

## I. Sexual Offender Legislation and Treatment in Selected European Countries

### Governing Serious Offenders

Recent developments in legislation in England and Wales

*by Karen Harrison*

#### *Abstract*

The study and management of those offenders classified as dangerous has been at the forefront of political concern for many years. In search for the »perfect« public protection solution many countries around the globe have tried a variety of risk management and sentencing ideas. Looking at the most recent developments in legislation in relation to adult dangerous offenders in England and Wales, this article maps out what these changes are and makes some comments on their suitability and efficacy. In short it questions whether the changes in dangerousness laws in England and Wales are satisfactory.

Keywords: Dangerous offenders, dangerousness laws, England and Wales, mandatory life sentence

#### **Der Umgang mit gefährlichen Straftätern**

Gesetzliche Entwicklungen in England und Wales

#### *Zusammenfassung*

Gefährliche Straftäter stehen schon seit Jahren im Fokus des kriminalpolitischen Interesses. Auf der Suche nach dem perfekten Schutz der Allgemeinbevölkerung vor solch gefährlichen Straftätern kommt weltweit eine ganze Reihe von Interventionen des Risikomanagements zum Einsatz. Der vorliegende Aufsatz beschäftigt sich mit den jüngsten gesetzlichen Entwicklungen in England und Wales. Neben einer Skizzierung der rechtlichen Veränderungen werden diese auch einer kritischen Analyse hinsichtlich ihrer Eignung und Wirksamkeit unterzogen.

Schlüsselwörter: Gefährliche Straftäter, Gefährlichkeit, England und Wales, lebenslange Freiheitsstrafe

#### *1. Introduction*

Serious crime has existed since time immemorial, although political governance of those classified as dangerous offenders did not begin, in England and Wales, until the end of the nineteenth century. It was only at this point that it was accepted that one of the state's duties was to protect its citizens from risk; with the realisation occurring that crime was not just misfortune, fate or an act of God (*Pratt 1997*). Dangerousness laws have therefore existed in England and Wales since the late nineteenth century, when they reflected a change in penal policy towards dangerous offenders due to transportation, impressment to the navy, corporeal punishment and sterilisation under a eugenics movement being either no longer available or socially unacceptable. Legislative options since this time have included the use of minimum sentences; penal servitude; a register of habitual, dangerous and professional offenders; extended sentences; public protection orders; longer than commensurate terms of imprisonment; imprisonment for public protection and more recently mandatory life sentences. This article looks at this most recent development in relation to adult dangerous offenders in England and Wales, mapping out what the changes are and making some comments on their suitability and efficacy.

## 2. Sentencing policy and rationale

The premise of sentencing policy in England and Wales for »normal« offenders is contained in the Criminal Justice Act (CJA) 2003 and works on the basis that the type and length of the sentence must be commensurate with the seriousness of the offence. This is the theory of just deserts, which is inextricably linked with the ideals of retribution with the justification being that it is not only the states right, but also its duty to punish those people who have done wrong. Sentencing policy for those classified as dangerous, however, is markedly different. Rather than delivering a proportionate sentence, the CJA 2003, allows for longer than commensurate sentencing defensible on the basis of public protection. Such policies are directed at what the offender might do in the future, rather than on what he/she has done in the past. This policy is therefore based on the theory of incapacitation where individuals are restrained rendering them incapable of reoffending. The concept of who the dangerous offender is has changed over the last four-five centuries, but is now largely settled on sexual offenders, those with a mental deficiency, violent offenders and more recently those committing crimes against the state. Indeed, the CJA 2003 defines them as serious sexual and violent offenders and those convicted of terrorism offences. Different to other countries, including Germany, Australia and the United States of America, a dangerous offender in England and Wales will be treated and hence sentenced as such at the time of sentencing. Hence, he/she will know at the court sentencing stage that they are to receive a disproportionate penalty. Traditionally this meant a longer determinate sentence; but since 2005, this changed to indeterminate sentencing. As explained in more detail below, offenders are now given a minimum term which they must serve in a custodial setting, with their actual release date dependent on a lowering of risk. Because of this indeterminacy, such sentences are classified as life sentences.

The rise of modern day dangerousness legislation in England and Wales can arguably be attributed to the rise of the new penology: the identification and management of high-risk categories and sub-populations (*Simon 1998*). Such legislation therefore aims to not only protect the public but also to prevent crime. This is achieved by punishing the criminal rather than by punishing the actual crime; thus paving the way for sentencing which is longer than commensurate with the offence in question. Sentencing policy has thus seen a shift from a retributive penal philosophy where the emphasis was focused on what the offender had done to one where the prevention of crime is key. This change is justified on a non-retributive, utilitarian theory of social defence, where the greater good (detaining a few dangerous offenders) is achieved for the greater number (the public at large) (*Bentham 1781*, cited by *Haist 2009*). On the basis that we expect the state to protect us against the criminal actions of others it is felt that if a person harms others then he gives society the right to interfere in his life, even if this amounts to indefinite containment.

Dangerousness legislation has also been influenced by populist punitiveness (*Bottoms 1995*), which adopts a zero tolerance policy in an effort to eliminate all offending behaviour. Although this is different to the new penology, which accepts that crime is the norm and thus concentrates on methods of managing it, it has nevertheless been argued that the two concepts still appear to coexist (*Simon 1998*). The new penal idea is not just about public protection but is also about expressing the sentiments of the public. So when new penal measures such as sentences of public protection are brought into existence, often this is due to the need to satisfy a public who perceive, often wrongly, that society is plagued by dangerous offenders. The introduction of new penal measures is therefore largely due to »the feeling that ›something must be done‹ and ›someone must be blamed‹ [which] increasingly finds political representation and fuels political action« (*Garland 2000*, 368).

The legislation has additionally seen a shift from welfare to neo-liberal rationality. Originally, the need for protection against such offenders was based on the belief that it was the state's duty to protect its citizens, in some way to provide them with a form of insurance against the petty thieves and habitual offenders. The state was thus the protector of its people. Neo-liberalism, however, looks at how national well-being can be improved including what needs to be done and »the nature of the persons upon whom they [the government] must act« (Rose 1992, 145). As Pratt explains, one of the major differences between the two eras was the fact that penal resources »came to be distributed according to an economy of scarcity« (Pratt 1996a, 30). Whilst welfarism wanted to widen the net and include as many people as possible into definitions of dangerousness, neo-liberalism wants the opposite. This consequently demands that the classification and prediction of dangerousness is accurate and thus necessitates effective risk assessment techniques. Despite such a change, »one right ... that the state owes to its subjects still lives on: the »right to protection« from the dangerous« (Pratt 1996b, 255). Thus, from the 1970s onwards, a true bifurcatory system emerged whereby only the really dangerous offenders were picked out as needing special and thus expensive forms of containment and punishment. Such justifications are largely why, in England and Wales, dangerousness legislation is mainly focused on sexual and violent offenders as these are deemed by most to commit the most serious offences and cause the most debilitating harm.

### 3. *Previous sentences for public protection*

Before the most recent developments in legislation are assessed, it may first be useful to briefly look at what the new legislation replaces. This will allow for comparison and an analysis of whether the amendments offer something better.

#### 3.1 *Imprisonment for Public Protection*

Imprisonment for Public Protection (IPP) was first introduced into England and Wales on 4 April 2005, through the CJA 2003. Its introduction into sentencing policy for dangerous offenders was radical in the sense that it extended the use of dangerousness legislation to those people who, on the face of things, had not committed serious offences. Prior to the CJA 2003, life sentences were mandatory for murder and then discretionary for serious offences such as manslaughter, grievous bodily harm with intent, rape and sexual intercourse with a girl under 13. The CJA 2003, however, extended public protection sentences to also include criminal damage; affray; exposure and voyeurism. While these latter offences are criminal and deserve censure, few would classify those committing such offences as dangerous. The relevant offences were contained in Schedule 15 of the Act and included 65 violent and 88 sex offences.

The test for an IPP sentence was that the offender was over 18, had committed a sexual or violent offence where the maximum penalty was at least 10 years and had been assessed as dangerous using risk assessment tools. The assessment of this was notoriously difficult and made worse by the fact that when the Act was first enacted, section 229(3) contained a presumption of dangerousness. It is therefore perhaps not that surprising that judges were forced to impose life sentences in wholly unrealistic cases. Judges were able to impose low minimum tariffs, for example, in May 2007 the average minimum term was 20 months (HM Chief Inspector of Prisons and HM Chief Inspector of Probation 2008) but nevertheless these were still indeterminate life sentences.

This led to the Criminal Justice and Immigration Act (CJIA) 2008 which imposed two statutory conditions on passing a sentence of IPP. Either the offender had to have committed a previous offence listed in a new Schedule 15A (of which there were 23 offences, encom-

passing offences from both the 1956 and 2003 Sexual Offences Act) or the minimum custodial term, if it was not an IPP sentence, would have been at least four years. On the basis that offenders tend to spend half of their sentence in custody, this equated to a minimum term of two years. In practice, the statutory condition regarding previous offending meant that the court could impose IPP even where the offence under consideration was not that serious; meaning that despite the intention to avoid short minimum tariffs, these could still be imposed where the offender had a previous conviction of an offence contained within Schedule 15A (*Thomas* 2008). It also affirmed the fact that despite risk assessment tools being used to aid in the prediction of dangerousness, the CJA 2003 relied heavily on using an offence-based classification where previous offending was a predominant predictor in serious further offending. Whilst this made the system less complex and arguably easier to follow, it also eroded the court's discretion and potentially included in its dangerousness classification those people who have been involved in one-off dangerous incidents; thus risking confusion and similarity between dangerous incidents and dangerous people. It could also have missed those whose previous offending had not brought them into the dangerousness fold (*Nash* 1992). It is also worth noting that the CJIA 2008 abolished the presumption of dangerousness; but this nevertheless still allowed the situation where a first time offender could be classified as dangerous.

The consequence of introducing IPP into dangerousness laws was a rapid expansion of the lifer population. In June 2006, there were 1,100 prisoners serving sentences of IPP in England and Wales. This rose to 4,863 in November 2008 (HC Deb, 10 November 2008, c872W) and in March 2012 stood at 6,017 (HC Deb, 18 June 2012, c681W). The amendments made by the CJIA 2008 did result in fewer IPP prisoners, but another common complaint of the system was the difficulty that offenders had in securing their release. When offenders were sentenced to IPP, the sentencing judge would impose a minimum term of custody, as mentioned above. Release, however, would only occur when the offender had demonstrated to the Parole Board that it was no longer necessary, on the grounds of public protection, for him/her to be detained in custody. This could not be considered until the minimum term had been served and was for the offender to demonstrate. The most common way in which an offender could prove this was through the completion of accredited offending behaviour programmes; however due to the rapid expansion of the lifer population, prisons in England and Wales had insufficient resources to offer such programmes. This resulted in a large amount of offenders detained in custody who were past their minimum tariff and unable to show a reduction in risk. In September 2012, this was 3,538 or 60% of the IPP population (Ministry of Justice 2013).

The UK government was taken to court over this matter when the Court of Appeal was asked to consider whether the Secretary of State had acted unlawfully by failing to provide for measures to allow prisoners serving indeterminate sentences to demonstrate to the Parole Board at tariff expiry that their detention was no longer necessary for reasons of public protection (*Wells v Parole Board* [2008] EWCA Civ 30). The Court of Appeal found that the Secretary of State's conduct was in breach of his public law duty, because the inadequate provision of offending behaviour programmes meant that a proportion of prisoners would be held in prison for longer than necessary; but that continued detention post-tariff was still lawful, unless the release decision was not adequately reviewed or the point was reached where detention was no longer necessary for public protection. This was also affirmed by the House of Lords (*Wells v Parole Board* [2009] UKHL 22). The European Court of Human Rights, however, found that the UK had breached Article 5 of the European Convention on Human Rights (lawful detention) and thus ordered that the UK had to ensure that there was reasonable provision of rehabilitative services (*James, Wells and Lee v UK* –

25119/09 57715/09 57877/09 – HEJUD [2012] ECHR 1706). In our current climate of austerity the financial resources needed to provide such change are unlikely.

If the Parole Board is satisfied that an IPP prisoner's risk of harm to the public is at an acceptable level he/she will then be released; assuming that they have served their minimum tariff. This is not the end of the sentence, however, with all released IPP prisoners being released on an IPP licence, which involves a number of conditions and supervision by the Probation Service. The offender can apply to the Parole Board to have his/her licence cancelled after 10 years, but this is not guaranteed and will again depend on perceptions of risk. While under the licence, the offender can be recalled to prison at any time, if it is deemed necessary in order to protect the public.

### 3.2 *Extended sentences*

The CJA 2003 in addition to indeterminate prison sentences also provided for an extended sentence under section 227. In essence if the offence had a maximum sentence of 10 years or more (a serious specified offence) the offender would be subject to IPP. If the offence had a maximum of less than 10 years, an extended sentence would be given. The section applied to all offenders aged 18 or over, who had been convicted of a specified offence (listed in Schedule 15); if the court considered that there was a significant risk that serious harm would be occasioned to members of the public by the commission of further specified offences and the court was not required under section 225 to impose a life sentence. Again two statutory conditions applied. Either that the offender had a previous conviction for an offence listed in Schedule 15A or the custodial term of the sentence was for at least four years. Prior to the CJIA 2008, the sentence had to be imposed, the CJIA 2008 changed it to a situation where it could be made, and in an attempt to lessen the number of IPP sentences being made also made it available for serious specified offences.

The extended sentence is a determinate sentence made up of two parts. The first period, known as the »appropriate custodial term« is the time spent in custody and is for whatever term that is commensurate with the seriousness of the offence, or where there is a previous dangerous offence and the appropriate custodial term would have been for less than 12 months, a term of at least 12 months. The custodial term must not exceed the statutory maximum and cannot be increased to serve public protection concerns, with the offender entitled to automatic release at the half-way stage (s. 247 CJA 2003, as amended by s. 25 CJIA 2008). The second period, known as the »extension period«, is a period of licence which follows the determinate custodial term. At the end of the custodial term, not on actual release, the offender's licence period will be extended by up to 5 years for violent offenders and by up to 8 years for sex offenders. The length chosen will be that which the court considers to be necessary in order to protect the public, although the aggregate length of the entire sentence must not exceed the maximum term allowed. The length of the extension period is not intended to be proportionate to the seriousness of the offence but is rather designed to protect the public from further offending; thus, the extension is often set to coincide with the availability and length of treatment and other rehabilitative programmes (Sentencing Guidelines Council 2008).

### 4. *Current sentences for public protection*

Current sentences for public protection are now contained within the Legal Aid, Sentencing and Punishment of Offenders Act (LASPOA) 2012, which came into force on 3 December 2012. Section 123 of the Act abolishes IPP, extended sentences and their young offender equivalents.

#### 4.1 *Mandatory life sentences*

The Act (s. 122 LASPOA 2012) inserts a new section (s. 224A) into the CJA 2003, which replaces the IPP sentence with a mandatory life sentence where a person has committed a second listed offence. This will apply where the offender is 18 or over, the offence took place after the commencement of the section (i.e. 3 December 2012) and he/she meets both a sentence condition and a previous offence condition (s. 224A[1][c] CJA 2003). The listed offences are contained in Schedule 15B and the offender must have committed an offence listed under part 1 of the Schedule, plus have a prior offence under the same schedule. The sentence condition is that the seriousness of the offence in question would merit a custodial sentence of at least 10 years. This exists to ensure that the provision only applies to serious offences. This arguably makes it better than the IPP sentence as this could be given where the court considered a determinate sentence of four years was sufficient. Also of significance is the fact that the court has to consider *both* a sentence condition and a previous offence condition. The test for IPP was that *either* the offender had a previous conviction for an offence specified in Schedule 15A *or* the notional determinate term was at least four years. The previous offence condition has two parts. First, the offender has already committed a previous offence listed in Part 1 Schedule 15B of the CJA 2003 (Schedule 15A has been abolished by the LASPOA 2012) *and* second, for that offence the offender received either a life sentence, a sentence of IPP (if the minimum term was for at least five years) or a determinate sentence of at least 10 years. There are 43 relevant offences listed in Schedule 15B with attempting, conspiring, inciting, aiding, abetting, counselling or procuring any of the listed offences also included, bringing it to a total of 44. In short, there are eight violent offences, 10 security/terrorist offences and 25 sexual offences including offences against both adults and children. If the necessary criteria are met, the court *must* impose a life sentence, unless there are particular circumstances which relate to either the offender, offence or previous offence which would make it unjust to do so (s. 224A[2] CJA 2003).

#### 4.2 *Extended determinate sentence*

The current law on extended sentences is now found in section 226A CJA 2003, amended by section 124 LASPOA 2012. They are available for violent and sexual offenders, over the age of 18, where four criteria are met. These are that the person has committed a specified offence (listed in Schedule 15); the court considers that there is significant risk to members of the public of serious harm which would be caused by the offender's reoffending; the court is not required to impose a sentence of imprisonment for life; and conditions A or B are met. Condition A is that the convicted offence is one which is listed in Schedule 15B and condition B that if the court was to impose an extended sentence the term that it would specify as the appropriate custodial term would be at least four years. The appropriate term is defined as that which is commensurate with the seriousness of the offence. These are the same exact two statutory conditions which the CJIA 2008 imposed for extended sentences in 2008 and so in this sense, apart from the name change to extended determinate sentences, very little has changed.

What has changed, however, are arrangements in respect of release on licence. Since the CJIA 2008, prisoners serving extended sentences were eligible for release at the halfway stage of their custodial element; notwithstanding they would have been subject to recall if any of the licence conditions had been breached. Section 125 LASPOA 2012 inserting section 246A into the CJA 2003, however, changes this position. Release is not permitted now until the prisoner has served two-thirds of his/her sentence (s. 246A[8][a] CJA 2003). So, if someone received 9 years custody and a 4 year extended licence, they would serve at least 6 years in custody and be subject to a 7 year extended licence. The time in custody can, however, be

extended further for those who meet either or both of two conditions: 1) where the appropriate custodial term was 10 years or more and 2) where the offence in question is listed in parts 1–3 of Schedule 15B. In such circumstances the release of the offender will now be decided by the Parole Board, who must be »satisfied that it is no longer necessary for the protection of the public that P [the prisoner] should be confined« (s. 246A[6][b] CJA 2003). In principle, the involvement of the Parole Board in making a risk assessment at this point is consistent with the rationale of the sentence, i.e. that the offender is dangerous, and should only be released when it is safe to do so, and subject to a clear supervision plan on release. However, the problem with this change is that it will add to an already overworked and underresourced Parole Board; largely caused by the explosive use of the IPP sentence. We could therefore very well see a situation in the near future whereby there are significant numbers of post-tariff prisoners being held in detention not just under sentences of IPP but also under extended determinate sentences. It is also worth noting that while the provisions concerning mandatory life under the LASPOA 2012 are not retrospective, this section is. It is therefore crucial whether the offender's offence is listed in the new Schedule 15B rather than in just Schedule 15.

## 5. *Criticisms, concerns and areas for improvement*

### 5.1 *Schedule 15B*

Looking at Schedule 15B in more detail it is made up of five parts; with parts 1 and 2 being more pertinent to offences committed within England and Wales. Part 1 contains 44 current offences. There is no need to include, for example, offences from the Sexual Offences Act 1956, because life under the LASPOA 2012 cannot be imposed retrospectively; i.e. the offence must have been committed after 3 December 2012. Part 1 of Schedule 15B is therefore predominantly in place for the life sentence. Part 2, however, is relevant as a qualifying trigger for both a life sentence and an extended determinate sentence. It includes murder and those offences which although now abolished would have constituted an offence specified in Part 1 if committed on the day that the offender was convicted. Presumably then this includes, for example, offences now abolished under the Sexual Offences Act 1956. This has two stark implications. First that the sentencing judge will need to decide which offence, if any, under Part 1 the offender would have been convicted of, if the law as it is now was in force then. This could be a complicated task, especially in relation to offences in Part 1 which did not exist at the time of the original offence. There is nothing in the explanatory notes of the Act to aid with this and so guidance is desperately needed to ensure not just fair but also consistent practice. If the judge deems that such behaviour does constitute a Part 1 offence, this can then be used as the trigger offence to invoke an extended sentence or be the first listed offence in a life sentence.

### 5.2 *No requirement of dangerousness*

It is also worth noting that in relation to section 224A and the new mandatory life sentence there is no longer a dangerousness assessment. While there were problems with how this was previously done, at least the court was meant to consider not just risk of future offending but also the gravity and seriousness of this offending. This may therefore suggest that we are moving away from dangerousness and risk as components of the penal system and focusing rather on static factors such as past behaviour. Under the mandatory life scheme therefore the rationale behind sentencing appears to have changed. Offenders are not arguably being preventively detained for what they *might* do in the future; they are being detained solely for

what they have done in the past; although it is acknowledged that past behaviour can often be a good predictor of future reoffending. There is a question therefore whether indeterminate sentencing is being used solely as punishment rather than as a form of crime prevention and public protection? If this is true, we see a reversed shift from the new penology back to retributive penal philosophy. It can be further argued that it is unjust to sentence someone to a life sentence who has not been found to be dangerous. While it may be true that the vast majority of people who find themselves under this legislation would be assessed as dangerous if such an assessment was needed (*Picton* 2013) it is nonetheless worrying that such a finding is no longer required.

#### 6. *Satisfactory change?*

Due to the hurdles which are now needed to be cleared in order to qualify for a mandatory life sentence for a second listed offence, it is unlikely that many offenders will be caught within its net; especially when we bear in mind how the particular circumstances clause might be used. As *Picton* therefore argues, life under the LASPOA 2012 »is not to be regarded as a substitute for IPP« (*Picton* 2013, 408). One consequence of this however, in public protection terms, is that those offenders who previously would have been assessed as dangerous and would previously have qualified for an indeterminate sentence will now receive a determinate sentence. This will have a determined end date; including a determined end date for licence conditions. In that sense, it is arguable that the new life sentence under the LASPOA 2012 will provide less public protection as fewer offenders will be held on life licence. If sentencing judges agree with this then there may be an explosion in the use of the new extended determinate sentence and in order to ensure that the offender is kept in a custodial setting until he/she is considered safe for release, we could therefore see an increase in the appropriate custodial term to at least ten years. While the court will need to justify this on the basis of commensurability, if the offender has already been assessed as dangerous and if there are also associated offences to take into consideration this shouldn't be too hard to do. This will result in a number of offenders again being held at the mercy of the Parole Board, being in the position where they have the burden of proving that their risk to the public has been reduced to an acceptable level. If this does occur it is arguable that nothing has really changed in dangerousness laws in England and Wales and would make all of these aforementioned amendments rather a waste of time!

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