Implications of the proposals contained in the Government's consultation document on personality disordered offenders

William Bingley responds to the Government's proposals.

In a splendidly splenetic editorial in the *Journal of Forensic Psychiatry* (May 1999) Michael Cavadino called for *Death to the Psychopath* which I initially thought somewhat excessive until I realised he was referring to the term and not the person. He wrote: 'The concept of psychopathic disorder is descended from the franker 'Moral Insanity'. Arguably the more modern term is simply a prime example of moralisms masquerading as medical science. Perhaps we should strip away the mask completely and for the term 'psychopath' substitute the word 'bastard'. For 'predominantly aggressive psychopath' read 'stroppy bastard'. For predominantly inadequate 'psychopath' read 'useless bastard'.' 'Would', he goes on, 'much be lost in the descriptive powers of the term - would not much be gained in the honest expression of the essential moral judgement and dehumanising contempt with which we view the psychopath?' He was not convinced that substituting the term personality disorder would make very much difference. By way of a contrast, Fallon (1999 Report of Committee of Inquiry into the Personality Disorder Unit at Ashworth Special Hospital, London: Home Office) concluded that 'whilst there continues to be much scepticism, uncertainty and lack of agreement about the nature, diagnosis and reliability of existing classifications of personality disorder ... there is considerable agreement about a number of what might be termed characteristics and descriptive terms (including that severe personality disorder is a useful descriptive term) 'such as to render it adequate for the very important social, economic, moral and legal consequences that in certain circumstances can flow - in part - from the application of that term - for individuals, families and society at large.'

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The debate about the psychopath is as old as time, or at least 200 years old (according to the Government's consultation document), when Pinel called the disorder 'manie sans delire'. Again, as the consultation document makes clear, what to do is quite properly debated within the business, with varying degrees of intensity most of the time. Periodically it marches on to the public agenda. What we have before us are some reasonably detailed options and, for the current times, an extremely long consultation period. I think the Government recognises the difficult dilemmas that are emeshed in this general issue - and it is clearly calling not only for comments on Options A and B, but also any other options that anybody can think of. One option that I suspect is not available is to do nothing, but I may be wrong.

In my presentation I would like to:

- briefly remind us of the clearly stated general policy intentions of the Government in relation to managing DPSPDs;
- look quickly at the preferred options;
- try to look at what might be termed the justifying precipitating events prior to confinement and, although I hesitate to use the term, what might be called the protective sentencing aspects of the proposals;
- ask the question whether Europe will be quite as unconcerned, as implied in the proposals; and finally
- emphasise the importance to the successful implementation of whatever we go for, of safe, sound, ethically acceptable and legal containment regimes and, in this regard, the centrality of the concept of justice.

Government policy

In relation to those with severe anti-social personality disorder who pose a severe grave risk to the public, the Government in *Modernising Mental Health Services* set out its principals very clearly:

- the safety of the public is of prime concern;
- admission to the new regime will not be dependent upon the person having committed an offence, nor whether they are treatable under the *Mental Health Act*;
- release into the community will depend upon rigorous assessment that the person no longer poses a grave risk to the public;
- the regime will comply with the Government's obligations under the European Convention of Human Rights.

What the future is about is protecting the public by seeking to reduce and manage the risk of a defined group of people. I think one of the questions, given the fairly catastrophic consequences that falling into this category could have to an individual, should be can we adequately describe those about whom we are talking? At the back of the consultation document is a very clear list of what we do not know enough about in relation to anti-social personality disorder:

- the incidence of anti-social personality disorder;
- its prevalence in the population;
- factors that could be predictive of the development of the disorder;
- the natural history of the disorder;
- effective interventions;
- outcomes;
- effective models of staff support;
- the natural history of an

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individual with anti-social personality disorder.

Some might conclude that we know more or less nothing. Historically, unless a citizen is mentally disordered, only serious offending justified prolonged deprivation of liberty. Why then is no provision made for detaining the dangerous, sane person, and why should so few people argue against the prophylactic detention of a dangerous person who is suffering from mental disorder? The answer must be that, in contrast to the case of the mentally 'healthy' violent man or woman, it can be argued that the disorder itself provides a basis for asserting that certain forms of violent or irrational conduct can be reasonably anticipated.

The proposals

The first model, Option A, is based on the existing legislative framework, but subject to important changes including facilitating greater use of the discretionary life sentence and extending its availability to a wider range of offences; providing new powers for remand for 'specialist assessment'; and amending the 1983 *Mental Health Act* by removing the power of the courts to order admission to hospital in cases where an offender is diagnosed as suffering from psychopathic disorder, but retaining the power of the Home Secretary to direct the transfer of any sentenced prisoner to hospital for treatment of other mental disorders. Thus, under Option A where the offender is diagnosed as having a psychopathic disorder, the Court would no longer have the power to order that the patient be detained in hospital as an alternative to a prison sentence. This appears to be the case whether or not the person was likely to benefit from the treatment in hospital and whether or not the person was considered to be a dangerous person with a severe personality disorder. However, the consultation document stresses that if the person is subsequently found to suffer from another form of mental disorder s/he could be transferred to hospital for treatment 'whether or not this was associated with the presence of severe personality disorder'. It also sets out proposed changes to the civil admission procedures under the 1983 Act, principally by removing the existing requirement of 'likely to benefit from hospital treatment' in the case of dangerous severe personality disorder individuals detained under civil proceedings and introducing new powers for compulsory supervision and recall of such persons following discharge from detention under civil proceedings. It seems that if you fall within the Psychopath Disorder legal category, but are not a dangerous person with severe personality disorder, then you will still be civilly admitted provided you satisfy the treatability test. One implication of the latter is that DSPD individuals would have to be managed in facilities run by the health services whether or not they are 'treatable' and the document suggests that this might require secure facilities being established. This option would also involve changes in the structure of prison and hospital services.

Option B in essence creates a separate system, including the introduction of new powers into both criminal and civil proceedings to provide for the indeterminate detention of DSPD individuals (plus powers for supervision and recall following a release from detention). Those subject to the new orders would be detained in services managed separately from mainstream prison and health service provision and includes the introduction of new powers in civil legislation. The DSPD Order would be available on the basis of evidence that the individual was suffering from a severe personality disorder and, as a consequence, presented a serious risk to the public. The Order would be subject to appeal and periodic review.

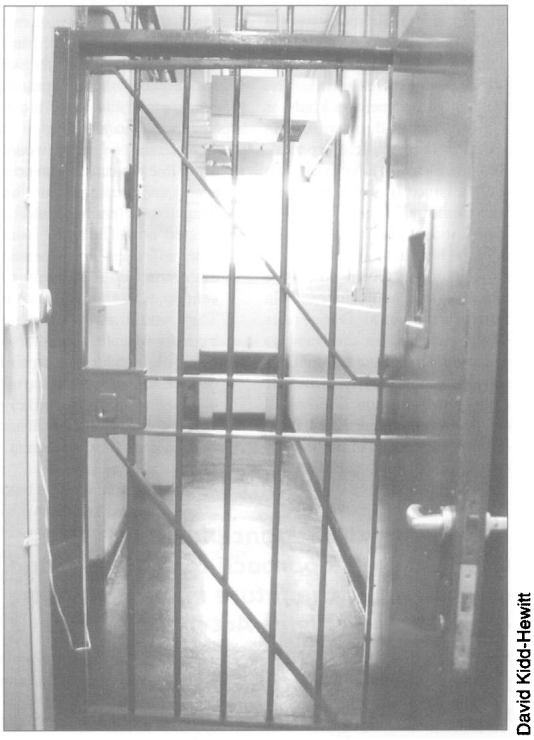
There are many important implications arising from these proposed options and in light of the request to think of others, perhaps we should not forget the Fallon Option, which can be summarised as: abolishing the legal category of psychopathic disorder (replacing it with personality disorder); establishing national assessment standards; removing from the courts the power to make Hospital Orders in relation to those with personality disorder; retaining the power to transfer personality disordered people from prison to hospital when the former are willing and able; introducing a reviewable sentence for those with serious personality disorder; and establishing a Reviewable Sentence Board.

Basically, what we are presented with in relation to convicted dangerous people with severe personality disorder, are proposals that in part amount to what might be termed protective sentencing. In relation to dangerous people with severe personality disorder who are not involved in criminal proceedings we are presented with the possibility of, in essence, a civil power to detain such people for the purpose of protecting the public by reducing and managing risk plus new supervisory powers.

Taking the latter first, a reasonable template against which to test the proposals are the circumstances set out by the Percy Commission, (whose recommendations formed the basis for that seminal piece of mental health legislation this century, the 1959 *Mental Health Act*) when considering the use of compulsory powers.

'We consider that the use of special compulsory powers on the grounds of the patient's mental disorder is justified when:

a. There is reasonable certainty that the patient is suffering from a pathological mental disorder and requires hospital community care; and
b. Suitable care cannot be provided without the use of compulsory power; and
c. If the patient himself is unwilling to receive the form of care which is considered necessary, there is at least a strong likelihood that his unwillingness is due to a lack of appreciation of his own condition deriving from the mental disorder itself; and
d. There is also either - i) a good prospect of benefit to the patient from the treatment proposed - an expectation that it will either cure or alleviate his mental disorder or strengthen his ability to regulate his social behaviour in



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spite of the underlying disorder, or bring him substantial benefit in the form of protection from neglect or exploitation by others; ii) a strong need to protect others from anti-social behaviour by the patient.'

The *1959 Mental Health Act* gave expression to the above by erecting a balanced structure which gave effect to three things in harmony with each other: the liberty of the subject; the necessity of bringing treatment to bear where treatment is required and can be beneficial to the individual; and the protection of the public. What is different with the new proposals is that what we are talking about is care and management. Notwithstanding the proposed removal of any treatability test, I do wonder actually how far away the new proposals really are in relation to the basic principles set out by the Percy Commission.

Central to the proposals in relation to convicted people is the proposed introduction of what might be termed protective sentencing. According to the Floud Committee (and Sir Leon Radzinowicz and Roger Hood) at the heart of the controversy is the 'ambiguous, historically shifting and essentially political motion of justifiable public harm'. The singling out of certain kinds of conduct as dangerous is 'essentially a political process'. Anselm Eldergill identified two specific issues: (i) should prisoners who remain dangerous at the expiration of their sentence be released back into society? (ii) If not, should any power to extend their detention, set out for example in some notional Dangerous Offenders Act, be confined to prisoners diagnosed as having a severe personality disorder or embrace all persons assessed as dangerous? He argued that three difficulties are immediately obvious. Firstly, most dangers in every day life seem to be unforeseeable. Secondly, predictions concerning foreseeable dangers are not particularly accurate; most offenders predicted to be dangerous turn out to be false positive. Is that true? How do we know? It would seem to me that prediction studies when applied to violence or sexual offenders must be extremely difficult. Thirdly, predictive sentencing cannot promise to reduce the crime rate. According to Brody and Tarling, 'the infrequency of really serious crimes of violence, their apparently general random quality and the rarity of anything like a "dangerous type" offers little encouragement for a policy which aims to reduce serious assaults by selective incapacitation of those with violent records'. Notwithstanding, is there a need with these types of proposals, dependent as they are on the determination, essentially by professionals that an individual falls into a particular category, to ask the question - what about the false positives? Will there be people whom we determine fall into this category who do not? Another way of putting it is how many false positives are we prepared to accept in order to achieve specific policy objectives? In responding to the protective sentence aspect of these proposals, it seems to me that three broad approaches are possible:

i. One school of thought would argue that protective sentences are unjustifiable. The dangerous offender should be treated no differently from other offenders and released once his or her ordinary sentence had been served. They would argue, on what basis are we entitled further to detain the individual, to do him or her this serious harm, knowing that it is more likely than not that he or she will not cause serious harm if released?

ii. A second approach would hold that such sentences are in principle supportable. Where offenders genuinely constitute a threat to the physical wellbeing of members of the public, their continued detention is warranted despite their having served their normal sentence. They have forfeited the right to be presumed harmless and any general right enjoyed by non-offenders to be at liberty. Although the pure retributivist holds that the offender cannot be punished for a crime he has not committed, Nigel Walker asks why incapacitation should not 'be regarded as a justification which is quite as sound as retribution, deterrent, or the need for treatment'.

iii. The third group would identify a distinction between imprisonment and forms of detention such as quarantine, which do not constitute punishment. In other words, questions of desert are relevant to punishment, but irrelevant to a range of social and preventative measures. Whereas the continued imprisonment of dangerous offenders is quite unjustified, detaining such persons further in some form of civil institution may be warranted. Such preventative civil detention differs from traditional imprisonment in that isolation alone is required and no harsher treatment is defensible. The third approach can be extended to dangerous persons generally, and it defends two main propositions: (a) subject to certain constraints, particularly concerning the identification of such persons, the civil detention of individuals properly classified as dangerous is justified, even if they have not committed any violent offences; (b) the protective sentencing of dangerous offenders is never justified. The contrary argument is that the civil detention of dangerous non-offenders is never warranted, and the risk presented by such persons must be worn by the community at large. The right to be presumed harmless, like the right to be presumed innocent, is fundamental to a free society.

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Europe

A key underlying principle in the Government's approach to this issue, and one, in light of the future implementation of the *Human Rights Act* it does not have much choice about, is that any proposals must comply with the European Convention of Human Rights. In particular, is the proposal to introduce powers to detain people indefinitely on the basis that they might otherwise commit an offence, whether or not they have committed any offence in the past and even though no treatment of any benefit can be provided, consistent with our obligations under the convention. The key provisions are article 5.1(a) and 5.1(e) and 5.4.

'5.1 Everyone has the right to liberty and security of person. No-one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law:

(a) The lawful detention of a person after conviction by a competent court;

(e) The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.

5.4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceeding by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if detention is not so lawful.'

The consultation document points out that the European Court has held that it is not an infringement of an individual's right to liberty to recall someone who has been released from prison following their conviction for an imprisonable offence (the cases of *Van Doroogenbroeck* and *Weeks v UK*).

As Camilla Parker has recently pointed out in *Legal Action* however, the proposals do not address the question of whether a person could be recalled when the justification for the original detention was based on article 5(1)(e) (that the person was of unsound mind). Indeed in 1993 the Department of Health rejected the

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Royal College of Psychiatrists' proposals for a Community Supervision Order which included the power to recall patients who had failed to accept supervision in the community on the basis that this arguably set a lower threshold for compulsory detention than allowed under the ECHR.

The seminal case of *Winterwork v the Netherlands* has clearly established that for detention under article 5(1)(e) to be justified, the following conditions generally must be met:

- there must be objective medical opinion to establish true mental disorder;
- the mental disorder must be of a kind or degree warranting compulsory confinement; and
- the validity of continued detention depends on the consistency of the mental disorder.

In connection with (e) detention, the consultation paper states 'it is accepted that when deciding whether detained person's condition has improved to the point when he is fit for release, the national authority is entitled to exercise caution whether the person may be a danger to the public'. No authority is sited for this statement although similar comments were made in the recent *Johnson v United Kingdom* which also referred to the European Court's decision in another case *Luberti v Italy*. As Camilla Parker points out, both Mr Luberti and Mr Johnson had been detained following a conviction for an imprisonable offence. Some would therefore argue whether the prolonged detention of a person who no longer falls within the criteria for detention under article 5(1)(e) and has committed no previous offence would be justified under the ECHR, particularly in the light of the European Court's comments in Johnson: 'It is, however, of paramount importance that appropriate safeguards are in place so as to ensure that any deferral of discharge is consonant with the purpose of article 5(1) and with the aim of the restriction in sub-paragraph (e)... and in particular that discharge is not unreasonably delayed.'

The discussion paper also discusses the implications for conditions of confinement or detention on grounds of unsoundness of mind and concludes that as with article 5.1(a), the requirement that detention under article 5.1(e) is 'lawful' in the sense of not 'arbitrary' does not concern conditions for detention or the provision of suitable treatment. These, it argues, are matters for Article 3 (in-human degrading treatment). It does, however, go on to indicate that this general rule is subject to the qualification that in the case of 'a person of unsound mind' his or her detention should be in a hospital clinic or other appropriate institution authorised for the detention of such people - an indication given in *Ashingdane v UK* (1985) and, I think, possibly very much strengthened recently in the case of *Aerts v Belgium* (1998). This leads to the final component of my presentation, the regime into which dangerous people with severe personality disorder may find themselves.

Confinement and justice

In its draft outline proposals the Mental Health Legislation Scoping Study Review Committee posited the principle of reciprocity. In essence, that if you are to compel somebody then there is a reciprocal obligation to provide them with a certain standard of care and regime. In examining these proposals the nature of the regimes within which the policy objectives set out for them would be achieved, need to be a central consideration. In his evidence to the Fallon Committee, Donald West described a number of basic provisions including:

- a secure and controlled environment;
- explicit institutional policies with clear rules on infractions which are not regarded as, or exploited, as retributive punishment;
- thorough needs assessment
- personalised therapeutic relationships;
- a forward-looking ethos; and
- a continuing and realistic registration of progress towards goals

Regimes that manage risk to others and particularly secure institutions, as was crucially emphasised in Lord Justice Woolf's report on the English prison system, must have an approach that emphasises the centrality of justice. It is possibly true that up until then those who, for example, ran secure institutions did not have, as a stated policy aspiration, the concept of justice. Tony Bottoms speculated about the factors that might explain this absence and identified paternalism, a pre-occupation with control and the fact that the language of treatment often does not integrate with the language of justice. The debate has moved on somewhat and the conceptual shift by Woolf has undoubtedly had some impact on the system. Nevertheless it may do no harm, at this stage, not to forget some of the key elements of that proposition. In this extremely important editorial to a special edition of *Criminal Behaviour and Mental Health* on institutions and mental health in 1993, Tony Bottoms suggested the following central features:

Humanity

- respect for detainees
- care for detainees
- hope for the future

Fairness in deprivation of rights

- procedural
- fairness of outcome
- absolute fairness (no cruel or unusual punishment)
- comparative fairness

Prevention of vulnerability

Maintenance of order, not only a utilitarian concept but also important element of justice

Accountability of staff

Community links and reintegration

Minimum use of custody and security

An individual's liberty should be interfered with only to the extent really necessary for public protection.

Justice to surrounding communities and to staff

If we are contemplating taking to ourselves the sort of powers set out in *Managing Dangerous People with Severe Personality Disorder* then, in my view, the concept of justice at the very least retains its centrality.

As John Rawls said:
'Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.'

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The views expressed in this article are personal to the author and do not necessarily reflect those of the Commission.