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sent by email

Scotland National Office

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Dear Mr Doohan

PUBLIC HEALTH LEGISLATION IN SCOTLAND: A CONSULTATION

Thank you for your letter of 25 October, inviting views from BMA Scotland on the review of public health legislation in Scotland.

We have serious concerns over the implications for patient confidentiality and the doctor-patient relationship arising from two of the specific proposals put forward in the consultation document: namely the expansion of the compulsory notification requirements beyond communicable diseases and organisms posing a serious and imminent threat to others, and the expansion of statutory powers to include domestic quarantine. Although there are one or two areas in the consultation where ethics and human rights are mentioned, it is worrying that there is no genuine attempt to set out the ethical and legal arguments to justify the increase in powers. Our concerns on these points, together with comments on other areas of the consultation, are set out in detail below:

Question 1: Organisational Authority

1.1 – proposal to assign legislative powers in relation to people to NHS Boards and for property and premises to local authorities

The current arrangements broadly speaking work well. It is unclear whether the proposed changes would work better. The proposed changes could give rise to different approaches where there is a potential or actual threat to public health from both people and premises and the two organisations take different views on how to proceed.

1.2 – whether the provisions in Tables 1 and 2, Annex D could usefully be updated and retained in new legislation

It would probably be more useful to draft a generic legal power if possible.

1.3 – whether there should be a requirement for the production of local Health Protection Plans and Statements

Local Health Protection Plans are more likely to be a bureaucratic burden on NHS Board and local authorities than a genuinely useful way of achieving joint approaches on health protection issues. We do not support a requirement for the production of local Health Protection Plans nor their incorporation within Community Plans.

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Chief Executive/Secretary: Tony Bourne

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1.4 – *whether the issues to be covered in Plans/Statements should include the matters covered in para. 3.1*

No. The current arrangements work well.

1.5 – *whether the AIDS (Control) 1987 Act should be considered for repeal in Scotland*

No. If the Act is repealed, there is a danger that NHS Boards might use the funding currently ring-fenced for HIV/Blood Borne Virus prevention for other purposes.

1.6 (a) - *whether the provision and statutory role for a DMO should be retained in new legislation*

The provision and statutory role of the DMO should be retained.

1.6 (b) - *if the role is retained, whether this should be a joint appointment between LA and NHS*

The current arrangements of the DMO role being appointed to the local authority by the NHS Board work well and should be retained. There should also be a similar "DEHO" role where the local authority appoints an environmental health officer to the NHS Board.

1.6 (c) - *if the role is retained, whether there should be defined qualifications/professions eligible to fulfil the role*

We are firmly of the view that the DMO role should only be undertaken by registered medical practitioners. The effectiveness of the health protection response of the NHS Board and local authority depends to a large extent on the willingness of the public to undertake actions and suffer restrictions on the say so of an individual. The public perceive doctors as having the necessary independence, professional ability and standing to command respect and acceptance of the need for these actions and restrictions in the wider public interest. Non-doctors are unlikely to be able to achieve this.

1.7 – *whether legislation should require that certain outcomes, including those restricting liberty, need input from a competent person and, in particular, a professional with defined qualifications*

Yes. This should be an appropriately qualified and experienced medical practitioner.

1.8 – *if so, whether these qualifications should be defined in regulations or guidance*

Regulations. The powers are too sweeping to be covered by guidance alone.

1.9 – *whether powers for Scottish Ministers to intervene in public health matters should follow the principles already established in legislation*

Yes.

Question 2: Notification Options

2.1 – *proposals for a new system of statutory notification to public health agencies*

The compulsory release of confidential information about an individual is a significant matter, with implications not only for the doctor-patient relationship, but for human rights and civil liberties. Any proposals to extend the extension of compulsory notification arrangements beyond infectious diseases and organisms that pose a serious and imminent threat to others must demonstrate that the public interest is strong enough to override patient confidentiality, that the action is proportionate to the level of risk, and that it will achieve the desired outcome. We believe that in this respect sufficient justification and proportionality have not been provided for the proposals presented in the consultation document. The proposals may also be counter productive should they cause patients to lose confidence in the notification system, with knock-on effects for the health of the public as a whole. In particular, we do not believe that sufficient justification has been provided to include "health risk states" as a notifiable condition. This could lead to patients refusing to provide information that they currently provide and a significant adverse effect on the management of serious public health incidents eg SARS.

On a separate point, and with specific regard to Q2.1(j), we do not support the removal of the fee per notification payable to general practitioners, not least because the proposals to extend the range of notifiable diseases/conditions, with penalties for non-compliance, would require GP practices to have robust systems in place to ensure notification.

2.2 – *proposals for developing an additional notification system for non-communicable diseases*

For the same reasons as our response to Q2.1, we do not believe that sufficient justification has been provided for extending the notification system to include non-communicable diseases. This would be a

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serious infringement of the patient's right to confidentiality, would potentially jeopardise patient confidence in giving information to doctors, and could lead to patients withholding information, thereby increasing the risk to the public health.

2.3 – proposals for the key issues that should be considered prior to making a new condition or hazard reportable

We do not support the extension of the notification system to include non-communicable diseases.

2.4 - whether to continue to exclude sexually transmitted infections from any new notification system and whether any other disease or condition should be excluded

The notification system should be restricted to infectious diseases and organisms that pose a serious and imminent threat to others.

2.5 – whether there are any other legislative options for surveillance which should be considered

See above.

Question 3: Investigation Options

3.1 – whether legislation should make it a statutory duty to divulge information during public health outbreaks or incidents

The vast majority of individuals and organisations involved in public health incidents and outbreaks release information on a voluntary basis. The introduction of a statutory duty to do so carries a significant risk of alienation and a reduction in the co-operation of individuals and organisations. We do not support the introduction of legislation making it a statutory duty for individuals or organisations to divulge information in these situations.

3.2 – proposals on the triggers necessary for such action

See above.

3.3 – who should be required to certify the need for such information

See above.

3.4 – appropriate appeal structures against the duty to divulge

See above

Question 4: Statutory Powers for Health Protection

4.1 – whether legislation should provide for the introduction of quarantine orders for up to 21 days, with provision for renewal or extension

The powers proposed for quarantine are extensive and should only be used in exceptional circumstances. As the document mentions, it will be extremely difficult to assess whether the use of compulsory powers is proportional to the threat where people may have been exposed to a serious disease but are showing no signs of illness. During an epidemic or pandemic, this might well result in powers being used widely, particularly as consideration is being given to the use of quarantine in domestic settings. It is unclear how an individual would have an opportunity to be able to take part in the legal process and oppose such an order effectively, given that it would only be considered for a person who posed a serious threat to others. Similar concerns apply to any appeal process. We would very much like to see further ethical and legal deliberation on the justification for these potentially very draconian powers.

There is also a shortage of practical information on how domestic quarantine would work - how, for example, would people obtain the necessities of life during their period of confinement? Furthermore, the restriction of liberty from the use of quarantine in hospitals could be, at least potentially, offset by the immediate availability of intensive medical care, but in domestic settings, such an offset will not be available.

4.2 – whether quarantine orders should only be applied where the criteria in paras 6.9 and 6.12 are met.

Yes. Quarantine orders should only be applicable where the criteria set out in 6.9 and 6.12 are all met.

4.3 – whether exclusion orders should be applied more widely, eg work, social and religious events, neighbours, travelling and other activities

No. These restrictions would be disproportionate. It should only be where the criteria in 6.9 and 6.12 are met that restrictions on travel and association would be justified and this would take place through a quarantine order.

4.4 – whether exclusion orders should apply to specified states and/or organisms and/or activities
Exclusion orders should only apply to work and school/nursery/child care settings.

4.5 – whether there should be penalties for non-compliance
We have doubts whether any penalties for non-compliance would be enforced.

4.6 – whether compensation payments should extend to all groups liable to be excluded under exclusion orders or affected by other orders
Compensation should be available to people who are excluded and also to parents/carers of those excluded.

4.7 – whether the payment of compensation should become the duty of the NHS
This would require a transfer of funds from the local authority sector to the NHS.

4.8 – whether legislation should provide for the introduction of detention orders covering those who refuse to comply with a quarantine order, and an appeal system
This should only be removal to a suitable hospital, and an appeal mechanism would be essential.

4.9 – proposal not to seek powers to require a person to have medical treatment
It would be unacceptable to have compulsory treatment of an adult who was of sound mind.

Question 5: Environmental Health Concerns and Nuisance

We have no comments on this section of the consultation.

Question 6: Mortuaries Options

6.1 – whether NHS Boards should become responsible for the resourcing and provision of mortuaries
It is unclear why NHS Boards should be required to fund the provision of mortuaries. It would be more appropriate for local authorities to be given responsibility for making suitable arrangements for the provision of mortuaries including the provision of police forensic mortuaries. Such mortuaries could be shared between several local authorities.

6.2 – whether the NHS should be allowed to charge the police for the use of mortuaries
See above.

6.3 – whether the provisions identified in Annex I should be updated and retained in new legislation
No comment.

Question 7: Port Health

We have no comments on this section of the consultation.

Question 8: Safeguards

8.1 – whether legislation should contain provisions similar to Regulation 12 in England and Wales, allowing the passing on of information beyond the health protection team by a competent person in specific circumstances

We do not support the introduction of legislation containing similar provisions to regulation 12 in England and Wales. Such a move would carry a serious risk of eroding public trust in patient confidentiality and adversely affect the health of the public.

8.2 – who should handle issues of enforcement against one's own organisation

A combination of robust internal procedures protecting and separating conflicts of interest, together with the ethical and professional framework of public health doctors and nurses is the most effective and sensible way to ensure this.

8.3 – whether outbreak and incident reports should be circulated to a defined audience

Outbreak reports produced by the OCT/IMT should, after removing information that could help identify individuals, become public documents and be made widely available.

Question 9: Tasks and Offences Options

9.1 – whether the proposed statutory split between governance and penalties is satisfactory

We do not believe that the public health would obtain improved protection through the introduction of additional monetary or other penalties on individuals or organisations.

9.2 – whether penalties should only be applied to the non-completion of tasks in List B

We do not support the introduction of new penalties for the non-completion of tasks in list B.

9.3 – whether legislation should include penalties for non-compliance with tasks

We do not support the introduction of new penalties for non-compliance with tasks.

9.4 – whether List A infringements might be addressed through the health governance framework, with List B breaches liable to attract a penalty

We do not support the introduction of new penalties for List A infringements or List B breaches.

9.5 – whether legislation should include provision for any other enforcement measure

No.

If you would like to discuss further any of the views expressed above, please do not hesitate to contact me on 0131 2473017 or sgallimore@bma.org.uk.

Yours sincerely



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