

# Book Launch

## *Protecting the Public? Detention and Release of Mentally Disordered Offenders*, Tessa Boyd-Caine (2010)

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Thank you Gail Mason, Co-Director of the Institute of Criminology, and Tessa Boyd-Caine for the invitation to come back to the Institute and to launch Tessa's book.

I have known Tessa for a decade now. We first met when she came to the Institute of Criminology at the University of Sydney to work as our administrator. We have been blessed over the years with some wonderful people working in that role and Tessa was exceptional. She played a large role in putting the Institute on a more professional footing and managed to keep the many strands of the Institute's work running effectively. She also became a student in our Master of Criminology program. I had great pleasure in teaching her and, of course, she excelled. I think that some of the other students found her a bit daunting, notwithstanding her personal warmth, since she demonstrated a keen curiosity and strong capacity for critical analysis. Tessa went on to work at the Mental Health Review Tribunal where she was encouraged to apply for a managerial position by someone who recognised her many talents. However, I think that the fact that she has chosen to have her book launch here indicates that the Institute of Criminology remains an important intellectual home for Tessa.

Tessa later went on to undertake her PhD in sociology and law at London School of Economics. The book that I am pleased to be launching tonight is one outcome of that PhD research. It has been a real pleasure to see Tessa go from strength to strength in her professional career and it is wonderful to count her as a valued friend.

When Tessa asked me to launch her book I was very honoured, but also concerned that I didn't have the necessary expertise concerning mental health issues to do it justice. And while that is no doubt true, it is also the case that the book speaks to a broad audience, specialists and non-specialists alike. The book is well structured and clearly written; a real pleasure to read. It has much to offer those working in mental health law and policy, and related areas, but it also offers a great deal to those of us working in other areas of criminology, law and policy, and to the general reader.

This is a book that engages with so many significant, contemporary legal and criminological issues, such as: challenges to the separation of powers and the rule of law; forensic psychiatry, dangerousness and risk; law and order politics; the tensions between public protection and the interests of patients; the role of victims in shaping political rhetoric and public policy; the media; and human rights. In some ways Tessa was in a unique position to write this book, given her background in criminology, human rights and her experience at the Mental Health Review Tribunal.

The book provides an analysis of 'executive discretion' based on an empirical study of 'restricted patients' in England and Wales, that is, of those people convicted of a criminal offence and who are detained in a hospital under the *Mental Health Act*. Executive discretion is an important topic and one about which there has been so little research. Her work fills a very significant gap in the literature.

Tessa notes that a significant context for this book is the ‘strong and growing pressure on the executive in relation to the public protection agenda’ (Boyd-Caine 2010:4) and she draws parallels with the use, and indeed expansion, of executive discretion in other domains beyond mental health. This, in itself, makes her book distinctive. Few studies have recognised these parallels, or the manner in which ‘the public protection agenda’ has become a common element in an increasing array of detention regimes (Boyd-Caine 2010:5). Perhaps the clearest and most troubling examples in contemporary Australia are those dealing with refugees and asylum seekers, and counter-terrorism. Tessa provides illustrations from the case of Dr Mohammed Haneef, who was arrested in Queensland and detained without charge on suspicion of having had some involvement in the terrorist attacks in London and Glasgow in 2007, a suspicion that was found to be without basis (Boyd-Caine 2010:3-4). Following Dr Haneef’s release from custody, the Minister for Immigration and Citizenship exercised executive discretion to cancel his visa, an action described by former Supreme Court judge, the Hon John Clark QC, in his subsequent inquiry into the matter as ‘mystifying’ (Clark 2008: pviii).

NSW and England and Wales have recently undergone reforms in forensic mental health, but in different directions. NSW no longer has executive discretion. Since the commencement of the *Mental Health Legislation Amendment (Forensic Provisions) Act 2008* (NSW) on 1 March 2009, the Forensic Division of the MHRT has the power to make orders for the care, detention and release of forensic patients. This power was previously held by the executive government. However, executive discretion has been retained in England and Wales. The Secretary of State and the Mental Health Review Tribunal in England and Wales share responsibility for determining the suitability for discharge of restricted patients, but the Secretary of State, supported by civil servants in the Mental Health Unit, holds responsibility for decisions leading up to discharge such as leave, transfer to less secure facilities, whether and how patients spend time in the community. This divergence in approach should not be seen to detract from the relevance of the book to NSW or elsewhere in Australia. Indeed, there is great value in comparing England and Wales with NSW, to consider the many factors that shape how these differing approaches are given effect in practice and especially to examine the role of human rights. As Tessa notes, ‘the absence of a domestic human rights instrument in Australia brings its relative value in each system into sharp relief’ (Boyd-Caine 2010:10).<sup>1</sup>

Tessa asks, *inter alia*, why does a cabinet minister make decisions about the discharge of forensic patients and not the psychiatrists or hospitals, or the courts, tribunals or parole boards that make decisions about other offenders? And given that ‘the public’ has become so essential to the work of public officials, as increasingly contemporary public policy draws its mandate from the perceived expression of public sentiment (Freiberg and Carson 2010), how do officials constitute ‘the public’ and what are their ideas about the best way to protect the public? Her response to such questions is grounded in careful empirical research and analysis that avoids the polarities that so often characterise debate in such controversial domains.

Those of you who know me won’t be surprised that I have been particularly interested in Tessa’s methodology. Her research used a mixed methods approach that draws on

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<sup>1</sup> The European Court of Human Rights jurisprudence influenced UK developments prior to the adoption of the *Human Rights Act 1998* (UK).

documentary sources and interviews with key stakeholders and patient advocates. Tessa integrates this material very effectively and provides a reflexive account of the research process, attuned to ethical issues, respectful of her subjects and recognising the reciprocity of the research endeavour. She gained extraordinary access to research subjects including within the Home Office and some very candid accounts. In her preface to the book, Tessa attributes the success she had in gaining access to research subjects to the esteem held for her supervisors, Professor Jill Peay and Professor Paul Rock, and no doubt that is, in part, true. However, I suspect that her professionalism and personal qualities also played a large part in gaining access and in building the trust and respect that underlie her relationships with research subjects

But what of her findings? Tessa found tensions between differing notions of the public held by different actors in the system. Different constructions of the public included ‘anyone and everyone’, particular constituencies—especially victims and their families—and public protection of the political sensitivities of the system, and the Minister (Boyd-Caine 2010:141). They also drew in part on idealised constructions of victim and offender which were seen as necessarily opposed, obscuring the interests of many victims who were also families and supporters of patients ( Boyd-Caine 2010:175). But perhaps unexpectedly, she also found widespread support for public accountability for release decisions that are taken in the name of public protection, support for the Secretary of State and executive discretion, and for the tribunal. Many respondents expressed the view that medical practitioners and others dealing with care, support and treatment of forensic patients should not carry responsibility for public protection, which was more properly a role for those who were democratically accountable ( Boyd-Caine 2010:177). Symbolic politics largely triumph, and subsume the human rights expressed in law and at a rhetorical level, as the public protection agenda overshadows patients’ interests ( Boyd-Caine 2010:167), but Tessa is cautious not to dismiss the value of a human rights framework. Importantly too, she flags at several points throughout the book opportunities where executive discretion could have been exercised more positively and with greater attention to the interests of patients if public protection had been construed in less oppositional terms.

I intend to recommend this book to postgraduate students as a very fine example of research and I encourage you to read it. It deserves a wide audience, and I hope that is also encourages others to turn their attention to executive discretion in all sorts of domains.

Julie Stubbs, Professor, Faculty of Law, University of NSW

## References

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