Unjust Deserts:
imprisonment for public protection

PRISON REFORM TRUST

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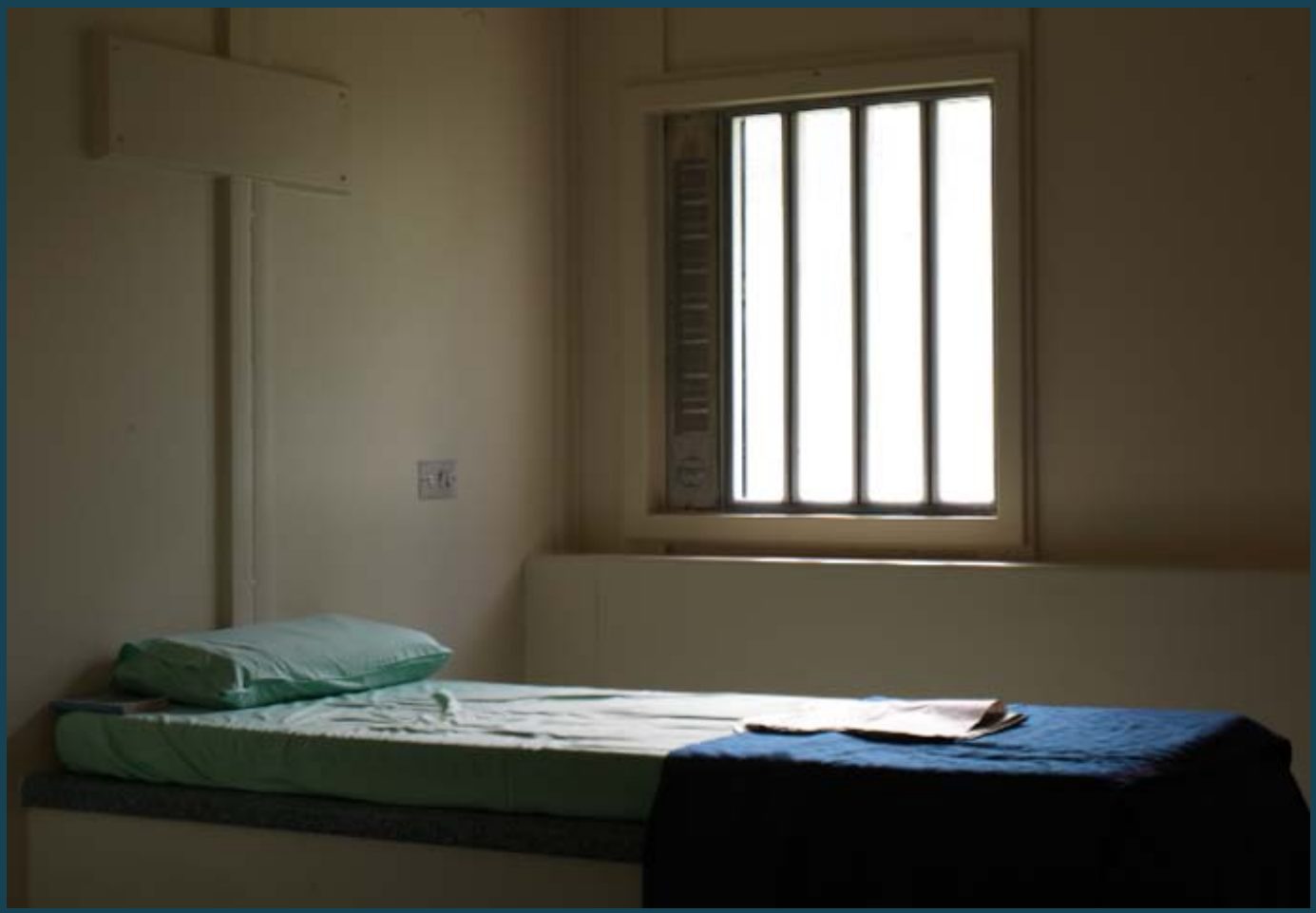

The work of the Prison Reform Trust is aimed at creating a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government, and criminal justice officials.

This report was written by Jessica Jacobson and Mike Hough

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Foreword

Proportionality and fairness are, or should be, cornerstones of the justice system. This aptly titled report *Unjust Deserts* gives a salutary account of the havoc caused by a pre-occupation with risk and the resulting ill-thought through legislation. The indeterminate sentence for public protection (IPP) hastily introduced in the Criminal Justice Act 2003 and then substantially amended by the Criminal Justice and Immigration Act 2008, was, in effect, a declamatory sentence, a legislative statement of toughness on crime.

The established partnership between the Institute for Criminal Policy Research, King's College London and the Prison Reform Trust was well placed, with the support of the Nuffield Foundation, to conduct an independent study of this sentence. Substantial research evidence has been gathered, from Crown Court judges, Parole Board members, prison governors and forensic psychologists, amongst others, with the kind assistance of the Lord Chief Justice, the Chairman of the Parole Board and the President of the Prison Governors' Association.

Material drawn from the Prison Reform Trust's advice and information service brings us to the human consequences of this sentence when we hear of its damaging impact on individual prisoners and their families. The authors chart how its effects were woefully underestimated. Jessica Jacobson and Mike Hough analyse a complicated situation in detail but with great clarity. They give proper recognition to the fact that, in this too widely drawn net, there are some people convicted of very serious crimes some of whom, undoubtedly, pose a continuing risk to public safety. They illustrate too how many others, often those most vulnerable due to mental illness or a learning disability, have been drawn into a situation characterised by uncertainty and injustice.

A prison system in which over 2,500 people are held well beyond tariff loses legitimacy in the eyes of those charged with its management and the public. The authors do not fight shy of the difficulties inherent in striking a balance between fairness and public protection. It is clear from their report that a better balance must be struck. I am sure that this report will make a timely and important contribution to the review of sentencing announced by the Secretary of State for Justice.

Lord Hurd of Westwell

Acknowledgements

The study was mounted as a joint enterprise between the Institute for Criminal Policy Research, King's College London, and the Prison Reform Trust. We worked together both to initiate and develop the study and to disseminate the results, though ICPR took sole responsibility for carrying out the research and writing the report. We are very grateful to the Nuffield Foundation for funding both ICPR's and PRT's work. Without their generosity this study would not have been possible.

A large number of other people were very generous with their time. We are grateful to those who helped to get the study off the ground, and particular thanks are due to Lord Judge, the present Lord Chief Justice, and to his predecessor, Lord Phillips. We should like to thank a number of people for reading and commenting on earlier drafts: Professor Andrew Ashworth, Nicola Padfield, Professor Julian Roberts and Lord Justice Thomas.

We are grateful also to those IPP prisoners and family members who are in contact with the Prison Reform Trust advice and information service, and gave us consent to quote from their letters in this report. We should also like to acknowledge the generosity of the Hadley Trust in funding this service.

Finally we would like to thank Francesca Cooney, Mark Day, Geoff Dobson, Kimmett Edgar, Juliet Lyon, and others at the Prison Reform Trust. The Trust's staff were consistently constructive and supportive, but at the same time never failed to respect our independence as researchers.

Jessica Jacobson
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June 2010

Summary

The indeterminate sentence of imprisonment for public protection (IPP) was created by the Criminal Justice Act 2003 (CJA). The sentence enables the courts to imprison for an indefinite period those convicted of violent and sexual offences who are deemed to be dangerous, but whose offending is not so serious that they qualify for a life sentence. Around 6,000 people have received the sentence since it was implemented in April 2005; about 2,500 of these are currently being held in custody beyond expiry of their minimum term in custody, or tariff.

The IPP sentence

Prior to 2005, the life sentence was the only indeterminate sentence available to judges, used only for the gravest offences. The IPP was a new form of indeterminate sentence. Like a life sentence, an IPP has a minimum term, or tariff, to be served in custody; thereafter release can only be authorised by the Parole Board. It differs substantively from the life sentence only in that it does not necessarily entail a life-long licence period, and is available for a greater number of offences.

The IPP is available as a sentence for a 'dangerous' offender who is convicted of a 'specified' violent or sexual offence that is also 'serious': that is, one of the 96 offences in Schedule 15 of the CJA that has a maximum sentence of at least ten years' imprisonment. The number of cases for which an IPP sentence was mandatory turned out to be much larger than the Home Office had originally envisaged, and the sentence was substantially amended by the Criminal Justice and Immigration Act 2008. Originally, judges were required to pass an IPP sentence when offences met the criteria; the amendments removed the mandatory nature of the sentence. Secondly, the sentence could no longer be passed, with some exceptions, for offences with a tariff of under two years – equivalent to a four-year determinate sentence. As a result of these changes, usage of the sentence by the courts declined, but not to the extent that had been expected by the Ministry of Justice.

Current use of IPP sentences

In total, 6,034 people had received the sentence of IPP by the end of December 2009. From August 2008 to December 2009, an average of around 75 IPP sentences were passed per month. The most recent count of the number of IPP prisoners in custody was 5,828, as at 19 January 2010. Around 2,500 of these had already completed their minimum custodial terms, of whom almost 500 were at least two years past tariff expiry. At the end of 2009, only 94 IPP prisoners had been released, of whom a quarter had been recalled.

Initially a third of IPP prisoners had tariffs of two years (equivalent to a determinate sentence of four years) or less. After the amendments of 2008, 18% had tariffs of two years or less; 24% had tariffs of five years or more.

The net result of the continuing steady usage of the IPP sentence by the courts, combined with the negligible number of IPP prisoners who have been released upon tariff expiry, is that today around one in ten of the sentenced prison population is now serving an IPP. It is clear that the ever-increasing amount (in term of both length and number) of post-tariff detention of IPP prisoners has contributed to the continuing growth of the prison population – and is likely to accelerate the growth over time. For the Prison Service, the burdens imposed by the IPP sentence are not only a matter of the additional numbers in prison, but also the logistical problems associated with the management of large numbers serving indeterminate sentences.

While the implications of the IPP sentence for the Prison Service – and for other agencies within the criminal justice system such as probation and the Parole Board – are considerable, the implications for those who receive the sentence are much greater. The large majority of IPP prisoners would have received determinate sentences, had they been sentenced prior to implementation of the CJA, meaning that they would have known when they would be released. IPP prisoners, on the other hand, can be released after tariff expiry only if they persuade the Parole Board that they no longer represent a serious risk to the public – and very few have successfully made such a case.

There are several reasons for the very low rate of release from IPP sentences – amounting to around 4% of all IPP prisoners who have completed their tariffs. The Parole Board is clearly over-stretched, meaning that there are often lengthy delays for parole hearings. Secondly, Parole Board decision-making tends, for understandable reasons, to be risk averse. Third, offending behaviour programmes, completion of which is viewed by parole panels as essential to readiness for release, are limited in their availability. Fourthly, many of those serving IPP sentences are refused places on programmes on various grounds including limited intellectual capacity or mental illness. A more fundamental problem with offending behaviour programmes is that their scope and effectiveness is limited; their focus on attitudes and thinking patterns arguably fails to acknowledge the breadth and depth of the inter-related problems that tend to underlie offending. The final reason for the low rate of release from IPP sentences lies in the inherent difficulty of demonstrating reduced risk, especially in a custodial setting, once one has been deemed 'dangerous' by the courts.

In other words, the apparent rationality of the IPP sentence – a system to manage and reduce the risks posed by serious offenders – is not translated into practice, and those who receive the sentence find themselves confronted with Kafkaesque obstacles to discovering when they have any prospect of release. The problems of unfairness associated with the IPP sentence are at their most intense for those with tariffs of under two years who were sentenced prior to the amendments to the sentence introduced by the Criminal Justice and Immigration Act 2008. The large majority of these individuals would not have been eligible for the sentence of IPP had they been convicted after the amendments took effect in July 2008. But because the amendments were not applied retroactively, their IPP sentences remain in place and they face the same difficulties as all other IPP prisoners in seeking to persuade the Parole Board that they should be released after tariff expiry. Thus most of these prisoners remain in custody, aware that people who are now being sentenced for offences entirely comparable to their own are receiving, and in due course completing, determinate sentences.

Some of those who have been given IPP sentences were convicted of very serious crimes, and of these, some continue to pose a serious risk to public safety. We do not underestimate the importance of addressing these issues effectively. However, the present situation has been described by the inspectorates of probation and prisons, in their recent joint report on IPP, as 'unsustainable' (CJJI, 2010), and it is evident that it involves considerable unfairness and injustice. Injustice of this sort needs to be remedied as a matter of urgency.

Conclusions and recommendations

The sentence of Imprisonment for Public Protection must count as one of the least carefully planned and implemented pieces of legislation in the history of British sentencing. Projections about levels of use were totally inadequate and, as a consequence, the resources required to implement the sentence were far too limited. Behind these practical problems lie more fundamental questions about the ability to predict the risks posed by those convicted of violent and sexual offences – and to predict reductions in risk. If the ability to predict risk has been overestimated – as we believe – then the basic rationale of the sentence may be open to question.

It is beyond the scope of this report to assess whether there are sufficiently robust predictive skills within the criminal justice system to permit a form of targeted indeterminate imprisonment that is both fair and cost-effective. Our first conclusion is that the Ministry of Justice needs as a matter of urgency to review the social and financial costs and benefits of the IPP sentence, and to examine the available policy options.[1] The main options are:

- To abolish the IPP sentence, and revert to the use of the discretionary life sentence to deal with those who genuinely pose a grave risk to society.
- To retain the IPP sentence but further narrow its criteria, to ensure that it is used less often, and targeted more carefully on those representing a real risk of serious reoffending.
- To leave the current arrangements in place, but locate sufficient resources to enable the Prison Service and Parole Board to operate release from the sentence in an effective, humane and fair way.

Such a review would need to include examination of historic reconviction rates for the population of prisoners with offending profiles that now attract IPP sentences. This could give some indication, at least at an aggregate level, of proportions of those eligible for IPP sentences who represent a serious risk to the public. No such work was done, to our knowledge, when the sentence was at the planning stage.

If the review settled on either of the first two options outlined above, it would need to grapple with a complex set of consequential issues. Should any amendments should be retroactive? If so, what provision is needed for supervision after release from custody of current IPP prisoners who would then be released from custody? If the amendments are not retroactive, what alternative strategies can be adopted to ensure that current IPP prisoners

1.The Joint Inspection by HMI Probation and HMI Prisons (CJJI, 2010) reached a similar conclusion, proposing a review at Ministerial level.

are released at an appropriate point, and properly supervised thereafter? An additional question, which we have not addressed in this report but should also be within the remit of a review of the IPP, is whether the extended sentence for dangerous offenders should be amended, in order to ensure that the courts make the best possible use of it.

A decision to abolish or further restrict the IPP sentence would require strong political leadership, in a context where public expectations about protection from the risk of serious crimes have become increasingly unrealistic. It will always be a challenge to convey to the public that criminal justice agencies cannot provide complete protection against these risks.

A review of indetereminate imprisonment will take time to carry out. Many things can and should be done in the short and middle term to reduce the unfairness and injustice of current practice. Perhaps the most pressing need is to take some remedial action to speed up the release of those sentenced, prior to the amendments to IPP sentences, with very short tariffs for less serious offences. It ought to be possible to give priority in sentence planning to this group, and to ensure that their parole hearings are also given priority. The best solution would be take further amend the 2008 amendments to make them retroactive, and to convert IPP sentences with very short tariffs into determinate sentences.

Many other changes also need to be considered, including:

- Better provision of offending behaviour programmes in prisons, and the provision of programmes for prisoners currently judged unsuitable for them.
- Recognition that programmes alone are unlikely by themselves to reduce risks on a scale which will permit a significantly higher proportion of IPP prisoners to be released, and that the National Offender Management Service needs to take a broader view of the rehabilitation of these prisoners, that takes account of all seven 'pathways' to rehabilitation that it has identified.
- Additional resources for parole hearings, to permit initial hearings around the time of tariff expiry, and more regular review thereafter.
- Finding solutions to shortages of judicial members of parole panels.
- The provision of training and guidance to Parole Board members to offset the tendency to risk-averse decision-making.
- The promotion of better and more realistic public understanding about the risks presented by people convicted of violent and sexual offences, and the importance of fair and proportionate sentencing.

There are also broader lessons for governments. It is clear that ministers and their officials in government departments are very badly placed to make dispassionate assessments of the costs and benefits of their own policy proposals. They will underestimate the former and exaggerate the latter. We therefore welcome the role given to the new Sentencing Council to carry out independent assessments of the impact of any legislative proposals for sentencing reform.

The history of the IPP sentence is one of bad trade-offs between protection of the public and basic fairness. We recognise that the task of achieving a better balance between public protection and fairness poses considerable political challenges; but there can be no doubt that a better balance has to be struck.

1. Introduction

The indeterminate sentence of imprisonment for public protection (IPP) was created by the Criminal Justice Act 2003. The sentence enables the courts to imprison for an indefinite period people convicted of violent and sexual offences who are deemed to be dangerous, but whose offending is not so serious that they qualify for a life sentence. Around 6,000 people have received the sentence since it was implemented in April 2005; almost all of these are still in custody, and about 2,500 of these are already beyond expiry of their minimum term or 'tariff'.

In this report, we will review the implications of the IPP sentence for those serving it and for the courts, the Prison Service and the Parole Board. In so doing, we will highlight what we perceive to be the flaws inherent in the design of the sentence, and the injustices in its implementation. The report describes how the IPP sentence vastly expanded the scope for indeterminate sentencing by the Crown Court, and thereby created a range of very serious problems which the Prison Service and other parts of the criminal justice system are today struggling to contain. The history of the IPP sentence provides an object lesson in how to mismanage sentencing reform.

Aims and methods of the study

This study emerged out of our interest in the shift towards risk-based sentencing in England and Wales. This shift has been seen most dramatically in the provisions of the 2003 Criminal Justice Act (CJA) for the sentencing of dangerous offenders.

Among other 'dangerousness' measures, the CJA created the indeterminate sentence of imprisonment for public protection (IPP). This is a custodial sentence for people who are deemed by the court to be dangerous, and have been convicted of certain violent or sexual offences. Those who receive an IPP are given a minimum term which they must spend in custody. They can thereafter be released only if they have satisfied the Parole Board that they are no longer dangerous, and after release they remain on licence for a minimum of ten years and potentially for the rest of their lives. IPP sentences are very similar to life sentences, which are also indeterminate; other custodial sentences, in contrast, are for fixed periods.

The overarching aim of this study is to examine the concept of dangerousness as it appears in the CJA sentencing provisions, and its implications for the management of people passing through the criminal justice system. More specifically, we are interested in how the IPP sentence has been put into practice, and the many challenges and difficulties encountered in this process. There were three elements to the research:

- We reviewed the available research literature, policy documents and statistics on the IPP sentence.
- We analysed written and phone enquiries from IPP prisoners and their families made to the Prison Reform Trust advice and information service (some extracts from written enquiries are included in the report as illustrative material).
- We interviewed Crown Court judges, criminal and prison lawyers, Parole Board members, prison-based forensic psychologists, prison governors and other senior officials.[2]

The research was complicated by the fact that over its course, the original legislative provisions for the IPP sentence were amended by the Criminal Justice and Immigration Act 2008. The aim of these amendments was to ensure that the sentence of IPP was more narrowly targeted on the most dangerous offenders; however, the basic structure of the sentence remained unchanged (see Chapter 2 for details). Hence although some of our interviews were conducted prior to the IPP amendments, most of the issues addressed at this relatively early stage of the research are still pertinent.

Key issues and structure of the report

This report addresses a range of problems associated with indeterminate sentencing and conceptions of dangerousness. In highlighting these, we do not question the basic rationale underlying the existence of indeterminate sentences: namely, that some people represent such a danger to others that they should remain in custody unless and until they no longer pose a high level of risk to the public. In our view, it is entirely right that public protection has long been seen as an important objective of sentencing. This is an objective that should, in certain circumstances, outweigh other considerations - including the general obligation, which underlies most sentencing policy and practice in this jurisdiction, for the severity of the sentence to reflect or be proportionate to the seriousness of the crime.

However, acceptance of the principle of indeterminate sentencing for public protection necessarily raises difficult questions - both practical and conceptual - about dangerousness. These questions relate to three main themes:

- *The dangerousness threshold and (dis)proportionality:* At what level of dangerousness, or seriousness of past and present offending, should someone be locked up indefinitely, rather than receive a proportionate, determinate sentence? And, just as critically, how 'safe' does a person given an indeterminate sentence need to be if he is to be released from custody?

- *Assessment of dangerousness:* How should dangerousness be identified and assessed a) at the point of sentence, when a person is being considered for indeterminate custody and b) at the point of possible release, after completion of the 'tariff' or minimum period in custody?

- *Management and reduction of dangerousness:* To what extent is it possible to reduce the level of danger posed by someone while he is in prison; and to the extent that this is possible, how can this be done most effectively?

2. Our respondents numbered 26 Crown Court judges (including seven whom we spoke to in two focus groups); 23 lawyers (six of whom responded to questions via email; all the others were interviewed); ten forensic psychologists (including both trainee and fully qualified psychologists based in prisons, and one who had a policy role); eight Parole Board members (two judicial members, two independent members, two psychiatrists, one psychologist and one probation member); and eight prison governors and other senior officials.

The creation of the IPP sentence lowered the dangerousness threshold very significantly: in other words, many more people now qualified as dangerous, and were thus deemed in need of indeterminate imprisonment, than hitherto (even if, as we shall see, the sentence was subsequently amended to shift the dangerousness threshold upwards again, to a degree).[3] And at the same time as **entry into** indeterminate sentencing was vastly expanded, **release from** the new indeterminate sentence was made extremely difficult. A variety of factors underlie the problems with release, including the practical constraints on the work of the Parole Board and interventions in prisons and – most significantly - the inherent difficulty of demonstrating reduced dangerousness, especially in the increasingly risk-averse culture that now permeates decision-making in criminal justice.

The result is that ever-increasing numbers of people are now serving IPP sentences from which they seemingly have little prospect of release, with major consequences for the Prison Service and for justice. It can, of course, be argued that if the creation of the IPP sentence has resulted in many of those convicted of violent and sexual offences being held in custody for much longer than they otherwise would be, this brings benefits in terms of crimes prevented through the incapacitation of these individuals. However, we shall argue that while it is difficult to put a price on improved public safety, the benefits of the IPP sentence are outweighed by the very considerable costs – taking account not only the additional costs borne by the over-stretched Prison Service, but also the costs of injustice.

No one should doubt that injustice carries a social cost. If the decisions of the justice system are seen as capricious, inconsistent or simply unfair, this erodes the legitimacy of the system in the eyes of the public – or at least in particular segments of the public. We shall present evidence that the IPP sentence is experienced by prisoners and their families in precisely these terms. One can only speculate about the long-term costs to the perceived legitimacy of the Prison Service – bearing in mind that stories of injustice can rapidly cascade down through groups of prisoners, their families and the communities from which they come.

Neither the financial costs nor the broader social costs appear to have been foreseen by the legislators who devised the sentence without, it seems, a clear rationale for greatly expanding the scope for indeterminate sentencing. Nor were the issues of assessment and management of dangerousness addressed in a clear or coherent way in the policy framework. Over the course of this report, we will demonstrate these considerable shortcomings in policy development, and the repercussions that have been felt across the criminal justice system and beyond.

The report comprises six chapters, including this introduction. Chapter Two outlines the components of the IPP sentence, as it was originally conceived, and why and how it was subsequently modified. Chapter Three looks at the scale and scope of usage of the IPP sentence and its impact on the Prison Service. Chapters Four and Five then address, respectively, the fundamental problems associated with **entry into** and **release from** the sentence of IPP. Finally, Chapter Six concludes the report by highlighting the key issues to have emerged from the study, and presenting recommendations for resolving the major difficulties associated with the sentence of IPP.

3. Indeterminate imprisonment appears to be used much more widely in England and Wales than in other European countries; see, for example, annual penal statistics published by the Council of Europe (2009).

2. What is the IPP sentence?

Recent years have seen an increasing emphasis on public protection as a goal of sentencing. Thus, the principle of proportionality, that is, the idea that the severity of punishment should match the seriousness of the crime, has lost some of its centrality within sentencing policy and practice.[4] The 'dangerousness' provisions of the Criminal Justice Act 2003 are one of the most important manifestations of the trend towards sentencing for public protection - whereby the person's likely future behaviour, and not just the gravity of past behaviour, guides the choice of sentence. The introduction of these measures is an example of the tendency of governments 'to use the political irresistibility of the claim of public protection to promote increasingly repressive measures' (Ashworth, 2010: 238). A parallel development over the past 10 years has been the government's establishment of the dangerous and severe personality disorder (DSPD) programme, which provides 300 high secure prison and hospital places for treatment of individuals considered dangerous as a result of severe personality disorder.

The dangerousness provisions of the 2003 Criminal Justice Act and the establishment of the DSPD programme are both manifestations of an emerging culture of risk aversion across the criminal justice system, mental health services and, indeed, wider society. It is only in this context of a 'politics of fear and insecurity' (Seddon, 2008: 312) that we can understand the development of such a flawed piece of legislation as that which created the sentence of IPP.

The dangerousness provisions of the Criminal Justice Act 2003

Several elements of the 2003 Criminal Justice Act (CJA) reflected the shift towards risk-based sentencing. In particular, sections 224 to 236 introduced a new sentencing framework for dangerous adults who are deemed dangerous. This framework encompasses three kinds of sentence:

- imprisonment for life
- indeterminate sentence of imprisonment for public protection (IPP)
- extended sentence.[5]

There are two parts to the legislative definition of a dangerous offender. First, such an offender is one who is convicted of a violent or sexual offence that is 'specified' by the CJA (see Figure 2.1).

4. Prior to 1991, sentencing principles were implicit in sentencing legislation, but the Criminal Justice Act 1991 embraced desert-based sentencing, and rendered explicit the principle of proportionality.
5. For offenders aged under 18, the equivalent sentences to the IPP and imprisonment for life were detention for public protection (DPP) and custody for life, respectively. The provisions for under-18s, contained in sections differed in some respects to those for adults; most notably, judges were given more discretion with respect to passing a DPP. This report is primarily focussed on the sentencing of adult offenders.

Figure 2.1: What is a 'specified' offence?

Schedule 15 of the Criminal Justice Act 2003 is a list of 153 violent and sexual offences, all of which have a maximum sentence of two years' imprisonment or more. These offences are referred to as specified offences in the CJA dangerousness provisions.

Any person can be considered dangerous for the purposes of the dangerousness provisions only if he is convicted of one or more specified offence.

96 of the 153 violent and sexual offences in Schedule 15 are referred to in the legislation as serious specified offences. These are offences that have a maximum penalty of at least ten years' imprisonment.[6]

The full list of specified offences – both serious and non-serious – is provided in Appendix 1 of this report.[7]

The second component of the definition of dangerousness is that the person poses

> *a significant risk to members of the public of serious harm occasioned by the commission by him of further such offences (Sn 229 (1)).*

In its original form, the CJA required that, unless it was unreasonable to do so, an adult should be presumed to be dangerous if he had committed a 'specified' offence and had a previous conviction for any such offence (Section (229 (3)). However, this presumption of dangerousness was subsequently removed by one of the amendments to the CJA dangerousness provisions made by the Criminal Justice and Immigration Act 2008. The CJA provisions for life sentences and extended sentences are briefly outlined below; this is followed by a more detailed discussion of the IPP sentence.

Life sentences

Before the CJA was enacted, three forms of life sentence were available to judges: mandatory life (for murder), automatic life (introduced by the Crime (Sentences) Act 1997 for a second serious violent or sexual offence) and discretionary life (for a range of serious offences). The CJA dangerousness provisions replaced the automatic life sentence. However, the Act did not have any bearing on the mandatory life sentence, and nor did it formally alter the criteria for a discretionary life sentence.[8] Section 225 (2) of the CJA states that, with respect to a dangerous offender, the court must impose a sentence of imprisonment for life if such a sentence is available for the offence and the seriousness of the offence justifies it. A life sentence specifies the minimum period of time that the person must serve in custody. On completing the minimum term, the person can only be released at the discretion of the Parole Board, and following release he will remain on a licence for the rest of his life.

Extended sentences

The extended sentence is the least severe of the three types of 'dangerous offender' sentence in the CJA. In contrast to both life and IPP sentences, the extended sentence is determinate; but attached to the finite custodial term is an extended licence period of up to five years (for a violent offence) or up to eight years (for a sexual offence).[9]

6. See Appendices B to E of the SGC guidance on dangerous offenders for a full list of 'specified' offences, subdivided by type (violent or sexual) and level of seriousness (serious and non-serious) (SGC, 2008).
7. Taken from the Sentencing Guidelines Council guidelines on dangerousness: http://www.sentencing-guidelines.gov.uk/docs/SGC%20Dangerous%200ffenders.pdf
8. However, the IPP was now available for some offences that would previously have attracted a discretionary life sentence. The number of all life sentences passed per year declined from a high of 625 in 2005 to 523 in 2008 (Ministry of Justice, 2010: Table 2.3).
9. Extended sentences had previously been available to the courts in a somewhat different form – having first been introduced by the Crime and Disorder Act 1998.

Originally, section 227 of the CJA made the extended sentence mandatory for adults who were deemed 'dangerous' and were convicted of any of the Schedule 15 'specified' offences that are not 'serious' (that is, their maximum sentence is less than 10 years' imprisonment: see Figure 2.1, above). Early release was conditional upon Parole Board review. Following the Criminal Justice and Immigration Act amendments to the CJA, use of the extended sentence is no longer mandatory, and release takes place automatically half-way through the sentence. It can be applied to any of the 153 'specified' offences, provided that the appropriate custodial term for the offence (that is, the total sentence before the extended licence period) is at least four years.[10]

The IPP sentence

Prior to the CJA 2003, the life sentence was the only indeterminate sentence available to judges. With the IPP, the CJA created a new form of indeterminate sentence, and thereby greatly lowered the threshold of dangerousness (or seriousness of past and present offending) over which indeterminacy became an option. The creation of the IPP built on – but went further than – the recommendation in Halliday's 2001 *Review of the Sentencing Framework* that a special sentence be devised for dangerous offenders, who would be released in the second half of their sentences at the discretion of the Parole Board, and could be subject to extended licence periods (Home Office, 2001).

Like a life sentence, an IPP has a minimum term, or tariff, to be served in custody; thereafter release can only be authorised by the Parole Board. It differs substantively from the life sentence only in that it does not necessarily entail a life-long licence period, and is available for a greater number of offences.

The IPP is available as a sentence for a 'dangerous' offender who is convicted of a 'specified' violent or sexual offence that is also 'serious': that is, one of the 96 offences in Schedule 15 of the CJA that has a maximum sentence of 10 years' imprisonment (see Appendix 1). The more specific criteria for imposing an IPP were substantially altered by the Criminal Justice and Immigration Act 2008, following the emergence of problems associated with over-use of the sentence by the courts and the imposition of many very short tariffs (see below for discussion of these initial difficulties). The criteria for, and components of, the sentence, in both its original and revised form, are outlined in Figure 2.2.[11]

The details provided in Figure 2.2 make it clear that the CJIA revisions to the IPP, which are contained in sections 13 to 17 of the Act, had the effect of simultaneously restricting and loosening usage of the sentence by the courts. The restriction took the form of the introduction of the minimum two-year tariff in most cases (specifically, all cases other than where there were previous convictions for certain very serious offences). This ruled out the IPP as a sentence for many of the kinds of offences for which it was passed prior to July 2008. On the other hand, whereas the IPP was originally mandatory for those who were convicted of serious specified offences and deemed dangerous, a considerable amount of discretion was restored to judges with the replacement of the word 'must' with 'may' in the legislation. The removal of the rebuttable presumption of dangerousness also served to bolster judicial discretion.[12]

10. However, as also applies to the revised IPP sentence (see below), the four-year minimum sentence rule does not apply if the offender has previously been convicted of any of a new list (set out in a new schedule 15A of the CJA) of 23 very serious offences.
11. The list of 'serious, specified' offences which are eligible for IPPs remains unaltered since the original CJA provisions were enacted. However, the scope to use the sentence of IPP for the offence of making indecent images of children has been restricted through the case of R.v. Terrell [2007] EWCA Crim 3079. Here, the Court of Appeal ruled that an IPP should not have been passed on a man who had pleaded guilty to several counts of this offence (involving the downloading of images, in this case), on the grounds that any re-offending was unlikely to cause direct harm to victims but would rather entail 'a small, uncertain and indirect contribution to harm'.
12. In Attorney's Reference (No 55 of 2008) [2008] EWCA Crim 2790, the Lord Chief Justice said of the removal of the rebuttable presumption of dangerousness, 'No court will mourn its departure'.

Figure 2.2: The IPP sentence – before and after its revision by the Criminal Justice and Immigration Act (CJIA)

Court sets the **tariff** – or minimum custodial term to be served.

Tariff normally equates to **half of determinate sentence** that would be imposed for offence. (Notional determinate term is halved because prisoners are released at half-way stage of determinate sentences.)

After tariff, **release is at the discretion of Parole Board** if 'it is no longer necessary for the protection of the public that the prisoner should be confined'.[13]

On release, offender subject to probation **supervision for the rest of his life**, unless Parole Board decides - after **at least ten years** – licence no longer needed for public protection.

Before CJIA amendments	**After CJIA amendments**
IPP available for **dangerous** people convicted of any **'serious, specified' offence**.	IPP available for **dangerous** people convicted of **'serious, specified' offence** meriting **at least four-year determinate sentence.**
No minimum tariff.	Above condition → **two-year minimum tariff**.
Where conditions for IPP met, IPP 'must' be imposed by court.	But **no minimum tariff** if previous conviction for any offence in new Schedule 15A (23 very serious offences including rape, manslaughter).
Offender **presumed to be dangerous** if previous conviction for any 'specified' offence – unless unreasonable to do so.	Where conditions for IPP met, IPP 'may' be imposed by court.
	Rebuttable presumption of dangerousness abolished.

The CJIA amendments to the IPP sentence were not applied retroactively. In other words, people who received short tariff IPPs before 14 July 2008 remained on their original indeterminate sentence. This is despite the fact that most of them would have been ineligible for an IPP, had they been sentenced on or after that date.

13. Section 28(6)(b) of the Crime (Sentences) Act 1997, to which release of IPP prisoners, like release of life sentence prisoners, is subject (CJA 225 (4)).

Initial difficulties with the IPP and efforts to address them

The CJA dangerousness provisions, in their original form, came into force in April 2005. By June of the following year, there were over 1,000 IPP prisoners in the prison population; by June 2007 the number had increased to almost 3,000 (see Chapter 3, below, for details on initial levels of use of the sentence). As the number of IPP prisoners grew rapidly, problems associated with their management soon emerged, alongside vociferous criticisms of the sentence from criminal justice professionals, IPP prisoners themselves and their families, penal reformers, and other commentators. Particular concerns were voiced about the large (and, it seems, largely unanticipated) impact of the IPP on the size of the prison population; the increased burdens placed on the courts and, especially, the Parole Board; the limits imposed on the discretion of judges;[14] and the perceived unfairness of incarcerating people indefinitely for offences that hitherto would have been considered not nearly serious enough for a life sentence.[15]

One of the most pressing problems to arise was that, due to the large numbers of IPP sentences being passed by the courts, and the overcrowding and inadequate resourcing of the Prison Service, IPP prisoners struggled to access interventions that, theoretically at least, could help them address their offending behaviour and thereby demonstrate to the Parole Board that they no longer posed a risk to the public. A key assumption that informed the design of the IPP sentence was that IPP prisoners, with the active support of the Prison Service, would be able to take active steps to reduce their dangerousness over the period of time they spent in custody. An important method by which the Prison Service has sought to reduce risk is through the enrolment of prisoners on accredited offending behaviour programmes.[16] In practice, however, the availability of these programmes to IPP prisoners has been very limited, since the early days of implementation of the new sentence. A direct result of this, combined with an increasingly tendency towards risk-aversion in the decision-making by the Parole Board, was that releases of IPP prisoners, upon expiry of their tariff periods, were very few and far between.

Initially, the problems associated with lack of access to offending behaviour programmes were most acute for those on short tariffs, who had little, if any, opportunity to demonstrate reduced risk before tariff expiry. Among others, IPP prisoners Brett Walker and David James launched legal challenges to their continued detention beyond tariff, on the grounds that the Parole Board had been unable to assess their suitability for release since they had not had the opportunity to engage in rehabilitative work (see below for figures on those held beyond tariff). Ultimately the House of Lords upheld the Court of Appeal ruling that Justice Secretary Jack Straw had acted unlawfully by not providing these prisoners with access to relevant interventions, though their continued detention was not found to be unlawful[17] (see Padfield, 2009, for a discussion of these cases).

Having recognized that implementation of the IPP sentence was causing some considerable problems, the government asked Lord Carter of Coles in June 2007 to review the CJA dangerousness provisions as part of a wider review of prisons. At the same time, the National Offender Management Service conducted an internal service review of IPP provisions (the

14. The Court of Appeal ruling R v Lang and others has been seen as an attempt to extend the scope for judicial discretion in determining dangerousness ([2005] EWCA Crim 2864), but the extent to which this influenced practice is unclear.
15. See, for example, Rose (2007), Howard League for Penal Reform (2007), Prison Reform Trust (2007), Nichol (2006, 2007) (specifically on issues facing the Parole Board). See also the range of evidence on IPPs submitted for the fifth report of the House of Commons Select Committee on Justice (Justice Select Committee, 2008).
16. The Prison Service never regarded Offending Behaviour Programmes as the sole method of risk reduction – even if these programmes ended up playing a central part in parole decision-making.
17. R. (Walker) v Secretary of State for Justice (Parole Board intervening) [2008] EWCA Civ 30; Wells vs Parole Board [2009] UKHL 22.

Lockyer Review), which highlighted the considerable difficulties being encountered in the management of the growing numbers of IPP prisoners (Ministry of Justice, 2007a: 6).

Lord Carter recommended that the IPP sentence should become a more flexible sentencing tool that could better target genuinely 'dangerous' offenders (Ministry of Justice, 2007b). The government responded by devising the various CJIA amendments to the dangerousness provisions, which were implemented on 14 July 2008, and applied to all people sentenced on or after that date. While the criteria for passing a sentence of IPP were substantially altered, the key components of the sentence remained the same (see Figure 2.2, above). However, the amendments added another layer of complexity to what was already, in the words of the Court of Appeal, a 'labyrinthine' and 'astonishingly complex' set of provisions.[18]

At the same time as legislative change was in process, the system of managing IPP prisoners within the secure estate was under review. IPP prisoners had originally been managed in the same way as lifers, in terms of categorisation, but this soon produced a logjam of IPP prisoners in local prisons (HMCIP, 2008; Ministry of Justice, 2007). In response, in February 2008 a more flexible system of managing IPP prisoners was introduced, whereby they were to be managed through the closed estate like determinate rather than life sentenced prisoners (HM Prison Service, 2008). As part of this, efforts were made to expedite sentence planning and the provision of interventions. Early 2008 also saw the roll-out of the third phase of the 'offender management model', under which IPP prisoners were brought under the overall management of community-based probation officers known as 'offender managers' rather than prison-based lifer managers (Ministry of Justice, 2007b). Another development was the allocation of additional funding for work in prisons with IPP prisoners (Hansard 5.10.09: Column WA475). (See Appendix 2 for more details on the management of IPP prisoners.)

Notwithstanding the legislative amendments and the changes to the management of IPP prisoners, the problems that emerged in the first two to three years of the sentence have not been satisfactorily resolved. As will be documented in later chapters, the number of IPP prisoners in the prison population continues to rise rapidly. The result of this is that provision for these prisoners continues to be inadequate: the Prison Service still struggles to move them through the secure estate and to make appropriate interventions available for them; while the input from community-based offender managers is often inconsistent (CJJI, 2010). At the same time, a repercussion of the Prison Service's attempt to advance IPP prisoners more quickly through their sentence plans is that, inevitably, that other prisoners, especially lifers, feel aggrieved at this prioritisation of IPP prisoners at their expense.[19]

The most problematic aspect of the current situation, arguably, is that the number of IPP prisoners who are being released at or near to tariff expiry is negligible. A particular anomaly here is that among those who are being held post-tariff are many on short tariffs who would not even have received an indeterminate sentence had they been convicted after implementation of the CJIA amendments. The overall situation is described by the probation and prisons inspectorates, in their second IPP joint report, as 'unsustainable' (CJJI, 2010).

18. The Court of Appeal ruling in R v Lang and others ([2005] EWCA Crim 2864) closes with the comment:

It would be inappropriate to conclude these proceedings without expressing our sympathy with all those sentencers whose decisions have been the subject of appeal to this Court. The fact that, in many cases, the sentencers were unsuccessful in finding their way through the provisions of this Act, which we have already described as labyrinthine, is a criticism not of them but of those who produced these astonishingly complex provisions. Whether now or in the fullness of time the public will benefit from sentencing provisions of such complexity is not for us to say. But it does seem to us that there is much to be said for a sentencing system which is intelligible to the general public as well as decipherable, with difficulty by the judiciary.

19. A growing tension between lifers and IPP prisoners is reported in a Sainsbury Centre for Mental Health report on IPP sentences (2008), as well as by several of our respondents.

3. IPP sentences: the picture in 2010

This chapter draws on the available statistical and other data to paint a picture of how the IPP sentence has been used since it was introduced. Despite the significance of the IPP within the criminal justice system and its prominence in public and political debate, there is no single, comprehensive source of official data on the sentence. Much of the information presented in this chapter thus derives from answers given to parliamentary questions. The most recent statistics that we have date to March 2010.

IPP sentences, releases, and population in custody

The first IPP sentences were passed in May 2005. As shown in Table 3.1, usage of the sentence by the courts accelerated rapidly; over a two and a half year period from January 2006, an average of about 140 IPP sentences were passed per month. By the end of July 2008, 4,753 such sentences had been passed.

The Criminal Justice and Immigration Act (CJIA) amendments to the sentence were implemented on 14 July 2008, and resulted in an immediate decline in use of the sentence. It had been predicted by the Ministry of Justice (2008; 2009a) that the amendments would reduce the monthly average of 140 by two-thirds, to around 45. In fact, the figures in Table 3.1 reveal that the monthly average fell by just under one half: an average of 75 IPP sentences were passed from August 2008 to December 2009 (although there has been a slight decline in the courts' level of use of the sentence over the last few months of this period). In total, 6,034 people had received the sentence of IPP by the end of December 2009.

Table 3.1: Numbers of IPP sentences passed

	2005	2006	2007	2008	2009
January		85	142	137	83
February		110	150	171	71
March		148	183	137	79
April		101	130	144	75
May	3	116	151	145	76
June	14	154	155	131	92
July	27	148	149	93	94
August	44	115	112	58	59
September	81	149	149	82	73
October	92	113	137	84	66
November	96	179	170	77	69
December	77	177	138	82	61
Total	434	1595	1766	1341	898

Source: Letter from Home Office Minister Maria Eagle MP to Andrew Stunell MP, 12.2.10, 'Indeterminate Sentenced Prisoners Parole Reviews PQ Reply'.

The net result of the initially high number of cases meeting IPP criteria, the steady usage of the IPP sentence by the courts after the sentence was amended, and the negligible number of IPP prisoners who have been released upon tariff expiry (see below), is that there are today around 6,000 people serving IPP sentences; see Table 3.2 for population figures.

Table 3.2: Population of IPP prisoners

30 Jun 2005	30 Jun 2006	30 Jun 2007	30 June 2008	31 Oct 2009	19 Jan 2010
24	1,079	2,859	4,461	5,659	5,828

Source: 2005-2008 figures from OMCS 2008, Table 7.17 (MoJ, 2009b); 2009 figure supplied to Prison Reform Trust by NOMs in personal communication, 6.11.09; 2010 figure from Hansard 21.1.10, Column 731W.

Tariff lengths for IPP sentences are set out in Table 3.3. Data on sentences passed before and after July 2008, when the CJIA amendments came into force, are presented separately. As the CJIA largely restricted the use of IPP to cases where the tariff would be two years or more[20], the later set of sentences tend to have longer tariffs: around one-third of pre-CJIA tariffs were two years or less, compared to a little under one-fifth of post-CJIA tariffs; and just 10% of pre-CJIA but almost one-quarter of post-CJIA tariffs were between five and ten years. In 2007, the shortest IPP tariff was 28 days, while the longest was just over 11 years, and the average tariff a little under three years. The equivalent figures for 2008 were 39 days (shortest tariff), 14 years, 8 months (longest) and 3 years, 5 months (average) (Hansard 4.3.09, Column 1710W).

Table 3.3: Tariff lengths for IPP sentences, before and after CJIA amendments

	May 05-June 08 (inc)		July 08 – Dec 09 (inc)	
Tariff length	No. IPP sentences	% of IPP sentences	No. IPP sentences	% of IPP senences
Up to 1 year	305	6%	13	1%
1+ to 2 years	1,323	28%	213	17%
2+ to 5 years	2,628	55%	743	58%
5+ to 10 years	464	10%	296	23%
10+ years	33	1%	16	1%
Total	4,753	100%	1,281	100%

Source: Letter from Home Office Minister Maria Eagle MP to Andrew Stunell MP, 12.2.10, 'Indeterminate Sentenced Prisoners Parole Reviews PQ Reply'.

Table 3.4 shows the numbers of IPP sentences with tariffs of 23 months or less over the years 2005 to 2008; these totalled 1,637. Most of these would not have received an IPP had they been sentenced after July 2008, when the CJIA ruled out tariffs of under two years other than in cases where the person has a previous conviction for a very serious offence. (The statistics do not show what proportion of the 365 short tariff IPP sentences passed in 2008 date from the first half of that year, but it can be assumed that most do.)

20. As noted in the previous chapter, this restriction does not apply in cases where the offender was previously convicted of any of 23 very serious offences, listed in new schedule 15A of the CJA.

Table 3.4: IPP sentences with a tariff of 23 months or less

Year	No. IPPs
2005	196
2006	529
2007	547
2008	365
Total	1,637

Source: Hansard 18.1.10, Column 25W

Despite the substantial numbers of IPP prisoners who have received relatively short tariffs (especially prior to July 2008), and who are thus theoretically eligible for release, the number who had been released at the time of writing was very small indeed. As can be seen from Table 3.5, a total of only 94 IPP prisoners had been released by the end of 2009. The table also includes the numbers of released IPP prisoners who had been recalled to custody – totalling 23, or a quarter of all those who had been released.[21]

The low rate of release of IPP prisoners means that, as documented in Table 3.6, growing numbers are being held beyond tariff expiry. By mid January 2010, almost 2,500 – or more than two-fifths of all IPP prisoners - were in this situation. As of 5 February 2010, 476 IPP prisoners were two years or more past tariff expiry (Hansard 9.2.10, Column 944W); and as of 4 March, 95 prisoners were three or more years post-tariff (Hansard 8.3.10: Column 94W). Looking only at IPP prisoners who had been given tariffs of two years or less, we see that as of 9 September 2009, 1,225 such individuals were being held beyond tariff expiry; the average amount of time these prisoners had been held post-tariff was 486 days.[22]

Table 3.5 Release and recalls of IPP prisoners, 2007-2009

Year	No. released	No. recalled
2007	11	2
2008	32	6
2009	51	15
Total	94	23

Source: Hansard 21.1.10, Column 731W.

Table 3.6: Post-tariff IPP prisoners in custody

	30 June2005	30 June2006	30 June2007	30 June2008	31 Oct2009	19 Jan2010
No. post-tariff IPPs	0	16	224	867	2,229	2,468
Post-tariff as % all IPPs in custody	-	1%	8%	19%	39%	42%

Source: Post-tariff 2005-2008 figures from Hansard 16.6.09, Column 261W; 2009 figure supplied to Prison Reform Trust by NOMS in personal communication, 6.11.09; 2010 figure from Hansard 21.1.10, Column 731W. Percentages calculated using population figures in Table 3.2.

21. This recall rate is in line with a prediction made in the report on the Lockyer Review that: 'based on lifer recalls, and bearing in mind that IPPs are "riskier", it might be safe to presume a recall rate of over one third, most likely in the first year of release' (Ministry of Justice, 2007b: 33). In contrast, however, Ministry of Justice prison population projections anticipate an annual 'breach rate' of 14% for IPP prisoners under supervision in the community. Parole Board figures reveal that 5.4% of 1,646 life sentence prisoners under active supervision in the community were recalled during 2008/9 for any reason (Parole Board, 2009).
22. Letter from Lord Bach, Parliamentary Under-Secretary of State, to Baroness Stern, 23.1.10, 'Indeterminate Sentence Prisoners: PQ Reply Correction'.

Characteristics of IPP prisoners

Table 3.7 shows the IPP prison population broken down by gender and age, as at January 2010. These figures show IPP prisoners to be overwhelmingly male: just 3% were female, which compares to 5% of the total population in custody. Two-thirds of the IPP population were aged between 21 and 39 years, broadly reflecting the age breakdown of the full prison population.

Table 3.7: Gender and age breakdown of IPP prisoners

Gender (no. and %)			Age (no. and %)		
Male	5,673	97%	15-17	23	-
Female	155	3%	18-20	284	5%
Total	5,828	100%	21-24	1,176	20%
			25-29	1,243	21%
			30-39	1,502	26%
			40-49	1,092	19%
			50-59	344	6%
			60+	164	3%
			Total	5,828	100%

Source: Hansard 26.1.10, Column 731W

At the time of writng, the most recent figures on the ethnicity of IPP prisoners derived from the Ministry of Justice Offender Management Caseload Statistics for 2008 (MoJ, 2009b: Table 7.20). These show that as of 30 June 2008, 78% of IPP prisoners were white, 14% black/black British, 4% Asian/Asian British, 3% 'mixed' and 1% Chinese or other. Again, this broadly reflects the ethnic make-up of all prisoners as of this date, although the proportion of all prisoners who were white was somewhat smaller (72%) and the proportion of Asian 'all prisoners' greater (7%).

The main offences for which IPP prisoners have been sentenced are shown in Tables 3.8a (up to December 2008) and 3.8b (January to December 2009). There are separate tables for the different time periods because the offence categorisation is slightly different for each. The different categorisations makes it difficult to compare IPP offences before and after the CJIA amendments, but it appears that robbery makes up a significant but slowly declining proportion of offences (22% in 2009), while sexual offences account for an increasing proportion (30% in 2009.

Table 3.8a: Breakdown of IPP offences, May 2005 to December 2008

	Arson	GBH & similar	Robbery/agg. burg etc	Posses. firearm	Sexual	Threats to kill	Manslaughter	Attempt. murder	Other	Total (all offences)
May 05 - June 08	5%	26%	28%	3%	23%	2%	2%	2%	8%	4,720
July 08 – Dec 08	6%	26%	23%	2%	27%	3%	2%	5%	6%	470
Total	274	1,360	1,427	166	1,203	108	113	133	406	5,190

Source: Hansard 16.6.09, Column 262W-264W

Table 3.8b: Breakdown of IPP offences, January to December 2009

	Arson	Violence against the person	Robbery	Firearms	Sexual	Total (all offences)
Jan 09 – Dec 09	6%	39%	22%	4%	30%	898
Total (all offences)	54	348	197	34	265	898

Source: Letter from Home Office Minister Maria Eagle MP to Andrew Stunell MP, 12.2.10, 'Indeterminate Sentenced Prisoners Parole Reviews PQ Reply'.

Mental health

IPP prisoners appear to suffer from significantly higher rates of mental health problems than other prisoners. The Sainsbury Centre for Mental Health (2008) analysed OASys[23] assessment data on 2,204 IPP prisoners, 3,368 lifer prisoners and 54,785 prisoners in the general prison population, and found:

- More than half of IPP prisoners had 'emotional wellbeing' problems compared to four in ten lifers and three in 10 of the general prison population.
- Around one in five of those serving IPP had received psychiatric treatment of any kind in the past (compared to 9% of the general prison population), with a similar proportion currently receiving medication for mental health problems.
- One in ten of those serving IPP was receiving psychiatric treatment in prison – a higher figure than for lifer prisoners, and twice as high as for the general prison population.

It has also been reported that as of January 2010, 115 serving IPP prisoners were in secure hospital under the powers of the Mental Health Act 1983[24] (Hansard 18.1.10, column 25W).

23. The Offender Assessment System risk measurement tool used by prisons and the probation service.
24. Under sections 47 and 48 of the Mental Health Act 1983, a prisoner serving a sentence of imprisonment can be transferred to hospital if he has a mental disorder and is considered to be in need of medical treatment in hospital.'

In many cases, IPP prisoners' mental disorders may be pre-existing conditions, and may have contributed to the offending behaviour. At the same time, it seems very likely that the stress created by the uncertainties of indeterminate imprisonment lead directly to poor emotional and mental health. For example, the Sainsbury Centre study found that 'not having a release date, and not knowing whether their efforts in prison would have any bearing on the Parole Board's considerations, had a forcible impact on prisoners' mental health' (2008: 41). The uncertainties about release over a prolonged period of imprisoment are also likely to contribute to family breakdown, and thus create further pressures on the mental health of IPP prisoners.

As will be discussed further in Chapter 5, below, mental health problems among IPP prisoners have serious implications for their capacity to engage in interventions aimed at addressing their 'dangerousness', and hence ultimately for their chances of persuading the Parole Board of their suitability for release. The evidence of high levels of mental illness among IPP prisoners also suggests that 'the IPP sentence is conflating "dangerousness" with "mental illness"' (SCMH, 2008: 54) and that the creation of the sentence is thus part of a broader process whereby the mental health and criminal justice approaches to defining and managing risk are converging. Rutherford (2009) has argued that the existence of the IPP sentence may permit findings of 'dangerousness' where otherwise mental health issues may be identified and the offenders thus diverted into mental health care. The passing of IPP sentences in these circumstances can be described as a kind of 'reverse diversion'.

Reflecting the high rates of mental illness and general distress among IPP prisoners, the rate of suicide appears to be higher in this group than among the prison population as a whole. Table 3.9 shows that there have been a total of 13 'self-inflicted deaths' of IPP prisoners since 2005; and that in 2008, IPP prisoners accounted for around 5% of the custodial population but 7% of all self-inflicted deaths in custody. This over-representation is based on small numbers, and must be treated as suggestive rather than conclusive evidence. However it points to the need for close monitoring in the future.

Table 3.9: Self-inflicted deaths of IPP prisoners

	2005	2006	2007	2008	2009
No. of IPP self-inflicted deaths	-	2	4	4	3
IPP self-inflicted deaths as % of all such deaths in custody	-	3%	4%	7%	5%
IPP pop. as % all custodial pop.	0.3%	1.4%	3.6%	5.4%	n/a

Source: Hansard 8.3.10: column 94W

Impact on the prison population

It is well known that the total prison population in England and Wales has almost doubled over the last 25 years. The number of prisoners on indeterminate sentences of all kinds has increased particularly sharply in recent years – more than tripling from 3,934 in June 1998 to 12,520 in June 2009. This increase reflects both the increasing use of the life sentence - a total of 394 life sentences were passed in 1998, compared to 523 in 2008 (Ministry of Justice, 2010: Table 2.3) – and the introduction of the IPP sentence in 2005. Table 3.10 shows that over the 11-year period from June 1998 to June 2009, indeterminate prisoners as a percentage of all sentenced prisoners increased from 8% to almost one-fifth (18%).

Table 3.10: Indeterminate prisoners in custody, and as percentage of all sentenced prisoners, 1998 to 2009 (end June figures)

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
All indet.	3,934	4,206	4,538	4,810	5,147	5,419	5,595	5,882	7,274	9,481	11,382	12,520
Mand. lifers	3,114	3,173	3,327	3,448	3,592	3,698	3,726	3,870	4,103	4,317	4,581	n/a
Other lifers*	820	1,033	1,211	1,362	1,555	1,721	1,869	1,988	2,092	2,305	2,341	n/a
IPP	0	0	0	0	0	0	0	24	1,079	2,859	4,461	n/a
All sent.	52,269	51,392	53,180	54,212	57,306	59,439	60,976	62,257	63,493	65,601	68,234	68,488
%indet of sent	8%	8%	9%	9%	9%	9%	9%	9%	11%	14%	17%	18%

Source: Figures for 1998-2008 from OMCS 2008 tables 7.3 and 7.17 (MoJ, 2009b); 2009 figures from monthly population in custody June 2009, table 1 (MoJ 2009c).

**Those on discretionary and automatic life sentences. The automatic life sentence was abolished by the CJA 2003, when the IPP was established.*

From December 2005 to December 2009 the total prison population grew by around 10,000, or 13%, from 74,626 to 84,636. It is by no means straightforward to assess the specific contribution of the IPP sentence to this increase. It can be assumed that the large majority IPP prisoners, under the previous regime, would have received determinate – and often lengthy determinate - sentences, although a small minority may have received discretionary or automatic life. Hence (excluding the impact of recalls to custody) IPP prisoners contribute to the growth in the prison population only to the extent that they are held in custody beyond the period of they would have served had they received a determinate sentence.

We can certainly assume that the majority of the current 2,500 post-tariff IPP prisoners have already been in custody for longer than they would otherwise have been – since IPP tariffs are meant, broadly speaking, to reflect the custodial terms that people would receive if sentenced determinately. However, some tariffs may in fact be shorter than the equivalent determinate custodial terms, since sentencers are directed 'not to incorporate an element of risk [in setting the tariff], which is already covered by the indeterminate nature of the sentence' (SGC, 2008: paragraph 9.1.2).[25] Additionally, prior to the CJA 2003, sentencers had the option to pass 'longer than commensurate' determinate sentences for violent or sexual offences.[26] Nevertheless, even if it is simplistic to assume that every post-tariff IPP prisoner has necessarily spent longer in custody than would have been the case had he been sentenced before April 2005, it is unarguable that the ever-increasing amount (in term of both length and number) of post-tariff detention has contributed to the increase in the prison population – and is likely to accelerate the increase over time. A Ministry of Justice statistics bulletin on the prison population (MoJ 2009d) notes that the introduction of the IPP has played a part in increasing the overall time served in custody by prisoners, which in turn has been an important factor in the growth of the prison population. This publication does not, however, attempt to quantify the specific contribution of IPP prisoners to this growth.

If it is difficult enough to assess the impact to date of the IPP sentence on the prison population, it is more difficult still to estimate the likely impact in the future. Factors that must be taken incorporated in any such projection include the length of time that IPP prisoners spend in custody after tariff expiry, and rates of recall to custody of ex-IPP prisoners on licence (as these individuals are likely to spend a great deal longer on licence than they would if they had been determinately sentenced). Both of these cannot be predicted with any confidence since so few IPP prisoners have thus far been released.

Even taking into account these difficulties, the initial government prediction of the impact of the IPP on the prison population now looks like a woeful under-estimate. As the criminal justice bill was debated in Parliament in February 2003, Home Office Minister Hilary Benn replied to a question about the impact of the dangerousness provisions on the prison population:

> *That is quite difficult to know. However, we have assumed in our modelling that over time—because it would take time for the effect to develop—there would be an additional 900 in the prison population. That is only modelling, of course, and the honest answer is that it is difficult to assess the effect, because it depends on the courts' interpretation of the provision. (Cited in Sainsbury Centre for Mental Health, 2008: 15).*[27]

By 2006, however, the Home Office was predicting that 'IPP sentences will increase the prison population by around 3,500 places and the effect will saturate by around 2012' (Home Office, 2006: 8). Prison population projections that have been published subsequently have not put a figure on the likely future impact of the IPP sentence. However, the 2008 and 2009 publications both include a table on 'assumptions of time served for IPP prisoners' which gives 54 months as the 'average time served post-tariff' (Ministry of Justice 2008 and 2009a:

25. Before the introduction of the IPP, many determinate sentences presumably incorporated the 'element for risk' that here is explicitly excluded from the IPP tariff. One of the judges we interviewed for this study complained about the lack of clarity in the guidance about the kinds of features of a dangerous offence that should and should not be reflected in the tariff, and commented that there have been contradictory Court of Appeal judgments on this issue.
26. 'Longer than commensurate' sentences for public protection were established by the Criminal Justice Act 1991, and abolished by the CJA 2003.
27. This overstates the latitude open to the courts in operating what were originally mandatory provisions. In evidence to the Court of Appeal, for the hearing of the Walker and James IPP case in November 2007, a NOMS official said that when the Criminal Justice Bill was drafted, assumptions were made that 'the overall impact of the legislation would be resource neutral' ([2008] EWCA Civ 30; see Approved Judgement paragraph 16).

Table B1). If the reality bears out this alarming prediction of an average of 4.5 years spent in custody after tariff expiry, the repercussions for the prison population over time – not to mention the repercussions for the individuals involved - will be very great indeed.[28] It was for this reason that the joint report of the inspectorates of Probation and Prisons described the present state of affairs as 'unsustainable' (CJJI, 2010).

Access to offending behaviour programmes

The primary means by which, in theory, an IPP prisoner can demonstrate reduced dangerousness is through participation in accredited programmes which address the causes, meaning and implications of offending behaviour. Most of these offending behaviour programmes, which were introduced into prisons from the mid-1990s onwards, take a cognitive behavioural therapy (CBT) approach to tackling to offending; that is, they are based on the idea that an individual can reduce his offending by deliberately making changes to his patterns of thinking and the associated patterns of behaviour that he has learnt. Programmes are formally accredited on the basis of research evidence and where a number of specific criteria are met including ongoing monitoring and evaluation. According to the Prison Service website, 13 fully or provisionally accredited programmes are currently delivered across the secure estate (excluding drugs programmes); among them are programmes which target people convicted of violent offences (such as the Cognitive Self Change Programme) and sexual offences (the Sex Offender Treatment Programmes).[29] Prisoners' sentence plans specify programmes which are appropriate to their offending and needs. However, the demand for places on the programmes greatly outstrips the supply.

The limited availability of programmes is indicated by the data on programme completions (accredited courses only) in Table 3.11.[30] Here we see that around one-third of all IPP prisoners, and just under one-fifth of those who had already passed their tariff dates, had not completed any accredited offending behaviour programme as of mid-January 1010.

Table 3.11: Completions of accredited offending behaviour programmes by IPP prisoners as of 19.1.10

	All IPP prisoners		Post-tariff IPP prisoners	
	Number	%	Number	%
Completed 0 programmes	1,991	34%	466	19%
Completed 1 programme	1,939	33%	779	32%
Completed 2+ programmes	1,898	33%	1,223	50%
Total	5,828	100%	2,468	100%

Source: Hansard, 26.1.10, Column 731W. (Percentages rounded)

28. As noted above, the 2008 and 2009 projections by the Ministry of Justice appear to have underestimated the continuing level of use of the sentence, following the CJIA amendments: they assume a monthly average of 45 IPPs imposed by the courts rather than the 70 we have so far seen. Chart 3 in the 2008 document shows the total IPP prison population peaking at around 5,500 in 2011; at the time of writing, in February 2010, this number has already been exceeded.
29. www.hmprisonservice.gov.uk/adviceandsupport/beforeafterrelease/offenderbehaviourprogrammes/
30. Completion rates do not solely reflect programme availability, but also the extent to which prisoners are assessed as suitable for the programmes (itself something of a contentious issue – see Chapter 6 for more on this) and prisoners' capacity to complete programmes they have embarked on. See Table 3.11 for completions per courses accessed, in relation to some specific programmes.

One programme only had been completed by a further third, and just under one-third of post-tariff prisoners. Given that IPP prisoners are typically required to undertake more than one programme in order to demonstrate significant risk reduction, these relatively low rates of programme completion have serious implications for their prospects of release.

Table 3.12 shows levels of access to, and completion of, some specific accredited programmes among the 5,828 IPP prisoners in custody in January 2010: namely, the Sex Offender Treatment Programme (SOTP); the Enhanced Thinking Skills (ETS) or Thinking Skills Programme (TSP)[31]; and Controlling Anger and Learning to Manage it (CALM). Around 3,500 (60%) of the IPP prison population have had access to the generic ETS or TSP cognitive skills programmes, while around 500, or 11%, have accessed one or more of the courses designated for sex offenders. These figures make it clear that the ETS and TSP programmes, which are relatively short in duration in that they run over just 20 and 19 sessions respectively, account for most of the programme completions recorded in Table 3.11, above.

Table 3.12: IPP prisoners starting and completing specific offending behaviour programmes as of 19.1.10

	No. started	No. completed	Completion rate (of programmes accessed)	Starts as % of total (n=5,828)	Completions as % of total (n=5,828)
ETS or TSP	3,509	3,344	95%	60%	57%
CALM	842	755	90%	14%	13%
1 or more SOTP	628	497	n/a*	11%	9%

Source: Hansard, 26.1.10, Column 731W

**Completion rate for SOTP is not available because figures on access and completion refer to 'one or more' courses.*

Overview

By January 2010 there were almost 6,000 IPP prisoners in custody, of whom around 2,500 had already completed their minimum custodial terms; almost 500 post-tariff IPP prisoners were at least two years past tariff expiry. Just 94 had thus far been released, around one-quarter of whom were subsequently recalled to custody.

Among the IPP prisoners who were held beyond their tariff expiry were many who faced a particular injustice. These are the prisoners who were sentenced before July 2008 and received tariffs of under two years: most of these individuals would have been ineligible for an indeterminate sentence had they been sentenced after July 2008 when the minimum two-

31. TSP was rolled out in 2009, and will replace ETS.

year tariff was introduced. By September 2009, more than 1,200 IPP prisoners with tariffs of two years or less were being held in custody beyond tariff expiry; the average amount of time they had been held post-tariff was around 16 months.

With the courts continuing to pass about 70 IPP sentences per month, and the rate of release remaining stubbornly low, the numbers of prisoners on IPP sentences look set to rise inexorably. And as the numbers rise, so the burdens on the already over-burdened Prison Service will increase. For the Prison Service, it is not only a matter of accommodating additional prisoners - but also a matter of trying to ensure that IPP prisoners are moved through the system, and have access to the interventions they need if they are to have any chance of demonstrating that they are no longer dangerous and thus should be released.

Clearly, there is a vicious circle already in operation here: the more IPP prisoners there are, the harder it is for them to access interventions and hence to make a good case for release; and this in turn pushes up the overall number of IPP prisoners. The circle is likely to become ever more vicious as cuts to public expenditure constrain prison budgets, and further erode the availability of interventions across the secure estate. Several of our respondents from within the Prison Service voiced their profound concerns about the implications of forthcoming prison budget cuts for work carried out with IPP prisoners.

For the prisoners stuck within the vicious circle, the frustrations are, potentially, immense – and this is something else that the Prison Service must try to manage, along with the anger of non-IPP prisoners who believe that IPP prisoners receive special treatment. That there are risks of these frustrations impacting significantly on the emotional and mental health of IPP prisoners - relatively high rates suicide have already been seen among IPP prisoners - seems self-evident. Over time, there may also be repercussions for order and security in prisons.

4. Problems of entry: how risky is too risky?

By mid-2007 there was widespread agreement across the criminal justice system that far too many people were sentenced to an IPP under the original CJA legislation. Since the legislation was amended, with effect from July 2008, the number of IPP sentences passed by the courts has roughly halved. It is obviously a matter of judgement whether the amended IPP sentence is now drawing the 'right' number of people into its net; but the view of many professionals within the criminal justice system – as we have learnt through our research interviews – is that the threshold of dangerousness is still set much too low. And what can hardly be disputed is that the threshold has been set in a somewhat arbitrary manner. The first part of this chapter will address this issue of the dangerousness threshold.

The second subject to be addressed is how decisions are made as to which individuals cross the threshold of dangerousness: that is, the issue of risk assessment. Our particular concerns here centre on the questionable efficacy of the available tools and methods of risk assessment, and the evident inconsistencies in how risk assessment is carried out. In addressing the broad issue of risk assessment, we necessarily look beyond its impact on sentencing to consider how the process impacts on later stages of the IPP sentence. The third and final part of the chapter will focus on the shift towards future-oriented, preventive sentencing that the IPP sentence entails, and the implications of this departure from principles of proportionality.

Arbitrary threshold of dangerousness

The IPP sentence allows dangerous people to be imprisoned indefinitely on the basis that the need of the public to be protected from them can in some circumstances trump the general principle that the severity of the sentence should match the seriousness of the offence that has been committed. This poses the question: how dangerous does someone need to be to warrant indeterminate imprisonment for the purpose of public protection?

There was no clear rationale for the threshold of dangerousness originally established by the IPP sentence. As we have seen above, there were two main parts to the definition of dangerousness as it applied to the IPP. First, the person had to be convicted of any one or more of 96 violent or sexual offences, all of which had a maximum sentence of at least 10 years' imprisonment; secondly, the person had to pose 'a significant risk ... of serious harm' to the public. Additionally, a previous conviction for any 'specified' offence (generally) denoted significant risk of serious harm. The direct consequence of this conceptualisation of dangerousness was that a great many more people were defined as dangerous and thus drawn into the net of the new indeterminate sentence than legislators had anticipated. Hebenton and Seddon describe this as a 'classic instance' of the 'net-widening' that is inevitably associated with the 'precautionary logic' currently propelling governments, on both sides of the Atlantic, to deploy 'law against law to ensure that institutional confinement is available for all those individuals who pose a serious threat to public safety' (2009: 347-8).

A particularly absurd aspect of the very broad definition of dangerousness was that some of individuals were given IPP tariffs of no more than a few months or even weeks. The absurdity lay in the fact that, first, such short tariffs suggested that the index offences were relatively minor and thus did not warrant indeterminate sentences on grounds of the perpetrators' supposed dangerousness; and, secondly, the prisoners' prospects of release on tariff completion were negligible, given the limited time available for addressing offending behaviour and thereby demonstrating reduced dangerousness.

The government response to the evident problem of an overly broad definition of dangerousness was to shift the threshold upwards – by introducing the two-year minimum tariff for most cases and by abolishing the presumption of dangerousness where there was a previous conviction for a specified offence. However, there is little evidence that this shift reflected a clear-sighted approach to developing meaningful criteria of dangerousness; rather, it appears to have been essentially an attempt to devise a formula that would produce manageable numbers of IPP prisoners (without incurring the significant political cost that would follow from an obvious 'softening' of policy on violent and sexual offences).

Of course, any criteria of dangerousness in sentencing legislation will be arbitrary to some extent, given that 'beyond a very narrow core of hard cases, the boundaries of what constitutes the kind of behaviour that can be considered dangerous is open to dispute and contention' (Bennett, 2008: 4). And the development of sentencing policy is necessarily driven by practical considerations - such as the limited resources of the Prison Service – as well as principle. Nevertheless, the replacement of one highly arbitrary threshold of dangerousness with another is a cause of concern. Moreover the new threshold can still be criticised for being set too low: both in the practical sense that the large numbers of people who are continuing to receive the sentence of IPP are imposing a heavy burden on the Prison Service; and in the more substantive sense that many of those deemed dangerous, even under the revised definition, arguably have not been convicted of offences that are serious enough to warrant indeterminate sentences.

A great many of our respondents – particularly the criminal and prison lawyers, but also a substantial number among our samples of judges, Parole Board members and prison governors/senior officials - expressed this latter view that the dangerousness criteria remain so broad that people are being inappropriately defined as dangerous. These respondents tended to question the rationale for the IPP sentence: they were of the view that the pre-existing discretionary life sentence provisions had been adequate for containing the risks to the public posed by the small number of genuinely dangerous offenders, or that rather than introducing an entirely new indeterminate sentence, government should have reviewed the sentence of discretionary life with a view to expanding its scope to a limited extent.

Other respondents, in contrast, were confident that a new sentence had been needed as a 'half-way house' to capture those whose offending was not serious enough to merit a life sentence, but posed enough of a risk to the public that indeterminate sentences were justified. Identifying those who fall into this category is another problem, however; and this is the issue to which we now turn.

The uncertainties of risk assessment

Wherever the threshold of dangerousness is set, the courts must have some means of determining which individuals cross it. This entails a process of 'risk assessment', which is undertaken not only at the point of sentence, but also at later stages – including, most critically, when the Parole Board considers eligibility for release. Decisions about risk made by courts and Parole Board panels are usually informed – at least partially – by the results of structured assessments undertaken by professionals such as probation officers, psychologists and psychiatrists. These structured risk assessments generally involve interviews with the prisoner and the use of standardised assessment tools.[32] For example, at the sentencing stage, a pre-sentence report prepared by a probation officer, and drawing on a structured OASys assessment, is usually submitted to the court to assist the judge's decision-making on risk.

Writing in an American context but with equal application to this jurisdiction, Simon (2005: 398) observes that 'Since the end of the 1990s..., risk assessment has become a largely uncontested aspect of a much expanded criminal process, ... entrusted to a range of criminal justice actors, including prosecutors, juries, judges, and administrative appointees'. This development followed a period, from the late 1970s, during which criminal justice risk assessment had been largely discredited. The current resurgence of risk assessment was driven partly by the political imperative to incapacitate those regarded as posing intolerable risks to the public, and investment in research activities aimed at developing sophisticated and statistically informed assessment tools. As noted in a report on the parole system, 'Devising reliable risk assessment models that will assist decision-makers to protect the public from future criminal behaviour has become the sine qua non of a society preoccupied with the avoidance of risk of harm' (Justice, 2009: 28). Today, a wide variety of tools exist which produce estimates of risk through the use of actuarial methods (that is, statistical techniques using information generalized from wider populations) generally in combination with structured clinical methods (involving diagnostic assessments of needs, behaviours and environmental factors).

The general subject of risk assessment is a large and complex one which we cannot address in detail in this report. We shall limit this discussion to three problematic aspects of risk assessment as it relates to the IPP sentence: first, difficulties relating to OASys and pre-sentence reports; secondly, the limitations of structured risk assessment; thirdly, the subjectivity of decision-making on risk. In discussing these issues, our focus is on risk assessment in sentencing, but we also touch on Parole Board decision-making.

Difficulties associated with OASys and pre-sentence reports

Court of Appeal case-law (collated in the Sentencing Guidelines Council guidance on dangerous offenders) states that: 'The court must obtain a pre-sentence report before deciding that the offender is a dangerous offender unless, in the circumstances of the case, the court considers that such a report is unnecessary'; also: 'The court is guided, but not bound, by the assessment of dangerousness in a pre-sentence report' (SGC, 2008: paragraphs 6.1.3 and 6.1.4). Only 11% of 176 IPP cases examined for the inspectorates' joint thematic review had been sentenced in the absence of a PSR (CJJI, 2010).

32. A wide variety of such tools exist which produce estimates of risk through the use of actuarial methods (that is, statistical techniques using information generalized from wider populations) generally in combination with structured clinical methods (involving diagnostic assessments of needs, behaviours and environmental factors). (For overviews of methods and tools of risk assessment, see Monahan (2006) and Kemshall (2001), among others.)

However, even if sentencers routinely order PSRs for dangerousness cases, it does not follow from this that the contribution of the PSR to the sentencing decision is constructive. One evident difficulty – to which some of our respondents alluded, and the HMI Probation report discusses – is the lack of fit between the CJA definition of dangerousness and the categorisations of risk which appear in PSRs, having been produced by OASys assessments. OASys assesses 'likelihood of reconviction' as low, medium or high, and 'risk of serious harm' as low, medium, high or very high. How exactly these classifications relate to the 'significant risk' of 'serious harm' which denotes dangerousness is unclear. As noted by the HMI Probation, the National Guide on the CJA dangerousness provisions, published by NOMS in 2005, fails to bring clarity to this issue, thanks to its 'convoluted' language. For example:

> *the Risk of Serious Harm assessment [in pre-sentence reports] should not be framed in 'significant risk' or Schedule 15 test terms. It should be framed in terms of risk of reoffending and impact so the court can take both variables into account ...*

And more confusingly still:

> *Practitioners must note the particular use of the word serious... it is not to be confused with serious as used in previous legislation or in determining sentencing thresholds (cited in CJJI, 2010: 19).*

The poor quality of a substantial minority of PSRs is another problem that the joint inspectorates' report discusses; noting, for example, that only 65% of reports examined for the review 'contained an analysis of the offence that provided helpful information to the court' (CJJI, 2010: 19). The quality of PSRs was praised highly by some of the judges we interviewed for this study, while others were very critical, or generally somewhat dismissive of the input of these reports into decision-making about risk:

> *By and large I'm afraid I take the view that it's not up to the probation service to assess risk – it's up to us. It's the judge's responsibility.*

> *Who's better [than judges] to judge [risk], really? ...We're better informed in any case than any other person making that assessment, in my humble opinion.*

Scepticism about the value of structured risk assessment tools

Where our judicial respondents were critical of PSRs, this was usually couched in terms of a general scepticism about structured assessments of risk. Judges frequently complained about the inadequacies of the 'formulaic', 'mechanistic' or 'sausage-machine-ish' approach to risk that is adopted in OASys assessments. The underlying point being made, very often, was that any attempt to measure risk in an entirely scientific or objective way – whether through OASys or other risk assessment tool - is inherently flawed, as it does not take account of the complexities of human nature and experiences. In the words of Corbett and Westwood, this is a process which treats individuals as 'subjects under scrutiny who, in turn, are viewed as a combination of (risk) factors liable to produce risk' (2005: 123). Judicial scepticism about

structured risk assessment was seemingly shared by the vast majority of our lawyer respondents, as well as several others we spoke to:

> *[Actuarial risk assessment tools] are trying to make statistical something that is actually a guess. (criminal lawyer)*

> *Judges aren't helped in their difficult task by tick-box assessments… [The assessment process used to involve] a human input – human understanding of people's situations ... [which has been] taken away by the allegedly scientific approach. (criminal lawyer)*

> *Probation have tools which are able to turn the process of reaching this necessarily subjective judgment ... into mechanistic decision-making … [producing a] quasi-scientific result. (judge)*

> *OASys has certain value, but you simply cannot quantify with any accuracy dangerousness and degree of dangerousness. (judge)*

In contrast to the lawyers and judges we spoke with, the psychologists tended to have confidence in structured risk assessment – unsurprisingly, given that risk assessment tools are embedded in the discipline of psychology, and risk assessments in prisons (and occasionally at the pre-sentence stage) are often undertaken by psychologists.[33] Our psychologist respondents discussed the strengths and weaknesses of specific clinical assessment tools and, by and large, viewed the use of these tools as an integral and essential element of work with people convicted of violent and sexual offences.

Research into the reliability of risk assessment tools has produced mixed results; thus, neither the scepticism of many legal professionals nor the relative confidence of forensic psychologists is entirely borne out by the evidence. An evaluation of this evidence is well beyond the scope of this report; it suffices to say that, in general, actuarial methods are proven to be superior to clinical methods of risk assessment,[34] although there are various well documented shortcomings associated with the former.[35] While actuarial methods may be more reliable than the alternatives, the application of group level data to individuals – especially where the group data relate to very rare occurrences such as incidents of serious violence – necessarily gives rise to errors, including both 'false negatives' and 'false positives'. The calculation of margins of error is thus a critical part of working with these assessment tools. There are also more theoretical problems with actuarial risk assessment: notably, it can be argued that it is inappropriate for sentence severity to reflect an individual's 'risk factors' that relate to social or demographic characteristics over which he has no control (Monahan, 2006).

33. The increasing emphasis on risk assessment within prisons is an important aspect of the rise in 'psychological power' in prisons, as documented by Crewe (2009); another aspect is the expansion in offending behaviour programmes, which are organised and overseen by psychologists.
34. As noted by Ashworth (2010), the Floud Committee concluded three decades ago, on the basis of a review of existing studies, that actuarial methods of predicting dangerousness are more reliable than clinical methods. (The Floud Committee was a working party on dangerous offenders set up by the Howard League for Penal Reform and Nacro).
35. For overviews of research on risk assessment tools see Hebenton and Seddon (2009), Bennett (2008), Monahan (2007), Harris (1999). See also Hart et al (2007) for an evaluation of the precision of actuarial risk instruments, and Coid et al (2007) for a study of the accuracy of risk tools being piloted for use in the UK's Dangerous and Severe Personality Disorder centres.

Subjective risk assessment

Reflecting their scepticism about structured risk assessment and, more specifically, the value of OASys as an assessment tool, many of our judicial respondents stressed that a subjective or intuitive approach to assessing risk, at the point of sentence, cannot be avoided. Some appeared to have a great deal of confidence in their abilities in this regard, often on the grounds that they had years of experience of working as criminal lawyers prior to joining the judiciary; others acknowledged that there is an inherent uncertainty to such a process. Examples of the judges' comments on this issue are presented in Box 4.1.

At the other end of the process, when Parole Board panels assess the risk of individuals who have completed their tariffs and can be considered for release, there is a very different approach to decision-making. For a start, the decisions are made by panels comprising three people rather than a single judge; additionally, whereas a judge usually works with nothing more than a PSR (and not always that), the facts of the case and an outline of previous offending before him, the parole panel usually has a vast array of reports from prison staff and other professionals, and including highly detailed assessments of any offending behaviour work undertaken. Another point of contrast is that the prisoner is more visible, and tends to play a much greater part, in parole hearings compared to the defendant at sentencing hearings. It is difficult to say if one approach to decision-making is likely to be 'better' than another; but given that the assessments of risk at both the sentencing and the parole stages have huge implications for the individual concerned, this disjuncture between the approaches can itself be questioned.

Despite the far greater access to information that parole panels have compared to the sentencing court, Parole Board members acknowledge that their decision-making is necessarily subjective and uncertain. One of our Parole Board respondents said, when asked if it is possible to assess risk with any accuracy (whether in relation to an IPP or life sentence prisoner), 'I'd go so far as to say that it's not possible'. Another commented that, notwithstanding the mountains of written evidence that panels sift through with respect to every case they deal with, nobody knows if their decisions are any better than those that would be produced by tossing a coin. A third said that when it comes to risk assessment by the Parole Board, 'you're probably as likely to get it wrong as you are to get it right'.

These respondents tended to stress that, in coming to their decisions about release, they review thoroughly the range of evidence that is presented to them, but also draw on 'instinct', 'intuition' or 'common sense'. One said that decisions depend as much on the panel members' 'subjective views' as on any 'structured weighing up of the different strands of information'; and added: 'Frankly, most panels in a borderline or difficult case place great store on the impressions they gather of the prisoner.' Another talked of having to 'tease out', in an oral hearing, the key issues at stake, and said that the skill to do this 'comes with experience'. But she resisted the idea that this is a matter of instinct: 'I can't put a finger on it ... I hate to use a word like instinct, because I don't believe in it.' Yet another was unapologetic about it: 'You get a feel for it. It's as simple as that ... It's an intangible thing, but it's based upon experience and gut reaction I suppose.'

Box 4.1: Judges' descriptions of the process of risk assessment

You kind of know instinctively if someone is dangerous or not ... Follow your instincts – they're probably right.

[In most cases, dangerousness] stares out at you from the page ... I'm decisive.

[Risk assessment] is entirely subjective – well, it's not entirely subjective because you have a PSR. But … we all come to that decision with our own views of humanity and prejudices - and a lot of that might be informed by cod psychology.

Usually it's overwhelming [that an offender is dangerous. I only pass [an IPP] if I'm absolutely 100 per cent sure, and usually they stare out at you.

I don't think I've found any difficulties [in assessing risk]. … You have to have that comforting belief in your abilities if you're going to be a judge, don't you!

[Risk assessment includes] gut feel. … It's a very human reaction to an amalgam of different matters.

On the whole, I'm afraid that I take the view that [risk assessment] is for the judge looking at the individual with whom he or she is dealing, and the circumstances of the crime that he's committed, and using his knowledge of criminals … Don't forget that I've worked for these people for much of my working life. I haven't just been diagnosing them and treating them or prosecuting them ... I've actually sat down in the cell with them and tried to find out what's going on. From their point of view. … [Risk assessment] is a matter of judgment. ... We are judges.

[Risk assessment] is an instinctive thing. … It's a value judgment, isn't it, and the decision is as good as the person making the value judgment.

[Risk assessment] is very subjective … I hope I approach it rationally.

A lot of this is purely visceral – does it feel right? ... I think ... this applies to all sentencing exercises. I look at it on a proper intellectual basis, ... but I suppose in the end I'm asking myself does it feel right? ... [But] I always ask that last.

There are some people, particularly after a trial and you've watched them in the witness box, and you've seen the person and felt the presence – and you know.

Extracts from letters to Prison Reform Trust from IPP prisoners

Correspondent 1: May 2009
In my previous letter I asked for advice about how I should be progressing with my IPP sentence if I'm post-tariff in a c-cat prison and completed my sentence plan .... I had to complain and bug the authorities to do all my OBPs [offending behaviour programmes] with my solicitor's aid yet not a single reduction in risk has been acknowledged right down the line to cell sharing and workshop risk! As imagined I'm very frustrated as all through my sentence 'they' have drilled it into me release is dependant upon OBP's.

Correspondent 2: July 2009
Since April I have been on the ACCT document[36] due to severe depression, the wing staff here at X have been very supportive and knew that the recommendations on my SARN [Standard Assessment of Risk and Need] was going to be a really tough time for me. … Upon hearing the SARN had been completed I went to the Psychology Dept, I was in a very distressed state and asked the author of the report what recommendations she had made. The psychologist seemed to take delight in informing me that she had recommended an extended SOTP [Sex Offender Treatment Programme] course, I am at the end of my tariff and the ESOTP means two/three years more in prison. … Shortly after speaking to her I returned to my cell and tried to end my life by overdosing on pills, unfortunately I was not successful ... The real staff that run the prison have been totally supportive to me over my depressed state and I have nothing but praise for them. Unfortunately psychology seem to be a law unto themselves and seem to answer to no one....

.... I have completed a SOTP course and because the matrix deems me as high risk I now have to attend an extended SOTP..... I am certainly not saying I did not deserve my sentence as I acted appallingly towards my victim …

Future-oriented sentencing and the departure from proportionality

By definition, to the extent that public protection is seen as an aim of sentencing, the focus of the sentencing exercise shifts from determining appropriate punishment for past act or acts to considering how to prevent people from committing certain acts in the future.[37] This is a major departure from the principle of proportionality in sentencing, whereby the severity of the sentence should reflect the seriousness of the crime that has been committed. The distinction between 'the backward-looking theory of punishment as just deserts and the forward-looking theory of punishment as crime control' (Monahan, 2006: 427) is manifest in the two components of the IPP sentence: the tariff reflects the seriousness of the past offence(s), while the indeterminacy of the sentence reflects the future risks posed by the offender.

36. ACCT (Assessment, Care in Custody and Teamwork) is the care-planning system used in prison for prisoners who are deemed at risk of suicide or self-harm.
37. Clearly, other widely accepted aims of sentencing, notably rehabilitation and deterrence, are also future rather than past-oriented.

There is an interesting contrast here with the discretionary life sentence, for which offence seriousness is a fundamental criterion, alongside dangerousness. This is made clear by the CJA 2003 provisions which specify that life can only be passed 'where the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life' (section 225(2)(b)), as well as by key Appeal Court judgments from both before and after the CJA.[38] A decision to impose the sentence of IPP, in contrast, is determined by offence seriousness only to the extent that the person has committed any of the 96 'serious specified' offences (many of which, such as robbery or sexual assault, cover an enormously wide range of illegal actions) and, in most cases, the tariff is at least two years. Once this relatively low criterion of seriousness is met, the decision - that is, the decision whether or not to impose an IPP; not the decision as to tariff length - hangs entirely on the court's determination of the level of danger that the person will pose in future.

There are three main respects in which this shift towards preventive, future-oriented sentencing is, arguably, problematic. First, there is the matter of principle. Proportionality – or what is often termed the just deserts approach - has long been established as the guiding principle of sentencing policy and practice in England and Wales. Section 142 of the Criminal Justice Act 2003 sets out the range of purposes that sentencers should consider in passing sentence, but the Sentencing Guidelines Council (2004) specified that proportionality should be the organising principle. This places fairness at the heart of sentencing decisions, in the sense that 'the penal sanction should fairly reflect the degree of reprehensibleness (that is, the harmfulness and culpability) of the actor's conduct' (von Hirsch and Ashworth, 2005: 4). A general commitment to the principle of proportionate sentencing does not, of course, rule out the possibility that in extreme cases it can be overridden, such as where there is a need for public protection. But in the view of many, including the large majority of the lawyers we interviewed for this study, and some of our other respondents, the IPP sentence makes it much too easy for proportionality to be trumped by public protection concerns.

Linked to the principled objection to the shift towards preventive, future-oriented sentencing is a second argument which is partially pragmatic: namely, that the limitations of risk assessment are so evident that if the courts have extensive powers to lock up individuals to pre-empt violent or sexual offending, these powers will often be used in ways that are neither effective nor just. Again, this viewpoint was expressed by many of our lawyer respondents (as well as some others), such as one who commented, in an email submission, that the IPP

> *requires the sentencing court to engage in a wholly speculative predictive exercise about future dangerousness when there is no reliable measure of such dangerousness …. The task of predicting whether particular types of offending might escalate to cause serious harm and then whether the person might pose a risk of harm in the future is simply too speculative and subjective to form the basis for indefinite detention.*

The third argument also has both pragmatic and principled aspects – and relates to the immense difficulty of effectively addressing the offending behaviour of individuals who are deemed by the courts to be dangerous, and can only be released when they no longer pose

38. For example, R v Hodgson (1968) 52 Cr.App.R.(S)113; R v Olawaie and others [2009] EWCA Crim 1925.

significant risks. Of course, the rehabilitation of violent and sexual offenders – and indeed of all sentenced offenders – is highly desirable; but making it a precondition of release for a large swathe of the prison population may be an unrealistic goal which imposes unmanageable burdens on the Prison Service. This 'problem of exit' from the IPP sentence will be further discussed in the next chapter of this report.

From other perspectives, the departure from proportionality associated with the creation of the IPP sentence is not necessarily problematic. For example, the psychologists whom we interviewed for this study almost universally viewed the principle of indeterminate sentencing for public protection in a positive light. In line with their professional role in prison settings, they welcomed the opportunities offered by the IPP to work with prisoners – for however long it takes – to reduce the risks they pose to the public. As one commented, 'The idea of people having to stay in prison for as long as they need to appeals to me. It seems quite logical.' Thus, for the psychologist respondents, the issue of (dis)proportionality is largely unimportant; what matters more is that sentences should provide scope for interventions to be undertaken with the prisoner. Such a stance presupposes, of course, the effectiveness of these interventions.

We expected that our judicial respondents would tend to share the lawyers' concerns about proportionality. However, very few appeared to perceive a tension between proportionality and public protection in regard to the sentence of IPP. For some, the relationship between these two principles of sentencing is unproblematic because they are required by statute to give precedence to public protection in cases where an IPP is justified, and they accept this:

> *If there is a risk – that's what I'm here for. I'm here to protect the public.*
>
> *[If you have decided an offender is dangerous] you no longer have a balancing act to perform. You have a duty to pass an IPP.*
>
> *Proportionality isn't part of my exercise – I apply the statute.*
>
> *You ought perhaps to deal with one set of unpleasant and extremely dangerous people in a different regime to the rest of the criminal community, because they present a different problem.*

Others did not seem to think that a meaningful distinction can be drawn between public protection and proportionality in sentencing:

> *[Proportionality and public protection] are sort of running in tandem, I think.*
>
> *I've never subdivided them – it's a global thing. … They are, to a large extent, if not totally, synonymous.*

Yet others stressed that the requirement for the IPP tariff to be proportionate ensures that a balance between public protection and proportionality can be struck without serious difficulty:

> *The very mechanics of the sentence allows for the proportionality to be catered for.*
>
> *It seems to me that there is no necessary conflict between proportionality and the kind of sentence we're talking about. … And the way that it's done is quite elegant – by saying what the determinate sentence is, you're actually applying proper principles; and then you're saying: 'But…'.*
>
> *It's a two-part test and we're required to perform it. Because we have to make an assessment in relation to what the determinate sentence would be – that's one assessment – and then we've got to make an entirely different assessment in relation to risk. I find it easy to compartmentalise.*

This latter view that the need for proportionality is satisfied through the setting of the tariff is, perhaps, difficult to sustain in a situation where IPP prisoners have only the smallest likelihood of release at or reasonably soon after tariff expiry. However, one judge argued that time spent in custody beyond tariff does not amount to disproportionate punishment because 'it is a consequence of their character being such that the public need to be protected from them ... It isn't punishment as such, although obviously the offender will perceive it to be so.' Such a comment contrasts vividly with the following, voiced by perhaps the only judge who expressed deep discomfort with the concept of the IPP:

> *At the end of the day you're making an educated guess as to future risk. You're punishing somebody, if you go for IPP, for what they might do. And we weren't used to doing that. So – yes – I think there is a tension between giving a sentence which is proportionate to the crime and giving a sentence based on an assessment of future risk. … I think probably, on balance, I'd prefer not to have the power of IPP.*

Extracts from letters to Prison Reform Trust from IPP prisoner

July 2008
I am a short tariff IPP who has completed the bulk of my offending behaviour work. However, according to my SARN [Standard Assessment of Risk and Need], I am required to be assessed for the extended SOTP [Sex Offender Treatment Programme].

I have written to all the prisons that list this course but my findings reveal this course, as a target, to be unachievable. For example, T- list this course but have no plans to run it, Y- are no longer taking IPP's as they have too many already, S- is a B-cat and I am a C-cat, and R- have no plans for this course either. How can this course be kept as a viable target on my sentence plan if no prisons are running the course. (Listing and running are two different things.)

I would appreciate some guidance at this time because with just over a year to go until the end of my tariff, I have no clear goals or direction. It would be wholly unreasonable to expect me to wait to get on to a non-existent waiting list .....

December 2008
I write to you with concern to the way that the prisons are assessing offenders such as myself. I have been recommended for the extended SOTP (which I cannot possibly complete to report stage by my tariff expiry) based primarily on the RM-2000 assessment (static risk). They also maintain that all the social and life skills courses I have done mean little because they were not offence related. Surely the whole point is to attain understanding and cognitive change?

January 2009
.... Moreover, it is not enough to say someone may benefit from a programme and so make it part of their sentence plan, especially in IPP cases. This is because such a decision based on a vague possibility could cost the prisoner 18 months or more custody on what is effectively a whim, 'maybe he will benefit, maybe he won't'.

5. Problems of exit: barriers to release of IPP prisoners

The low rate of release of IPP prisoners from custody could be described as the most pressing and visible problem associated with the sentence. The additional burdens on the Prison Service associated with IPP are not so much to do with the fact that these prisoners are entering prison – most of them would be in prison for significant periods even if they had not received this particular sentence – but the fact that they do not leave. As we have just discussed, the issue of disproportionality arises in relation to post-tariff detention; and the longer that prisoners are held beyond tariff, the more disproportionate their sentences can be said to be. Unsurprisingly, the bitterest complaints from IPP prisoners and their families are about the injustices of incarceration with seemingly no end in sight.

Perhaps it should come as no surprise that large numbers of IPP prisoners are being held in custody beyond tariff expiry. The concept of a minimum term for dangerous prisoners does not imply that they have any entitlement to release upon its expiry: it means simply that they can be considered for release at this point. However, surely few would have predicted that, almost five years after the sentence was introduced, no more than around 4% of almost 2,500 post-tariff IPP prisoners would have been released. The Home Office prediction, cited above, of an additional 900 in the prison population indicates that legislators entirely failed to anticipate the scale of post-tariff detention (to the extent that they gave it any consideration whatsoever).

Why, then, are the numbers of releases from IPP sentences so very low? There are three key issues here, which will be discussed in turn below. First, the Parole Board is clearly over-stretched and, in addition, its decision-making is highly risk averse, as reflected in its low release rates. Secondly, offending behaviour programmes – completion of which is viewed as essential for people's readiness for release – are limited in their availability and also, even more importantly, in their scope and effectiveness. Thirdly, it is inherently extremely difficult for someone to demonstrate their reduced dangerousness, given that the converse of the low dangerousness threshold set by the IPP sentence is a high 'safety' threshold for release.

The over-stretched and risk averse Parole Board

One of the more prosaic reasons for the low rate of release from IPP sentences is that the Parole Board simply does not have the capacity to hear all IPP cases when their tariffs expire. The introduction of the IPP greatly increased the demand for oral hearings by the Parole Board: 1,900 oral hearings were held in 2005/06, compared to 2,757 in the year 2008/09 (Parole Board, 2006; 2009). This increase in demand, together with a shortage of Parole Board panel members (particularly judicial members), and various practical difficulties associated with the collation of the necessary paperwork for panels, led to many and lengthy delays in hearings since the relatively early days of the IPP sentence.[39] As the Parole Board

39. See, for example, Nichol (2006, 2007), National Audit Office (2008), Justice Select Committee (2008).
40. EWHC 1638 (Admin)

continued to struggle to fulfil its obligations, the IPP right to a hearing around the time of tariff expiry was affirmed by the case of R (Betteridge) v Parole Board (2009),[40] in which it was asserted that a delay in listing the claimant's Parole Board hearing, due to a lack of panel members, breached his right to a speedy hearing under Article 5(4) of the European Convention on Human Rights.[41]

Various steps have been taken to ease the burden on the Parole Board. These include the introduction of the Intensive Case Management System which aims to improve the content and delivery time of dossiers (Parole Board, 2008); increased recruitment of judicial members; and the introduction of a generic parole process with robust performance monitoring (as set out in Prison Service Order 6010). In addition, the Parole Board rules have been amended to permit non-judicial members to chair panels in some IPP hearings, and to allow cases to be dealt with on paper rather than by oral hearing where there is no prospect of release (Parole Board (Amendment) Rules 2009). Despite these provisions, delays in hearings continue to be commonplace. It has been reported that of 2,280 IPP prisoners who were over tariff as of 16 December 2009, only half (1,124) had had a Parole Board review 'either on expiry or following expiry of their tariff', while the other half (1,156) were 'recorded as still awaiting a review or a decision from a review.[42]

Where IPP cases are heard by the Parole Board, for understandable reasons it is generally reluctant to sanction release. This risk averse approach is clearly illustrated by Table 5.1, which shows that release was directed in just eight per cent of hearings in 2008/9, with similar figures in the preceding years; the figure for April to September 2009 appears to be even lower. The equivalent figure for lifers is 15% release directed in each of the years 2006/7, 2007/8 and 2008/9 (Parole Board, 2009).

Table 5.1: Outcomes of IPP Parole Board oral hearings of IPP cases

	No. cases considered	% released	% not released	% deferred/adjourned at hearing
2006/7	74	8%	59%	32%
2007/8	253	7%	76%	17%
2008/9	556	8%	70%	22%
April-Sept 09	473	5%*	n/a	n/a

Source: 2006/7 to 2008/9 figures from Parole Board Annual Report (Parole Board, 2009); April-Sept 09 figures derived from Hansard 26.11.09, column 338W (no. of hearings held) and Hansard 26.1.10, Column 731W (no. of IPPs released).
**Note that the 5% release rate for April-Sept 09 is calculated using data from two different sources, and thus may not be reliable.*

Various inter-related factors would seem to account for the Parole Board's reluctance to release IPP prisoners. These include the limitations of offending behaviour programmes and the inherent difficulty of demonstrating reduced dangerousness, to be discussed below. These problems are compounded by the uncertainties of the risk assessment process, and the fact that in IPP cases, as with lifers, the Parole Board must consider the likelihood of re-offending over the remainder of the individuals' lives (or, at a minimum, over the next ten years). Prior to the CJA 2003, which made parole automatic for all determinate sentenced prisoners,

41. Article 5(4) reads: 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'
42. Letter from Home Office Minister Maria Eagle MP to Andrew Stunell MP, 19.1.10 'Indeterminate Sentenced Prisoners Parole Reviews PQ Reply'.

those serving determinate sentences of at least four years could only be released half-way through their sentence at the discretion of the Parole Board.[43] The Parole Board's approach also reflects the broader trend towards risk aversion which is manifest in policy and practice across the criminal justice system. Again as applies to other parts of the system, the ever-increasing pressures on the Parole Board to 'get it right' all the time are at least partially driven by sensationalist and relentless reporting of cases where people who have been released by the Parole Board have gone on to commit appalling crimes. Two of the most prominent among these cases are those of Damian Hanson and Anthony Rice, both of whom committed murder, in 2004 and 2005 respectively, after having been released by the Parole Board (in Hanson's case, on Parole and in Rice's case, on life licence). In both cases, subsequent investigations by HM Chief Inspector of Probation found that the parole decisions were not necessarily unreasonable, but highlighted a variety of shortcomings in the parole process (HM Inspectorate of Probation 2006a, 2006b).[44]

Of course, the pressures on the Parole Board to 'get it right' tend to operate in one direction only, in the sense that the public and political scrutiny is always of seemingly inappropriate decisions to release prisoners, and never the possibly ill-informed decisions not to release. The Chairman of the Parole Board, Sir David Latham, has himself commented on the problems created by risk aversion:

> *Our release rates have reduced in the last few years in a way which is arguably an over-reaction to public concern about the reoffending by released prisoners….Actually, the serious further offending rate of released prisoners is just 1-2%; a level that has remained stable for many years.*[45]

Some of the implications of risk aversion in the criminal justice system are noted by Hebenton and Seddon:

> *Within precautionary logic, margins of error are viewed in a distinctive way. False 'positives' (incorrectly assessing a person as 'dangerous') are part and parcel of being cautious in the face of uncertainty — erring 'on the safe side'. By contrast, false 'negatives' (incorrectly rating a person as 'safe') cannot be tolerated because the consequences of this type of error for public safety and security are seen as potentially catastrophic (2009: 352).*

The 'precautionary logic' described by Hebenton and Seddon requires criminal justice agencies to attempt to eliminate rather than manage risk, and silences debate about what levels of risk might realistically be tolerable. In this environment, the Parole Board is inevitably propelled towards demanding ever higher standards of the prisoners it releases – all the more so given that the statutory test applied to IPP (and life sentenced) prisoners is so vague that it can be constantly redefined. Under the Crime (Sentences) Act 1997, an indeterminate sentenced prisoner can be released if the Parole Board is satisfied that it is no longer necessary for the protection of the public that he be confined (section 28(6)b)). As noted in a JUSTICE report on the parole system, this 'life and limb test', as it is commonly known, 'refers to the nature of a risk which justifies continued detention, [but] it gives no indication of the actual level of risk required' (JUSTICE, 2009: 26).

43. In these cases, the Parole Board was required to consider likelihood of re-offending over the period between the one-half and two-thirds stages of the sentence. Hence the 'parole window' was much narrower than it is in both IPP and life sentence cases.
44. See Harding (2006) for discussion of these cases and their implications for the Parole Board. See also the recent
45. Amelia Hill, 'Parole chief: release more prisoners', The *Guardian*, 31.3.10, www.guardian.co.uk/uk/2010/mar/31/parole-chief-warns-overreaction .

Despite the external pressures on the performance of the Parole Board, among the Parole Board members we interviewed there appeared to be a general acceptance that uncertainty is an integral element of the parole decision-making process – as we have already noted, above, in our discussion of risk assessment. One Parole Board member expressed this point of view bluntly: 'If you can't live with uncertainty, you shouldn't be doing the job.'

Extracts from letters to Prison Reform Trust from IPP prisoners

Correspondent 1: April 2009
....being that we have here at XX a next-to-no-good lifer PO who doesn't seem to know anything about what's going on or if he does, never comes to see you to tell you, could you possibly tell me how I could, if there's anyway, of speeding up my parole process. I'm now 9 months post my tariff and I handed in my dossier over 2 ½ months ago. Everything in it (barring 2 reports) are extremely positive, and I've been recommended for release by probation, so as you can imagine it's extremely frustrating waiting and waiting for this day to come ....

Correspondent 2: April 2009
I am an IPP Prisoner with 2 years (nearly) of a six and a half year tariff served and would appreciate any information on IPP sentences. As I am confused by this! As one moment I'm told I am not a lifer and the next I am a lifer. I would also like to know what recourse I have as I've now served two years of my tariff and have completed no courses on my sentence plan. My half-way review is due next year and one of the courses I have to do lasts for a year from start to final report stage …

Limitations of offending behaviour programmes

Since the relatively early days of the IPP sentence, limited availability of accredited offending behaviour programmes – which are viewed as the primary means by which dangerousness can be reduced - has been an obvious impediment to IPP prisoners' progress and, ultimately, has lessened their prospects of release. (See Chapter 3, above, for a brief description of programmes.) This has been the focus of several of the legal challenges made to the post-tariff detention of IPP prisoners.

Increased resourcing of offending behaviour work has hence been part of the government strategy to contain the emerging problems associated the IPP sentence. For example, the years 2007-8, 2008-9 and 2009-10 saw the allocation of an additional £3 million funding 'to establishments to support work with [IPP] prisoners, with a view to ensuring that assessments are made on time and to improving access to interventions' (Hansard 5.10.09, column WA475). However, as discussed in Chapter 3 of this report, demand for places on offending behaviour programmes continues to far outstrip supply.

Moreover, comments made to us in interview by governors and senior officials in the Prison Service make it clear that the problems of access to interventions are compounded by the immense practical difficulties – in an overcrowded prison system – of matching places at prisons which offer particular programmes to the prisoners who need to undertake them. These difficulties are vividly illustrated by the many letters, phone-calls and emails received by the Prison Reform Trust advice and information from prisoners and family members asking in desperation about which establishments run specific programmes and how transfer to those prisons can be arranged. The frustrations and anxieties of prisoners and their families who are trying to track down elusive places on programmes are multiplied when – as appears to happen with some regularity – prisoners complete certain interventions only to find that others are then added to their sentence plans.[46] And as frustration and anxiety rises, the prisoners' receptiveness to interventions, as and when they are finally available, is likely to decline.

Offending behaviour programmes: the question of impact

The limited availability of offending behaviour programmes and the associated logistical difficulties are, essentially, practical problems which can theoretically be overcome through increased resourcing (difficult as this would be in the current economic climate). But it can by no means be assumed that greater provision of interventions would translate into higher rates of release of IPP prisoners. A more fundamental issue than the availability of interventions is the question of their effectiveness: to what extent will someone's participation in a specified offending behaviour programme genuinely impact on the level of risk he poses to the public?

The development of offending behaviour programmes largely based on the principles of cognitive behaviour therapy, and their establishment within the prison system (and in the community) as a core component of rehabilitative work, has been supported by encouraging research evidence. The overall message from the large numbers of studies undertaken – including meta-analyses - is that these programmes, if delivered well, have a positive impact on reoffending rates. However, the programmes are never claimed to work for everyone who completes them; the positive effects that have been demonstrated are often modest; and some of the research evidence of impact is far from categorical.[47] As noted by McNeill (2009: 45):

> *There is no generalizable recipe for helping an individual offender change his or her behaviour; precise knowledge about which methods seem to work best with specific kinds of offenders and offences remains limited, not least due to the important shortcomings (with regard to study design, etc) in studies on this subject.*

In 2005, a Home Affairs Select Committee report noted the 'confusing picture' produced by recent Home Office research into the impact on offending of cognitive skills programmes. It concluded that these research results 'argue in favour of reducing the priority given to offending behaviour programmes. They should continue to be offered as part of the range of interventions for prisoners but fitted into a much wider rehabilitation agenda' – advice that does not, to date, appear to have been heeded (House of Commons, 2005: 72).

46. Problems with the sentence planning process, which is 'at the heart of managing an IPP sentence', are highlighted by the second joint inspectorates' report on IPPs. Sentence plans were frequently found to be incomplete or of poor quality, and one particular problem was the lack of up-to-date information on programme types and availability (CJJI: 26-7).
47. See, for example, Landenberger and Lipsey (2005) for a meta-analysis which demonstrates the overall effectiveness of CBT offending behaviour programmes; they also cite a number of other meta-analyses which provide encouraging results. Wikström and Treiber (2008) cite a variety of evaluations of offender-oriented programmes which demonstrate a 'rather small effect' on the re-offending of young people. A review of the evidence on offending behaviour programmes by the Sainsbury Centre for Mental Health (2008) found that they have a 'modest' impact on re-offending levels – ranging from a reduction of 10% or less to 24%, depending on the type of programme and features of the offender.

The wider rehabilitation agenda

The reference in the above quotation to the 'wider rehabilitation agenda' points to what is often seen as the primary weakness of most of the existing offending behaviour programmes: namely, that their focus on attitudes and thinking patterns is too narrow, and fails to acknowledge the breadth and depth of the inter-related problems that tend to underlie offending. As the large research literature in this field has amply demonstrated, if offending behaviour is usually multi-factorial, so desistance from offending is often driven by various factors – among which the development of positive social bonds including family relationships, the acquisition of employment, and advancing age appear to be particularly important.[48] From this perspective, rehabilitation strategies should not over-focus on a single dimension of social integration (cf Ward and Maruna, 2007).

Indeed, this is explicitly recognised in NOMS policy on resettlement, within which seven 'reducing reoffending pathways' are highlighted as being of critical importance. The seven pathways are accommodation; education, training and employment; health; drugs and alcohol; finance, benefits and debt; children and families; attitudes, thinking and behaviour.[49] Offending behaviour work falls within just one of the seven pathways – 'attitudes, thinking and behaviour'. Thus the over-riding emphasis on offending behaviour programmes in relation to the management of IPP prisoners would seem to be at odds with large swathes of national policy. Moreover, the very nature of the IPP sentence could be said to undermine some of the resettlement pathways: in particular, employment prospects and accommodation are extremely difficult to maintain where there is a great deal of uncertainty over sentence length. And perhaps even more significantly, the indeterminacy of the sentence can place family relationships under very great strain, thus potentially contributing to family breakdown. The impact on family is clear from many of the queries from family members received by the Prison Reform Trust advice and information service; see, for example, the letter quoted on page 45. The Sainsbury Centre for Mental Health study of IPPs found that 'indeterminacy damages relationships with family and friends, particularly for prisoners with children' (2008: 8).

Ineligibility for offending behaviour programmes

Another well-documented limitation of offending behaviour programmes is that large numbers of prisoners are deemed ineligible for them. For example, although learning disabilities or learning difficulties are prevalent across the prison population,[50] 'conventional offending behaviour programmes are not generally accessible for those with an IQ below 80' (Talbot, 2008: 17).[51] The unfairness of this is graphically illustrated by the following quote from young man serving an IPP sentence:

> *To lower my risk, I have to do ETS [Enhanced Thinking Skills: a course offered in prison] but because I can't read and write, I can't lower my situation. I'm just stuck. They are saying that until I can read and write I can't do ETS and I can't lower my risk. …It's like when I'm trying to say I can't learn no more. I've been to a special school and I've learnt as much as I can but they don't believe that. But why should I be punished for two things? I'm being punished for the crime and again for not being able to read and write. (Prison Reform Trust, 2007:8)*

48. See, for example, Uggen et al (2004); Sampson and Laub (2005); Farrall and Calverley (2006).
49. See, for example, the National Reducing Re-offending Delivery Plan (NOMS, 2005).
50. A recent review of research concluded that between 20% and 30% of offenders 'have learning difficulties or learning disabilities that interfere with their ability to cope within the criminal justice system' (Loucks, 2007:1).
51. A recent decision of the High Court found that there had been a breach of the Disability Discrimination Act 1995, and that the Secretary of State had breached his public law duties, in the case of a life sentence prisoner who had been unable to access offending behaviour programmes due to a learning disability. This prisoner, having failed to make progress towards release, had served well over twice the four-year tariff he had received on an automatic life sentence (Gill v Secretary of State for Justice [2010] EWHC 364 (Admin)).

In its report on adults with learning difficulties, the Joint Committee on Human Rights described this problem as:

> *one of the most serious issues in our inquiry. We are deeply concerned that this evidence indicates that, because of a failure to provide for their needs, people with learning disabilities may serve longer custodial sentences than others convicted of comparable crimes. This clearly engages Article 5 ECHR (right to liberty) and Article 14 (enjoyment of ECHR rights without discrimination).*
> *(Joint Committee, 2008: 76)*

There is also evidence that access to offending behaviour programmes is particularly difficult for IPP prisoners who have mental health problems – and it should be remembered that IPP prisoners appear to suffer from significantly higher rates of mental health problems than other prisoners - although adapted programmes have recently been introduced in some high and medium secure hospitals (SCMH, 2008).

The second joint inspectorates' IPP report came across a number of cases in which prisoners were unable to undertake programmes for reasons that were 'outside of the control of the individual offender and not linked with their motivation or willingness to comply' (CJJI, 2010: 22). These included an East European prisoner whose poor command of English was a barrier to participation, and someone with Asperger's syndrome who was highly resistant to change and would not accept responsibility for his offending. Such prisoners, it seems, are unable to take even the first steps of the long journey towards securing release; notwithstanding the recent assertion by a justice minister that 'all reasonable adjustments should be made to ensure programmes are accessible to those who could potentially benefit, and if not alternative provision should be made' (Hansard, 12.3.10: Column 547W).

Professionals' ambivalence about offending behaviour programmes

Some awareness of the relatively modest research results or programme evaluations, plus their own professional experiences, appear to have persuaded most of our respondents that accredited offending behaviour interventions have some value but are of limited effectiveness. Among these respondents were several of the Parole Board members we spoke with – indicating that the doubts about impact are feeding into the Parole Board's reluctance to release IPP prisoners. Examples of the somewhat sceptical comments about offending behaviour work made by a range of our respondents are provided in Box 5.1. However, the psychologists we interviewed tended to speak in much more positive terms than others about what can be achieved through programmes – provided these are properly resourced and delivered. As was true of their relative confidence in risk assessment tools, the psychologists' general (if not wholly unqualified) commitment to offending behaviour programmes clearly reflected, at least in part, the centrality of the role of the psychologist in these interventions.

Occasionally it was suggested in interview that because IPP prisoners are typically told that they must undertake offending programmes in order to be considered for release, they often – inevitably but misguidedly – believe that programme completion is, in and of itself, 'proof' of reduced dangerousness. A parallel problem is associated with the frequent use of structured risk assessment tools, in that prisoners can become overly concerned with reducing their risk 'scores' at the expense of efforts to achieve meaningful self-change.

Box 5.1: Ambivalence about offending behaviour programmes

Some [programmes] make a difference. (Parole Board member)

Too much of a one-size-fits-all approach ... Stifles innovation. (Parole Board member)

They have the potential to make a difference. (Parole Board member)

Programmes are as good as the prisoner makes them ... I'm not one of the cynics. (Parole Board member)

Generally they don't work. (Parole Board member)

The jury's out ... On balance, it's better for offenders to attend programmes than not. (Parole Board member)

We'll see in ten years' time [if programmes are effective]. (prison governor)

Some of [the interventions] are effective. (prison governor)

[In order to address risk] you have to be prepared to deal with a whole range of issues, not all of which are touched by offending behaviour programmes .... [Programmes] have some impact on some people. (prison governor)

Courses may be over-hyped, but we haven't got anything much better. (senior official)

It's almost too early to say [if programmes are effective]. (judge)

They're obviously valuable tools … But it would depend on the case. They're not a panacea for all ills. (judge)

I know they do improve the situation for some ... The principle is fantastic. (judge)

Like anything – you've got to try – you can't just say they're all rubbish. (judge)

If I didn't believe the individual can change I'd be a very depressed man, doing the job I do! But I'm confident that they can. It just takes some people a huge amount of time, and a lot of incentive and pressure... (judge)

It's better to do the courses than not to. (judge)

There's an assumption [by the Parole Board] that if you've done the requisite courses, you've got rid of your risk. And if you've not done the courses you've still got your risk – which I think is a complete non-starter, myself. (judge)

I have no doubt that risk can be reduced in certain circumstances. (judge)

One of our judicial respondents advanced an interesting, if cynical, counter-argument to these concerns about the superficiality of the available indicators of reduced risk, such as programme completions. He said that while he does not know if offending behaviour programmes have an impact on dangerousness ('although I have a strong contrary suspicion'), they can possibly help to 'level the playing field' for the IPP prisoner when he faces the Parole Board. If someone has completed programmes, at the very least this is something that can help to structure and ultimately justify a Parole panel's decision to release him – otherwise, the pressures on the panel to continue to find him dangerous will be overwhelming. As we will now go on to discuss, the task of genuinely moving from a 'dangerous' to a 'no longer dangerous' state of being is inherently extremely difficult.

Extracts from letters to Prison Reform Trust from IPP prisoners

Correspondent 1: March, May 2008
Please could you do some research in Newcastle upon Tyne and other Areas, just to see if they do the adapted SOTP? I am been told, by people who are meant to help me, that ASOTP does not exiist in on the outside. If so, could yous get me the postal address? This is very important. ...

... Please could you find out if Cornwall and Wales do the Adapted SOTP out in the community? The prison can't offer me this. Except the North Ease, I need to know what and where they do ASOTP and postal address. I am a IPP prisoner and stuck. Probation won't help. Thank you.

Correspondent 2: April 2009
...Please could you let me know what prisons run the healthy sexual functioning course, as I am being told that even thou I don't fit the criterion for the HSF course, I may need to be assessed for it, this is so I can write to those prisons and find out the length of time I may have to wait for said assessment. ...

Correspondent 3: May 2009
... I completed the SOTP in November and received a very positive post course report in March, however a SARN (Standard Assessment of Risk and Need) has been undertaken on me and has stated my dynamic risk of recidivism is now medium/high and recommends I am not released, recommending I am assessed for the Health Sexual Functioning Programme. I will obviously be speaking to my solicitor but it would be very helpful if you have any information regarding the programme you could send me. I am also concerned that this programme is relatively new and has not been audited for effectiveness. I have been told that the nearest prison which offers the programme is HMP S- – it would be very helpful if you were able to enquire how long the waiting list is for assessment and to get on the programme there and how long it lasts, including post programme reports.

Inherent difficulty of reducing dangerousness

Once someone has been defined as 'dangerous' by the sentencing court and has been given an IPP sentence on this basis, the onus is on him, once he has completed his minimum term, to demonstrate to the Parole Board that he longer poses a risk to the public. This is made clear by the House of Lords judgment in the cases of James, Lee and Wells. Here it was asserted that although there should not be a presumption of continued dangerousness after tariff expiry, the 'default position ... is that the prisoner is to remain detained unless the Board are satisfied he can be safely released'. (How exactly this 'default position' differs from a presumption of continued dangerousness is not clarified.) This is because the sentence of IPP will only be passed where the sentencing judge decides that 'the prisoner would continue to be dangerous at the expiry of the punitive element [i.e. tariff] of the sentence; the necessary predictive judgment will have been made'.[52] But, given the uncertainties and subjectivity of the risk assessment process, how exactly can the prisoner convincingly demonstrate to the Parole Board that he is no longer dangerous? One of our lawyer respondents observed (in an email) that the IPP prisoner is placed:

> *in the unenviable position of having first been sentenced on the intuitive possibility that a risk might exist and then having to demonstrate that those risks have reduced. If a risk cannot be properly quantified (or even identified), the presumption is continued detention and this can nearly always be justified on the basis of the actuarial tools assessing static risk factors.*

As was noted by many of the prison-based psychologists, prison governors and senior Prison Service officials whom we interviewed, it is particularly difficult for a prisoner to demonstrate that he is no longer dangerous when his risks have only been addressed in a custodial setting – since this is a highly artificial environment in which individuals do not have opportunities to face and learn to deal with many of the triggers of their dangerous behaviour. For this reason, open prisons potentially have a very important role to play in preparing IPP prisoners for possible release, although to date the movement of IPP prisoners into open conditions has been slow. As of 5 February 2010, just under 200 IPP prisoners (197 to be specific), out of the total population of almost 6,000, were in open conditions (Hansard, 9.2.10: column 944W). Limited use of release on temporary licence (ROTL) for IPP prisoners also has implications for their capacity to demonstrate reduced risk.

If it is difficult to establish how exactly IPP prisoners can demonstrate their reduced dangerousness, it is also difficult to know by how much the level of dangerousness needs to be reduced. In other words, how 'safe' does an IPP prisoner have to be in order to be released? The vagueness of the 'life and limb' test for release has already been noted; but this is evidently a test under which the demands made of prisoners can be very stringent. Since IPP prisoners must positively demonstrate reduced risk before they can be released, the converse of the relatively low threshold of dangerousness for an IPP sentence is a relatively high threshold of 'safety' for release.

52. ([2009] UKHL 22: paragraph 50).

Extracts from letter to Prison Reform Trust from mother of IPP prisoner, November 2009

Initially, we naively expected that our son would be released on or about the expiry of his 18 months' minimum tariff, i.e. in December 2008. After all, by then, we understood that he would have served the 'punitive' part of his sentence, having been incarcerated for 11 months of that time in a Cat B prison, on a Vulnerable Person's Wing, so locked in his cell for 22 out of 24 hours each day, without access to work or offender-related courses

…As it turns out, J- was transferred in May 2008 to a Cat C prison, where he remains to this day … J's father was very upset by the Parole Hearing [held in November 2009]. He feels that the decision not to release J- had already been made prior to the Hearing, which turned out to be a 'cat and mouse game' to wear J- down, belittle him, and reduce him to tears. (The Hearing had to be interrupted twice, to allow J- to compose himself.)

… If he is 'lucky', he will have another parole in a year's time (it could be in 2 years' time), but if he hasn't done the [specified] course, will probably fail to secure his release. This cannot be right, as J- is going round in circles, with the goal-posts being continually shifted, so there is little chance of him being released.

We, his parents, are extremely distressed by this situation. We are elderly, and trying our best as J-'s only next-of-kin, to keep his affairs in order, but this is getting increasingly difficult, owing to not knowing when he will be released. Other people have been supportive to us, but are now perplexed as to why he isn't being released, and may be assuming that his original offence must be more serious than it was. Our health is starting to deteriorate, and we worry that we will not be able to maintain this level of support, which after all is important for everyone as it will enable J- to more successfully re-integrate into society, when he is finally released.

… We feel that the situation created by the imposition of an IPP on our son, for what is not now classified as a serious offence, is cruel and inhumane. We should be able to plan for his release, having a date to work towards. All we have is this Kafkaesque nightmare, to which there seems no end.

6. Conclusions

This report has charted the use of the sentence of imprisonment for public protection since its introduction in 2005. The main points to emerge are:

- Initial use of the sentence was much higher than anticipated by the Home Office when the legislation was planned.
- Reductions in the use of IPP prisoners following the 2008 amendments to the legislation were smaller than expected by the Ministry of Justice.
- There was inadequate provision of courses to reduce the risks presented by IPP prisoners, making it impossible for them to demonstrate suitability for release.
- There was insufficient capacity for the Parole Board to review cases in a timely way shortly after prisoners had completed their tariff period in custody.
- By the end of 2009 around 6,000 prisoners had been sentenced to an IPP, of whom 94 had been released.
- Around one in ten of the sentenced prison population is serving an IPP.

To some, this might seem a positive outcome: it means that a large proportion of people convicted of violent and sexual offences are serving much longer prison sentences than they would have faced before the introduction of IPP. There are undoubtedly some benefits that may have accrued in terms of crimes prevented. However this report has also pointed to some of the considerable costs. These are not simply financial. They relate to:

- limited ability to predict risk accurately
- limited ability to reduce risk
- limited resources to achieve those reductions in risk that are possible
- limited Parole Board capacity and risk averse decision-making
- the IPP prisoners who are no longer eligible for this sentence.

The first two points are questions about the principle of indeterminate preventative detention, and we shall discuss these first. We shall then consider the problems created by the fact that the amendments to the legislation were not retroactive. Next, we will examine the problems created by shortages of courses and parole delays - these are simpler – but no less serious – questions about the current operation of the IPP sentence judged in its own terms. We shall end by drawing out the lessons to be learnt from the mismanagement of the sentence as a policy reform, and considering the policy options that are available to the government.

Principles of indeterminate sentencing: problems of predicting risk

We start from the position that some preventative detention is ethically acceptable. In cases where it can be predicted with a high degree of certainty that someone is very likely to commit a grave crime, then one can justify some form of indeterminate sentence until such a point that the risk has reduced. The difficult policy question is where to set the threshold for moving from proportionate sentencing to preventative sentencing.

Theoretically this is a two-dimensional threshold, reflecting on the one hand the degree of certainty in predicting reoffending, and on the other the seriousness of the probable offences. The probability that a heroin-dependent shoplifter with 50 previous convictions will commit further theft offences is very high, but this provides no justification for indeterminate preventative detention. In practice it is generally very hard to predict with any certainty whether someone who has committed a serious sexual or violent offence will go on to commit further grave offences. Any system of prediction, whether clinical or actuarial, will have 'false positives' where people are wrongly identified as dangerous, and 'false negatives' where they are wrongly identified as low-risk. Setting the threshold at different levels implies accepting a different trade-off between levels of false positives and false negatives. Allowing indeterminate preventative detention only for those identified with high certainty as being at risk of very serious offences minimises the number of false positives, and maximises the number of false negatives. That is, very few people are wrongly identified as dangerous, and thus locked up without adequate justification.

Lowering the threshold progressively increases the number of false positives, and reduces the number of false negatives. What lowering the threshold means in reality is that the public is offered better protection against grave crimes, at the cost of incarcerating people who actually do not pose a risk of serious reoffending. The introduction of the IPP sentence involved a sharp reduction in the threshold for preventative detention, and the amendments in 2008 raised the threshold again, but by no means to its pre-2005 level.

The gains in public protection achieved by lowering the threshold for preventative detention need to be offset against the costs. First there are the straightforwardly financial costs of imprisoning people beyond the tariff that they would serve under a determinate sentence. We have not been able to quantify this cost, but the 'order of magnitude' costs of the extra places in custody that IPP prisoners have absorbed is probably around £100 million.[53] Leaving aside issues of fairness, the investment question to ask is not simply whether the grave crimes prevented are worth £100m to the public purse, but whether preventative detention is the best available strategy for achieving this level of prevention. To our knowledge, no formal analysis of this sort was carried out before the sentence was introduced.

Secondly, any policy analysis relating to preventative detention also has to place a (negative) value, if not a cost, on false positives. We know that, in the short term, at least, gains in public safety can be achieved by preventative detention, and that the more extensive the levels of detention, the greater the short-term gains. However, these gains are bought at the cost of detention of people wrongly assessed as posing significant risks. It strikes us as wrong in principle to imprison indeterminately a population of offenders a proportion of whom represent no significant risk. The larger this proportion, the greater the wrong.[54]

Added to this must be the costs in terms of damage to the legitimacy of the justice system, as seen through the eyes of offenders and those at risk of involvement in crime. Preventative detention is almost by definition unfair to some offenders. The more widespread its use, the greater this unfairness. A system of sentencing that seems arbitrary and capricious to the sentenced population will not, in the long term, secure compliance – and indeed may generate defiance.

53. For example, if the IPP sentence has added an extra 2,500 to the prison population, this will have cost an extra £100 million, using a cost per place of £40,000.
54. As observed by Ashworth (2010), the question of how risk should be redistributed between a known offender and potential victim was addressed by the Floud Committee, which concluded that it is justifiable to protect potential victims by burdening offenders because the latter have lost the benefit of being presumed free of harmful intentions through their commission of serious offences. Ashworth notes that 'the philosophy of the 2003 Act bears some similarity to the Floud approach', but raises several criticisms of it. For example, he points to the problem of false positives associated with the assessment of risk; and argues also that 'the idea of a balance between the rights of the offender and the rights of the potential victim is flawed, since the offender's right is against he state, and it is being compared with the state's justification for overriding it' (2010: 237).

As things stand, levels of information about the costs and benefits of extending preventative sentencing through the IPP sentence are scant. What can be said with certainty is that the threshold for the use of preventative sentencing was lowered too far and too fast by the 2003 Criminal Justice Act in a way that strikes us as negligent of costs and negligent of rights. The amendments to the sentence that took effect in 2008 went some way to righting this wrong, but in our view the threshold is still set far too low. Even in its amended form, the IPP sentence can be applied to offences which are not, in themselves, serious enough to justify the over-riding of the principle of proportionality.

Our first conclusion is that the Ministry of Justice needs as a matter of urgency to review the social and financial costs and benefits of the IPP sentence, and to examine the policy options open to it. The Joint Inspection by HMI Probation and HMI Prisons (CJJI, 2010) reached a similar conclusion, proposing a review at Ministerial level.

Any such review needs to make a dispassionate assessment of the real scope for reducing risk. Our interviews with professionals left us with a sense that many were prepared to make a 'willing suspension of disbelief' about the precision of risk assessment and the impact of courses design to reduce risk. These technologies, if effective, provide a rationale for moving away from principles of proportionality in sentencing, and adopting the practice of preventative sentencing. We are far from convinced that all that is required to correct the injustices of associated with IPP sentences is to fine-tune psychologists' predictive skills and to improve rehabilitative course.

There needs to be greater recognition that courses alone are unlikely by themselves to reduce risks on a scale which will permit a significantly higher proportion of IPP prisoners to be released, and that the Prison Service needs to take a broader view of the rehabilitation of these prisoners, that takes account of all seven 'pathways' to rehabilitation that it has identified.

However, there can be no doubt that, assessed in its own terms, the sentence faces serious problems that need correcting, and it is to these that we now turn.

Those convicted of less serious offences before the 2008 amendments

The problems of unfairness associated with the sentence are at their most intense for those with tariffs of under two years who were sentenced prior to the 2008 amendments. As the amendments were not retroactive, almost all of this group remain in prison[55], serving terms well in excess of their tariff in the knowledge that people sentenced for similar offences after the amendments will have already have completed their sentences.

It strikes us as fundamentally unfair to have two groups of prisoners with identical criminal histories, one group sentenced prior to July 2008, subject to indeterminate preventative sentences, and the other sentenced thereafter, and serving relatively short determinate

55. However, there have been some successful appeals, and the Court of Appeal has permitted a handful of out-of-time appeals for cases involving the downloading of child pornography similar to Terrell (R.v. Terrell [2007] EWCA Crim 3079) .

sentences. The former group will watch the latter leave prison whilst they remain subject to indeterminate preventative detention – detention that was imposed in relation to offences which, by any measure, were of relatively low levels of seriousness.

The best solution is to further amend the 2008 amendments to make them retroactive, and to translate the tariffs of the short-sentence IPP prisoners into determinate sentences – though this group would also need resettlement support. *The immediate practical options now are for the Prison Service to give priority in sentence planning to this group, and for the Parole Board to ensure that their parole hearings are also given priority.*

Inadequate provision of courses and limited Parole Board capacity

We have seen that there have been considerable problems in providing courses to all prisoners to reduce the risks they present to the public – and to demonstrate reductions in risk. It is clearly unfair to impose a sentence with this rationale and then fail to provide prisoners with the means to reduce risks. We have presented examples of this sort of unfairness – where prisons are not running the required courses, or there are no available places in the foreseeable future, or the prisoner is judged not to be intellectually equipped for the course, or is judged to be insufficiently risky to be given a place.

Leaving aside for the time being the effectiveness of these courses, it is fundamentally unfair to tell prisoners that they have to demonstrate reductions in risk if they are to be released and then to deny them the means to do so.[56] This unfairness is not mitigated by the severity of the crimes that have led to the sentence. It is simply an affront to principles of justice. The remedy depends, of course, on the effectiveness of these courses. If their effectiveness is taken for granted, then it is simply a question of locating the necessary resources for improving provision. If, however, as we have argued, too much faith is being placed in them, it will be necessary to put in place a more comprehensive range of rehabilitative arrangements. *However, judging the IPP sentence on its own terms, there needs to be much better provision of courses, and provision of courses for prisoners currently judged unsuitable for them.*

The consequences of delays in parole reviews are similarly unfair. Delays create a sense amongst prisoners that the authority exercised over them is capricious and unfair. This is no less corrosive of regime quality than the unmeetable requirements to participate in courses. As a matter of urgency, there should be:

1. *Additional resources for parole hearings, to permit initial hearings shortly after prisoners reach their tariff date, and more regular review thereafter*
2. *Provision of training and guidance to Parole Board members to offset risk-averse decision-making.*[57]

Clearly these proposals all require money, and this is a difficult time to locate new resources for rehabilitation. If the Treasury requires instrumental or utilitarian justifications for correcting the injustices associated with the sentnce, however, they are easy to find. We have seen that a tenth of the sentenced prison population is now serving IPP sentences. Including

56. Article 8 of the European Convention on Human Rights is constructed as disallowing indeterminate imprisonment in the absence of review of individual cases. The Supreme Court ruling on 21 April 2010 about the entitlement of those placed on the Sex Offenders Register is relevant here.
57. A more nuanced approach to risk assessment might, for example, aim to assess not simply levels of risk, but to identify trigger points and strategies for managing exposure to these trigger points.

lifers, a fifth are serving indeterminate sentences. In some prisons the proportion is much higher. It is much harder to manage a prison with high levels of uncertainty about release dates than one where prisoners know when they can expect to be released. These problems are exacerbated when the uncertainty is seen to be unfair. Fair treatment is a critically important component of safe and orderly prison regimes (Liebling, 2004). The costs of a breakdown in prison order could far exceed the costs of providing courses.

Public understanding of risk

Public concern about the risks posed by very dangerous people provided the political impetus to create the IPP sentence. There is no doubt that this public concern is strongly felt, and demands a political response. However, finding the best way of responding is made complex by media coverage of grave crimes, which does little to set the risks in context. The public needs reassurance that these risks are low - but politicians who do this may be portrayed by the media as complacent. The political temptation is to promise tough action to manage these risks effectively – whether or not the promise can actually be delivered. This temptation needs to be resisted. *There is an important – and difficult – task of public education to be done. Politicians and practitioners within the justice system need to foster a better public understanding about levels of risk posed by dangerous offenders. They need to convey to the public that risks posed by dangerous offenders can be reduced, but that they can never be eliminated at a reasonable social and financial cost.* This is not a message that will be welcomed by an increasingly risk-averse public.

IPP: an object lesson in how to mismanage sentencing reform

As HM Chief Inspector of Prisons put it in her 2007/08 annual report, there is a need 'to avoid un-thought-through and unresourced legislation of the kind that produced the indeterminate sentence for public protection' (HMCIP, 2009). The planning and introduction of the IPP sentence was badly mismanaged. It has imposed a needlessly large burden on prison service budgets, and prisoners have been forced to navigate their way through a system of Kafka-esque complexity. Little account has been taken of the broader costs of introducing a demonstrably unfair system. There are clear lessons for government here.

Ministers and their officials in government departments are very badly placed to make dispassionate assessments of the costs and benefits of their own policy proposals. To steer these through parliamentary and Treasury scrutiny, they will underestimate the costs and exaggerate the benefits. We therefore welcome the role given to the new Sentencing Council to carry out independent assessments of the impact of any legislative proposals for sentencing reform. *If the new government administration proposes new sentencing measures to replace the current IPP provisions, it is essential that there is an independent assessment of the impact of such proposals.*

Policy options

We have concluded from our study of the IPP sentence that there is an urgent need for government to review the sentence, and examine the available policy options. The major policy options that should be considered are:

- Abolishing the IPP sentence, and reverting to the use of the discretionary life sentence to deal with those who genuinely pose a grave risk to society.
- Retaining the IPP sentence but further narrowing its criteria, to ensure that it is used less often, and targeted more tightly on those representing real risks.
- Leaving the current arrangements in place, but locating sufficient resources to enable the Prison Service and Parole Board to operate release from the sentence in an effective, humane and fair way.

Such a review would need to include examination of historic reconviction rates for the population of prisoners with offending profiles that now attract IPP sentences. This could give some indication, at least at an aggregate level, of proportions of offenders eligible for IPP sentences who represent a serious risk to the public.

If the review settled on either of the first two options outlined above, it would need to grapple with a complex set of consequential issues. Should any amendments should be retroactive? If so, what provision is needed for supervision after release from custody of current IPP prisoners who would then be released from custody? If the amendments are not retroactive, what alternative strategies can be adopted to ensure that current IPP prisoners are released at an appropriate point, and properly supervised thereafter? An additional question, which we have not addressed in this report but should also be within the remit of a review of the IPP, is whether the extended sentence for dangerous offenders should be amended, in order to ensure that the courts make the best possible use of it.

A decision to abolish or further restrict the IPP sentence would require strong political leadership, in a context where public expectations about protection from the risk of serious crimes have become increasingly unrealistic. It will always be a challenge to convey to the public that criminal justice agencies cannot provide complete protection against these risks.

The history of the IPP sentence is one of bad trade-offs between protection of the public and basic fairness. We recognise that the task of achieving a better balance between public protection and fairness poses considerable political challenges; but there can be no doubt that a better balance has to be struck.

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APPENDIX 1: Specified offences under the Criminal Justice Act 2003

SERIOUS VIOLENT OFFENCES ELIGIBLE FOR IPP

OFFENCE	MAXIMUM PENALTY
Manslaughter	Life
Kidnapping	Life
False imprisonment	Life
Soliciting murder (section 4 of the Offences against the Person Act 1861)	Life
Threats to kill (section 16 of the Offences against the Person Act 1861)	10 years
Wounding with intent to cause grievous bodily harm (section 18 of the Offences against the Person Act 1861)	Life
Attempting to choke, suffocate or strangle in order to commit or assist in committing an indictable offence (section 21 of the Offences Against the Person Act 1861)	Life
Using chloroform etc. to commit or assist in the committing of any indictable offence (section 22 of the Offences Against the Person Act 1861)	Life
Maliciously administering poison etc. so as to endanger life or inflict grievous bodily harm (section 23 of the Offences Against the Person Act 1861)	10 years
Causing bodily injury by explosives (section 28 of the Offences Against the Person Act 1861)	Life
Using explosives etc. with intent to do grievous bodily harm (section 29 of the Offences Against the Person Act 1861)	Life
Placing explosives etc. with intent to do bodily injury (section 30 of the Offences Against the Person Act 1861)	14 years
Endangering the safety of railway passengers (section 32 of the Offences Against the Person Act 1861)	Life
Causing explosion likely to endanger life or property (section 2 of the Explosive Substances Act 1883)	Life
Attempt to cause explosion, or making or keeping explosive with intent to endanger life or property (section 3 of the Explosive Substances Act 1883)	Life
Child destruction (section 1 of the Infant Life (Preservation) Act 1929)	Life
Cruelty to children (section 1 of the Children and Young Persons Act 1933)	10 years

Infanticide (section 1 of the Infanticide Act 1938)	Life
Possession of firearm with intent to endanger life (section 16 of the Firearms Act 1968)	Life
Possession of firearm with intent to cause fear of violence (section 16A of the Firearms Act 1968)	10 years
Use of firearm to resist arrest (section 17(1) of the Firearms Act 1968)	Life
Possession of firearm at time of committing or being arrested for offence specified in Schedule 1 to that Act (section 17(2) of the Firearms Act 1968)	Life
Carrying a firearm with criminal intent (section 18 of the Firearms Act 1968)	Life
Robbery or assault with intent to rob (section 8 of the Theft Act 1968)	Life
Burglary with intent to inflict grievous bodily harm on a person or do unlawful damage to a building or anything in it. (section 9 of the Theft Act 1968)	14 years (building which is a dwelling) 10 years otherwise
Aggravated burglary (section 10 of the Theft Act 1968)	Life
Aggravated vehicle-taking involving an accident which caused the death of any person (Section 12A of the Theft Act 1968)	14 years
Arson (section 1 of the Criminal Damage Act 1971)	Life
Destroying or damaging property other than an offence of arson (section 1(2) of the Criminal Damage Act 1971)	Life
Hostage-taking (section 1 of the Taking of Hostages Act 1982)	Life
Hijacking (section 1 of the Aviation Security Act 1982)	Life
Destroying, damaging or endangering safety of aircraft (section 2 of the Aviation Security Act 1982)	Life
Other acts endangering or likely to endanger safety of aircraft (section 3 of the Aviation Security Act 1982)	Life
Riot (section 1 of the Public Order Act 1986)	10 years
Torture (section 134 of the Criminal Justice Act 1988)	Life
Causing death by dangerous driving (section 1 of the Road Traffic Act 1988)	14 years
Causing death by careless driving when under influence of drink or drugs (section 3A of the Road Traffic Act 1988)	14 years
Endangering safety at aerodromes (section 1 of the Aviation and Maritime Security Act 1990)	Life
Hijacking of ships (section 9 of the Aviation and Maritime Security Act 1990)	Life
Seizing or exercising control of fixed platforms (section 10 of the Aviation and Maritime Security Act 1990)	Life

Destroying fixed platforms or endangering their safety (section 11 of the Aviation and Maritime Security Act 1990)	Life
Other acts endangering or likely to endanger safe navigation (section 12 of the Aviation and Maritime Security Act 1990)	Life

Offences involving threats (section 13 of the Aviation and Maritime Security Act 1990)	Life
Offences relating to Channel Tunnel trains and the tunnel system (Part II of the Channel Tunnel (Security) Order 1994 (S.I. 1994/570))	Life
Genocide, crimes against humanity, war crimes and related offences), other than one involving murder (section 51 or 52 of the International Criminal Court Act 2001)	30 years
Female genital mutilation (section 1 of the Female Genital Mutilation Act 2003)	14 years
Assisting a girl to mutilate her own genitalia (section 2 of the Female Genital Mutilation Act 2003)	14 years
Assisting a non-UK person to mutilate overseas a girl's genitalia (section 3 of the Female Genital Mutilation Act 2003)	14 years
Causing or allowing the death of a child or vulnerable adult (section 5 of the Domestic Violence, Crime and Victims Act 2004)	14 years
Aiding, abetting, counselling, procuring or inciting the commission of an offence set out in this Annex, conspiring to commit an offence set out in this Annex, or attempting to commit an offence set out in this Annex.	Same as the substantive offence
An attempt to commit murder or a conspiracy to commit murder	Life

SERIOUS SEXUAL OFFENCES ELIGIBLE FOR IPP

OFFENCE	MAXIMUM PENALTY
Rape (section 1 of the Sexual Offences Act 1956)	Life
Intercourse with girl under thirteen (section 5 of the Sexual Offences Act 1956) *AN ATTEMPT TO COMMIT THIS OFFENCE IS NOT A SERIOUS OFFENCE*	Life (other than for an attempt to commit this offence)
Intercourse with girl under 16 (section 6 of the Sexual Offences Act 1956)	2 years
Incest by a man (section 10 of the Sexual Offences Act 1956) *ONLY A SERIOUS OFFENCE IF THE GIRL/WOMAN IS UNDER 13* *AN ATTEMPT TO COMMIT THIS OFFENCE IS NOT A SERIOUS OFFENCE*	Life (girl/woman under 13, other than an attempt to commit this offence)
Indecent assault on a woman (section 14 of the Sexual Offences Act 1956)	10 years
Indecent assault on a man section 15 of the Sexual Offences Act 1956)	10 years
Assault with intent to commit buggery (section 16 of the Sexual Offences Act 1956)	10 years
Abduction of woman by force or for the sake of her property (section 17 of the Sexual Offences Act 1956)	14 years
Permitting girl under thirteen to use premises for intercourse (section 25 of the Sexual Offences Act 1956)	Life
Indecent conduct towards young child (under section 1 of the Indecency with Children Act 1960)	10 years
Burglary with intent to commit rape (section 9 of the Theft Act 1968)	14 years (building which is a dwelling) 10 years otherwise
Indecent photographs of children (section 1 of the Protection of Children Act 1978)	10 years
Rape (section 1 of the Sexual Offences Act 2003)	Life
Assault by penetration (section 2 of the Sexual Offences Act 2003)	Life
Sexual assault (section 3 of the Sexual Offences Act 2003)	10 years
Causing a person to engage in sexual activity without consent (section 4 of the Sexual Offences Act 2003)	10 years
Rape of a child under 13 (section 5 of the Sexual Offences Act 2003)	Life
Assault of a child under 13 by penetration (section 6 of the Sexual Offences Act 2003)	Life
Sexual assault of a child under 13 (section 7 of the Sexual Offences Act 2003)	14 years

Causing or inciting a child under 13 to engage in sexual activity (section 8 of the Sexual Offences Act 2003)	14 years
Sexual activity with a child (section 9 of the Sexual Offences Act 2003)	14 years
Causing or inciting a child to engage in sexual activity (section 10 of the Sexual Offences Act 2003)	14 years
Engaging in sexual activity in the presence of a child (section 11 of the Sexual Offences Act 2003)	10 years
Causing a child to watch a sexual act (section 12 of the Sexual Offences Act 2003)	10 years
Arranging or facilitating commission of a child sex offence (section 14 of the Sexual Offences Act 2003)	14 years
Meeting a child following sexual grooming etc. (section 15 of the Sexual Offences Act 2003)	10 years
Sexual activity with a child family member (section 25 of the Sexual Offences Act 2003)	14 years (offender aged 18 or over) 5 years (offender under 18)
Inciting a child family member to engage in sexual activity (section 26 of the Sexual Offences Act 2003)	14 years (offender aged 18 or over) 5 years (offender under 18)
Sexual activity with a person with a mental disorder impeding choice (section 30 of the Sexual Offences Act 2003)	14 years
Causing or inciting a person with a mental disorder impeding choice to engage in sexual activity (section 31 of the Sexual Offences Act 2003)	14 years
Engaging in sexual activity in the presence of a person with a mental disorder impeding choice (section 32 of the Sexual Offences Act 2003)	10 years
Causing a person with a mental disorder impeding choice to watch a sexual act (section 33 of the Sexual Offences Act 2003)	10 years
Inducement, threat or deception to procure sexual activity with a person with a mental disorder (section 34 of the Sexual Offences Act 2003)	14 years
Causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception (section 35 of the Sexual Offences Act 2003)	14 years
Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder (section 36 of the Sexual Offences Act 2003)	10 years
Causing a person with a mental disorder to watch a sexual act by inducement, threat or deception (section 37 of the Sexual Offences Act 2003)	10 years
Care workers: sexual activity with a person with a mental disorder (section 38 of the Sexual Offences Act 2003)	10 years

Care workers: causing or inciting sexual activity (section 39 of the Sexual Offences Act 2003)	10 years
Paying for sexual services of a child (section 47 of the Sexual Offences Act 2003) *ONLY A SERIOUS OFFENCE IF THE CHILD IS UNDER 16*	Life (child under 13 and the offence involves penetration) 14 years (child under 16)
Causing or inciting child prostitution or pornography (section 48 of the Sexual Offences Act 2003)	14 years
Controlling a child prostitute or a child involved in pornography (section 49 of the Sexual Offences Act 2003)	14 years
Arranging or facilitating child prostitution or pornography (section 50 of the Sexual Offences Act 2003)	14 years
Trafficking into the UK for sexual exploitation (section 57 of the Sexual Offences Act 2003)	14 years
Trafficking within the UK for sexual exploitation (section 58 of the Sexual Offences Act 2003)	14 years
Trafficking out of the UK for sexual exploitation (section 59 of the Sexual Offences Act 2003)	14 years
Administering a substance with intent (section 61 of the Sexual Offences Act 2003)	10 years
Committing an offence with intent to commit a sexual offence (section 62 of the Sexual Offences Act 2003)	10 years
Trespass with intent to commit a sexual offence (section 63 of the Sexual Offences Act 2003)	10 years
UNLESS OTHERWISE STATED: aiding, abetting, counselling, procuring or inciting the commission of an offence set out in this Annex, conspiring to commit an offence set out in this Annex, or attempting to commit an offence set out in this Annex.	Same as the substantive offence unless otherwise stated

SPECIFIED VIOLENT OFFENCES WHICH ARE NOT SERIOUS OFFENCES, THUS ELIGIBLE FOR EXTENDED SENTENCE BUT NOT IPP

OFFENCE	MAXIMUM PENALTY
Malicious wounding (section 20 of the Offences against the Person Act 1861)	5 years
Abandoning children (section 27 of the Offences Against the Persons Act 1861)	5 years
Setting spring guns etc. with intent to do grievous bodily harm (section 31 of the Offences Against the Person Act 1861)	5 years
Injuring persons by furious driving (section 35 of the Offences Against the Person Act 1861)	2 years
Assaulting officer preserving wreck (section 37 of the Offences Against the Person Act 1861)	7 years
Assault with intent to resist arrest (section 38 of the Offences Against the Person Act 1861)	2 years
Assault occasioning actual bodily harm (section 47 of the Offences Against the Person Act 1861)	5 years
Offences in relation to certain dangerous articles (section 4 of the Aviation Security Act 1982)	5 years
Ill-treatment of patients (section 127 of the Mental Health Act 1983)	2 years
Female circumcision (section 1 of the Prohibition of Female Circumcision Act 1985)	5 years
Violent disorder (section 2 of the Public Order Act 1986)	5 years
Affray (section 3 of the Public Order Act 1986)	3 years
Putting people in fear of violence (section 4 of the Protection from Harassment Act 1997)	5 years
Racially or religiously aggravated assaults (section 29 of the Crime and Disorder Act 1998)	7 years (GBH or ABH) 2 years (common assault)
Racially or religiously aggravated offences under section 4 or 4A of the Public Order Act 1986 (section 31(1)(a) or (b) of the Crime and Disorder Act 1998)	2 years
Aiding, abetting, counselling, procuring or inciting the commission of an offence set out in this Annex, conspiring to commit an offence set out in this Annex, or attempting to commit an offence set out in this Annex.	Same as the substantive offence

SPECIFIED SEXUAL OFFENCES WHICH ARE NOT SERIOUS OFFENCES AND THUS ELIGIBLE FOR EXTENDED SENTENCE BUT NOT IPP

OFFENCE	MAXIMUM PENALTY
Procurement of woman by threats (section 2 of the Sexual Offences Act 1956)	2 years
Procurement of woman by false pretences (section 3 of the Sexual Offences Act 1956)	2 years
Administering drugs to obtain or facilitate intercourse (section 4 of the Sexual Offences Act 1956)	2 years
An attempt to commit the offence in section 5 of the Sexual Offences Act 1956 (sexual intercourse with a girl under 13) *THE SUBSTANTIVE OFFENCE IS A SERIOUS OFFENCE*	7 years
Intercourse with girl under 16 (section 6 of the Sexual Offences Act 1956)	2 years
Intercourse with a defective (section 7 of the Sexual Offences Act 1956)	2 years
Procurement of a defective (section 9 of the Sexual Offences Act 1956)	2 years
Incest by a man (section 10 of the Sexual Offences Act 1956) *ONLY NOT A SERIOUS OFFENCE IF THE GIRL/WOMAN IS AGED 13 OR OVER*	7 years (girl/woman aged 13 or over, other than an attempt to commit this offence)
An attempt to commit the offence in section 10 of the Sexual Offences Act 1956 (incest by a man) *THE SUBSTANTIVE OFFENCE IS A SERIOUS OFFENCE IF THE GIRL IS AGED UNDER 13*	7 years (girl under 13) 2 years (girl/woman aged 13 or over)
Incest by a woman (section 11 of the Sexual Offences Act 1956)	7 years 2 years (attempting to commit this offence)
Abduction of unmarried girl under eighteen from parent or guardian (section 19 of the Sexual Offences Act 1956)	2 years
Abduction of unmarried girl under sixteen from parent or guardian (section 20 of the Sexual Offences Act 1956)	2 years
Abduction of defective from parent or guardian (section 21 of the Sexual Offences Act 1956)	2 years
Causing prostitution of women (section 22 of the Sexual Offences Act 1956)	2 years

Procuration of girl under twenty-one (section 23 of the Sexual Offences Act 1956)	2 years
Detention of woman in brothel (section 24 of the Sexual Offences Act 1956)	2 years
Permitting girl under sixteen to use premises for intercourse (section 26 of the Sexual Offences Act 1956)	2 years
Permitting defective to use premises for intercourse (section 27 of the Sexual Offences Act 1956)	2 years
Causing or encouraging the prostitution of, intercourse with or indecent assault on girl under sixteen (section 28 of the Sexual Offences Act 1956)	2 years
Causing or encouraging prostitution of defective (section 29 of the Sexual Offences Act 1956)	2 years
Soliciting by men (section 32 of the Sexual Offences Act 1956)	2 years
Keeping a brothel (section 33 of the Sexual Offences Act 1956)	6 months
Sexual intercourse with patients (section 128 of the Mental Health Act 1959)	2 years
Procuring others to commit homosexual acts (section 4 of the Sexual Offences Act 1967)	2 years
Living on earnings of male prostitution (section 5 of the Sexual Offences Act 1967)	7 years
Inciting girl under sixteen to have incestuous sexual intercourse (section 54 of the Criminal Law Act 1977)	2 years
Fraudulent evasion of the prohibition on importing indecent or obscene articles (section 170 of the Customs and Excise Management Act 1979 (in relation to the prohibition in section 42 of the Customs Consolidation Act 1876))	7 years
Possession of indecent photograph of a child (section 160 of the Criminal Justice Act 1988)	5 years
Child sex offences committed by children or young persons (section 13 of the Sexual Offences Act 2003)	5 years
Abuse of position of trust: sexual activity with a child (section 16 of the Sexual Offences Act 2003)	5 years
Abuse of position of trust: causing or inciting a child to engage in sexual activity (section 17 of the Sexual Offences Act 2003)	5 years
Abuse of position of trust: sexual activity in the presence of a child (section 18 of the Sexual Offences Act 2003)	5 years

Abuse of position of trust: causing a child to watch a sexual act (section 19 of the Sexual Offences Act 2003)	5 years
Care workers: sexual activity in the presence of a person with a mental disorder (section 40 of the Sexual Offences Act 2003)	7 years
Care workers: causing a person with a mental disorder to watch a sexual act (section 41 of the Sexual Offences Act 2003)	7 years

Paying for sexual services of a child (section 47 of the Sexual Offences Act 2003) *ONLY NOT A SERIOUS OFFENCE IF THE CHILD IS AGED 16 OR 17*	7 years (child aged 16 or 17)
Causing or inciting prostitution for gain (section 52 of the Sexual Offences Act 2003)	7 years
Controlling prostitution for gain (section 53 of the Sexual Offences Act 2003)	7 years
Sex with an adult relative: penetration (section 64 of the Sexual Offences Act 2003)	2 years
Sex with an adult relative: consenting to penetration (section 65 of the Sexual Offences Act 2003)	2 years
Exposure (section 66 of the Sexual Offences Act 2003)	2 years
Voyeurism (section 67 of the Sexual Offences Act 2003)	2 years
Intercourse with an animal (section 69 of the Sexual Offences Act 2003)	2 years
Sexual penetration of a corpse (section 70 of the Sexual Offences Act 2003)	2 years
Aiding, abetting, counselling, procuring or inciting the commission of an offence set out in this Annex, conspiring to commit an offence set out in this Annex, or attempting to commit an offence set out in this Annex.	Same as the substantive offence unless otherwise stated

APPENDIX 2:

Management of IPP prisoners

When the IPP sentence was introduced, IPP prisoners were managed as life sentence prisoners within the prison system, in terms of categorisation. This meant that they were expected to remain in local prisons (the prisons to which they would initially be sent following sentence) until a process of assessment was completed. Subsequently, they were to be sent to first stage lifer (category B) establishments for further assessment, the completion of sentence plans detailing appropriate interventions, and the start of intervention work. They could then, in theory, proceed to category C training prisons for completion of the interventions, and thereafter to open or resettlement prisons.[58]

In practice, and as clearly documented in a thematic review of IPP published by the prisons and probation chief inspectorates in 2008, the large numbers of IPP prisoners entering an already over-crowded Prison Service, the overly bureaucratic and rigid system of lifer management, and the lack of understanding of the IPP sentence among many prison staff, all contributed to a severe logjam of IPP prisoners in local prisons, where they had little or no opportunity to embark on interventions of any kind (let alone make meaningful progress through their so-called sentence plans) (HMCIP, 2008). The report on the Lockyer review of indeterminate sentence prisoners expressed the problem in stark terms:

The current reliance on the lifer management arrangements for dealing with all IPP prisoners has failed. IPPs are stacking in local prisons and are not moving to establishments where their needs can be assessed or better met (Ministry of Justice 2007a: 22).

In response to the very evident and deepening problems associated with the movement of IPP prisoners through the secure estate, a new and more flexible system of IPP management was introduced in February 2008, as detailed in Prison Service Instruction 07/2008 for male IPP prisoners (HM Prison Service, 2008). The PSI specified that IPP prisoners were henceforth to be managed through the closed estate like determinate rather than life sentenced prisoners. This was to be achieved by amending the categorisation process, such that IPP prisoners were no longer required to enter category B conditions. Under the new system, there was a presumption that IPP prisoners with tariffs of 3 years or less would receive a C categorisation and thus move directly into a training prison, while those who were categorised as B could progress from here through the normal process of categorisation review. At the time of writing, the system established by PSI 07/2008 is still in place and is widely regarded as a significant improvement on the previous arrangements; but evidence is emerging that the bottleneck of IPP prisoners has shifted from category B to category C establishments, as movement on to open or resettlement prisons is proving difficult.

58. This account refers to male IPP prisoners, who make up the very large majority of the IPP population. Management of female IPP prisoners broadly follows the same approach, but the system of categorisation of women in prison is somewhat different.

Around the same time as the new system of IPP categorisation was introduced, the third phase of the offender management model was rolled out, with further implications for the management of IPP prisoners. The offender management model was launched with the establishment of the National Offender Management Service (NOMS) in 2004, and is intended to be an integrated approach to sentence planning and delivery by the prison and probation services. Phase III of the model was specifically directed at the IPP custodial population, and meant that these prisoners were brought under the overall management of community-based probation officers known as 'offender managers' (rather than, as had generally been the case prior to this, lifer managers in the prisons). The offender managers were given responsibility for conducting assessments and formulating sentence plans. Day-to-day supervision of IPP prisoners, meanwhile, was to be undertaken by prison-based 'offender supervisors', usually prison officers (see Ministry of Justice (2007c) for details on Phase III Offender Management).

In practice, as has been documented by the latest joint inspectorates' report (CJJI, 2010), the relocation of IPP prisoners from the lifer system into offender management units has been problematic in various respects. Input from offender managers has been constrained by inconsistent implementation of Phase III of the offender management model, and the inevitable logistical difficulties associated with the use of community-based probation staff to manage prisoners spending lengthy periods of time in custody. The consequences of these problems include poor quality sentence planning and an 'unacceptably low' completion rate of plans.

Unjust Deserts:
imprisonment for public protection

The history of the sentence of imprisonment for public protection (IPP) is an object lesson in how to mismanage sentencing reform.

This report describes the IPP sentence and its usage. It reviews the implications of the IPP sentence for those serving it and for the criminal justice system as a whole. It highlights the flaws inherent in the design of the sentence and the injustices arising from its implementation.

The report describes how the IPP sentence greatly expanded the scope for indeterminate sentencing and thereby created a range of problems with which the Prison Service and other parts of the justice system are today failing to cope. It concludes that there is an urgent need for the government to re-examine the sentence and offers policy options to assist in any such review.

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