Liberty’s response to the Department of Health Consultation:
Review of Parts II, V and VI of the Public Health (Control of Disease) Act 1984

June 2007
About Liberty

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.

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.


Contact

Gareth Crossman            Jago Russell
Director of Policy        Policy Officer
Direct Line: 020 7378 3654 Direct Line 020 7378 3659
Email: GarethC@liberty-human-rights.org.uk Email: JagoR@liberty-human-rights.org.uk
Introduction

1. Liberty welcomes the opportunity to respond to the Department of Health’s consultation on the Review of Parts II, V and VI of the Public Health (Control of Disease) Act 1984 (the “Act”). In outline, these Parts of the Act relate to measures to prevent or minimise the spread of disease. The Department has described the overarching aim of the proposals to be the replacement of the existing law with a more modern and flexible framework, in order to provide a stronger response to infectious disease and contamination within the UK and at our international borders.

2. In this short response we do not seek to address all of the issues raised in the paper. Indeed, much of the consultation deals with public health measures on which we are not best qualified to comment. We focus on those aspects of the consultation which we consider to have the potential to affect our civil liberties and human rights.

***

General Issues

3. At the outset, we emphasise the importance of the Government’s role in protecting the life and well-being of those within its jurisdiction, including from contamination and disease. Indeed, this is a requirement of human rights law. This does not, however, give the State a green light to disregard other important rights and freedoms in pursuit of a safer society. Neither does it entitle the Executive and local government to exercise powers which more properly belong to other limbs of Government. Our comments highlight areas in which, in pursuit

---

1 Available at: [http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_073452](http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_073452)
2 Cf Oneryildiz v Turkey 48939/99, Grand Chamber Judgment 30.11.04

---
of a more flexible legal framework, these dangers have perhaps inadvertently been overlooked.

4. Many of the proposals appear to represent a welcome and sensible modernisation of the current rules. A good example is Proposal 3, widening the scope of the powers in Part II of the Act to include contamination as well as infection. However, we feel that many of the proposals have scope for improvement.

5. Of particular concern is the shift from a range of specific, narrowly defined powers to broader general powers epitomised by Proposal 4. One can see the appeal of such unrestricted powers from the perspective of pure administrative convenience and flexibility. It should, however, be remembered that reasonable statutory limits on the powers conferred on public bodies play an important role: providing our elected representatives in Parliament with the opportunity to scrutinise and circumscribe the way the powers it confers are exercised; restricting the scope for abuse, inconsistency and injustice; and giving citizens a clear sense of the way their rights and freedoms might legally be restricted.

6. This approach is particularly evident in, but not restricted to, Proposal 26 (the suggestion of a new and very broad power for the Secretary of State). In many places the paper suggests that details of the new laws should be provided in secondary legislation. While we entirely accept that sometimes it will be appropriate for detail to be provided in secondary legislation we are concerned that the paper proposes an over-reliance on this, in areas where detail should be provided on the face of the primary legislation. A good example of this is Proposal 12, which suggests that the permitted techniques of medical examination should be left to regulation. Whilst we recognise the importance of maintaining flexibility, there is a strong case for providing, in the primary legislation, at least an indication of those methods which cannot be included as
techniques for medical examination, because of their particularly intrusive or disproportionate effects on the individuals examined.

7. The suggestion of broad, flexible powers means that the safeguards contained in Proposal 2, and the review mechanism contained in Proposal 11, become of paramount importance. Yet it is not clear from the consultation paper how the Proposal 2 safeguards will operate. Will they be legally binding conditions on the exercise of the powers, which must be considered and followed by decision makers? Alternatively, must they merely be “borne in mind”, as the consultation paper at one point suggests, and have no legal effect? Nor is it clear from the consultation paper how the mechanism for review of the exercise of powers will operate, both in terms of who will review decisions, and what will happen if an order is found to have been made unlawfully.

8. It is disappointing that the paper does not provide any analysis of how the existing powers have been used, why they have ceased to be effective and, in terms of evidence either from the UK or internationally, why it is considered that the new proposed powers would be better. Have the existing powers been used regularly or only in the most exceptional circumstances? Have there been situations where powers were needed that have not existed? How is it envisaged that the use of these new powers would differ? We accept that, where powers are given to local government, it is difficult to gather such data. Without this it is, however, difficult to assess the need for the proposed changes. Data must be collected in the future to assess how powers are being used and to ensure that their use is justified, proportionate, fair and consistent.

9. One final area on which we comment is the new offences proposed in the paper. We are concerned that these are over-broad and would risk criminalising activity which does not merit criminal sanction.

***
The General Principles

10. We welcome both the idea of having general principles enshrined in the legislation and the specific principles suggested. However, we would emphasise the importance of these principles not merely being things “that should be borne in mind” but principles which all decision-makers exercising powers under the Act (local authorities, JPs and the Secretary of State) must have regard to before they can exercise their powers. The principles should not be relegated to guidance produced under the Act but, instead, be stated on the face of the legislation. Furthermore, we consider that the principles should be sufficiently robust to enable the review mechanism in Proposal 11 to sanction the actions of a decision-maker for failure to comply. As noted above, this is particular important given the proposed shift from specific and narrowly-defined powers in the existing legislation to the more general and wide-ranging powers proposed.

11. In terms of the specific principles themselves, we would suggest that the phrase “that would achieve the appropriate level of health protection” be deleted from principles (d) and (e). As the principles are meant to guide decision-makers when making orders for the protection of public health, it is unquestionable that they will be designed to achieve the appropriate level of health protection. A further point is that, although the principles make reference to, inter alia, proportionality and non-discrimination, they do not make specific reference to “human rights” under the Human Rights Act 1998. Although public authorities are in any event bound by the provisions of the Human Rights Act, we feel that it is important that decision-makers are reminded of their responsibilities under the Act when making decisions which have the potential seriously to interfere with basic rights and freedoms.

3 This approach reflects that taken in the Mental Capacity Act 2005, which states without qualification in section 1(6) that, “regard must be had to whether the purpose for which it [the act or decision] is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.”
12. Liberty would also suggest the inclusion of one further principle: that any obligations imposed should be clear and accessible. It is a fundamental principle of the rule of law – particularly when breach of an order is a criminal offence, as is envisaged by Proposal 24 – that obligations imposed by public authorities on individuals are clear and accessible. This is vital to enable individuals to understand what they need to do to comply with the obligations, to avoid criminal sanctions and to understand the consequences of their actions.

***

The Order-Making Process

13. We welcome the concern shown in the consultation paper for due process and accountability indicated by the commitment in Proposal 6 that, as a general rule, justices of the peace rather than local authorities themselves should take the decision to require action of a person or action in relation to a particular thing. However, we consider that considerations of due process and accountability would be best served if decisions were taken not by justices of the peace acting alone, but acting together – i.e. as magistrates in the magistrates’ court. In this way, the machinery of the court is available to record and solemnise the decisions taken. We appreciate that there may be circumstances – of emergency for instance – when it is not possible to assemble a magistrates’ court, and when the decision of one JP, later approved by a magistrates’ court, would have to suffice.

14. Another advantage of the use of magistrates’ courts rather than individual JPs would be the fact that the magistrate(s) making the decision would have the support of the staff of the court. Such staff - or if decisions are taken by individual JPs, the JPs themselves - would clearly need training in the public health and
human rights issues that would be raised by applications for orders. The lack of any provision for this in the consultation paper is a serious omission.

15. We do not object to a local authority having the power to request someone to do something, without the prior authorisation of a court (Proposal 27). However, where an order requires action or creates coercive powers, as the consultation paper itself recognises, prior authorisation by an independent judicial authority would (where possible) be preferable. A sound justification should be provided for departing from these normal requirements. We are not convinced by the justifications for giving local authorities the power to make orders without prior authorisation in Proposals 28 and 29. A similar point can be made in relation to Proposals 34 and 36. The safeguards of due process and accountability are no less important where orders relate to action taken at the UK’s borders, whether those affected are UK citizens returning from trips overseas or foreign nationals. Where possible, orders creating legal obligations or powers of compulsion should be approved by a court. A sound justification (i.e. the need to respond quickly to an unforeseeable emergency) should be shown for abandoning the normal requirement for prior judicial authorisation.

16. Proposal 9 suggests that, as a general rule, it should be possible for a justice of the peace to act, if he deems it necessary, without the person who

---

4 The reasoning given in the consultation paper in relation to Proposal 28 – that “the action required is straightforward and something that parents and carers should expect to take if circumstances demand it” does not address the fact that the order affects the liberty of a person and so should be subjected to prior independent authorisation if possible. The action may well be straightforward, but not noticeably more so than, say, an adult staying at home, which the consultation paper recognises is an order that requires standards of due process and accountability to be followed in its imposition.

5 The justification given in Proposal 34, that “The pressure of people passing through points of entry and exit would make it difficult to apply such a requirement” is perhaps hard to follow, given that, generally, it is envisaged that these ad hoc orders would be used infrequently. Of course it is legitimate for central government backed up by Parliamentary scrutiny (or, in an emergency situation, the Secretary of State, with later Parliamentary scrutiny) to determine that certain people be subject to requirements (for instance, medical tests) prior to being allowed to enter the country or take up UK residence. Where it became necessary to make a particular order on a frequent basis, this would be the appropriate way to proceed. However, we do not think it acceptable that local authorities be able to determine potentially intrusive matters on an ad-hoc basis lacking procedural safeguards.
might be the subject of the order being present. We consider that, where possible, the person who is the target of the order should be present. Obviously there may need to be exceptions to this: i.e. in case of an emergency, where the person refuses to attend having been given notice, or where, as the consultation paper suggests, there is an obvious, proven, risk of flight by the individual. Such exceptions should, however, be clearly set out in primary legislation. Where possible, the person who is the target of an order made in his/her absence should have the opportunity to challenge the terms of the order at a later date.

***

All Powers for All Diseases?

17. We have outlined in the introduction our overarching concerns about the preference expressed in the paper for broader, more flexible powers. Notwithstanding this, we do accept the desire to ensure that the regime is able to deal with evolving threats, for example new diseases in the future. For this reason we agree, consistent with Proposal 4, that as a starting point the new powers should be available for infection or contamination generally, rather than only for specific infections or contaminations. We do, however, believe that there are some powers which should only be available when dealing with serious threats to public health, i.e. from very virulent or life-threatening diseases. It would, for example, be inappropriate and disproportionate to use the power (in Proposal 15) to require someone to stay at home, or the power (in Proposal 13) to require someone to submit to a potentially very intrusive medical examination, in relation to a person infected with a common cold. The paper recognises that there are some infections or contaminations for which the exercise of some of the powers suggested in the consultation paper would be inappropriate.\(^6\)

---

\(^6\) paragraph 3.14
18. We would propose that, while the general starting point should be that the powers in Part II are available for all infections and contaminations, certain more severe powers (i.e. the powers in Proposal 15 to detain someone at home and others discussed below) should be expressly limited to infections and contaminations meeting specified seriousness criteria, set out on the face of the Bill. These could, for example, be defined in a generic way – i.e. infections and contaminations which are “life threatening” or “highly infectious and life threatening” (for infections only). Alternatively, a list of severe of infections or contaminations could be contained in a Schedule to the Act. We accept that it would need to be possible to amend such a list by means of secondary legislation subject to appropriate Parliamentary scrutiny.\(^7\)

19. We are not convinced about the vague suggestion of a “white list” and a “black list” approach.\(^8\) First, having both a “white list” and a “black list” inevitably leaves a grey area in the middle where it is unclear which powers are to apply to which diseases. Furthermore, the suggestion of a “black list” is accompanied in the consultation paper by the caveat that, where circumstances demanded, powers not normally available for a “black list” infection or contamination would be available. This could effectively render the “black list” meaningless.

***

\(^7\) If an emergency arose, and a new disease needed to be included, the Secretary of State would have the power to make emergency regulations, either pursuant to the powers envisaged in Proposal 26 (see our comments below) or pursuant to the Civil Contingencies Act 2004 (where the wide definition of “emergency” should allow action in a public health emergency).

\(^8\) Para 3.17 states: “It may be possible to devise an approach that both: • specifies individual diseases, where their known characteristics already suggest that use of the powers in cases that involve them might be appropriate (a “white list”) or inappropriate (a “black list”); but also • allows the powers to be used in circumstances other than those envisaged by the “white list”, such as those considered in the previous paragraph, where it can be shown that doing so is consistent with the kind of principles considered under Proposal 2.”
Possible Scope of Orders

20. Proposal 8 addresses the question of when orders made under Part 2 should be able to require action. It suggests two alternatives: first, the power to do this in a broad range of circumstances; or secondly, in a narrower range of circumstances, i.e. when a person who is the subject of the order is “thought, or known, to pose a risk to others”. For the reasons set out in the paper we agree with the suggestion that the situations in which orders should be able to require action should be narrowly drawn. We would find it hard to see a justification for a justice of the peace (or a magistrates’ court) having the power to impose an order for the protection of public health where the person concerned is not “thought, or known, to pose a risk to others”.

21. Turning to the specific powers, we agree that the power proposed in Proposal 13 requiring a person to undergo a medical examination should, in extreme situations, continue to be available. However, the potentially intrusive nature of such examination means that it should only be available for “serious infections and contaminations”. We could not, for example, see any justification for a power requiring a person to undergo a medical examination when the person is thought to be infected or potentially infected with, a common cold or head lice. Furthermore, appropriate limits on what types of examination are permissible should be set out on the face of the Act.

22. Proposal 14 indicates that a power to require “risk-reduction measures” be available not only, as at present, where a person is suffering from a disease but also where a person “poses, or may pose, a risk of infecting or contaminating others”. This is a huge extension of the current powers. It would allow measures to be taken not only when a person shows symptoms of an infection or contamination but also when they show no such symptoms. In some cases we could see a justification for such a measure (i.e. when someone who has been working closely with birds known to be infected with bird flu). Such wide-ranging
powers should, however, only apply with respect to the most serious infections and contaminations and where there is a significant chance that someone (not yet showing symptoms) may have been infected. After all, if not restricted in this way, this proposal would allow obligations or restrictions to be placed on any person who is perfectly healthy, on the basis that s/he may be infected with a disease and may, therefore, pose a risk of infection to others. We would apply a similar analysis to Proposal 17 (powers in relation to things or premises).

23. Proposal 15 lists the risk reduction measures available. We agree that the most proportionate way of reducing a risk of infection will not always be to remove a person to hospital and to detain them there. If exercised appropriately, in a restrained and proportionate manner, a broader range of actions could lead to less severe interferences with individual rights and freedoms. We welcome the commitment at paragraph 5.11 that it should not be possible to order a person to undergo treatment, vaccination or other prophylaxis. Consistent with our comments on Proposal 14, we consider that some of the suggested actions would be sufficiently invasive of a person’s rights and freedoms for their imposition to be justified only in relation to the most serious infections and contaminations. In relation to many infections it might be reasonable to require someone to monitor his/her temperature at regular intervals. Other requirements, however, should only be available in respect of serious public health risks – i.e. a requirement for a person to stay at home (effectively under house arrest, breach of an order being a criminal offence under Proposal 24) or to avoid contact with vulnerable people such as the elderly or young (i.e. potentially separating a child from their parent). Similar considerations would also apply to the more intrusive powers to be exercised in relation to things and premises pursuant to Proposal 18.

24. In relation to the powers to be exercised at borders (Proposals 34 to 39), consistent with our approach to Proposals 13, 14, 15, 17 and 18, we believe that certain powers (for instance medical examination (paragraph 10.6)) should only
be exercisable in relation to the most serious public health risks. Liberty is particularly concerned about the proposal to create a power to refuse entry to the UK. UK citizens may, for example, have nowhere else to go, particularly if they are infected or contaminated. We would also be concerned if these broad powers were used as a means of immigration control by, for example, refusing entry to those who have come from countries in sub-Saharan Africa due to the high rates of HIV prevalent there.

25. Liberty considers that all orders imposed under the Act should be time limited. The time limit for an individual order should take into account, in a manner consistent with the requirements of proportionality, the nature of the public health threat and of the obligations imposed by the order. The Act should also impose a maximum duration for any order. Although we recognise that it should be possible for local authorities to apply to have an order extended, we consider that this should have to be done by way of a separate application to the magistrates’ court.

***

**General Power for the Secretary of State**

26. Proposal 26 suggests a general regulation-making power for the Secretary of State. The scope of the suggested power is enormous: “to make provision to prevent, protect against, control and provide a public health response to the spread of disease”. This would allow the Secretary of State to make any regulation whatsoever in the public health field, effectively enabling him/her to rewrite the Act. It is not explained, and is in any event unclear, why such a broad power is necessary. It suggests a lack of faith in the thoroughness and

---

9 Furthermore, the proposal does not set out the procedure envisaged for the creation of regulation – whether, for instance, regulations would be subject to the affirmative resolution procedure.
completeness of the process of identifying what new laws are needed or a desire to allow the executive to act without Parliamentary scrutiny.

27. Rather than giving the Secretary of State such a general and broad power, the legislation should itemise specific matters (for instance, designating points of entry into the UK) on which the Secretary of State could make regulations. Only in times of emergency, where flexibility and the ability to respond promptly to any threat are of paramount importance, do we suggest that the Secretary of State be given broad powers. There are, however, existing powers to make emergency regulations under the Civil Contingencies Act 2004, where the definition of “emergency” is sufficiently wide to cover a public health emergency.

***

Information Powers

28. Analysis of this section (Proposals 19 to 23) is difficult not only because no information is provided on why information should be required, but also because the precise information powers themselves are not identified, replaced by a commitment to consult further before regulations introducing such powers are provided. We are not convinced that such powers should be made in secondary legislation. The paper states that this would “make it easier to ensure that they are carefully targeted and remain relevant to needs”.

Primary legislation is, however, just as capable of careful targeting. Given the extent of the possible impact on personal privacy, we consider that these powers should be set out in primary legislation so that Parliament is better able to scrutinise and debate the proposals. All information powers should be exercised in strict compliance with

---

10 With regulations created by the Secretary of State submitted to Parliament for approval under the affirmative (or preferably super-affirmative) resolution procedure. The list of matters amenable to regulation by the Secretary of State could, we envisage, be amended by regulation if, for example, it became clear from experience that an additional power were needed.

11 This discussion is replaced by an assertion that “it is reasonable that there are circumstances in which it is possible to require information to be provided to help protect people from the risk of disease”.

14
the Data Protection Act. Information gathering should, for example, be kept to a minimum and be strictly proportional to the nature of the threat to public health. Data collected to meet a specific public health threat should be destroyed once that threat had passed.

***

**Compensation (Proposal 10)**

29. Liberty does not consider it appropriate for the current position to be inverted so that the general rule is that compensation is not available for those who are detrimentally affected by orders made under the Act. Many of the suggested orders would be intrusive, having a potentially significant negative effect on personal liberty and property. They may result in easily quantifiable loss, such as loss of earnings or loss suffered as a result of the destruction of goods. While we understand the desire not to dissuade people from taking voluntary action, we feel that a more just solution would be to maintain the current presumption that compensation is available and to consider any necessary additions to the existing exceptions to this rule: i.e. where a failure to take steps results in a breach of a pre-existing legal obligation\(^\text{12}\) or where the subject of the order failed voluntarily to take reasonable and obvious steps to mitigate a public health danger.

***

**Review Mechanisms**

30. As we stated in the introduction, with the shift from specific to general powers the review mechanism takes on increased significance. With this in mind,

\(^{12}\) Though if there were a pre-existing legal obligation this may result not just in the unavailability of compensation but in sanction being imposed for that breach.
we would wish to see a much greater level of detail on how the review process will work. For instance, who will conduct reviews, how will they be carried out, and what will the effect be if an order is found to have been unlawfully imposed or imposed without due regard to the guiding principles?

31. Given the huge increase in the scope of the powers available to central and local government to deal with public health threats, any new legislation should include a clear reporting requirement on how the powers have been used. We would suggest a requirement that information be collected from local authorities and that reports are made on a yearly basis to Parliament.

***

Over-broad criminalisation

32. Proposal 24 suggests two new criminal offences:

- first, knowingly or recklessly putting others at risk of infection or contamination contrary to provisions made in or under the Act; and
- secondly, failing to comply with a requirement created in or under the Act.

33. We appreciate that orders made by justices of the peace or, as we suggest, magistrates’ courts, must be backed up by some form of legal sanction for non-compliance. We are, however, concerned that the second offence could go much further than this, as it is proposed that it would cover failure to comply with all requirements “under the Act”. Combined with the proposal for unrestricted delegated powers (Proposal 26) this would effectively enable the Secretary of State for Health to create, by secondary legislation, any new criminal offence which s/he believes would be helpful to prevent, protect against, control and
provide a public health response to the spread of disease. This is clearly constitutionally unacceptable in a society governed by the Rule of Law.

34. We are also profoundly concerned about the scope of the first proposed offence. First, it would criminalise putting others at risk of infection or contamination contrary to provisions made in or under the Act. Given the broad powers to make provisions under the Act to reduce the risk of infection or contamination (notably Proposal 26); this could criminalise a potentially unlimited range of behaviour. Secondly, as a general point, we are concerned about the proposal to criminalise not only knowingly but also recklessly putting others at risk. Liberty has previously expressed concerns about criminal offences based on the mental element of recklessness.\(^\text{13}\) We do not disagree with the use of “recklessness” where the underlying behaviour is criminal (i.e. if you hit someone or deceive them, then it is appropriate for a jury to be able to convict you of an offence even if you did not intend the consequences of your actions). Recklessness is not, however, an acceptable standard where the underlying behaviour is not, in itself, criminal. Therefore, in this context, we do not think it would be acceptable to criminalise recklessly infecting someone by being in a public place (even if an order had been made under the Act recommending that you should not do so).

\[\text{Jago Russell and David Howe, Liberty}\]

\(^{13}\) Cf our comments on s.1 of the Terrorism Act 2006