



Chartered  
Institute of  
Environmental  
Health

# Draft Health Protection Regulations

Response to Department of Health consultation

September 2009

# The Chartered Institute of Environmental Health

As a **professional body**, we set standards and accredit courses and qualifications for the education of our professional members and other environmental health practitioners.

As a **knowledge centre**, we provide information, evidence and policy advice to local and national government, environmental and public health practitioners, industry and other stakeholders. We publish books and magazines, run educational events and commission research.

As an **awarding body**, we provide qualifications, events, and trainer and candidate support materials on topics relevant to health, wellbeing and safety to develop workplace skills and best practice in volunteers, employees, business managers and business owners.

As a **campaigning organisation**, we work to push environmental health further up the public agenda and to promote improvements in environmental and public health policy.

We are a **registered charity** with over 10,500 members across England, Wales and Northern Ireland.

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# Introduction

The Chartered Institute of Environmental Health (CIEH) welcomes this opportunity to comment on the Department of Health consultation on the proposed health protection regulations.

We have constructed our response in three parts:

Part 1 is concerned with our approach to this health protection consultation

Part 2 contains our specific comments on the proposed regulations

Part 3 contains our additional concerns and comments

## Part 1

### The CIEH approach to this health protection consultation

- 1.1 The CIEH supports these proposed regulations, to be made under the amended Public Health (Control of Disease) Act 1984, which will take forward the process of modernising health protection legislation in England. The Health and Social Care Act 2008 replaced outdated measures in the 1984 Act with a new, modernised framework for health protection. The CIEH has supported the introduction of an “all hazards” approach with more flexible powers and improved safeguards for people who might be affected by them.
- 1.2 This legislation operates in some of the most serious and sensitive areas of public health control, requiring multi-agency action on an urgent and even emergency basis. The CIEH has advised its members that the proposals have major implications for local authorities because they will affect among other things the environmental health practitioners’ ability to investigate incidents, gain entry into various premises, obtain samples and impose restrictions on the public’s movement and they could also determine what costs the local authority can recover for the legal process and any remedial action.
- 1.3 To support this consultation we published a lengthy article in the September 2009 edition of our journal *Environmental Health Practitioner* which stated:

*“EHPs are among the first on the scene in emergencies such as a major flood, a communicable disease outbreak, a polonium incident or an anthrax poisoning.*

*Local authorities, as category 1 responders, are involved from the outset and the EHP liaises with the various agencies, provides advice and support to the local community and negotiates the way back to normality. In many incidents, this process is managed within a legal framework that is not equipped for modern emergencies.”*
- 1.4 We advised that it is therefore important for environmental health practitioners to consider carefully how these proposals will assist them in their various roles and responsibilities.

## Part 2

### Specific comments on the proposed regulations

#### 2.1 Draft Health Protection (Notification) Regulations

##### 2.1.1 **Duty to notify suspected disease, infection or contamination in patients**

2.1.1.1 We note that the requirement in regulation 2(1) for registered medical practitioners is to notify where they have reasonable grounds for suspecting disease, infection or contamination in patients.

2.1.1.2 The CIEH welcomes this requirement which properly reflects the all hazards approach and will, where properly exercised, enable prompt reaction by local authorities and other agencies with roles in health protection.

2.1.1.3 It is the expectation of the CIEH that the inclusion of contamination in patients will provide for the notification of suspected allergic reactions which is an area of increasing concern, not only in relation to adverse reactions to ingested food and drink, but also skin contact with chemicals in the environment. The CIEH would therefore wish the inclusion in the notification requirements of contamination in a patient not to be limited to concerns only for the likelihood that such contamination may be passed on by the patient, but also to enhance the detection and monitoring of the effects of environmental contamination in the population.

2.1.1.4 As an example of the practical application of our suggested use of this provision we would draw your attention to the severe chemical burns and skin sores to people who purchased leather sofas imported from China which were later discovered to contain the toxic fungicide, di-methyl fumarate (DMF): a substance being used as a mould inhibitor and subsequently banned by the European Commission from products being placed or made available on the market.

2.1.1.5 The CIEH considers that application of the notification requirements during periods of pandemic disease need special consideration. During the current period of pandemic influenza the numbers of notifications has increased by many hundredfold and higher levels can be anticipated if further episodes of pandemic flu occur. In such circumstances the normal notification requirements and arrangements are likely to be overwhelmed and the proposed regulations should recognise this and make provision for the suspension of normal notification requirements and for alternative procedures, perhaps as directed by the Chief Medical Officer as being appropriate for the particular episode.

2.1.1.6 Notification is a key part of the surveillance and control process. The current legislation contains an offence for failure by a doctor to notify the relevant diseases to the Proper Officer. In addition payment is made for such notifications. While the CIEH is not aware of prosecutions brought for such an offence, both the sanction and the reward are there as incentives to notify. Even so it is widely accepted that notification is variable. Common experiences have been for notifications to increase (or decrease) along with

changes in personnel at doctor's surgeries and when the payment rates change. Delays in making notifications for apparent administrative convenience also occur. Under the proposed changes both the sanction and reward elements are to be removed.

- 2.1.1.7 Notification is of greatest effect when it is made promptly and the requirement in regulation 2(3) for notification to be provided in writing within three days is welcomed. However, based on our members long experience of receiving such notifications, we are concerned that in the absence of penalties and explicit sanctions, there will be some registered medical practitioners who will fail to put in place the necessary systems and procedures to ensure that the notification requirement is consistently complied with. We understand that the DH intends that compliance with this requirement will lie with the general 'governance' standards and will be subject to the same scrutiny, nevertheless, local authorities will need to be told with whom, in their areas, they might raise concerns about persistent non-notification.
- 2.1.1.8 Regulation 2(4) requires that where a registered medical practitioner considers the case to be urgent, then notification must be provided orally as soon as reasonably practicable. It can reasonably be considered that the ubiquity and reliability of electronic communication through e-mail, allowing prompt communication in writing, now makes the distinction between written and oral communication unnecessary. Regulation 8 makes provision in this respect but appears to require, in regulation 8(2), a prior hard copy agreement for the use of e-mail between a multiplicity of potential and varying recipients and notifiers. This is an onerous and anomalous requirement, traceable back to the 1984 Act as amended, that does not reflect accepted modern communication arrangements. The CIEH therefore recommends that there should be a general consent to e-notifications subject to individual usage being acknowledged to confirm satisfactory receipt. An electronic template for notifications should also be provided.
- 2.1.1.9 In view of our comments in this and the previous paragraph, there is a risk that the number of notifications made in a timely manner may fall.
- 2.1.1.10 Furthermore, the regulation should be amended so as to include provision for the local authority and/or Health Protection Agency to identify as urgent, either generally or for a limited period, particular suspected diseases, infections or contaminations in patients. This will be of particular assistance where, in the absence of an outbreak being declared, there are concerns to determine whether there are patients whose conditions are linked or need to be considered to identify common factors.

## **2.1.2 Duty to notify suspected disease, infection or contamination in dead persons**

- 2.1.2.1 It is a requirement of regulation 3(4) that where the registered medical practitioner considers that the case is urgent, notification must be provided orally as soon as reasonably practicable. The CIEH recommends that, as proposed above, electronic communication would combine the necessary speed with the greater certainty of the written word and should be the method of choice.

- 2.1.2.2 The matters to which the registered medical practitioner must have regard in determining whether the case is urgent are set out in regulation 3(5). Notwithstanding what may be implicit in regulation 3(5)(a)-(c) we recommend that this list should also include a consideration of the likelihood that the body may be handled, treated or removed from the place where it has been examined.

### 2.1.3 **Duty to notify causative agents found in human samples**

- 2.1.3.1 The CIEH welcomes the requirement for the operator of a diagnostic laboratory to notify the Health Protection Agency where the diagnostic laboratory identifies in a human sample a causative agent as listed in Schedule 2 of the proposed regulations.
- 2.1.3.2 There are many other laboratories that may identify pathogenic organisms linked to notifiable diseases as part of their work with environmental samples including food and water. At present these are excluded from the proposed regulations. There will be times when this intelligence could be of crucial importance in the identification of sources of an outbreak. The CIEH would welcome further discussion with the Department on how the notification arrangements could be extended to cover the relevant activities without placing undue burdens on either the laboratory or the Proper Officers. The CIEH would also welcome a review of how the new notification arrangements will operate alongside the separate requirements to notify the PCTs on certain water based organisms.
- 2.1.3.3 In particular, the CIEH recommends that this requirement is extended to all laboratories carrying out testing of food intended for human consumption. Such an extension would ensure that preventive measures might be taken at the earliest possible stage to prevent unnecessary spread through food. An example of this situation can be seen in the Salmonella contamination of chocolate that occurred in 2006. It was only by chance that food samples were submitted to the Health Protection Agency at the same time as an investigation of a foodborne disease outbreak was taking place, establishing the link between contaminated food and human illness. A requirement for notification of contaminated food by private laboratories should assist in limiting human illness by allowing early action to be taken e.g. food withdrawal and recall.

## 2.2 **Draft Health Protection (Part 2A Orders) Regulations**

### 2.2.1 **Evidence required for a Part 2A application in relation to persons**

- 2.2.1.1 The evidence which a justice of the peace must have available is listed in paragraph 2 and is supported by the CIEH.
- 2.2.1.2 Regulation 3(3) states that the report required under paragraph 3(2)(a) *“must not omit information from all of paragraphs 2(a)(i) to 2 (a)(iv)”*. This wording is awkward and may lead to confusion. The CIEH recommends the use of the wording: ‘must include information from one or more of paragraphs 2(a)(i) to 2 (a)(iv)’.

## **2.2.2 Duty on local authorities to give notice of Part 2A applications**

- 2.2.2.1 Regulation 5(2) requires the local authority to give notice of its application for a Part 2A order to the persons specified and regulation 5(7) states that this requirement does not apply where, in the view of the local authority, the person is likely to abscond or otherwise take steps to undermine the order being applied for. These provisions are supported by the CIEH.

## **2.2.3 Duty on local authorities to provide information**

- 2.2.3.1 Regulation 6(2) requires the local authority to take all reasonable steps to ensure that the person who is the subject of the order understands certain matters as set out in regulation 6(2) (a) and (b).
- 2.2.3.2 The first of these regulation 6(2)(a) is clear in that it is concerned with the nature and purpose of the order and the person's right to apply for a variation or revocation of the order
- 2.2.3.3 However, the second regulation 6(2)(b) states *"the relevant support services available to the person (and how to access them)"* without explaining what support services are relevant. People subject to Part 2A Orders and local authorities are, hence, both left in the dark about what to expect and what should be provided. The CIEH recommends that it is specified what, as a minimum, these services should comprise.
- 2.2.3.4 We believe that it is the intention that the relevant support services are meant to include all those which will facilitate compliance with the requirements of the order. For example, where a person is required by an order to vacate their home, then depending on their particular personal circumstances, the support services might include provision of temporary alternative housing accommodation as well as removal and storage facilities for household furniture and personal possessions.

## **2.2.4 Duty on local authorities to report variations or revocations of Part 2A Orders to the Health Protection Agency**

- 2.2.4.1 Regulations 7 and 8 specify that notifications for the stated purposes are to be submitted to the chief executive of the Health Protection Agency. The CIEH requests that consideration be given to more appropriate, including regional, levels within the Health Protection Agency to which to report Part 2A Orders, revocations etc.

## **2.2.5 Duty on local authorities to have regard to welfare**

- 2.2.5.1 Under Regulation 9, there is a duty to have regard to the welfare of persons detained or isolated etc. as a consequence of using Part 2A powers. Where the "Part 2A" authority is also the authority with the wider social care functions this should be straightforward. In two-tier Council areas, the District Council will be responsible for dealing with the Part 2A powers, but the County Council has the general welfare and social care role. To enable the new powers and duties to be discharged in this respect, it would be

helpful if it was made clear that upper tier authorities had a duty to co-operate with lower tier ones.

## 2.3 Draft Health Protection (Local Authority Powers) Regulations

### 2.3.1 Requirement to keep a child away from school

2.3.1.1 The use of the term school, as defined by section 4 of the Education Act 1996, means that these provisions cannot be applied in respect of children attending day nurseries and non-maintained nurseries. Though we appreciate the word “school” appears in the enabling Act, the CIEH recommends that these provisions of the proposed regulations should extend to all children in schools, nurseries, day care or educational establishments of any description in recognition that young children are vulnerable and need protection in all such circumstances.

### 2.3.2 Disinfection or decontamination of articles on request of the owner

2.3.2.1 Paragraph 6 allows a local authority to disinfect or decontaminate premises, but contains the caveat that the local authority must be reasonably satisfied that the premises will not be devalued as a consequence of its actions. The CIEH considers that it is not appropriate for the local authority to be expected to exercise judgements in this manner and this caveat should be omitted. It is a general expectation that tenants need to obtain the agreement of the owner of the property in advance of carrying out any structural works. It can be anticipated that the local authority, or its contractors, will identify to the occupants the need for structural works where these arise.

### 2.3.3 Request for co-operation for health protection purposes

2.3.3.1 The CIEH wishes to challenge the intention and value of this provision contained regulation 7 which provides that a local authority may by a notice in writing request any person to take action to prevent significant harm to health.

2.3.3.2 Local authorities frequently provide advice and make requests in writing in relation to many areas of public health protection e.g. in relation to food safety. Indeed there has been considerable attention paid to this by the agencies concerned with the Government’s “better regulation” agenda. The concern of those agencies has been in relation to the need for there to be clear differentiation between informal advice and legal requirements. This proposed provision appears to contradict this expectation of “better regulation” in that it creates a statutory basis for “informal” action. It may well be that the recipients of such “requests” will not actually appreciate that what is being requested cannot be legally “required”.

2.3.3.3 The proposed regulation also allows the local authority to offer incentive payments, compensation and expenses in connection with its request. While there may be good arguments for the payment of compensation and expenses, it is the view of the CIEH that offering people financial incentives not to put others at risk is an unsound principle and a reason why this provision should not be included in the regulations.

2.3.3.4 The Part 2A order provisions include in proposed regulation 9 the duty on local authorities to have regard to welfare where persons are detained in hospital or kept in isolation or quarantine. The CIEH recommends that this proposed regulation be utilised, or redrafted if necessary to allow the local authority to take into account any resultant loss of earnings arising from their requirements to exclude people from work.

#### 2.3.4 **Restriction of contact with dead bodies and restriction of access to dead bodies**

2.3.4.1 There are requirements in both regulations 8 and 9 relating to the display of notices where the local authority have determined that contact with or access to dead bodies should be restricted or prohibited.

2.3.4.2 Regulation 8(2) and Regulation 9(2) state that the local authority may put up a notice stating the terms of the prohibition. The CIEH recommends that it should be a requirement for the local authority to formally serve the notice, together with copies for display, on any person having charge or control of premises in which a dead body is located (as specified in paragraph 10(3)). That person should be required to put up the specified notice and it should be an offence for any person to remove or deface the notice.

2.3.4.3 It is stated in both regulations 8(6) and 9(6) that an offence has not been committed if, among other stipulations, the person had the local authority's agreement or they had a reasonable excuse for failing to comply. We support the intention that local authorities should give agreement where appropriate to accommodate cultural and religious practices. Guidance is needed to facilitate a sensitive and consistent approach to the exercise of this discretion.

## Part 3

### Additional concerns and comments

#### 3.1 Recovery of costs by local authority

- 3.1.1 The CIEH understands that it is intended that the JP should be able to order a person to undertake measures at their own expense, or to reimburse the local authority for the costs it has incurred.
- 3.1.2 The CIEH and its membership are greatly concerned that in the absence of clear and effective arrangements for the recovery of costs, local authorities will be reluctant to undertake procedures which could result in them incurring expenditure for which there is no provision within their budgets.
- 3.1.3 **It would be totally unacceptable for the decision of a local authority on whether or not to undertake these important health protection measures to be determined, delayed or distorted by cost considerations.**
- 3.1.4 In responding to the polonium contamination incident in 2006 and the decontamination of methamphetamine incident in 2008, Westminster City Council required the owners of the premises concerned to pay for the costs of decontamination. Nevertheless, the local authority itself still incurred substantial costs and in the case of the polonium incident alone these have been estimated in the region of £250,000. Dealing with such work also requires the allocation of staff on a full time basis for the duration of the incident and, again in the case of the polonium incident, this amounted to some three to four months of a senior environmental health manager. Such costs and even substantially lesser amounts cannot be readily absorbed within local authority budgets, let alone environmental health budgets where as a result of many years of economies there are unlikely to be contingency sums.
- 3.1.5 The CIEH is greatly concerned that there is no specific requirement for the JP to consider costs and no specific permission or mechanism for the local authority to recover its costs.
- 3.1.6 At present the proposed regulations contain no explicit powers for local authorities to recover any costs incurred. The remaining parts of the 1984 Act similarly provide no such powers. The extension of the powers to include other hazards increases this potential liability significantly as referred to above. Local authorities have a wide range of other powers, including under other Public Health Acts that enable them to carry out works in default of the person responsible, and to recharge the costs. These powers are usually set out clearly and unambiguously.
- 3.1.7 In the case of works to premises these usually include the ability to place a charge on the premises if the costs cannot be recovered through the normal debt processes. This can be particularly helpful in the case of elderly occupiers without other resources, where it avoids the need to seek payment until the property is next sold. Without any clear such powers local authorities will be deterred from taking action unless absolutely necessary and then only if the costs can be contained to a reasonable level.

3.1.8 Other such powers provide adequate means to protect the interests of those with a legal interest in the property by way of an ability to challenge both the need for works and the reasonableness of the cost.

## 3.2 Powers of entry

3.2.1 There are powers of entry contained in Sections 61-63 of the 1984 Act which will continue to apply. However the ability to take samples or photographs or to carry out other investigative steps is not specifically included. We believe that the model for such powers is that contained in the Health and Safety at Work etc. Act 1974, which has since been used as the basis for a range of environmental protection functions.

## 3.3 Use of electronic communications in notification procedures

3.3.1 It would seem sensible to require electronic notification generally, unless there are exceptional circumstances that would prevent this means of communication being utilised. This would support the essential requirement for notification which is to facilitate action to prevent further spread at the earliest possible opportunity. Such a requirement would also assist the legislation to remain “fit for purpose” in this respect for years to come.

## 3.4 Exclusion of food handlers

3.4.1 The legislation proposes to discontinue the local authority powers to “exclude” infected food handlers from working with food. Justifications for this approach include the view that the food hygiene legislation provides equivalent measures of protection, however the CIEH does not support this view. The food hygiene legislation places the responsibility for the production of safe food on the food business operator, through compliance with the relevant hygiene and safety legislation. An infected food handler is required to report illness or symptoms to the food business operator, who would then be expected to exclude them from work activities associated with foodhandling.

3.4.2 The proposed regulations would “dilute” the powers currently available to local authorities to directly “exclude” infected food handlers. Whilst these powers have not been frequently used they allow swift action to be taken to protect public health. The food hygiene legislation relies on the food business operator taking immediate action, which could cause serious difficulties for the business where a key member of staff is involved. The decision making will be complex, particularly when the food business operator is not expert in recognising the risks posed. Indeed there has been considerable media debate recently about the timeliness of exclusion in one high profile case, involving a foodborne virus, which affected a large number of consumers.

3.4.3 Whilst the new legislation will offer opportunities for direct exclusion, subject to JP approval, this is likely to introduce delay. The willingness of JPs to take a “precautionary” approach remains to be determined but reluctance or failure to act in a serious case could create significant health impacts.

3.4.4 A further consideration is the matter of charging. It may not be envisaged that fees would be imposed on local authorities seeking an “order” from a JP, however the CIEH understands that some local authorities have been charged recently when applying for a Hygiene Emergency Prohibition Order. This is particularly relevant as this applies to

a situation where a serious health risk exists within a food business and the local authority needs the Court's approval to ensure closure.

- 3.4.5 In summary, the CIEH is concerned about the fetters being imposed on the ability to take swift action to protect public health by the proposed removal of this power and would urge the Department of Health to reconsider this issue.