

UNGRIPP

Legal Q&A Session on the IPP Sentence

Summary of session held on 13th January 2021

Questions answered by Dean Kingham of Swain & Co. Solicitors.

Introduction and Contents

This document contains a summary of the commentary, questions and responses from a legal Q&A session held for people serving an IPP sentence, and their families. Commentary and responses were provided by Dean Kingham, and are reproduced in this summary. Dean is Head of Prison and Public law at Swain and Co. Solicitors. He is a committee member for the Association of Prison Lawyers, and Parole Board lead. He specialises in representing complex cases before the Parole Board, and those stuck in the system.

Use the contents list below to navigate to specific summaries and questions. Questions marked with an * are paraphrased, so as to avoid personally identifying case details.

The last section of the document contains a glossary of abbreviated terms used throughout the session. All abbreviations in the text are directly linked to the glossary, to aid understanding.

We hope that people affected by the IPP sentence find the provided information useful. Follow our work campaigning for change to the IPP sentence at <https://www.ungripp.com> and on Twitter @UNGRIPP. Follow Dean's work at @deankingham on Twitter.

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Summary of the Current Situation

There are 3,252 people serving an IPP sentence in prison. 9 in 10 are past their tariff date. 1,357 of the total number of IPP sentenced prisoners are there because they were recalled to prison. In my experience, there are a wide range of reasons for both continued detention and recall, and for why professionals (e.g. psychologists and Probation Officers) argue for continued detention.

Impact of Covid-19

The Covid 19 pandemic has caused issues, but the response by the Parole Board has, thankfully been very good. They are still running hearings regularly, both by phone and video link. The pandemic has, in fact, increased the number of hearings held every month, because panel members no longer have to travel. There was initially a concern that the pandemic would affect release rates, as there was a presumption that remote hearings would be less fair. The latest figures from the Parole Board suggest that the release rate has increased slightly during the pandemic, particularly releases directed based on reviews of papers. Before the pandemic, the release rate on papers had dropped so much that we were advising clients to work on the basis of proceeding to oral hearing.

The pandemic has had significant effects. Prison regimes have effectively stopped running, as have offending behaviour programmes, and progressive moves. Prisoners' ability to evidence risk reduction has diminished. Something we are working on to address this is getting prisoners access to the Covid-19 vaccine. There are currently four priority groups in the community, but no mention of whether these include prisoners that fall into those groups. We will share any updates on this via our Twitter feed: @SwainSolicitors.

Broader Trends

Over the last three years there have been broader changes to gaining parole. We've found that IPP sentenced prisoners who have been given a sentence plan and completed it, are having new sentence plan targets added which involve engagement with the Offending Personality Disorder ([OPD](#)) Pathway. You can read more about the pathway here:

<http://personalitydisorder.org.uk/the-offender-personality-disorder-pathway/>

One of the main messages I always tell people serving an IPP sentence is that when you go for Parole you need to make the most of expert evidence. We do that through independent psychologists. Prison Service psychologists completing assessments tend to still be in training. Independent psychologists have a much wider range of experience. For example, they've often worked in mental health units, or with people in the community. We find that Prison Service psychologists tend to almost always recommend a place on the [OPD](#) Pathway before release. But there are diagnostic issues with personality disorder, which means that somebody can be wrongly diagnosed as disordered. For example, we find that Probation staff often confuse personality traits (which everybody has) with disorder.

We find that people serving IPP sentences who have completed offending behaviour programmes and have excellent behaviour are often told that they need to spend time on a Psychologically Informed Planned Environment ([PIPE](#)) unit, to consolidate their learning. We often challenge this, questioning why somebody already evidencing good custodial behaviour needs to spend an extra 12 months providing further evidence. We argue that open conditions are the place to provide that evidence.

The legal ‘test for release’ is very important. The test is:

“The Parole Board is empowered to direct release if it is satisfied that it is no longer necessary for the protection of the public that (the prisoner) be confined” (from The Parole Board Decision-Making Framework, 2019).

Our experience is that many professionals who present evidence to the Parole Board do not understand the test for release. Our clients report the same experience when they are interviewed for Parole-related assessments. For example, it is often stated that a person “would benefit” from engaging in a particular intervention, and that to release without it would set them up to fail. For something to be beneficial is different to it being necessary to protect the public. We’ve found that Parole Boards are getting better at questioning witnesses on this point.

Relationships

I am often asked questions about relationships with Community Offender Managers ([COMs](#)), or Probation Officers. The National Probation Service has been failing for some time. I often see individuals who have had six different Community Offender Managers in 12 months. Prisoners will call and write to them, but rarely get a response. I am often asked if it is worth complaining. My approach is that if a Community Offender Manager is recommending that someone remains in custody, and they don’t know that person very well, then their evidence carries less weight. If a person that knows the individual very well (such as their Prison Offender Manager, or [POM](#)) is supporting release, that is stronger evidence. The same principle applies to those with poor relationships with their Community Offender Manager – the quality of those officers’ evidence tends to be poorer. We find that, in all likelihood, complaints are unlikely to be upheld or to result in the allocation of a new Community Offender Manager. We suggest it is better to expose the flaws in the relationship via the hearing itself.

Recall

Recall is a particular problem. The Parole Board recognises it, but they only become involved once a person has already been recalled. Recalls are authorised by the Secretary of State. Some members of the Parole Board take the view that this should not be the Secretary of State’s job. People serving an IPP sentence are only supposed to be recalled if a person is behaving in a way that directly poses a serious risk of harm. Many Probation Officers don’t understand the definition of serious harm, and initiate recall for lesser reasons. The Secretary of State is supposed to review the paperwork and authorise the decision, but in reality that review is so minimal that it amounts to a rubber stamp of the Probation Officer’s

decision. Some members of the Parole Board favour a change in the system so that the decision is first reviewed by a duty member of the Parole Board, to see if recall should be initiated. We currently find that the standard of recall reports is so poor that it gives an individual sufficient ammunition to achieve release at a Parole hearing. To put this problem in context – over 9,000 people were recalled to prison in the last 12 months, which is around 12% of the entire prison population. Recall is a major issue, that comes back to Probation Officers being too quick to recall, due to misunderstanding of the risk of serious harm test, and pressure from senior managers.

Q&A Session

Is recalling an IPP sentenced prisoner legal?

The legality of a recall is for the Parole Board to decide, but it often isn't adequately addressed at hearings. There is relevant case law to indicate what the Parole Board should consider. The first step is to decide whether a recall is appropriate, which is sometimes clear and sometimes not. Because reports are often so poorly prepared, I've found I can often show that alternatives to recall haven't been sufficiently scrutinised.

What can someone serving an IPP sentence do if they're not getting on with their Offender Manager?

They can complain to Probation, but it's very difficult to get a new Offender Manager. There is a huge turnover of staff in Probation, so it's unlikely that any Offender Manager will remain in place for very long anyway. Complaining is a judgement call, based on the reasons for not getting on. If it's because the Offender Manager doesn't understand the release test, or keeps adding things to someone's sentence plan, those issues are best addressed in the Parole hearing.

Are there any forthcoming changes to the IPP sentence?

I would love to say yes, but any meaningful changes have to come from the Government. They occasionally hint at it, but there seems to be no desire on their part to change. The Government – particularly the Secretary of State – would much rather blame the Parole Board if something goes wrong than be in a position where they get blamed.

How often is a person's Risk of Serious Harm (ROSH) assessment reviewed?

The [ROSH](#) assessment forms part of a prisoner's Offender Assessment System ([OASys](#)) assessment, which should be completed annually. However, a flaw in the [ROSH](#) assessment is that a policy has been developed for people serving IPP and life sentences, which states that they will not be released with a [ROSH](#) grade of anything other than 'high risk'. This is because Approved Premises in the community will not take anybody graded medium risk or

less, because demand for places currently outstrips supply. This has led to some bizarre situations in Parole hearings where people are graded as high risk on paper, but the Probation Officer says that in their view the person is medium risk. They also say they are reluctant to reduce risk scores until a person has been tested in the community. This way of thinking increased when private companies were contracted to manage medium risk individuals in the community (leaving the National Probation Service to manage only high risk individuals). So there are political factors which have changed the way the [ROSH](#) assessment operates.

What can someone serving an IPP sentence do if their hearing is pushed back for several months?

They can claim compensation for a delayed Parole hearing. But there is no advantage to doing that while the hearing is still ongoing. It's better to claim afterwards. This is because the hearing might be delayed further, and the ability to claim is linked to the outcome of the review. What can be done also depends on why a hearing is pushed back. Many are adjourned because reports are not completed. It's then a case of putting pressure on those who need to provide reports. For example, if a psychological assessment being completed by the prison is not done, then get an independent one. Independent psychologists are still completing assessments for prisoners during the pandemic.

Is completing an offending behaviour programme a mandatory requirement for release?

The legal position – in case law – is that it's not necessary. But any prisoner you speak to will say it's very difficult to achieve release without completing programmes. It's very important to scrutinise why a particular programme has been deemed necessary for someone to complete. For example, one programme was scrapped because of concerns that it may increase risk. Assessments by Ministry of Justice employed professionals seem to no longer say that programmes are necessary. But psychological assessments will often advance programmes, stating that they would be 'benefit' an individual. But the Parole Board test for release is not whether something is beneficial for public protection; it's whether it is necessary.

How can someone serving an IPP sentence avoid staying in prison beyond their tariff date because of delays?*

The Parole Board are listing more hearings during the pandemic because members don't have to travel. All hearings are currently held remotely. Previously, some hearings were listed as necessary to be held face-to-face, but the Parole Board recently reviewed these and decided some could be held remotely. I would say the chance of an on-tariff hearing is greater than it's ever been.

What can someone serving an IPP sentence do now to prove they have lowered their risk, given that Covid-19 has stopped programmes from running?

We've been drawing attention to the impact of the pandemic on this issue. The Joint Select Committee on Human Rights does do some scrutiny visits to prisons which might address this. One thing I always point to as good evidence is how people have handled the Covid-induced changes to prison regimes. Good solid custodial behaviour and nothing indicative of serious harm is in itself good evidence. Without that, it's tricky. The Government could make more use of technology to continue programme delivery, which is a matter of resources and investment. We are looking into this currently.

At a Parole hearing, what goes in favour of somebody serving an IPP sentence? And what can family do in support?

A good release and resettlement plan, with short, medium and long term goals is important. So is a good support network. Also a really good understanding of identified risk factors. That's not me saying to accept that those risk factors are correct, but the more prepared the individual is the better. The Parole Board wants to know that a person understands what their perceived risks are, what the warning signs will be if they start to struggle in the community, and what they would then do.

One question that people can fall down on is what their risk factors are. They may be being asked that question 10 or 15 years after they committed their crime, so it's tempting to say they have no risk factors. The Parole Board doesn't like to hear that. So it's a case of distinguishing:

"At the time, my risk factors were x, y and z, but because of a, b & c, this is where I am now. If x happened, it would increase my risk again, and this is what I would do."

It's best to have a detailed release plan which fills in these gaps. Sometimes Probation Officers don't have those.

Is release to an Approved Premises a must, or can someone be released to a home address?

It isn't a 'must', but it's a bit of a cultural thing with the Parole Board and its expert witnesses. The general approach is that an Approved Premises (AP) is necessary. One thing the pandemic has done is shown that an Approved Premises isn't always necessary. Panels are prepared to scrutinise much more, because the pandemic has increased AP waiting lists. Some people manage their risk better by being left alone to get on with it, and an outcome may well be the realisation that an AP isn't always necessary. If possible, prepare a risk management plan which shows that an AP isn't necessary (for example, using tagging instead). Some panels will always take the position that an AP is needed, but others are questioning it.

Can family members speak at hearings, and have the opportunity to correct factual mistakes?

My own practice is to encourage family members to provide statements to the Parole Board. Particularly if there is a burning issue, like a family member being assessed as contributing to someone's risk level. Statements can be put in. Generally, I think there is a reluctance to have families give evidence. Not because of what they might say, but because it enables the Parole Board to ask whatever they want, and some will go above and beyond to damage an individual case as a result.

What can be done to secure release?

Prepare a full and detailed risk management plan, with [protective factors](#) (things that reduce a person's risk). There is an assessment tool called the [SAPROF](#), which has a useful website that explains all the protective items which professionals will assess someone against. Over the last few years, psychologists have started using the [SAPROF](#) to assess protective factors, as well as assessing risk factors. I would say in each case, give consideration to getting an assessment by an independent psychologist. The Parole Board love evidence from psychologists. It enables them to sit behind that in their decision. Some Parole Board members are always concerned about what will happen if they release someone who commits a serious further offence. In their decision, they're always looking to be able to point towards someone else's evidence that says risk is manageable. I always point out that the risk of a serious further offence is very low – less than 1%.

<https://www.saprof.com>

Are the programmes that people complete in prison accredited?

By and large, yes. Some private prisons have developed unaccredited programmes. We did some work on what it means for a programme to be accredited. Several years ago, the Ministry of Justice stopped publicising the accreditation panel members because it started attracting questions about what it means to be accredited. There is a small evidence base, and programmes are essentially experimental. The latest programmes to be delivered are accredited based on current psychological thinking, because there are not yet any studies to demonstrate that they reduce risk.

Can people still access psychological assessments during Covid-19?*

A number of prisons have suspended psychological assessments. That's where the lawyer comes in. Rule 38 of the Prison Act is all about access to a legal advisor. We remind prisons of that, and get access to clients.

Is it true that someone can write to the Parole Board and ask for release?

Yes, that is an option. Executive release (release without going through the Parole Board) doesn't apply to people serving an IPP sentence. Executive release sounds great and can be quick, but only 1 in 5 applications are successful. I've tried in instances where the Parole Board was likely to release someone, and the Secretary of State has said no.

Who does the release plan?

The Probation Officer. And they have a duty to do so, even if they don't support release. We often find that if they don't support release, they don't do a release plan. We don't raise that until the hearing, at which point we find the Parole Board often join in. If the Probation Officer has produced a release plan but you think there are gaps in it, produce your own and submit it.

How can someone contact an Offender Manager who has dropped out of touch?*

It's likely they will no longer be the Community Offender Manager. You can contact the Probation Office. But nowadays more emphasis is being placed on the Prison Offender Manager ([POM](#)), so it might be better to make contact with them.

What should someone do if they can't make a recommended progressive move because of Covid-19?*

It's tricky, but we know if they want to move someone they will. Article 5 (of the Human Rights Act) puts a duty on the Government to provide risk reduction work. Case law used to say that's important, but now its emphasis is reduced. There has to be evidence of a systemic failure to provide the work. If a sentence plan states that a person has to complete particular objectives and they must move prisons to do so, then it's well worth keeping an accurate record of all applications and complaints, because there is still the ability to go to the Prison and Probation Ombudsman ([PPO](#)). They can sometimes be very good. They have the power to inspect documents and to hand them to us or an individual. They can also inspect formal records and interview people. So it's worth thinking about involving them.

The Prison Service also have a duty to preserve life under Article 2 (of the Human Rights Act). They will respond that that's why transfers have been restricted. The judicial review route can be taken but it's a remedy of last resort. You have to show that you've tried everything else. Those who decide on judicial reviews are not looking to get involved in the management of the Prison Service. This is why prisoners need the vaccine. Decisions are being taken by a very small group of people at MoJ headquarters, so most people don't know what's happening. The Prison Officers Association ([POA](#)) hold quite a lot of sway with the MoJ, and they are pressuring for officers to have the vaccine. The ability of whole prisons to progress through the stages of lockdown that they have set themselves, is dependent on their ability to combat Covid. I've been working on asking the Government to create a special vaccine category for anyone involved with the criminal justice system.

Something to note is that being in a Category C prison is not a requirement for being released or progressing to open conditions. People can achieve either of those outcomes from a Category A or B prison, if they cannot move to Category C conditions at the moment. Professionals will sometimes recommend testing in Category C conditions first, but this isn't required if all core risk reduction work is completed.

What can be done about the delays experienced by those who transfer from secure hospital to prison?*

Those transferred to hospital and then back to prison have suffered delays. I'm the Parole Board lead for the Association of Prison Lawyers. The Parole Board and Public Protection Casework Section ([PPCS](#)) have been looking at how they can ensure that those returning from hospital can have a timely Parole review.

How likely are the Parole Board to make allowances for not being able to access programmes, or to bring hearings forward to relieve pressure?

The Parole Board have made it clear that there will be no change to the test for release. But panels do vary in how often they are reminding people of that. It's good to carefully scrutinise the reasons why particular programmes are being advanced, and if they are truly necessary for public protection.

What are ROTLs?

[ROTL](#) stands for Release on Temporary License. They are overnight releases to approved premises for those in open conditions.

Can anyone other than the Offender Manager initiate recall?

The report may be started by someone else; for example, hostel staff. But it's the Offender Manager's job to do the report and initiate recall. Sometimes we've found incidences where, if the Offender Manager doesn't want to initiate recall but their line manager does, the line manager will wait until the Offender Manager has finished work for the weekend and initiate an out-of-hours recall.

What if someone has been knocked back by the Parole Board because of a recommendation to complete a programme, but has been told years earlier that they were unsuitable for that programme?*

You can always challenge a Parole Board decision but the test for challenge is quite high. They have recently introduced a reconsideration mechanism, which is quite quick. The test is whether the panel's decision was irrational – so irrational that no other panel would come

to the same conclusion. They might sometimes make a decision that you don't agree with, but they can defend it.

Can someone be recalled based on police intelligence?

This is one of the problems with the Secretary of State rubber stamping recall decisions rather than scrutinising them. In cases of allegation, the Parole Board can conduct a mini-trial and produce a finding of fact. We have said that it's unfair to produce a finding of fact, based only on an individual statement of allegation. If someone is arrested and charged, there would be a right to know more about the person making the allegation. The policy is quite new, and Parole Board members are not always legally trained. They are sometimes finding themselves in a position where they're asked to make findings based on police or prison intelligence, and it's not always very fair. So the policy is lawful, but we're trying to say that the way it's interpreted needs to be properly fair to the individual. The Parole Board cannot do fact finding if a person is recalled on intelligence, then tried, and found guilty or not guilty. Their policy is for matters not adjudicated on. They treat those convicted as properly convicted, and should therefore treat those acquitted properly acquitted.

During the pandemic, when would someone still have to have a face-to-face hearing?*

The Parole Board originally had a number of people down for face-to-face hearings who didn't strictly need it. We've written and said we don't think they really need it. The final decision is taken at the time of the paper review, so it very much depends on what Parole Board member you get. More recently, the Parole Board have done another internal review, and agreed that more people can have remote hearings. Face-to-face reviews tend to be reserved for particularly vulnerable people, with mental health problems or learning disabilities. The release rates remain the same, whether hearings are face-to-face or remote.

If someone a remote hearing, can they have their solicitor in the room with them?

At the moment, that's not being allowed. But something the Parole Board is being very good with, is facilitating contact between solicitors and their clients. In remote hearings, they make sure there are regular breaks for solicitors to talk to their clients privately, either by coming off the line or setting up a separate line for them.

How can someone access their mental health hospital records?

Anyone is entitled to see their own records, and can access them by making a direct request to their hospital, or their hospital area headquarters, via the Data Protection Act. We've found that, for those who return to prison from hospital, their dossier doesn't always reflect the work they did in hospital. In hospital, people have much better access to programmes and individual work. We routinely seek to obtain them and get them added to the dossier.

What about general hospital records?

The same as above. They're generally very good at providing patient records. It takes around a month. They may want formal written authority if someone else is asking to access a person's records (for example, solicitor or family member). This can be a simple written document with a statement from the person, with their prison number, saying they authorise the hospital to provide their records under the Data Protection Act, signed and dated. Sometimes prisons ask for evidence of updated written permission if its more than 6 months old, but this isn't needed under the Data Protection Act.

Glossary

- AP. Approved Premises.** A form of controlled accommodation for people released from prison, under supervision of the Probation Service. They were formerly known as bail hostels or Probation hostels. They allow closer supervision than other forms of accommodation, with restrictions such as curfews, and sign-on times.
- COM. Community Offender Manager.** The Probation Officer who retains overall responsibility for managing a person's sentence, and supervises them when they are released into the community. Formerly, they were simply known as the Offender Manager.
- OASys. Offender Assessment System.** The assessment tool that is used to assess an individual's risk factors, and any needs they have, which are related to their offending behaviour. It has sections to assess risk of harm to specific individuals and to the general public, and to detail sentence plans and risk management plans.
- OPD. Offending Personality Disorder Pathway.** In 2015, the Ministry of Justice and the Department Health agreed to jointly manage people diagnosed with, or showing traits of, personality disorder. This was because previously, such people often fell between the cracks of the two systems. The result was the OPD Pathway. People showing concerning behaviour are screened to see if they are likely to be suffering from personality disorder (a formal diagnosis is not needed to access the pathway). If they pass screening, they may become eligible for a range of interventions on the pathway. This can range from intensive treatment for personality disorder, extra help to consolidate changes they have already made (via a [PIPE](#) unit), specialist accommodation on release, or staff managing them may receive specialist advice on how best to work with their personality traits. The OPD pathway is become a more common sentence plan objective for people who have completed offending behaviour programmes, but are still judged to be at high risk of causing serious harm. However, the term 'personality disorder' has a complex history: some mental health professionals believe it isn't a valid or helpful diagnosis, and directs attention away from the effects of a person's traumatic history or current circumstances. The

OPD pathway doesn't require a formal diagnosis of personality disorder in order to access it – a move which is intended to speed up progress, and avoid stigmatising labels. In practice, it means that somebody can be referred and set objectives based on the assessed presence of 'personality traits' that are judged as linked to risk of reoffending.

- OS. Offender Supervisor.** Until recently, this was the term used to describe the professional (usually a Probation Officer or Senior Prison Officer) inside prison who managed a person's sentence, including setting the sentence plan. However, the term has now changed to Prison Offender Manager ([POM](#)).
- POA. Prison Officers Association.** The union for Prison Officers.
- POM. Prison Offender Manager.** The professional (usually a Probation Officer or Senior Prison Officer) inside prison who manages a person's sentence, including setting the sentence plan. Until recently, they were known as the Offender Supervisor ([OS](#)), but POM has now replaced this term.
- PPO. Prison and Probation Ombudsman.** The independent organisation whose duty it is to investigate complaints by prisoners, all deaths that occur in prison, and deaths of recently released prisoners.
- Protective factors.** Factors that are assessed as reducing someone's risk of reoffending. They are a more recent addition to assessments of risk, and are intended to describe what individual characteristics and circumstances will act as a buffer to risk. For example, drugs might be a risk factor for someone, but good links with a substance misuse support group might act as a protective factor in this instance.
- PIPE. Psychologically Informed Planned Environment.** A PIPE unit is a prison wing that is explicitly designed around principles of rehabilitation. It helps people who have completed core risk reduction work (like offending behaviour programmes) put into practice the things they have learnt, with the help of specially trained officers and overseen by a unit psychologist. The units offer both greater support and closer monitoring. The units are influenced by the Enabling Environment principles developed by the Royal College of Psychiatry, which were designed for environments that help people recovering from mental health issues to flourish. They were thought to provide the kind of reinforcement needed to maintain progress made on offending behaviour programmes, which evidence suggested could be short-lived without consolidation.
- PPCS. Public Protection Casework Section.** The administrative unit within the Ministry of Justice that deal with issues of public protection (e.g. the various review and recall processes).
- ROTL. Release on Temporary License.** Overnight releases from prison (generally Category D prisons), to Approved Premises. ROTLs are designed to accustom people to the

community, and help them prepare for release by seeking/undertaking work and/or spending time with family. Successfully completed ROTLs can also act as evidence of a person's ability to manage their risk.

ROSH. Risk of Serious Harm. An assessment that forms part of the Offender Assessment System (OASys). The available rankings are Very High, High, Medium or Low risk of harm, and separate ratings are made for risk of serious harm to the public, 'known other', and to children.

SAPROF. Structured Assessment of Protective Factors for violence risk. An assessment tool used, mainly by psychologists, to judge the factors that reduce a person's risk of reoffending. It is designed to be used alongside risk assessment tools.