Liberty’s response to the Department of Health’s consultation on Pandemic Influenza and the Mental Health Act 1983: proposed changes

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Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

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1. Liberty welcomes the opportunity to respond to the Department of Health’s consultation on Pandemic Influenza and the *Mental Health Act 1983* (MHA) which was launched on 10th September 2009. The consultation, launched with little publicity, has a closing date for responses less than four weeks after its launch, making it difficult to provide a substantive detailed response. The consultation document invites comments on proposals to make temporary changes to the MHA and associated secondary legislation in the event of severe staff shortages because of swine flu. The purpose of the consultation is to ensure the MHA can still operate effectively if the number of medical professional staff is reduced through illness during the swine flu pandemic. It states that the current planning assumptions are for a 10-12% rate of absence from work in the general population in the peak period of the pandemic and states that health and social care organisations as a whole have a high number of staff with childcare and caring responsibilities so the percentage of staff off work could be up to 25%. No references are given as to where these figures come from. Reference is made to the fact that front line health and social care workers will be offered the swine flu vaccine, yet any reduction in the number of those affected as a result of vaccination is not estimated in the consultation document.

2. In particular, the consultation proposes reducing from two to one the number of doctors required to approve the involuntary detention and forced treatment of a person. It also proposes removing the need for a second opinion doctor before a person is compulsorily medicated. In respect of people detained under Part 3 powers, who are involved in criminal proceedings, it proposes suspending the time limits by which a person is admitted to hospital after a court order or conveyed to hospital etc (proposals are to amend over nine sections). It also proposes allowing people who do not have formal evidence of competency or the completion of training to be approved as those who can make certain orders under the MHA.

3. While we understand the Department of Health’s very real concerns about the impact a pandemic could have on our hospitals and the potential gravity of future swine flu outbreaks, we do not believe these proposals have been properly considered. A comprehensive public consultation response is also now unlikely given that the total consultation period is less than four weeks. While we understand the urgency of the perceived threat of swine flu, it is reasonable to imagine that the Government would have been planning contingency measures for a number of years.
for a pandemic of this sort given there have been other scares in the past (i.e. Bird flu, SARS etc) and that consultation on any such measures would have been published back in June when the pandemic was announced. It is also questionable whether the area of mental health is the only area in which changes like these would be necessary in the event of staff shortages due to the pandemic. Arguably prison services, police services, immigration facilities, remand centres etc would all be affected, yet as far as we know no proposals for change have been made in respect of these services. We are therefore unclear as to why the operation of the MHA has been singled out and we do not believe that the case has properly been made out to show that temporary measures of the kind proposed here are necessary. No evidence is given as to where the estimate of staff absenteeism comes from and it is not broken down into the relevant staff categories (i.e. doctors, psychologists etc).

4. It is important to recognise the intrusiveness of the powers contained within the MHA. Depriving a person of their liberty and requiring them to undergo medical treatment significantly engages a person’s human rights. Limitations on such fundamental rights can only be justified where it is necessary and proportionate to do so and where appropriate safeguards are in place. In certain situations where there are clear mental health concerns and hospitalisation and/or treatment would be for an individual’s benefit requiring a person to be detained in hospital will be necessary and proportionate. However, the circumstances in which such detention or treatment should be ordered requires stringent safeguards to ensure people are not unlawfully and wrongly detained or treated. The amendments proposed here would compromise this. As Dr Tony Zigmond from the Royal College of Psychiatrists said when this consultation was launched:

To take away just about all the safeguards seems a serious step which removes the protections for patients and professionals. This is a much softer standard than we have now. ¹

5. We are concerned that this rushed and seemingly ill-thought through proposed measure will have longer term implications that will outlive any swine flu pandemic. The use of such ‘emergency’ measures sets a worrying precedent when linked with NHS staff shortages. At a time when cuts in public spending are being

discussed it is important to ensure that understaffing for economic reasons does not similarly become a reason for reducing safeguards. All too often in the criminal justice sphere we have seen measures introduced to deal with one particular problem then being extended to other situations. Our recent legislative history on counter-terrorism powerfully demonstrates how powers introduced to deal with an ‘emergency’ are continued long after the emergency has passed. Any changes introduced to deal with the potential threat of swine flu must therefore be strictly time limited (if they are to be introduced at all).

6. We are also concerned by the ‘trigger’ at which these changes would become applicable. The consultation suggests ‘temporary amendments’ if staff absence reaches a level in which the usual procedures under the MHA cannot be followed. It goes on to say that this “may be confined to certain areas if some are more seriously affected than others”. Once “the level of staff absence has reduced to a level at which a gradual return to normality will be possible” transitional arrangements would “facilitate a smooth return” to the usual MHA procedures. However, a three month transitional period is proposed to clear any backlog of requests for second opinion requests. The consultation also states that it is not possible to be precise about the level of staff absence that might make these measures necessary (and therefore be brought into force). This is a very confusing approach to legislating. This either means that the amendments would be brought in affecting all areas of England\(^2\) if there is a certain average level of staff shortages, regardless of whether a particular hospital has a full team, or it means that the provisions of the MHA would apply differently according to which hospital in England you are in. The first proposition is problematic as it means that although there may be no reason why the MHA cannot be complied with in certain hospitals, shortcuts would be permitted and compliance not required. The second proposition is no more attractive as it means that the law would apply differently throughout England, raising very real concerns about equal treatment under the law. The consultation states that these changes would be permissive in the sense that if a hospital or doctor wished to continue to comply with the provisions of the MHA they could, they just would not be required to do so. It is only natural that in a busy and stressful environment the quickest and least restrictive method of complying with requirements is likely to be followed – it is no real safeguard to say that more stringent measures can be followed where possible. It is also unclear when these provisions will lapse – will this be set out in the amendments

\(^2\) The consultation states that it relates solely to England. No information is given as to how Wales, Scotland and Northern Ireland intend to cope with the swine flu pandemic.
or are the powers to last so long as is ‘necessary’, and if so, how will that be determined. Much greater thought, and consultation, needs to take place to consider all of these issues.

7. It is also important to note the real potential for a disproportionate impact of any such changes on ethnic minority groups. The 2008 Count Me In Census\(^3\) on inpatient care showed that considerably more people from black and some other ethnic minority groups were forcibly detained or treated under the MHA than those of white ethnicity, despite having similar rates of mental illness as other ethnic groups. This impact needs to be properly assessed in an equality impact assessment on these proposals if they are to proceed.

8. On the basis of the information provided in this consultation we do not agree that allowing just one medical recommendation on an application for someone to be detained under the MHA is acceptable. Mental health legislation has, since 1959, required the approval of two doctors before a person can be detained.\(^4\) Having two medical professionals approving detention is essential to help ensure “a reasonable degree of medical certainty and consistency before confinement may occur”.\(^5\) We are also concerned by the vagueness of the proposals to suspend time limits for taking certain actions ordered by the courts under various section in Part 3 of the Act. No explanation is given as to why, for example, it would be necessary to extend beyond 28 days, the time for conveying people to hospital where a court has declared it necessary that they receive treatment. This is already a fairly substantial period of time and it is difficult to understand why this time limit would be impossible to comply with. In particular we are concerned by the blanket statement that these time limits would be ‘suspended’, without any indication given as to how long these would be suspended for. We are also concerned by the proposal to temporarily approve people as approved clinicians under the MHA who do not have the requisite training. No indication is given as to how long these people would remain approved. This is particularly worrying given the parallel proposal to allow only one approved person to approve the detention or treatment of a person. If that one person was


\(^5\) Ibid at page 175.
also not properly trained the system of safeguards ensured under the MHA would be heavily compromised.

9. On the basis of the limited information available in this consultation we find the proposals contained within it very concerning. The safeguards in the MHA are extremely important as the Act provides for highly intrusive powers. Limiting and amending these safeguards should only take place after proper consultation when it can be demonstrated that it is necessary and proportionate to do so. This has not occurred here. While we appreciate the threat swine flu may potentially pose we do not believe a pandemic of this nature could be considered to be unforeseeable and believe that work of this nature should have been carried out in a timely way before such a threat arose. It is unclear to date whether swine flu will have far-reaching implications for the medical profession. We believe much greater safeguards need to be built in to any amendments before being introduced and greater consultation needs to take place. As such we cannot support the current proposals in this consultation.

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