

November 2015 copy for December 2015

Robert Banks, a barrister, writes *Banks on Sentence*. It is the second-largest selling criminal practitioner's text book and is used by judges for sentencing more than any other. The book is classified by the Ministry of Justice as a core judicial text book. The 2015 edition of the book and app was published recently. The app is for Apple iPads and Windows 8/10 tablets and computers and costs £99 (incl. VAT). Updates will appear in the relevant paragraph. The print copy costs £106 and there will be regular updates on www.banksr.com. There is also a discount available when the print copy and app are purchased together. If you have access to a computer, you can follow Robert on: @BanksonSentence and you can receive his weekly sentencing Alert.

Q Another year is slipping by and I am still here waiting for release, which is so dependent on courses. My courses are either cancelled or don't seem to make any difference. I got an IPP sentence in 2007 and I seem trapped in the system. I served my sentence years ago. It's a disgrace. Nowadays people who have committed far worse crimes than I did get a fixed term and at the end of it are released. But not me. Is anything going to be done about us?

A I wish I knew. Perhaps you would like to know the context of this stain on our criminal justice system.

A House of Commons briefing paper issued in August 2015 sets out the government's view. The paper says, 'The main concerns about IPP were that:

- a) Some less serious offenders were given very short tariffs but then have been kept in prison for a long time after these have expired.
- b) The prison and parole systems could not cope with the need to give all these short-tariff prisoners appropriate access to rehabilitative and resettlement programmes so that they could demonstrate they were no longer a risk to society.
- c) The administrative delays resulted in uncertainty and perceived injustice for prisoners and litigation.
- d) The rapid increase in the numbers of those on IPPs contributed to prison overcrowding, which in turn exacerbated the problems with providing rehabilitation.

In October 2008, HM Chief Inspector of Prisons said, in a review of IPP, "The large number of new IPP prisoners led to IPP prisoners languishing in local prisons for months and years, unable to access the interventions they would need before the expiry of their often short tariffs. A belated decision to move them to training prisons, without any additional resources and sometimes to ones which did not offer relevant programmes, merely transferred the problem. As a consequence, the Court of Appeal found that the Secretary of State had acted unlawfully, and that there had been 'a systemic failure to put in place the resources necessary to implement the scheme of rehabilitation necessary to enable the relevant provisions of the 2003 Act to function as intended'. Rather more pithily, a prison lifer governor told me that it is as though the government went out and did its shopping without first buying a fridge".'

Also in 2008, the government made it more difficult to impose IPP but failed to address all those wrongly in prison on short tariffs.

In June 2010, after the change in government, the prison minister said, "We have inherited a very serious problem with IPP prisoners. Many cannot get on courses because our prisons are wholly overcrowded and unable to address offending behaviour. That is not a defensible position." There followed a review of IPP, which on 21 June 2011 led to the Legal Aid, Sentencing and Punishment of Offenders Bill. The Prime Minister, David Cameron, said at a press conference that day, "The consultation also raised significant concerns about the

effectiveness of IPPs. We have inherited a system that is unclear, inconsistent and uncertain. Unclear because actually a large proportion of the public don't really know what indeterminate sentences are or how they work. Inconsistent because they can mean that two people who commit the same crime can end up getting very different punishments. And uncertain because victims and their families don't have any certainty about the sentence that will be served or when their assailants will be let out. So we're going to review the existing system urgently with a view to replacing it with an alternative that is clear, tough and better understood by the public." Kenneth Clarke, the Secretary of State for Justice, said that the government was replacing a regime that did not work as it was intended. He also said, "What is wrong is that indeterminate sentences are unfair between prisoner and prisoner. The Parole Board has been given the task of trying to see whether a prisoner could prove that he is no longer a risk to the public. It is almost impossible for the prisoner to prove that, so it is something of a lottery and hardly any are released. We therefore face an impossible problem."

The following year, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 abolished IPPs for those convicted on or after 3 December 2012. A new extended sentence was introduced.

The real problem of those already serving IPP and who were wrongly held in prison was not dealt with. It had, however, been addressed in the House of Lords while the Bill was being considered. Lord McNally, a government minister, responded by saying, "We do not think that it is right or appropriate retrospectively to alter sentences that were lawfully imposed by the court simply because a policy decision has now been taken to repeal that sentence." He described dealing with the backlog of cases as being like "disarming a time bomb. It is not just a matter of throwing the gates open; this has to be a managed process. However, I hope that I have made it clear that that process is being managed ... and that we are trying to target resources to make sure that this is carried forward with due urgency."

Interestingly, every part of that analysis was flawed. The problem has never been properly addressed since. It is not as if it is legally difficult to construct the legislation to deal with this. One of the most helpful contributions was made by Eoin McLennan-Murray, the President of the Prison Government Association, who said at the annual conference of his Association in October 2010, "IPP was a blatant injustice. The government should urgently review those cases with a view to immediate release, unless there is clear evidence that the prisoner presents an unacceptable risk to the public."

In 2013 and 2014 attempts in the Supreme Court to rectify the problems with IPP failed.

Since then nothing has happened. It cannot be said that the government does not understand the problem. Those in charge just seem to prefer to do nothing about it. Perhaps they think that then they can't be accused of being soft on crime. The problem is that the large number of people in prison who should not be there creates serious problems, not only for the prisoner, but also for other prisoners and the prison system itself.

There is one piece of news. On 10 December 2015, in the Court of Appeal, the Lord Chief Justice will hear about a dozen beyond-tariff IPP cases. I am involved in one of the cases and I understand that all the defendants are challenging the imposition of IPP rather than detention beyond the end of the tariff. Normally when a series of cases are linked together this is because the Lord Chief Justice wants to issue new guidance.

On a different point you might like to consider those trapped with the old automatic life sentence, who think they have been forgotten. Unlike the new automatic life, the order applied to any length of sentence once the provisions were triggered by a second serious offence. It has most of the faults of IPP, but no one seems to be fighting for them to be dealt with justly.

Asking Robert and Jason questions

All letters should be sent to Inside Time, marked for Robert Banks or Jason Elliott. Letters are then sent by Inside Time to David Wells of Wells Burcombe, who forwards them to Robert and Jason.

Please make sure your question concerns sentence, prison law or release and not conviction. Prison law and release are dealt with by Jason Elliott (PO Box 847, North Shields, NE29 1FJ). Conviction enquiries should be sent to Inside Time and they will be answered by someone else. Unless you say you don't want your question and answer published in Inside Time, it will be assumed you have no objection to publication. It is usually not possible to determine whether a particular defendant has grounds of appeal without seeing all the paperwork. Analysing all the paperwork is not possible. The column is designed for simple questions and answers. Robert and Jason cannot in their answers in effect do the work that should be done by solicitors and barristers who have the relevant case papers.

No one will have their identity revealed. Letters which: a) are without an address, b) cannot be read, or c) are sent direct to Robert, cannot be answered. If your solicitor wants to see previous questions and answers, they are at www.banksr.com.