

**PUBLIC HEALTH (SCOTLAND) BILL:
Powers and functions of Scottish Ministers, Health Boards and local authorities.
Role of the ‘competent’ person
Medical examination – consent issues**

Public Health Consultation proposals

1. The consultation invited views on a number of proposals in relation to the powers and functions of Scottish Ministers, Health Boards and local authorities, and whether the exercise of some of the powers required the statutory input of a medical or other professional. In particular, it proposed to assign public health legislative powers in relation to people to Health Boards and for legislative powers in relation to property and premises to remain with local authorities.
2. It also proposed that new legislation should define the actions for which professional input was required and place a duty on statutory authorities to ensure a person with appropriate professional competence carries these out. The professional qualifications and accreditation of competent persons in relation to the functions which they carried out would be set out in regulations. It asked whether the provision and statutory role of the DMO should be retained in legislation.
3. The consultation document referred briefly to the current power to medically examine someone suspected of suffering from, or carrying, an organism capable of causing a serious infectious disease, if that person refuses such an examination. It did not, however, ask any specific question about the continued need for such provision and what it might entail.

Consultation responses

4. There was mixed support for the proposal to assign public health powers for people to NHS Boards, with powers for premises remaining with local authorities. The majority of responses asserted that greater clarity was required on what was being proposed. There was also a general recognition that people and premises/property were inextricably linked in many public health incidents and that it was therefore important that nothing was done to diminish co-operation between local authorities and Health Boards in the protection of public health.
5. Around half of the consultees responded to the question on the need for a statutory DMO role and just under three-quarters of them supported the role, saying that it had served the public well to date. The remainder did not think that the DMO provision and statutory role should be retained.

(NHS Lanarkshire) –Seventy-five per cent is a large majority and the recommendations should reflect this view.

Action Taken

Local authority/NHS split of responsibility with duty to co-operate

6. We have reconsidered the issues, taking into account the consultees’ responses. There is clearly some misunderstanding regarding the extent of the proposed transfer of responsibilities from local authorities to Health Boards, which has caused concern, particularly amongst the environmental health profession. Several respondents interpreted the suggested organisational

change as the responsibility for undertaking all public health investigations would move to the NHS and the EHOs would no longer be investigating communicable diseases. This is not the case. We continue to recognise and value the key role played by the environmental health profession at local level to protect public health. Investigations will be carried out by health board and local authority personnel largely as they are at the moment (although we are proposing enhanced investigatory powers), but the statutory powers in relation to what will happen to people as a result of these investigations will transfer to the NHS. So, for example, it is proposed that the enhanced powers of exclusion from a wide number of settings (work, school, nursery, place of entertainment etc) contemplated in the legislative proposals, be exercised by the Health Board, with the local authority having a duty to co-operate. Similarly so in relation to the updating of removal and detention powers and the proposed new power to quarantine. This is seen as logical as the Health Board is responsible for protecting the health of individuals who would be subject to these orders. The use of the NHS Central Legal office will ensure consistency of legal advice across Health Boards. Investigative and enforcement duties in relation to public health carried out by local authorities would remain unchanged.

(NHS Lanarkshire) - Clarification of the split responsibility with a duty to co-operate in the roles of the NHS and Local Authority is welcome. The need for joint working between NHS and Environmental Health remains crucial to public health and environmental health investigations and interventions in controlling communicable disease and environmental hazards.

Use of the Competent Person

7. Following consideration of the consultation responses, we continue to see the need for more flexibility in the competencies and qualifications of those undertaking health protection functions at local level. Our reasoning for this is three-fold:

- the need to maximise the skills, expertise and knowledge of the current workforce patterns within Health Protection Teams at local levels which includes specialist nurses and public health specialists;
- the need to provide legal clarity as to when a medical practitioner is required; and
- the need to provide legal clarity for the involvement of local authority public health specialists.

8. The concern for future proofing the legislation is also a consideration and we wish to maintain the strength of the public health protection workforce by ensuring the necessary legal framework which can tolerate unknown but possible changes to health professionals' training systems.

9. The flexibility would be facilitated by the appointment/designation of 'competent persons' by the Health Board and by the local authority. These persons would be suitably qualified to carry out the functions/responsibilities assigned to them by the Health Board or local authority and to carry out legislative duties in health protection. The qualifications and competencies of 'competent persons' will be set out in regulations. Those functions which require the restriction of personal liberty, e.g. quarantine and detention would continue to require the input of a 'competent person', with suitable qualifications. It is envisaged that the lead officer for environmental health would be the 'competent' person for local authorities.

(NHS Lanarkshire) – The inclusion of a clear definition of competencies in the regulations is welcomed. The key issue is that competent persons are suitably qualified, accredited and experienced in relevant public health and clinical practice. In discharging the proposed powers relating to people, clinical judgements regarding both personal and public health risks require to be made. Retaining public confidence in the application of relevant powers will continue to be important.

10. In addition to those functions which restrict personal liberty, Health Boards will have responsibility for the following - to plan for health protection at local level, in consultation with the local authority; to lead public health incident investigations; to share information in specified circumstances and to receive statutory notifications of infectious diseases, organisms and health risk states. Local authorities continue to take the lead in respect of cleansing, decontamination etc of premises and things; and the investigation of statutory nuisances/environmental health concerns EHCs (as you will have seen from previous correspondence, it is likely that changes to the EPA will mean that we won't be proceeding with this, unless a strong case is made by the environmental health profession); lead responsibility on port health, and ensurance of provision of mortuaries, other than where deaths are hospital related.

(NHS Lanarkshire) - Clarification of Health Board and Local Authority roles is welcomed.

Proposed provisions

Aim of the Bill

11. The proposed aim of the Bill is to consolidate and update the law on the protection of public health. At the moment we are working to a definition of 'protection of public health' which matches that set out in International Health Regulations (IHR 2005), i.e. *the prevention, protection against, control and provision of a public health response to the spread of disease.* 'Disease' is intended to cover (again in line with IHR 2005) *an illness or medical condition, irrespective of origin or source that presents, or could present, significant harm to humans.* This definition covers diseases caused by infection and by contamination. These definitions are, of course, subject to change as the Bill develops.

(NHS Lanarkshire) - The focus of the proposed legislative change is on Health Protection and the name of any new Bill could include this.

Organisational authority

Scottish Ministers

12. Scottish Ministers are to have powers in the Bill to make provision for the purpose of protecting public health in Scotland. The Bill will consolidate and clarify their powers in this field providing: power to delegate functions to Health Boards, local authorities and Health Protection Scotland (through the Common Services Agency, its legal identity); power to direct functions to other bodies where a Health Board or local authority is failing to undertake the functions to a satisfactory standard; and direct the allocation of resources between health board and local authorities where it is necessary. The power to order a public inquiry into matters of concern arising from health protection issues is already available through the Inquiries Act 2005.

Health Boards

13. This is not yet finalised, however, to date, the following powers and functions are being assigned to Health Boards in the draft Bill:

- Duty to co-operate with the local authority and other relevant persons who have an interest in the protection of public health.
- General duty to plan, in collaboration with the relevant local authority, for the protection of public health in its area. We do not want to add unnecessarily to the planning burden on NHS Boards and local authorities. What is to be covered by this planning function and how it is to be taken forward will therefore be set out in guidance. This will ensure that we avoid duplication of planning effort in light of other local planning arrangements, some of which are currently being reviewed.
- An updating of the current powers of removal to and detention in hospital, on order from the sheriff, where someone has an infectious disease, or is contaminated, and as a consequence of that disease or contamination there is a significant risk to public health. Order to be applied for by the 'competent' person of the Health Board.

(NHS Lanarkshire) - Suitable places for detention and suitable service provision will be required to detain potentially or actually infected people against their will and Boards should co-operate on this.

- Power to exclude an individual or individuals from a wide range of communal settings, as set out in the exclusion order, issued by the 'competent' person (e.g. school, nursery, work, places of entertainment etc), in specific circumstances and where there is a risk to public health.
- Power to quarantine someone in their own home or other setting, on order from the sheriff, in particular circumstances to be set out in the legislation, and where there is a risk to public health.

It goes without saying that the powers in relation to quarantine and removal/detention are only relevant where an individual does not accept constraints voluntarily.

- Receipt of statutory notifications of infectious diseases, organisms and health risk states; and potential public health emergencies of international concern. Onward notification to the Common Services Agency (the legal entity of Health Protection Scotland).
- Medical examination/medical assessment – see attached paper.
- Duty to ensure provision for mortuary and post-mortem facilities where deaths occur in hospital, on hospital premises, or where death has been confirmed on hospital premises, including for the purpose of undertaking post-mortem examinations.
- Port health functions relating to people.

Local authorities

14. This is not yet finalised, however, to date, the following powers and functions are being assigned to local authorities in the Bill:

- Duty to co-operate with the local health board and other relevant persons who have an interest in the protection of public health.
- General duty to plan, with the Health Board, for the protection of public health in its area.
- Power to order a range of public health measures in relation to premises and locations, including residential premises, sheds, tents, ships, boats, aircrafts, trains, other conveyances and land. This includes power to seal off premises, or parts of premises, and restrict access. It also includes power to require premises to be cleansed, disinfected or decontaminated.
- Power to order a range of public health measures in relation to things, including cleansing, disinfection, decontamination.
- Duty to ensure the provision of mortuary and post-mortem facilities for deaths, other than hospital-related deaths, including for Crown Office Procurator Fiscal instructed post-mortem examinations.
- Port health functions relating to premises, conveyances and things.

Power of medical examination

(NHS Lanarkshire) - This power requires a competent medical examination by suitably qualified professionals and indicates the need for input from a medical officer, designated or otherwise.

1. Section 72 of the Health Services and Public Health Act 1968 empowers a sheriff, on a written certificate by the DMO, to order someone to undergo a medical examination if he is satisfied that there is reason to believe that he or she, although not suffering from an infectious disease, is carrying an organism that is capable of causing it and that it is in the public interest for the person to be medically examined. Medical examinations can include bacteriological and radiological tests and similar investigations. Similar provision, without the need for an order from the Sheriff, is contained in the Public Health (Ships) (Scotland) Regulations 1971 and Public Health (Aircraft) (Scotland) Regulations 1971, as amended, at ports/points of entry into Scotland.

2. It is appropriate now, in reviewing the existing legislation, to consider what powers and procedures are necessary at the present time and for the future, and to ensure that they comply with the European Convention on Human Rights (ECHR). The ECHR does recognise that there are circumstances, such as the prevention of the spreading of infectious disease, in which interference with the right to liberty and security of person (article 5) may be justified. Similarly, ECHR recognises that interference with right to respect for private and family life (article 8) may be justified if it is necessary for the protection of health or for the protection of the rights and freedoms of others. The latest International Health Regulations (IHR) indicate that, if there is evidence of an imminent public health risk, the State Party may, in accordance with national law, and to the extent necessary to control such a risk, compel the traveller to undergo or advise the traveller to undergo (amongst other things) the least invasive and intrusive medical examination that would achieve the public health objective.

3. The Department of Health and the Welsh Assembly have recently consulted on a proposal to continue for it to be possible for a judge to require a person to undergo medical examination, with the detail of what could or could not be included within that examination and by whom such examinations should be carried out, to be contained in regulations. It is also proposed that the requirement to apply to the judge for a medical examination to be carried out would not be required at ports/points of entry into the England, because of the pressure of passing through points of entry and exit would make this difficult. Many other countries also maintain powers to medically examine without consent, where there is a significant risk to public health.

4. Clearly any system of public health requires the most transparent and fair use of law with the minimum infringement of individuals' rights. The vast majority of people who may be suspected of having a disease, either at ports or in-country, which would pose a risk to public health will accept health advice, agree to be medically examined (if this is thought to be appropriate) and to be treated (if suitable treatment is available). From previous public health protection experience people, e.g. who require detention, can be involved in a discussion over time about accepting treatment and their state monitored by the non-intrusive care they will receive. It is also recognised that a medical examination will not, in itself, reduce the risk to others, and that isolation measures may well still need to be applied. In addition, those undergoing medical examinations may find some measures more intrusive than others.

5. However, it is possible that the findings of a medical examination can help to ensure that any further action taken is proportionate to the risk involved. For example, the examination might

establish that the person concerned does not pose any risk to others, in which case it would be unnecessary to ask him or others to stay in quarantine.

Proposals

6. In these circumstances, we consider that it is appropriate for Scotland to have the full range of health protection measures at its disposal to protect its population from the spread of disease, including retaining the current power to have someone medically examined on Order from a sheriff. Clearly the power would only ever be used in the most extreme circumstances. In addition, it is important to note that any sheriff's order would not compel a doctor to carry out an examination, but would compel the individual to undergo an examination. There is no intention, at this time, of compelling someone to have a medical examination without an Order from the Sheriff.

7. In considering what might be allowed within a medical examination, there is a need to ensure that what is being undertaken is the least intrusive and invasive procedures which would be required to achieve the public health purpose. We would propose to use the definitions of 'intrusive' and 'invasive' as set out in IHR 2005 and replicated below. We are currently considering how that might be achieved within the legislation.

Medical treatment

15. There is no intention of taking power to treat someone against their will, including the provision of vaccination or other forms of prophylaxis. However, we are currently considering how it might be possible to require someone to be disinfected or decontaminated, in certain circumstances. Again, it is not considered that this should be possible without an order from the Sheriff.

(NHS Lanarkshire) - The requirement in England for a medically qualified specialist to be available for health protection purposes at all times - HSG(93)56 should be noted.

'Intrusive' means possibly provoking discomfort through close or intimate contact or questioning.

'Invasive' means the puncture or incision of the skin or insertion of an instrument or foreign material into the body or the examination of a body cavity.