

# Managing people with dangerous severe personality disorder

## *Liberty response to Home Office consultation*

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#### 1 Introduction

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research. It is the largest organisation of its kind in Europe and is democratically run.

Liberty welcomes the opportunity to comment on the Government's consultation paper *Managing Dangerous People with Severe Personality Disorder: Proposals for Policy Development*. Our preliminary views on the civil liberties and human rights implications of the proposals are set out below.

Liberty recognises the concern caused to the public by the dangerous behaviour of a small number of personality disordered individuals, and the government's desire to protect the public from serious risk from this group. However, we believe it is wrong, as a matter of principle, that preventative detention should be used for those who have not committed an offence.

We consider that, as a matter of principle, detention should only be authorised for individuals with severe personality disorder (SPD) either because they have committed an

offence, or because treatment of their psychopathic disorder may alleviate their condition. The attached statement by Liberty and other organisations outlines our concerns.

The Government's proposals, however, seek to detain individuals with SPD, who may be untreatable and who may have committed no offence.

In its consultation paper the Government accepts that there is a divergence in psychiatric opinion in the diagnosis of SPD. Furthermore, risk assessment is a notoriously difficult undertaking and there is no accurate way of determining dangerousness. In our view these two matters are insufficiently certain to warrant detention, potentially for a long period of time.

We also have concerns about the practical effects of these proposals. SPD is as notoriously difficult to manage and treat as it is to define, and the mismanagement of this condition has given rise to critical reports. The most recent of these is the Fallon Inquiry into Ashworth hospital, which found:

*"insular, closed institutions whose predominantly custodial and therapeutically pessimistic culture had isolated them from the mainstream of forensic psychiatry [and where] recruitment of adequate numbers of high quality managerial and clinical staff had therefore proved almost impossible".*

In light of the report's recommendation that Ashworth Hospital be closed we have serious concerns about the proper management and care of individuals under a new regime proposed in the consultation.

Individuals with dangerous severe personality disorder (DSPD) are already stigmatised and suffer discrimination. We are concerned that these proposals will increase this, thus deterring not only those with DSPD but other mentally vulnerable people from seeking help and access to professionals.

It is highly likely that individuals subject to these procedures will be detained for long periods. Such potential infringements on personal liberty should only occur where there is greater clarity regarding risk, diagnosis and treatment than the Government's proposals can offer.

### **Human Rights Act implications**

The detention of an individual is provided for under Article 5 of the European Convention on Human Rights (ECHR). The current relevant authorisation for the detention of individuals with DSPD, the group at whom these proposals are aimed, is either that they have committed an offence (Article 5(1) (c) or that they are suffering from a mental illness (Article 5(1) (e)).

The Government proposals include both these sets, in addition to those diagnosed as suffering from SPD who are untreatable and therefore currently cannot be detained under the Mental Health Acts and have committed no crime.

The preventative detention of an individual with DSPD who has not committed an offence could not be authorised under Article 5(1) (c)

There are difficulties in assessing whether the detention of an individual with untreatable DSPD could be authorised under Article 5(1) (e).

To date the European Court of Human Rights has not been asked to consider the questions that these proposals raise.

For detention to be authorised under Article 5(1) (e) there must be sufficient certainty in diagnosis for the detention not to be arbitrary. The consultation paper acknowledges the divergence in medical opinion in respect of SPD and the difficulties with risk assessment. A court may say that there was sufficient certainty in medical opinion to comply with Article 5 (1) (e) in respect of medical certainty of the diagnosis of SPD.

However, stringent safeguards would need to be in place for such a detention not to be arbitrary or disproportionate under the European Convention on Human Rights. There would need to be evidence beyond reasonable doubt both that the individual was suffering from SPD and that they presented a serious and immediate risk. Both of these would be highly problematic to prove, bearing in mind the lack of medical consensus regarding SPD, and the difficulties of risk assessment, especially where there is no offence.

The European Court of Human Rights (ECtHR) has not dealt specifically with the issue as to whether treatment is a requirement of Article 5 (1) (e) and therefore whether it can authorise the detention of those who are considered untreatable. However it does establish that those detained under Article 5(1) (e) must be detained in a suitable therapeutic environment. Thus detention of DSPD individuals under these proposals in a prison environment would not comply.

ECHR jurisprudence is developing towards recognition of a state's positive obligations to protect the lives of those known to be at immediate serious risk. These rights have to be balanced against an individual's Article 5(1) (e) rights. It is possible that the ECtHR will recognise that in some circumstances detention under Article 5(1) (e) can be authorised for an individual with DSPD who can be shown to present a serious and immediate risk to others.

However the Government would have to demonstrate a pressing social need, that such an individual could not be dealt with by other means and that such measures were proportionate. We question whether this could be shown, in light of the facts of previous cases, and the lack of any similar measures in other jurisdictions, either European or elsewhere.

## **2 The proposals**

The consultation paper suggests two possible models for introducing the new powers of indeterminate detention and the re-organisation of services for individuals with DSPD.

The first model (Option A) is based on the existing legislative framework but with significant changes. The second model (Option B) would create a separate system for the indeterminate detention of people with DSPD.

### **2.1 Option A: maintaining the existing legislative framework with modifications**

In addition to amending the current criminal justice legislation, Option A also proposes changes to the civil admission procedures under the Mental Health Act 1983 ('the Act'). One of the conditions which must be met under the Act before a person diagnosed as suffering from psychopathic disorder can be detained in hospital is that treatment "is likely to alleviate or prevent a deterioration" of the person's condition (the 'treatability test'). The consultation paper proposes that the Act should be amended so that:

The 'treatability test' be removed from the conditions for the detention of DSPD individuals under the Act;

New powers for compulsory supervision and recall of DSPD individuals follow discharge from detention under civil proceedings.

Thus DSPD individuals could be detained whether or not they are 'treatable'.

## **2.2 Option B: the creation of a separate system**

Under this option new powers would be introduced in both criminal and civil proceedings to provide for the indeterminate detention of DSPD individuals, as well as powers for supervision and recall following release from detention. Those subject to the new orders would be detained in services managed separately from mainstream prison and health service provision.

In addition to introducing extensive changes to the criminal justice system Option B proposes:

The introduction of the 'DSPD order'. This 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.

Compulsory assessment. The DSPD order could only be made following a period of compulsory assessment in a specialist facility.

Option B creates a new legal framework for the detention of all dangerous severely personality disordered individuals, which will be based on the risk that they present rather than whether they have been convicted of an offence. This option would also require the creation of new facilities separate from the prison and health service.

## **2.3 The persons at whom the government's proposals are aimed**

The Government's proposals are directed towards securing the detention of all individuals with DSPD, whether or not they are treatable. As the Government has noted, most of these individuals are already detained either in hospitals or prisons and their detention is authorised either under Article 5(1)(a) or 5(1)(e).

What the government is seeking to achieve is a mechanism for the detention of such persons who are currently in the community or will at some point return to the community, and who are deemed to be untreatable and thus not subject to detention under the Mental Health Act 1983. It is possible to conceive of a spectrum of individuals to whom such a new power might extend:

- a) A determinate sentence prisoner reaching the end of his sentence who was convicted for an offence for which the life sentence was not available;
- b) A determinate sentence prisoner convicted of an offence for which a life sentence was available but where, for one reason or another, a life sentence was not imposed;
- c) A person in the community who has a string of convictions for violence or sexual offences, but is not currently before the court, and who is not considered by psychiatrists who have assessed him to be treatable.
- d) A person in the community who has not been convicted of any serious offences and is not considered treatable.

## **3 Current provisions authorising the detention of individuals**

The main provision under the ECHR which authorises the detention of individuals is Article 5, which states:

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

- a. the lawful detention of a person after conviction by a competent court;
- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c. the lawful arrest or detention of a person effected for the purpose of bringing him before a competent legal authority on reasonable suspicion of having committed an offence or when reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- 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;
- f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Decisions by the ECtHR have established the following principles;

Under the Convention the detention of any person is permitted only if it falls within one of the exceptions contained in Article 5(1). The Court has consistently held that those exceptions call for a narrow interpretation, for example *Engels v The Netherlands* 1 EHRR 647; *Winterwerp v Netherlands* (1979) 2 EHRR 387.

In *Guzzardi v Italy* 3 EHRR 367 the Court stated in respect of 5(1)(c) that it is not directed towards a policy of general prevention against an individual or a category of individuals who present a danger on account of their continuing propensity to crime: it does no more than afford the contracting states a means of preventing a concrete and specific offence.

It is a further fundamental Convention principle that the detention must not be arbitrary. In any particular case, it must actually be shown to serve the Article 5(1) purpose that is relied upon: see e.g. *Winterwerp v Netherlands* (1979) 2 EHRR 387.

In *Stanley Johnson v the UK* (1997) The Court stated:

d) "the Court stresses, however that the lawfulness of the applicant's continued detention under domestic law is not itself decisive. It must also be established that his detention after 15 June was in conformity with the purpose of Article 5(1), which is to prevent persons from being deprived of their liberty in an arbitrary fashion"

### **3.1 Article 5(1) grounds applicable to untreatable DSPD individuals**

Article 5(1)(c) authorises, among other things, the detention of an individual when it is reasonably considered necessary to prevent his committing an offence. The provision has been given a restrictive interpretation by the Court which has held that that it is not directed towards a policy of general prevention, directed against an individual or category of individuals who present a danger on account of their continuing propensity to crime. The provision affords a means of preventing a concrete and specified offence: see e.g. *Guzzardi v Italy* 3 EHRR 367 above. Given this construction, the detention of untreatable DSPD persons does not fall within the scope of Article 5(1)(c).

The only other provision which, on the face of it, might encompass an order for the detention of untreatable DSPD's is Article 5(1)(e) which authorises the detention of a person of unsound mind. In respect of the DSPD at whom the Government's proposals are aimed, two issues that must be satisfied before Article 5(1)(e) can be said to authorise the detention of DSPD persons:

- a) There must be sufficient certainty within the psychiatric community as to whether the diagnosis is a proper one so as to bring it within the meaning of "unsound mind".

b) Article 5 (1) (e) must be able to authorise the detention of persons who, though of unsound mind, are not treatable.

### **3.2 Psychiatric certainty in relation to the diagnosis**

The ECHR does not state what is meant by "persons of unsound mind". The ECtHR has declined to define the term on the ground that its meaning is continually evolving. As research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitudes to mental illness change so that a greater understanding of the problems of mental patients becomes more widespread (*Winterwerp v Netherlands* (1979) 2 EHRR 387 (para 37)).

In *Winterwerp* the Court noted that the ECHR does not define 'persons of unsound mind'. While commenting that a definitive definition cannot be given to this term the Court noted that Article 5(1)(e):

*"obviously cannot be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society."*

The Court considered that to hold otherwise would:

be irreconcilable with the exhaustive list of exceptions in article 5(1)(e) which call for a narrow interpretation;

fail to conform with the object and purpose of article 5(1) - to ensure that no one should be dispossessed of his liberty in an arbitrary fashion;

disregard the importance of the right to liberty in a democratic society.

The Court held that for detention to be lawful under Article 5(1)(e) the following conditions must be met (except in an emergency):

objective medical opinion to establish a true mental disorder;

the mental disorder must be of a kind or degree warranting compulsory confinement;

the validity of continued detention depends on the persistency of the mental disorder.

The Court has given no definition of the term 'unsound mind' and in *Winterwerp* noted that this is a term whose meaning is continually evolving as research in psychiatry progresses.

In the consultation document the government expressly recognises that there is no consensus in the psychiatric community on the nature of personality disorder, how it should be managed or the extent of the role health professionals should be expected to play in dealing with those personality disordered people judged to be unlikely to respond to treatment (para 15, p.7). Plainly, it is a matter for the psychiatric community to determine whether there is a psychiatric condition that can be properly labelled as severe personality disorder, that is whether such a condition exists and whether a person who is suffering from it can be described as a person of unsound mind. There is some room for argument that at present there is insufficient agreement within the community for the condition which is labelled SPD to constitute unsoundness of mind. No challenge has ever been made to this diagnosis on the ground that it does not constitute unsoundness of mind. It may be that the condition would be treated as being sufficiently recognised by the psychiatric community to bring it within the scope of Article 5(1)(e). However this is a different issue from whether any particular individual can be proved to be suffering from SPD with a sufficient degree of certainty.

### **3.3 Article 5(1)(e) and the detention of untreatable persons of unsound mind**

There is no case law which expressly deals with the question of whether the detention of persons of unsound mind who are not treatable is permissible under Article 5(1)(e). In *Winterwerp*, the Court held that the provision was not concerned with the appropriateness of a particular form of treatment that the patient was receiving. Such an issue would appear to fall within Article 3.

In *Ashingdane v United Kingdom* (1985) 7 EHRR 528 The court accepted that there must be some relationship between the grounds of detention and the place and conditions of detention. In principle this should be in a clinic, hospital or other appropriate institution. The court would not concern itself with the suitability of treatment or conditions, providing they were such as to accompany the reason for the detention.

It is clear, therefore, that persons who are detained on grounds of mental disorder must be detained in an institution which is appropriate for the provision of treatment for that disorder. It is arguable that if the provision of treatment is an integral and essential component of their detention, then unless the person of unsound mind is, in principle, treatable their detention is arbitrary. Further support for such a case may be derived from the case of *Guzzardi v Italy* 3 EHRR 367 where it was held that:

*"the reason why the Convention allows [persons of unsound mind, alcoholics and drug addicts], all of whom are socially maladjusted, to be deprived of their liberty is not only that they have to be considered as occasionally dangerous for public safety but also that their own interests may necessitate their detention. One cannot therefore deduce from the fact that Article 5 authorises the detention of vagrants that the same or even stronger reasons apply to anyone whom may be regarded as still more dangerous"* (para 98).

### **3.4 Protection of the public**

Both *Guzzardi* and *Ashingdane* were decided before there had been any significant development in Convention jurisprudence of the concept of the State's positive obligations. In our view, in assessing the scope of Article 5(1)(e) today the Court would seek to strike a balance between the rights of the person who is to be deprived of his liberty and the state's positive obligations under the Convention to protect persons from an infringement by others of their Convention rights.

In relation to Article 2 (right to life) and Article 3 (torture etc), the Court has held that the State may be obliged actively to take measures to prevent the breach by one person of these rights as enjoyed by another. The provision of remedies after the event is not sufficient, see for example *Osman v United Kingdom* (1999) 1 FLR 198. In *Osman* the Court held that such obligations arise where it can be established that:

*"the authorities knew or ought to have known at the time of the existence of a real or immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."*

At present the detention of a DSPD individual who has not committed an offence and is not deemed treatable would not fall with the scope of the State's powers, and their failure to detain would not amount to a violation under Article 2.

However, the Court is bound to consider Articles 2 and 3 and ask itself what measures are available to a State in the discharge of their duties, when assessing whether the scope of Article 5(1)(e) is broad enough to authorise the detention of untreatable DSPD persons. The point made by the Government in the consultation paper is that in relation to the group of 300-600 persons identified, there are no other effective protective measures that it is currently able to take.

This as a matter of factual evidence we would dispute - the wide definition of treatment allows for the detention of most SPD individuals, and a failure to detain has often been a failure of the relevant services, linked to lack of resources, rather than a shortcoming in the law. However, there may be a few DSPD persons who have not committed an offence and who are not treatable, who currently cannot be detained.

It may be possible, although we think it unlikely, to envisage a situation where there were near absolute certainty as to the diagnosis of a particular individual and his propensity for fatal violence, in which the state would be powerless to prevent his going on to kill. In this unlikely situation the Court might develop the jurisprudence under Article 5(1)(e) in a manner that provides the state with the legal mechanisms necessary to protect the interests of others under Articles 2 and 3. It is possible therefore, that the detention of untreatable DSPD persons could potentially fall within Article 5(1) (e).

### **3.5 Conclusion**

We consider that if the government were to introduce legislation creating mechanisms to secure the detention of those 300-600 untreatable DSPD persons whom it is thought are currently in the community, it would not automatically violate the Convention. However, we discuss below a number of procedural safeguards that any such mechanism must incorporate if compliance is to be assured.

## **4 Procedural safeguards**

### **4.1 Medical evidence**

The government has already taken on board the need to comply with Article 5(4). It is clear that any order for the detention of DSPD persons would have to be made by a court. However, it has said relatively little about the procedure to be adopted and the evidence that must be adduced before such an order can be made. These are both matters that directly engage the Convention.

The ECtHR has held that, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has reliably been shown to be of unsound mind.

*"The very nature of what has to be established before the competent national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such disorder":*

*Winterwerp* para 39.

The government proposes (at para 10, p.13) that in the case of individuals who are not currently before the criminal courts an order can only be made following referral for specialist assessment. Such referrals will be made in civil proceedings, e.g. by a medico-legal tribunal, and will be subject to appeal. Referral will only be available on the basis of prior psychiatric reports together with evidence of probable risk. Evidence of risk will be provided from reports from the police, probation or prison service. The government envisages that over time such evidence will most often come from the local multi-agency public protection panels and risk panels. The proceedings envisaged are currently subject to the ongoing review of the Mental Health Act.

Once a referral has been ordered assessment will be undertaken over a period of several weeks, perhaps longer in exceptional cases, by a multi-disciplinary team - including professionals with specialist training drawn from the probation, health, prison and social services. It will need to include an intensive process of systematic observation, formal assessment, and history taking using a battery of standardised procedures so that at the end of the period the team can produce a report on whether the individual has a personality

disorder. If the person being assessed is found to be personality disordered, comments can be included in the report on the nature and severity of the disorder and the associated risk to the public. This assessment report will inform the court's decisions on initial detention made in either civil or criminal proceedings: see paras 38-9, pp.18-19).

Medical evidence is required at two stages: first, in order to found the basis for making an order for assessment. In view of the preliminary and temporary nature of any detention for the purposes of assessment we consider a scheme operating under the Mental Health Act 1983 whereby detention may be based upon the evidence of two registered medical practitioners, one at least of whom is approved under s. 12 of that Act is adequate to safeguard an individual's rights under 5(1)(e). This is particularly so where the decision to make an order is placed with a medico-legal tribunal where the medical member of the panel has a specialist expertise in personality disorders.

However, when it comes to the medical evidence necessary to support the making of an order, greater safeguards are needed in view of the uncertainty as to diagnosis, together with the indeterminate period of detention that will be authorised. At this stage the person must be reliably shown to be suffering from a personality disorder. It would appear that the Government envisages that the report from the assessment centre will form a sufficient evidential basis upon which to make the order.

Though the establishment of specialist assessment centres is a welcome safeguard against mistaken diagnoses, it is to be assumed that the psychiatrists working in those centres and who will be responsible for the preparation of such reports will be drawn from the psychiatric community where, currently, no consensus about the existence of the disorder exists. It is also to be assumed that the psychiatrists working in the centres will be sympathetic to the view that the diagnosis is a medically proper one. We consider that, at the very least, in order to safeguard against the risk of mistaken diagnoses, there must be at least one other independent report from a consultant forensic psychiatrist with specialist expertise in personality disorders. Two such reports would be preferable.

#### **4.2 Burden and standard of proof**

The burden must rest upon the State to prove that the conditions justifying detention apply. The standard of proof should in our view be the criminal standard to cater both for the uncertainties that are associated with diagnosis and risk assessment. The Government has not been forthcoming about the subjective and uncertain nature of risk assessment. This is a notoriously difficult exercise and not one which members of the police, probation and prison service are necessarily any more equipped to conduct than anyone else. What these services can provide is relevant information about the individual concerned. However, the interpretation of that information is a matter of opinion and judgement. There is a great deal of room for error and a high standard of proof will offer an important safeguard against mistakes. Such a standard also adequately recognises the draconian nature of the order, which potentially authorises life long detention. That prospect is a very real one for DSPD persons who are considered to be untreatable.

#### **4.3 The test of dangerousness**

Two very important issues that engage the ECHR concept of proportionality have been given scant attention by the government. The first concerns the nature of the danger that is capable of justifying the imposition of an order and the second, the level of risk that the individual must be proven to present of behaving in such a dangerous manner.

The principle of proportionality, a governing principle in ECHR jurisprudence, requires that a fair balance is struck between the protection of individual rights and the interests of the community at large by securing that the restrictions on individual rights are strictly proportionate to the legitimate aim they pursue.

As indicated the government's proposals are drastic measures. They will authorise the lifelong detention of persons who are not currently before the criminal court charged with an offence, who may never have committed any serious offences in the past, and who themselves will gain no benefit from their detention. A very serious competing interest will be required to justify as proportionate such an extreme interference with the right to liberty.

We earlier indicated that the State is under a positive obligation to safeguard the rights enjoyed by others under Articles 2 and 3. To the extent that such an order were to be aimed at preventing the commission of offences that would involve the violation of such rights, we consider that it would be found to be proportionate. Such offences are those which endanger life or limb or involve the commission of serious sexual offences and in respect of which life sentences may be imposed. We do not consider that the measure would be found to be proportionate in respect of lesser offences. Indeed the fact that the life sentence is not available for any person convicted of such offences conclusively demonstrates that the Government does not consider that such stringent measures are required to protect the public against their commission.

The drastic nature of the measure also calls for a high level of risk to be proven. In our view nothing less than proof that the individual is highly likely, or virtually certain, to commit such offences will justify the imposition of the order on grounds of proportionality.

#### **4.4 Place for detention**

Wherever an individual's detention is based solely upon the ground that he is suffering from a severe personality disorder, he must be detained in an institution the object of which is to provide treatment for that disorder (*Ashingdane v UK*). The detention of such a person in a prison is not, in our view, compatible with Article 5(1)(e). Under the government's second proposal the creation of such institutions is envisaged.

#### **4.5 Reviews of detention**

The government recognises that Article 5(4) of the ECHR requires that there be regular reviews by a court of continued detention. The scope of such reviews is not closely defined. However, the nature of Article 5(1)(e) detention requires discharge if the reviewing court is satisfied either that the individual is no longer suffering from SPD or, if he so suffering, he no longer meets the dangerousness test. For detention to be lawful the review must be effective. There are fundamental difficulties as to how this can happen, and in particular how a DSPD person can 'get better', if there are no formal treatment criteria.

It is not made clear how frequently such reviews are to take place. In view of the susceptibility of the condition to change over time reviews are required at least annually. The review process under s. 28 of the Crime (Sentences) Act 1997 in respect of post-tariff discretionary lifers and HMP detainees, which provides for reviews only once every two years, should not be used as a model. Such an interval pays insufficient regard to the possibility of change and carries with it the prospect of arbitrary detention.

During the review process the burden must remain on the State to prove beyond reasonable doubt that the detained person both continues to suffer a severe personality disorder and that the risk of his committing offences dangerous to life or limb, or serious sexual offences, remains very high.

The Government appears to envisage that discharge will always be conditional in that DSPD persons will at all times be subject to recall (p.17 para 24(h)). In our view the court must have the power to order absolute discharge in the event that the conditions of detention are no longer satisfied and it is not appropriate for the individual to remain liable to recall. This mirrors the powers that the Mental Health Review Tribunals have under s. 73 of the Mental Health Act 1983. There is no basis for distinguishing between the two situations. A power of

absolute discharge ensures that liability to recall does not persist when the court considers that such a power is arbitrary.

## **5 Practical concerns**

Definition, detention and treatment of SPD individuals has proved extremely problematic. There has been a string of inquiries following concerns over the apparent mismanagement and breakdown of services for this group. Most recently the Fallon Report was extremely critical of Ashworth Hospital, especially regarding the operation of the severe personality disorder ward.

The Fallon Inquiry noted that such institutions were inclined to become closed and isolated, vulnerable to control by often extremely dangerous and devious patients. Therapeutic input was minimal, the regime being predominately custodial. In particular there were difficulties with recruitment of adequate numbers of trained staff. At Ashworth the project for patients with personality disorders had been underused for a year because of the absence of an overseeing consultant psychiatrist. The Mental Health Act Commissions Biennial Report 1997-9 drew attention to the difficulties of staffing the high security hospitals. We are concerned that any institutions under these proposals would have similar difficulties in attracting the appropriate calibre of staff.

Individuals with mental health problems - and in particular SPD patients - are already stigmatised within society. We are concerned that individuals who these proposals are aimed at will be labelled and further stigmatised. In particular we are concerned that by virtue of being subject to these orders they may attract extreme adverse publicity which in turn may lead to vigilante type attacks, similar to those following the recent release of Robert Oliver. The practical effect of this may make their release into the community, should their condition warrant it, difficult to achieve. This difficulty has been found recently in America, where states which have detained offenders under draconian sex offenders legislation passed in response to public demand now wish to release offenders no longer considered to be a risk.

We are also concerned regarding the 'chill effect' these proposals may have in deterring not only those suffering from SPD, but other individuals with mental health problems, from seeking the professional help and intervention which may prevent escalation of their condition if sought at an early stage.

Finally we note that the Government has expressed its commitment to tackling all forms of discrimination. Mental health sufferers, and in particular those with SPD already face severe discrimination in many areas. We consider these proposals will increase this discrimination, both in how these groups are perceived, and in the actual measures in place for them. Similar draconian preventative powers are not being considered for other dangerous groups of people, for example reckless drivers.

## **6 Conclusion**

Liberty remains deeply concerned about the human rights implications of the Government's proposals. We accept that in theory the proposals could be compliant with the European Convention on Human Rights, especially bearing in mind the potential development of jurisprudence in respect of the state's positive obligations to protect life under Article 2.

However, to be compliant the proposals would have to be strictly proportionate and strict safeguards would be essential. These would require the establishment beyond reasonable doubt on objective evidence that an individual was suffering from SPD and that they were an immediate and serious risk. Bearing in mind the lack of certainty in psychiatric opinion and the degree of difficulty there is with risk assessment, we consider this would be difficult to establish - particularly in cases where no serious offence has been committed.

Conversely we consider the consequences to an individual of incorrect detention under these proposals to be extremely serious. The experience of the operation of similar provisions, albeit in respect of those convicted of serious offences, in other jurisdictions, and the lessons from inquiries such as the Fallon Inquiry, cause us concern as to how such a system would work in practice, and the effect this would have on the rights of the individuals detained under such provisions.

In theory we accept that these proposals - with the necessary strict safeguards - may be in compliance with the European Convention on Human Rights. In practice the risk which they pose to the civil liberties of those they will affect is too great for Liberty to support them.