# Detaining Dangerous Offenders: dangerous confusions and dangerous politics

**Barbara Hudson** explains the variety of legal and political definitions of people described as 'dangerous'.

The Government White Paper *Reforming the Mental Health Act* attracted widespread criticism for its proposals concerning detention of persons classified as suffering from Dangerous and Severe Personality Disorders (Department of Health/Home Office, 2000).

These proposals provide for detention of persons who under the *1983 Mental Health Act* would fall outside the 'treatability' criteria of civil legislation and outside the offence criteria of criminal legislation.

In the latter case, this might mean that they could no longer be detained because they had served a determinate, proportionate sentence, or that they could not be detained at all because they had not been convicted of an offence. The proposals concerning persons not convicted of an offence but diagnosed as DSPD are, I understand, being re-drafted, but the *2002 Criminal Justice Bill* clarifies and introduces the extended powers for indeterminate sentencing of dangerous offenders proposed in the White Paper.

## Who are we talking about?

According to the White Paper, *Dangerous People with Severe Personality Disorder,* these are persons who are characterised not by the nature of their illness, but by the nature of the risk they pose to others.

Instead of a clinical category such as 'schizophrenia', we find a moral category 'dangerous', with legal connotations in that it is predicated on the notion of crimes which may be committed against another (innocent) person.

In the *Criminal Justice Bill* a dangerous offender is someone who has committed dangerous crimes: either a 'specified' serious sexual and violent offence punishable by life imprisonment (introduced in the *1991 Criminal Justice Act*); or an offence such that the court considers that it, or it and one or more offences, justify the imposition of a life sentence.

On the other hand, dangerousness can be an attribute of the offender: if the offence does not warrant extended imprisonment, the court must impose imprisonment for public protection. Dangerousness is a moral category because it describes a person, in contrast to 'risk', which is connected to acts (Castel, 1991). 'Risk' begs the question 'risk to whom?' and arguments about risks posed by mentally disordered persons usually concede that the mentally disordered are much more likely to harm themselves than to harm anyone else.

'Dangerousness' conflates and confuses moral, clinical and legal categories, and begs a different question, 'how dangerous?' The risk category that attaches to persons rather than acts is 'at risk': while 'at risk' points to a need for treatment of the sufferer, 'dangerous' points unequivocally to protection of the public. The White Paper estimates that between 2,100 and 2,400 men are dangerous and severely personality disordered (DSPD). It does not give a qualitative or clinical answer: it suggests no behaviours, lists no symptoms that define DSPD.

The vagueness is illustrated by section 1.6: "The legal provisions that apply will be the same for all those who are assessed as posing a risk to others as a result of their mental disorder, whatever the diagnosis, but they will contain some flexibility which allows for the different processes of assessment that are proposed for those who are thought to be DSPD."

## What are we talking about?

The White Paper proposes powers of detention for assessment, and for containment after assessment.

Powers are to be parallel for civil detention (in secure hospitals) and criminal detention (in prisons). Initial 28-day assessments will be followed by in-depth extended assessments (up to 3 months); at the end of the assessment period the case for detention is to be accompanied by a care-plan. Removal of the treatability criterion, however, means that the 'care' envisaged is predominantly 'control'.

Once assessed as DSPD, persons can be made subject to indeterminate detention by civil or criminal proceedings, subject to periodic review. In criminal cases, sentencing powers will include discretionary life sentences (i.e. where the offence does not make the life sentence mandatory), with release conditional on assessment of whether the offender is still DSPD. With determinate sentences, release will be conditional on improvement of DSPD assessment. Released DSPD persons will be subject to area risk management arrangements, with powers of recall to institutional confinement.

What we are talking about, then, is extension of criminal justice powers associated with dangerous offences (murder, sexual offences) to dangerous offenders, whether or not their offences are serious, sexual or violent, and the creation of parallel powers

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for detention of dangerous persons, who may have committed no offences at all.

## Research: confusing description with diagnosis

The proposed legislation is certainly not evidence-based, although the White Paper claims that commentators welcomed the emphasis on research. Pilot projects will be evaluated, we are assured, but rather than detentions being carried out in accordance with agreed symptoms and behaviours, specification of DSPD will be derived from the characteristics of the detained population. DSPD evaluation is therefore set to incorporate the basic error of confusing description with explanation, in this case distilling the characteristics of a supposed clinical condition from the characteristics of those so diagnosed.

Jill Peay concludes that there is no possibility of policy and practice following from research evidence in the case of DSPD since there is "No agreed definition, no clear diagnosis, no agreed treatment, no means of assessing when the predicted risk may have been reduced, and no obvious link between the alleged underlying condition and the behaviour" (Peay, 2002: 781. Also, see pg 18 of this issue). This new definition repeats the descriptiveness of the definition of psychopathy in the *1983 Mental Health Act*, which includes in its definition that psychopathy is a disorder that has resulted in "abnormally aggressive or seriously irresponsible conduct".

## The politics of dangerousness

*Reforming the Mental Health Act* signifies a distinctive swing in the dominant concerns of mental health legislation. The *1959 Mental Health Act* is concerned with the treatment needs of sufferers, its principal focus is on making treatment available without too much bureaucratic hindrance. The *1983 Mental Health Act* is concerned above all with safeguarding the rights of patients to participate or not in treatment, counteracting perceived abuses under the 1959 Act. Similarly, the *2002 Criminal Justice Bill* completes the shift towards public protection evident in the 1996 White Paper *Protecting the Public* and subsequent legislation, away from the emphasis on rights in the 1982 and 1991 *Criminal Justice Acts*.

Although there is no evidence of more incidents of death and injury to the public caused by mentally disordered persons, and no significant rise in levels of dangerous crimes, the general climate of heightened demand for protection against certain sorts of danger – paedophilia and other sexual offences – has meshed with a couple of high profile murder cases.

The killing of John Zito by Christopher Clunes led to demands for compulsory treatment, and the shakiness of the conviction of Michael Stone for the killings of Lynne and Megan Russell led to demands for powers to detain people who while they might not be killers 'beyond reasonable doubt', are nevertheless the sort of people who are likely to be killers.

These proposals are disturbing, breaching rights to freedom from detention without having been convicted of a crime, and to proportionality of detention to seriousness consequent on conviction. Civil detention becomes a dangerous power if it is not limited by the condition of treatability; preventive criminal detention becomes a dangerous power if it is not limited by the condition of proportionality to the offence committed. ■

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**References:**

Castel, R. (1991) 'From dangerousness to risk' in Burchell, G., Gordon, C. and Miller, P. eds. *The Foucault Effect: Studies in Governmentality*, Chicago; University of Chicago Press.

Department of Health/Home Office (2000), *Reforming the Mental Health Act: Part II High Risk Patients*, Cm5016-II, London: The Stationery Office, or www.doh.gov.uk/mentalhealth/whitepaper2.pdf.

Home Office (2002) *Criminal Justice Bill*, 21st November, London: The Stationery Office, or www.homeoffice.gov.uk/legislation.

Peay, J. (2002) 'Mentally Disordered Offenders' in M. Maguire, R. Morgan and R. Reiner, eds. *The Oxford Handbook of Criminology*, pp.746-791, Oxford: Oxford University Press.