the "dangerous offender" regime allowed for IPP sentences to be imposed for low-level offending, and it has also been well-documented that in many cases, the sentence actually served far exceeded the minimum tariff and, in some cases, the maximum term for that offence, either because rehabilitative courses could not be accessed or due to factors pertaining to the offender. The IPP regime has been, it is submitted, comprehensively discredited. How then can it be principled to allow the sentence to continue to apply?

Any such re-visiting would have to be enacted by statute. It may be that there should be a specific body to revisit the sentence imposed, either one especially convened for the task or the CACD itself. Each case would require a fresh assessment: The Court/body could leave the IPPs in force in any case where they thought the person continued to pose a risk to the public, in violent or sexual cases. As against that, there would be quite a number who would no longer satisfy that test (if they ever had) and therefore be entitled to freedom from the order.

Another option is for the test for release to be changed. It can be seen that section 128(1) of LASPO provides that the Secretary of State may by order provide that, following a referral by the Secretary of State of the case of a discretionary release prisoner, the Parole Board (a) must direct the prisoner's release if it is satisfied that conditions specified in the order are met, or (b) must do so unless it is satisfied that conditions specified in the order are met. It is submitted that (b) is to be preferred. The test for dangerousness set out in Chapter 5 of CJA 2003 was that the offender poses a significant risk of causing serious harm to members of the public from future offending. Applying that test, the test for release could be phrased as *the Parole Board must direct the prisoner's release unless it is satisfied that he poses a significant risk of causing serious harm to members of the public* .

It could also be that the Parole Board are directed to make that assessment afresh, so that the starting-point is not the original sentencing Court's assessment but a fresh assessment made by the Parole Board, whilst allowing it to take into account all relevant factors including the facts of the index offence and previous convictions.

Another suggestion, in fact made by the Right Honourable Michael Gove MP, in the Longford Lecture, 2016 was executive clemency: "In terms of pure justice and fairness, there are far too many prisoners, who were sentenced under the IPP - Imprisonment for Public Protection - indeterminate sentence provisions who have served far longer than the gravity of their offence requires and who should be released. *I would recommend using the power of executive clemency for those 500 or so IPP prisoners who have been in jail for far longer than the tariff for their offence and have now – after multiple parole reviews – served even longer than the maximum determinate sentence for that index offence.*"

What are the current barriers preventing release?

One difficulty with the parole regime is that in making its assessment of risk, the Parole Board takes into account all of the prisoner's behaviour whilst in prison. Any disciplinary or behavioural problems, even those that can be described as low-level, seem to result in release being refused. Such behavioural or discipline problems can also manifest themselves after a move to Open conditions (often a prerequisite to release) following a long period in closed conditions. Mental health difficulties, either pre-occurring or occurring as a result of lengthy incarceration, also affect a prisoner's ability to move through the system and show a reduction in risk. Continued detention under the uncertainty of IPP sentences is often counter-productive and creates a cycle of progress and disruption. This has to be broken by a decisive initiative.

As set out above, another barrier is one of resources. Prison and Community Probation officers (Offender Managers and Offender Supervisors) are required to assess the prisoner and provide a resettlement plan. Due to pressures of work these are very often undertaken last minute and do not bear up to the scrutiny of the Parole Board. Another factor is the assessment of the prisoner. Assessments are often (especially since the pandemic) undertaken over video-link and appointments are short.

Assisting release

An option is for the Government to focus new psychological and rehabilitation resources on serving IPP prisoners: dedicated release on temporary licence ("ROTL") provision: even for example to establish a specialist 'half way house' facility such as Warren Hill to prepare prisoners for release. The costs of keeping these prisoner in custody is immense. Resources should be spent now to save costs later and solve the 'greatest stain on the criminal justice system' as Lord Brown called it in the forward to the Prison Reform Trust report of 2020:"'No life, no freedom, no future: The experiences of people recalled whilst serving IPP sentences."

As Michael Gove said in the Longford Lecture, 2016: " *But rehabilitation will only be successful on the scale we need it to be if we either spend far more on our prisons or have significantly fewer offenders in them. ... I'm not opposed to tougher sentencing in some areas - such as stalking or particularly child cruelty - but I am convinced that we cannot provide the effective level of rehabilitation we need for offenders without either increasing expenditure significantly or reducing prisoner numbers overall - and reducing prisoner numbers is not just better for taxpayers - it's better for all of us.*"

Recall

In the year to June 2019, the number of IPP re-calls exceeded those being released.

At present, a prisoner released on licence can be recalled if he breaches any of his licence conditions. Another potential solution to the cycle of release and recall is for the Secretary of State to cancel all re-calls which have been triggered by conduct which did not amount to a criminal offence. One difficulty here is arguably that unless there is a power to re-call for breach of licence conditions there could not be effective licence conditions. However, this could be a one-off starting initiative, indicating that the hurdle for re-call should be higher.

Period of licence

Under s. 31A of the Crime (Sentences) Act 1997, the SSJ has power to terminate the period of IPP licence if directed to do so by the Parole Board.[26] However, this applies only to those prisoners who have already been released on licence and where ten years have passed since their release. An option for the future could be to reduce the period after release after which

[26] s. 31A(2) C(S)A 1997.

the prisoner can apply to have the licence terminated. The length of time could have a correlation with the length of the original minimum tariff.

Another possibility is for there to be a proactive review of the licence terms of all released IPP prisoners so that the onus is not on the prisoners themselves.

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