

## Public Health and Public Law

“True security is based on people’s welfare – on a thriving economy, on strong public health and education programmes, and on fundamental respect for our common humanity.”

Ban Ki-Moon, UN Secretary-General<sup>1</sup>

1. This chapter will seek to answer the following questions:
  - 1.1 What is public health?
  - 1.2 Who are the different actors in the public health process?
  - 1.3 What are the powers and duties of the actors in the public health sector?
  - 1.4 What charges may be made for public health services?
  - 1.5 What impact does EU law have upon public health?

### What is Public Health?

2. The concept of public health is not defined in legislation relating to the NHS. A number of different definitions or approaches to the concept have been provided. The answer to the question is made more complicated by the fact that the ‘public health’ has been given a wide range of meanings over time:<sup>2</sup> in Victorian legislation, it related to matters so diverse that they would in the 21<sup>st</sup> Century be dealt with by the planning regime,<sup>3</sup> regulation of water companies,<sup>4</sup> or employment protection.<sup>5</sup> Whilst these matters are capable of having an impact upon public health in the modern sense, they are beyond the scope of this chapter.

<sup>1</sup> UN Secretary-General’s message to Peace Memorial Ceremony, 6 August 2013, <https://www.un.org/sg/en/content/sg/statement/2013-08-06/secretary-generals-message-peace-memorial-ceremony-delivered-ms>

<sup>2</sup> The phrase can still be used to mean “environmental hygiene”: Cross on Local Government Law – Bailey (ed.), Sweet & Maxwell, 19-01.

<sup>3</sup> Public Health (Buildings in Streets) Act 1888, s.3 (prohibition on bringing buildings forward in urban areas).

<sup>4</sup> Public Health Act 1875, s.55 (“pure and wholesome water”).

<sup>5</sup> Public Health (Fruit Pickers Lodgings) Act 1882, s.2 (the power of local authorities to secure decent lodging and accommodation of persons engaged in hop picking within their area to extend to those picking fruit and vegetables).

3. In *R (National Aids Trust) v National Health Service Commissioning Board (NHS England)* [2017] 1 WLR 1477, Longmore LJ described (at para. 15) certain legislative provisions as “refer[ring] to a number of services which would typically fall within the description “public health”.” These provisions concern the medical inspection of school pupils, weighing and measuring of children, and powers in relation to research.<sup>6</sup> Longmore LJ considered that the fact that health services are preventative does not necessarily make them part of public health functions. Neither did the fact that services constituted treatments mean that they were not part of public health functions.<sup>7</sup> In the same case the Judge said at para 33 “*The distinction between public health functions and non-public health functions must be sought in some distinction other than that between prevention and cure*”. It might be thought that this says where the dividing line should not be placed but says little about where it should lie.
  
4. Sir Donald Acheson provided the following definition of ‘public health’ in his landmark report *Public Health in England*:<sup>8</sup>

“the science and art of preventing disease, prolonging life, and promoting health through the organised efforts of society”.
  
5. An editorial in the *Journal of Public Health* provided the following guidance (subject to heavy caveat):<sup>9</sup>

“if you know that somebody benefits but you can’t say who—and particularly if the recipients are asymptomatic—then it is probably public health.”
  
6. The Faculty of Public Health says that public health is about groups of people rather than individuals, and is concerned with “the bigger picture”.<sup>10</sup>

<sup>6</sup> 2006 Act, Schedule 1, paras 1-7B and 13, considered in further detail below.

<sup>7</sup> *National Aids Trust*, para. 33.

<sup>8</sup> 1988, Stationery Office.

<sup>9</sup> ‘What is public health?’ – Eugene Milne, (2016) 38(4) *Journal of Public Health* 633, 634.

<sup>10</sup> [http://www.fph.org.uk/uploads/about\\_us\\_leaflet\\_2007.pdf](http://www.fph.org.uk/uploads/about_us_leaflet_2007.pdf)

7. The UK Public Health Association notes the different definitions of public health used by different organisations.<sup>11</sup> It considers that public health is an “approach”. The focus is upon society as opposed to being focused on individual patients. It includes prevention of illness and disease, as well as promoting health and well-being. Public health looks at the “*root causes of illness and disease*”, and addresses “*inequalities, injustices and denials of human rights*”.
  
8. The UK Public Health Association identifies three main priorities for public health:<sup>12</sup>
  - Health inequalities
  - Sustainable development
  - Anti-health forces
  
9. The Secretary of State has a specific target duty relating to seeking to reduce health inequalities.<sup>13</sup> The quest for sustainable development is largely pursued through the planning system, and is the watchword of the National Planning Policy Framework,<sup>14</sup> which is the responsibility of the Secretary of State for Communities and Local Government. Anti-health forces are likely to be within the purview of the Secretary of State for Health, although other state institutions play a key role (such as the police and social services who work to prevent injuries from domestic violence).<sup>15</sup>

### Who are the Different Actors in the Public Health Process?

10. A number of different bodies have a role to play in the process of maintaining and promoting public health:

<sup>11</sup> <https://www.ukpha.org.uk/about-us/index.html>

<sup>12</sup> <https://www.ukpha.org.uk/about-us/index.html>

<sup>13</sup> National Health Service Act 2006, s. 1C.

<sup>14</sup> <https://www.gov.uk/guidance/national-planning-policy-framework> for judicial decisions interpreting the NPPF, see <http://www.landmarkchambers.co.uk/nppf>

<sup>15</sup> See, for instance, the guidance on the packaging of tobacco products <https://www.gov.uk/government/publications/packaging-of-tobacco-products>

- Local authorities
  - The Secretary of State
  - NHS England
11. The reforms brought about by the Health and Social Care Act 2012 restored the local authorities in the provision of public health services. This had been the position prior to 1948 and, to some extent, had reflected practice between 1948 and 2013 in areas such as the control of infectious diseases where local authorities continued to play a key role. A “local authority” for the purposes of the legislation means:<sup>16</sup>
- (a) a county council in England;
  - (b) a district council in England, other than a council for a district in a county for which there is a county council;
  - (c) a London borough council;
  - (d) the Council of the Isles of Scilly;
  - (e) the Common Council of the City of London.
12. Local authorities are required, acting jointly with the Secretary of State, to appoint a Director of Public Health, who has responsibility for public health functions.<sup>17</sup> The appointment is terminable by the local authority, having consulted the Secretary of State.<sup>18</sup> The Secretary of State has the power to direct the local authority to review a Director’s performance, and investigate any failings, and consider taking certain steps, as well as reporting to the Secretary of State on action taken in relation to the direction.<sup>19</sup>
13. The responsibilities of Directors of Public Health prescribed by the Secretary of State under s.73A(1)(f) of the 2006 Act are set out at Regulation 14 of the NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) Regulations 2012:<sup>20</sup>

<sup>16</sup> National Health Service Act 2006, s. 2B(5).

<sup>17</sup> National Health Service Act 2006, s. 73A(1).

<sup>18</sup> National Health Service Act 2006, s.73A(5), (6).

<sup>19</sup> National Health Service Act 2006, s.73A(4).

<sup>20</sup> These functions are functions in the exercise of which a local authority must have regard to documents of the Secretary of State produced for that purpose: Regulation 15; 2006 Act s.73B(2)(e).

- (a) any of the [local] authority's functions arising from it being an authority which must be consulted pursuant to section 5(3)(bb) (statement of licensing policy) of the Licensing Act 2003;
- (b) any of the authority's functions arising from it being a responsible authority, by virtue of sections 13(4)(bb) (authorised persons and responsible authorities), 69(4)(bb) (authorised persons and responsible authorities) or 172B(4)(da) (procedural requirements for early morning alcohol restriction order) of the Licensing Act 2003, for the purposes of the following sections of that Act—
  - (i) sections 18 , 35 and 41B (representations by a responsible authority in relation to applications for, or to vary, premises licences);
  - (ii) section 31 (representations by a responsible authority in relation to determination of application for provisional statement);
  - (iii) sections 51, 52 and 53 (applications and representations by a responsible authority for and in relation to a review of premises licences);
  - (iv) section 53C (representations by a responsible authority in relation to summary reviews of premises licences);
  - (v) sections 72 , 85 and 86B (representations by a responsible authority in relation to applications concerning club premises certificates);
  - (vi) sections 87, 88 and 89 (applications and representations by a responsible authority for and in relation to a review of club premises certificates);
  - (vii) section 96 (powers of a responsible authority in relation to inspection of club premises);
  - (viii) section 167 (representations by a responsible authority in relation to review of premises licence following closure order);
  - (ix) section 172B (representations by a responsible authority in relation to early morning alcohol restriction orders).
- (c) any of the authority's functions arising from its duty to provide, or arrange the provision of, healthy start vitamins under regulation 8A of the Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005.

14. The Secretary of State has his own powers in relation to public health, set out further below. The Secretary of State may arrange for other bodies to carry out his public health functions, namely:<sup>21</sup>

- NHS England
- a clinical commissioning group
- a local authority (as defined above)

<sup>21</sup> National Health Service Act 2006, s.7A.

- a combined authority.
15. Section 13E of the 2006 Act imposes public health responsibilities upon NHS England, which are considered further below. However, s.1H(2) of the 2006 Act otherwise excludes NHS England from concurrent provision of public health services with the Secretary of State (except when delegated by the Secretary of State under s.7A).
  16. The Faculty of Public Health is an association of public health professionals. It provides examinations, accreditation and CPD in the field of public health.

## The Powers and Duties of the Actors in Public Health

### Local Authorities

17. Local authorities have a general and wide discretion to expend money and take actions to discharge their overall duties concerning public health.<sup>22</sup> The primary duty is under section 2B of the NHS Act which requires local authorities to “*take such steps as [they] consider appropriate for improving the health of the people in [their] area*”.<sup>23</sup> This is a target duty which gives a large amount of discretion to local authorities to decide how to perform their duties. However, as seen below, there are a number of specific public health interventions that must be carried out on a universal basis.
18. The steps which may be taken to comply with this duty include:<sup>24</sup>
  - (a) providing information and advice;
  - (b) providing service or facilities designed to promote healthy living (whether by helping individuals to address behaviour that is detrimental to health or in any other way);
  - (c) providing services or facilities for the prevention, diagnosis or treatment of illness;

---

<sup>22</sup> “The range of activity that local authorities might decide to engage in under their new health improvement duty is wide and goes beyond health services for individuals.” *Guidance: Local authority charging for public health activity* – Department of Health, 1.6 available online at <https://www.gov.uk/government/publications/guidance-for-local-authority-charging-on-public-health-activity-2> (accessed 16 November 2017).

<sup>23</sup> 2006 Act, s. 2B(1).

<sup>24</sup> 2006 Act, s.2B(3)

- (d) providing financial incentives to encourage individuals to adopt healthier lifestyles;
  - (e) providing assistance (including financial assistance) to help individuals to minimise any risks to health arising from their accommodation or environment;
  - (f) providing or participating in the provision of training for persons working or seeking to work in the field of health improvement;
  - (g) making available the services of any person or any facilities.
19. In exercising a range of public health functions, local authorities must have regard to any document published by the Secretary of State for that purpose.<sup>25</sup>
20. Guidance issued by the Secretary of State has sought to deal with the difficult question of when the socially beneficial functions which have been carried out by local authorities for many years come within the scope of health improvement services:<sup>26</sup>
- “1.17 Local authorities have always provided services that can have a bearing – sometimes a significant one – on the health of the local population. Currently they include social care, leisure, housing, planning refuse collection and many more. It does not follow that such services now have the purpose of improving health in terms of the 2012 Act. Social care is still social care, not health improvement. Local authority-run sports facilities may have the incidental benefit of improving health for some of those who use them but they can continue to be a leisure service – except when a local authority arranges access to them for certain individuals specifically to improve their health. Where a service has a number of purposes, local authorities should consider the primary purpose – if health improvement is only an incidental effect or ancillary purpose, the service should continue to be carried out under other local authority powers.
- 1.18 If, on the other hand, a local authority was providing a service under pre-existing powers that does have health improvement as its primary purpose (smoking cessation, for example) and continues to provide that service from April 2013, then it must do so under its new duty in section 2B and will no longer be able to charge for it (except in the limited circumstances described above)”
21. It is notable that the Secretary of State’s view is that functions which had been provided by local authorities prior to the entry into force of the Health and Social Care Act 2012

---

<sup>25</sup> 2006 Act, Section 73B.

<sup>26</sup> *Guidance: Local authority charging for public health activity* – Department of Health, 1.17-1.18, available online at <https://www.gov.uk/government/publications/guidance-for-local-authority-charging-on-public-health-activity--2> (accessed 16 November 2017).

may be subsumed within the general duty in s.2B. Hence, for example, the general provision of local authority sports facilities delivers public health benefits but it not a public health service. However an exercise class provided as part of rehabilitation for those recovering from a specific medical condition would be a public health measure (and so must be provided free of charge subject to the charging regime discussed below).

22. Schedule 1 of the NHS Act includes a duty upon local authorities to provide for medical inspection and medical treatment of pupils in attendance at schools maintained by that local authority.<sup>27</sup> The governing body of a foundation, voluntary or foundation special school must make available to a local authority appropriate accommodation to assist it in making provision in relation to pupils at the school in question.<sup>28</sup> A local authority has a discretion in relation to the provision of inspection or treatment of students at a further education college maintained by the authority, or child or young person who is receiving primary or secondary education otherwise than at a school.<sup>29</sup> In relation to the further education college, the inspection or treatment may occur only with the consent of the governors of the institution.<sup>30</sup> Where an educational establishment within its area is not maintained by the local authority, it may provide for medical inspection or treatment of junior or senior pupils in attendance, with the arrangement of the proprietor of the establishment.<sup>31</sup> The arrangement may involve payment of the local authority by the proprietor.<sup>32</sup>
23. Regulations may also require a local authority to undertake the public health functions of the Secretary of State.<sup>33</sup> The Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) Regulations 2013 sets out a number of public health duties upon local authorities:

---

<sup>27</sup> 2006 Act, Schedule 1, para. 1.

<sup>28</sup> 2006 Act, Schedule 1, para. 5.

<sup>29</sup> 2006 Act, Schedule 1, para. 2(1).

<sup>30</sup> 2006 Act, Schedule 1, para. 4.

<sup>31</sup> 2006 Act, Schedule 1, para. 2(2).

<sup>32</sup> 2006 Act, Schedule 1, para. 3.

<sup>33</sup> 2006 Act, s.6C.

- weighing and measuring children;
  - health check assessment;
  - universal health visitor reviews of pregnant women and infants;
  - sexual health services;
  - public health advice services;
  - advice to other public bodies.
24. A local authority is under a duty, so far as is reasonably practicable, to provide for the weighing and measuring of children registered in a school in that local authority's area at the age of 4-5 and 10-11.<sup>34</sup>
25. The duty is slightly different in relation to health check assessments: a local authority shall *"provide, or shall make arrangements to secure the provision of"*, health checks. Health checks are to be offered to "eligible persons" in a local authority's area. Eligible persons are those who are aged 40-74. An eligible person shall be offered such a health check once in every "relevant period". A relevant period is essentially a period of five years.<sup>35</sup> A local authority is to act with the aim of increasing the percentage of eligible persons within its area participating in health checks.<sup>36</sup> Certain people are not eligible people:<sup>37</sup>
- those who have been diagnosed with particular conditions (including coronary heart disease, diabetes, hypertension and stroke);
  - those who are being prescribed statins for the purpose of lowering cholesterol;
  - those who, via some form of NHS health check, have been assessed as having a twenty percent or higher risk of having a "cardiovascular event" during the following ten years.

---

<sup>34</sup> Public Health Functions Regulations, Regulation 3.

<sup>35</sup> Public Health Functions Regulations, Regulation 3(4).

<sup>36</sup> Public Health Functions Regulations, Regulation 3(6).

<sup>37</sup> Public Health Functions Regulations, Regulation 3(5).

26. Regulation 5 of the 2013 Regulations sets out various details of the health checks to be carried out:

- (a) People between 65 and 74 are to be given information to raise awareness of dementia, and the availability of memory services;
- (b) Certain information which must be recorded is prescribed (including age, smoking status, body mass index, blood pressure, physical activity levels, and family history of coronary heart disease of parent or sibling when under 60 years), AUDIT<sup>38</sup> score of alcohol consumption);
- (c) Various pieces of information are to be communicated to the person who has undergone the health test (their BMI, cholesterol level, blood pressure, cardiovascular risk score, and AUDIT score);
- (d) If the information is not carried out by the individual's GP, the information should be forwarded to his or her GP;
- (e) The assessment must be carried out by a healthcare professional.<sup>39</sup>

27. Local authorities have a discretion as to whether to provide for the weighing of junior pupils in maintained schools; (by arrangement with the proprietor), in non-maintained schools in the local authority's area; (by arrangement with the proprietor) at registered early years providers.<sup>40</sup> The detail of the personal information to be disclosed is set out in Part 3 of the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013. Regulation 11 sets out conditions for weighing and measuring under Schedule 1 of the 2006 Act:

(2) The conditions are—

- (a) the child to be weighed and measured is able and willing to stand unaided on scales and under a height measure;
- (b) a parent of the child has not withdrawn the child from participation in the weighing and measuring exercise;

<sup>38</sup> "The Alcohol Use Disorders Identification Test", Guidelines for Use in Primary Care – Babor et al (2<sup>nd</sup> edn), WHO/MSD//MSB/01.6a, World Health Organisation, 2001. Available online at <http://www.who.int/>.

<sup>39</sup> As defined in s.25(3) of the National Health Service Reform and Health Care Professions Act 2002.

<sup>40</sup> 2006 Act, Schedule 1, para. 7A.

- (c) the weighing and measuring exercise is conducted in a room or screened area where information on the measurements is secure and cannot be seen or heard by anyone who is not assisting in the conduct of the exercise or overseeing it; and
- (d) the arrangements for the weighing and measuring exercise are managed on behalf of the local authority by a registered medical practitioner, a registered nurse or a registered dietitian.
28. A local authority must take steps such that parents are given a reasonable opportunity to withdraw their child from participation in the exercise, and if a child has been withdrawn, then they are not weighed or measured.<sup>41</sup> Information may be processed, so that it can be transferred to a parent of the child in question, with advisory material relating to the weight of children.<sup>42</sup> Information gathered must be provided to the Health and Social Care Information Centre, established under s.252 of the 2012 Act.<sup>43</sup>
29. The Secretary of State has published a policy guidance paper entitled '*The Healthy Child Programme*'.<sup>44</sup> This sets out a programme for reviews, screening tests, immunisations, health promotion guidance and support for pregnant women, infants and their families. Local authorities are under a duty to provide, or to make arrangements for the provision of, universal health visitor reviews.<sup>45</sup> Universal health visitor reviews are assessments and reviews of the eligible person's health and development. These must be provided once in each of the following periods:<sup>46</sup>
- a woman who is more than 28 weeks pregnant;
  - a child who is aged between one day and two weeks;
  - a child who is aged between six and eight weeks;
  - a child who is aged between nine and 15 months; or

---

<sup>41</sup> Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013, Regulation 12.

<sup>42</sup> Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013, Regulation 14.

<sup>43</sup> Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013, Regulation 15.

<sup>44</sup> Available online at <http://www.gov.uk/government/publications/healthy-child-programme-pregnancy-and-the-first-5-years-of-life>

<sup>45</sup> Public Health Functions Regulations, Regulation 5A(1).

<sup>46</sup> Public Health Functions Regulations, Regulation 5A(2).

- a child who is aged between 24 months and 30 months.
30. Universal health visitor reviews are to be carried out by a health visitor (a registered nurse or midwife who is also registered as a Specialist Community Public Health Nurse or Health Visitor), a healthcare professional trained in child health and development, a nursery nurse, or where an individual has links with a family nurse partnership, a family nurse.<sup>47</sup>
31. Each local authority shall provide, or shall make arrangements to secure the provision of, sexual health services in its area. This is to be achieved in two ways: by making arrangements for contraceptive services, and by exercising functions for preventing the spread of sexually transmitted infections, for treating, testing and caring for people with such infections, and for notifying sexual partners of people with such infections.<sup>48</sup> These services are to be “open access”, meaning that they are “available for the benefit of all people present in the local authority’s area”, which in practice means that the services can be accessed by individuals without being referred to the service by a GP (unlike other NHS elective services).<sup>49</sup> The contraceptive services are to include advice on, and reasonable access to, a broad range of contraceptive substances and appliances, as well as advice on preventing unintended pregnancy.<sup>50</sup> However, the local authority does not have to offer services in relation to sterilisation or vasectomy, other than preliminary advice on the availability of those procedures.<sup>51</sup> The duty under Regulation 6 does not extend to treating or caring for those infected with HIV.<sup>52</sup>
32. A local authority is to provide a public health advice service to any clinical commissioning group whose area falls wholly or partly within that authority’s area.<sup>53</sup> Such a service consists of the provision “of such information and advice to a clinical commissioning group as the local authority considers necessary or appropriate, with a

<sup>47</sup> Public Health Functions Regulations, Regulation 5B.

<sup>48</sup> Public Health Functions Regulations, Regulation 6.

<sup>49</sup> Public Health Functions Regulations, Regulation 6(2).

<sup>50</sup> Public Health Functions Regulations, Regulation 6(3).

<sup>51</sup> Public Health Functions Regulations, Regulation 6(4).

<sup>52</sup> Public Health Functions Regulations, Regulation 6(5).

<sup>53</sup> Public Health Functions Regulations, Regulation 7.

*view to protecting and improving the health of the people in the authority's area".*<sup>54</sup> In deciding what matters to cover in the advice, the local authority shall have regard to the needs of people in its area. The decision is to be by agreement between the local authority and the CCGs; if there is no agreement, the range of services is decided by the local authority alone.<sup>55</sup>

33. A local authority is responsible for providing information or advice to a range of "responsible persons" and "relevant bodies" so that the responsible person or relevant body may prepare or participate in appropriate local health protection arrangements. There is a list of responsible bodies,<sup>56</sup> which includes the relevant head of the police and fire service. There is no list of relevant bodies, such bodies instead being defined as "*a body whose activities, in the opinion of the local authority, have a significant effect upon, or whose activities may be significantly affected by a threat to, the health of individuals in the local authority's area*".<sup>57</sup> The Regulations provide an indicative list, including school governing bodies, providers of social care services, voluntary organisations, registered charities, and businesses.
34. "*Local health protection arrangements*" are defined as "*arrangements made for the purpose of protecting individuals in the area of the authority from events or occurrences which threaten, or are liable to threaten, their health*".<sup>58</sup> They may in particular include arrangements to deal with infectious disease, environmental hazards and contamination, and extreme weather events. They may also include arrangements for epidemiological surveillance, for environmental hazard monitoring, for coordinating incident management with another local authority, and for stockpiling medicines and medical supplies.<sup>59</sup>

<sup>54</sup> Public Health Functions Regulations, Regulation 7(2).

<sup>55</sup> Public Health Functions Regulations, Regulation 7(5).

<sup>56</sup> Public Health Functions Regulations, Regulation 8(3).

<sup>57</sup> Public Health Functions Regulations, Regulation 8(3).

<sup>58</sup> Public Health Functions Regulations, Regulation 8(4).

<sup>59</sup> Public Health Functions Regulations, Regulation 8(4).

35. The dental public health functions of local authorities in England are set out in Regulation 17 of the NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) Regulations 2012:

(1) Each local authority shall have the following functions in relation to dental public health in England.

(2) A local authority shall provide, or shall make arrangements to secure the provision of, the following within its area—

(a) to the extent that the authority considers appropriate for improving the health of the people in its area, oral health promotion programmes;

(b) oral health surveys<sup>60</sup> to facilitate—

(i) the assessment and monitoring of oral health needs,

(ii) the planning and evaluation of oral health promotion programmes,<sup>61</sup>

(iii) the planning and evaluation of the arrangements for provision of dental services as part of the health service, and

(iv) where there are water fluoridation programmes<sup>62</sup> affecting the authority's area, the monitoring and reporting of the effect of water fluoridation programmes.

(3) The local authority shall participate in any oral health survey conducted or commissioned by the Secretary of State under paragraph 13(1) of Schedule 1 to the 2006 Act (powers in relation to research etc) so far as that survey is conducted within the authority's area.

36. Detailed provision regarding complaints about the public health functions of local authorities is set out at Regulations 19-33 of the NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) Regulations 2012. Local authorities are required to make arrangements for the handling and consideration of complaints, which must be such as to ensure that:<sup>63</sup>

<sup>60</sup> Defined in Regulation 16 of the Partnership Arrangements, etc Regulations as “survey[s] to establish the prevalence and incidence of disease or abnormality of the oral cavity”.

<sup>61</sup> Defined in Regulation 16 of the Partnership Arrangements, etc Regulations as “health promotion and disease prevention programme[s] the underlying purpose of which is to educate and support members of the public about ways in which they may improve their oral health.

<sup>62</sup> Defined in Regulation 16 of the Partnership Arrangements, etc Regulations as fluoridation arrangements made under section 87(1) (fluoridation of water supplies at request of relevant authorities) of the Water Industry Act 1991.

<sup>63</sup> Partnership Arrangements, etc. Regulations, Regulation 21.

(2) The arrangements for dealing with complaints must be such as to ensure that—

- (i) complaints are dealt with efficiently;
- (ii) complaints are properly investigated;
- (iii) complainants are treated with respect and courtesy;
- (iv) complainants receive, so far as is reasonably practical—
  - (i) assistance to enable them to understand the procedure in relation to complaints,  
or
  - (ii) advice on where they may obtain such assistance;
  - (v) complainants receive a timely and appropriate response;
  - (vi) complainants are told the outcome of the investigation of their complaint; and
  - (vii) action is taken if necessary in the light of the outcome of a complaint.

37. Information regarding the arrangements for complaints, and how further information about those arrangements may be obtained, must be publicised.<sup>64</sup>
38. Local authorities are required to designate a responsible person (for ensuring compliance with the arrangements), and a complaints manager (to be responsible for managing the procedures for handling and considering complaints in accordance with arrangements made under the Regulations.<sup>65</sup> The responsible person is to be the local authority's chief executive or other person designated as the authority's head of paid service.<sup>66</sup> The complaints manager can be the same person, but need not (and indeed not even be an employee of the local authority).<sup>67</sup>
39. Unless there is good reason, and it remains possible to investigate the complaint effectively and fairly, a complaint must be accepted for an investigation if it is made more than twelve months after the date on which the matter the subject of the complaint occurred or (if later), the date on which the matter came to the notice of the complainant.<sup>68</sup> However, the complaint need not be made in writing: it can be made

---

<sup>64</sup> Partnership Arrangements, etc. Regulations, Regulation 31.

<sup>65</sup> Partnership Arrangements, etc. Regulations, Regulation 22(1).

<sup>66</sup> Partnership Arrangements, etc. Regulations, Regulation 22(4).

<sup>67</sup> Partnership Arrangements, etc. Regulations, Regulation 22(5).

<sup>68</sup> Partnership Arrangements, etc. Regulations, Regulation 27.

orally or electronically.<sup>69</sup> If the investigation of the response does not give rise to a conclusion within 6 months (or other period agreed with the complainant), the authority must notify the complainant in writing, explaining the reason for the delay in responding to the complaint.<sup>70</sup>

40. A local authority must maintain a monitoring record including records of each complaint received about the delivery of public health services, the subject-matter and outcome of each complaint, and whether the report of the outcome was sent to the complainant within the response period.<sup>71</sup> There is an obligation on local authorities to prepare annual reports in relation to complaints.<sup>72</sup>
41. Local authorities have the power to “conduct, commission or assist” research for “any purpose connected with the exercise of its functions in relation to the health service”.<sup>73</sup>

### The Secretary of State

42. Section 2A of the NHS 2006 provides:

(1) The Secretary of State must take such steps as the Secretary of State considers appropriate for the purpose of protecting the public in England from disease or other dangers to health.

(2) The steps that may be taken under subsection (1) include— (a) the conduct of research or such other steps as the Secretary of State considers appropriate for advancing knowledge and understanding; (b) providing microbiological or other technical services (whether in laboratories or otherwise); (c) providing vaccination, immunisation or screening services; (d) providing other services or facilities for the prevention, diagnosis or treatment of illness; (e) providing training; (f) providing information and advice; (g) making available the services of any person or any facilities.

---

<sup>69</sup> Partnership Arrangements, etc. Regulations, Regulation 28(1).

<sup>70</sup> Partnership Arrangements, etc. Regulations, Regulation 29(4).

<sup>71</sup> Partnership Arrangements, etc. Regulations, Regulation 32.

<sup>72</sup> Partnership Arrangements, etc. Regulations, Regulation 33.

<sup>73</sup> 2006 Act, Schedule 1, para. 13.

(3) Subsection (4) applies in relation to any function under this section which relates to— (a) the protection of the public from ionising or non-ionising radiation, and (b) a matter in respect of which a relevant body has a function.

(4) In exercising the function, the Secretary of State must— (a) consult the relevant body; and (b) have regard to its policies.

(5) For the purposes of subsections (3) and (4), each of the following is a relevant body— (a) the Health and Safety Executive; (b) the Office for Nuclear Regulation.”

43. Schedule, para. 7C of the NHS 2006 provides:

“The Secretary of State must for the purposes of the health service make arrangements for—

- (a) collecting, screening, analysis, processing and supplying blood or other tissues,
- (b) preparing blood components and reagents, and
- (c) facilitating tissue and organ transplantation”

44. The Secretary of State has a duty to make arrangement “*to such extent as he considers necessary to meet all reasonable requirements*” for giving advice on contraception, the medical examination of persons seeking advice on contraception, the treatment of such persons, and the supply of contraceptive substances and appliances.<sup>74</sup> This is the same wording as is used for the CCG duty to provide acute services under section 3 of the NHS Act. Accordingly the court’s interpretation that this wording gives a wide discretion afforded to the decision maker will apply to the discharge of this duty.

45. Schedule 1, para. 12 of the NHS Act provides the power for the Secretary of State to carry on such activities as in his opinion can conveniently be carried on in conjunction with a microbiological service. Charges may be made for services or materials supplied.

46. The Secretary of State (as well as NHS England, and clinical commissioning groups) is given the power to “*conduct, commission or assist*” research into “*any matters relating*

<sup>74</sup> 2006 Act, Schedule 1, para. 8.

*to the causation, prevention, diagnosis or treatment of illness”, and any such other matters connected with any service under the Act as the body thinks fit.*<sup>75</sup>

47. The Secretary of State is under an obligation to make arrangements to deliver vaccination programmes pursuant to recommendations made by the Joint Committee on Vaccination and Immunisation where the recommendation:<sup>76</sup>

- (i) relates to new provision for vaccination under a national vaccination programme or to changes to existing provision under such a programme;
- (ii) is made by the Joint Committee on Vaccination and Immunisation (not merely by a subcommittee);
- (iii) is in response to a question referred to the Joint Committee by the Secretary of State;
- (iv) is based on an assessment which demonstrates cost-effectiveness; and
- (v) does not relate to vaccination in respect of travel or occupational health.

48. The duty on the Secretary of State comes to an end where the Joint Committee withdraws its recommendation.<sup>77</sup> There is an unresolved legal issue about the extent to which vaccination and immunisation programmes can offer NHS services to individuals selected on the basis of a protected characteristic under the Equality Act 2010 (such as sex, age, race or a particular disability). In order to make the most effective use of resources, vaccination and immunisation programmes are targeted at those who are most likely to benefit from the programme. However, to the extent that such targeting is defined by relation to a patient’s sex (or some other protected characteristic) there appears to be a strong argument that the denial of the opportunity for other patients to have access to the service may constitute direct discrimination in the provision of public services. If the targeting constitutes indirect discrimination on the grounds of a protected characteristic, a case may be made that the discrimination is justified. However if targeting constitutes direct discrimination, a justification defence will not apply.

<sup>75</sup> 2006 Act, Schedule 1, para. 13.

<sup>76</sup> The Health Protection (Vaccination) Regulations 2009, Regulations 1-2.

<sup>77</sup> The Health Protection (Vaccination) Regulations 2009, Regulation 2(4).

NHS England

49. Section 1H of the 2006 Act provides:

- (1) There is to be a body corporate known as the National Health Service Commissioning Board (“the Board”).
- (2) The Board is subject to the duty under section 1(1) concurrently with the Secretary of State except in relation to that part of the health service that is provided in pursuance of the public health functions of the Secretary of State or local authorities.
- (3) For the purpose of discharging that duty, the Board—
  - (a) has the function of arranging for the provision of services for the purposes of the health service in England in accordance with this Act, and
  - (b) must exercise the functions conferred on it by this Act in relation to clinical commissioning groups so as to secure that services are provided for those purposes in accordance with this Act.
- (4) Schedule A1 makes further provision about the Board.
- (5) In this Act—
  - (a) any reference to the public health functions of the Secretary of State is a reference to the functions of the Secretary of State under sections 2A and 2B and paragraphs 7C, 8 and 12 of Schedule 1, and
  - (b) any reference to the public health functions of local authorities is a reference to the functions of local authorities under sections 2B and 111 and paragraphs 1 to 7B and 13 of Schedule 1.

50. Section 13E of the 2006 Act provides:

- (1) The Board must exercise its functions with a view to securing continuous improvement in the quality of services provided to individuals for or in connection with—
  - (a) the prevention, diagnosis or treatment of illness, or
  - (b) the protection or improvement of public health.
- (2) In discharging its duty under subsection (1), the Board must, in particular, act with a view to securing continuous improvement in the outcomes that are achieved from the provision of the services.
- (3) The outcomes relevant for the purposes of subsection (2) include, in particular, outcomes which show—
  - (a) the effectiveness of the services,

- (b) the safety of the services, and
- (c) the quality of the experience undergone by patients.

- (4) In discharging its duty under subsection (1), the Board must have regard to—
  - (a) any document published by the Secretary of State for the purposes of this section, and
  - (b) the quality standards prepared by NICE under section 234 of the Health and Social Care Act 2012.

51. The extent of NHS England’s powers (and duties) came to a head in the case of *R (National Aids Trust) v National Health Service Commissioning Board* [2017] 1 WLR 1477. Services for patients with HIV is a “specialist service” under Regulation 11 and Schedule 4 to the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 and thus NHS England was the responsible commissioner for any such services<sup>78</sup>.
52. NHS England argued that, despite the wording of section 13E, it did not have the power to fund a drug for patients who were at risk but had not yet contracted HIV. The Court of Appeal agreed that NHS England did not have general public health functions but disagreed that the proposed treatment fell within the scope of “public health” under the NHS Act (despite the fact that the recipients of the drug had not contracted HIV) as opposed to treatment for individual patients. Longmore LJ, giving the leading judgment, held that NHS England had commissioning responsibility for HIV services. He held that treatment for HIV included treatment designed to prevent a patient contracting HIV.

Underhill LJ held at para. 50, “*Parliament did intend to exclude NHS England from any responsibility in the field of public health, subject to the particular power given to the Secretary of State by section 7A of the Act, under which he may arrange for it to exercise any of his public health functions*”. Underhill LJ considered it unlikely that different bodies would be entrusted with substantially identical functions. The prophylactic effect of PrEP, forms a “seamless continuum with its provision for those who have just

---

<sup>78</sup> See page XX of the chapter on the Responsible Commissioner for a description of the division between services commissioned by CCGs and services commissioned by NHS England.

been exposed to HIV infection (i.e. PEP)".<sup>79</sup> Hence, perhaps reluctantly, he agreed that a drug to prevent a patient contracting HIV constituted treatment for HIV. Whilst there is a strong argument that the court reached the right decision on the facts of the PreP case, the judgments leave a considerable amount of uncertainty as to what measures would fall within the scope of a local authority public health duty and which fall on NHS England or CCGs.

### Cooperation in Relation to Public Health Functions

53. Sir Ivor Jennings famously said that Parliament's sovereignty extends so far as to permit it to prohibit a Frenchman from smoking on the streets of Paris (the prohibition forming part of English law, the practical issue being enforcement of it).<sup>80</sup> Similar issues arise regarding duties of co-operation which are imposed on a variety of NHS bodies around the delivery of public health issues.
54. Section 247B of the 2006 Act imposes co-operation duties which gives vires to NHS bodies but may not, in practice, are probably unenforceable. It provides:
- (1) This section applies to any body or other person that exercises functions similar to those of the Secretary of State under section 2A (whether or not in relation to the United Kingdom).
  - (2) The Secretary of State must co-operate with the body or other person in the exercise by it of those functions.
  - (3) If the Secretary of State acts under subsection (2) at the request of the body or other person, the Secretary of State may impose charges in respect of any costs incurred by the Secretary of State in doing so.
  - (4) The body or other person must co-operate with the Secretary of State in the exercise by the Secretary of State of functions under section 2A.
  - (5) If the body or other person acts under subsection (4) at the request of the Secretary of State, it may impose charges in respect of any costs incurred by it in doing so.

<sup>79</sup> Para. 55.

<sup>80</sup> *The Law and the Constitution*, 5<sup>th</sup> edn, (London: University of London Press, 1959), p.170, cited in 'The conceptual foundations of parliamentary sovereignty: reconsidering Jennings and Wade' – Michael Gordon [2009] PL 519, 523.

55. Section 271 of the 2006 Act imposes a territorial limit upon the exercise of ministerial functions. However, this limit is expressly excluded from applying to s.247B (s.271(3)(da)).
56. The upshot is that bodies exercising public functions in relation to territories other than the United Kingdom may be required by UK law to cooperate with the Secretary of State, and may be subjected to charges if the body requests cooperation by the Secretary of State. How this is to work in practice remains to be seen.

### **Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005**

57. The Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005 provide for a scheme for food and vitamin vouchers to be made available for pregnant women and infants in low-income families. The scheme was originally piloted within four postcode districts before being rolled out nationally.<sup>81</sup> The food which can be provided under the scheme is milk (being liquid cow's milk, but not including milk where chemicals, vitamins, flavours or colours have been added or removed); infant formula (which must satisfy by itself the nutritional requirements of the infants for whom it is intended); and fresh or frozen<sup>82</sup> fruit or vegetables (to which no fat, salt, sugar, flavouring or any other ingredients have been added).<sup>83</sup>

### **Public Health (Control of Disease) Act 1984**

58. The Public Health (Control of Disease) Act 1984 ("**the 1984 Act**"), provides for the power for the Secretary of State to make regulations in relation to a number of matters. Regulations made under the Act include:

- The Health Protection (Vaccination) Regulations 2009

---

<sup>81</sup> The amendment being made by Regulation 4 of the Health Start Scheme and Welfare Food (Amendment No. 2) Regulations 2006, which came into force on 27 November 2006.

<sup>82</sup> The additional to allow frozen fruit and vegetables was introduced by the Healthy Start Scheme and Welfare Food (Amendment) Regulations, Regulation 2, which came into force on 6 April 2011.

<sup>83</sup> Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005, Schedule 3.

- The Health Protection (Local Authority Powers) Regulations 2010;
- The Health Protection (Part 2A Orders) Regulations 2010;
- The Health Protection (Notification) Regulations 2010;
- Amendments to regulations concerning public health and ships and aircraft.

### Part 2A Orders

59. The Health and Social Care Act 2008 introduced Part 2A into the 1984 Act. This includes a power to make orders which constitute health measures to be taken in relation to persons, things and premises.

60. Section 45G provides:

- (1) A justice of the peace may make an order under subsection (2) in relation to a person ("P") if the justice is satisfied that–
  - (a) P is or may be infected or contaminated,
  - (b) the infection or contamination is one which presents or could present significant harm to human health,
  - (c) there is a risk that P might infect or contaminate others, and
  - (d) it is necessary to make the order in order to remove or reduce that risk.
- (2) The order may impose on or in relation to P one or more of the following restrictions or requirements–
  - (a) that P submit to medical examination;
  - (b) that P be removed to a hospital or other suitable establishment;
  - (c) that P be detained in a hospital or other suitable establishment;
  - (d) that P be kept in isolation or quarantine;
  - (e) that P be disinfected or decontaminated;
  - (f) that P wear protective clothing;
  - (g) that P provide information or answer questions about P's health or other circumstances;
  - (h) that P's health be monitored and the results reported;
  - (i) that P attend training or advice sessions on how to reduce the risk of infecting or contaminating others;
  - (j) that P be subject to restrictions on where P goes or with whom P has contact;
  - (k) that P abstain from working or trading.

- (3) A justice of the peace may make an order under subsection (4) in relation to a person (“P”) if the justice is satisfied that–
  - (a) P is or may be infected or contaminated,
  - (b) the infection or contamination is one which presents or could present significant harm to human health,
  - (c) there is a risk that a related party might infect or contaminate others, and
  - (d) it is necessary to make the order in order to remove or reduce that risk.
- (4) The order may impose on or in relation to P a requirement that P provide information or answer questions about P's health or other circumstances (including, in particular, information or questions about the identity of a related party).
- (5) “*Related party*” means–
  - (a) a person who has or may have infected or contaminated P, or
  - (b) a person whom P has or may have infected or contaminated.
- (6) An order under this section may also order a person with parental responsibility (within the meaning of the Children Act 1989) for P to secure that P submits to or complies with the restrictions or requirements imposed by the order.
- (7) The appropriate Minister must by regulations make provision about the evidence that must be available to a justice of the peace before the justice can be satisfied as mentioned in subsection (1) or (3).
- (8) Any reference in this section to a person who is infected or contaminated includes a reference to a person who carries the source of an infection or contamination, and any reference to infecting or contaminating others includes a reference to passing that source to others.

61. If an order requires a person to be detained or kept in isolation or quarantine at a place, and the person leaves the place contrary to the requirement in the order, then (during the period that the requirement is in force), a constable may take the person into custody and return the person to that place.<sup>84</sup> However, it is significant that the justice of the peace (i.e. a magistrate) does not have the power to require the infected person to submit to treatment for the condition. Thus a person can be isolated and offered appropriate treatment (and kept in isolation until the risk of infection is reduced) but cannot be required to accept any medication which is offered.

62. Certain evidence which must be provided in relation to an application under s.45G(1) or (3) is set out in Regulation 4 of the Health Protection (Part 2A Orders) Regulations 2010:

---

<sup>84</sup> Section 45O(5)-(6).

(2) That evidence is—

- (a) a report which gives details (insofar as known and relevant), or gives reasons for the omission of details, of—
  - (i) the signs and symptoms of the infection or contamination in the person (P) who is the subject of the application,
  - (ii) P's diagnosis,
  - (iii) the outcome of clinical or laboratory tests, and
  - (iv) P's recent contacts with, or proximity to, a source or sources of infection or contamination;
- (b) a summary of the characteristics and effects of the infection or contamination which P has or may have which includes an explanation of—
  - (i) the mechanism by which the infection or contamination spreads,
  - (ii) how easily the infection or contamination spreads amongst humans, and
  - (iii) the impact of the infection or contamination on human health (by reference to pain, disability and the likelihood of death);
- (c) in relation to applications seeking an order under section 45G(2), an assessment of the risk to human health that P presents, including a description of any acts or omissions, or anticipated acts or omissions, of P which affect that risk;
- (d) in relation to applications seeking an order under section 45G(4), an assessment of the risk to human health that the related party presents, including any acts or omissions, or anticipated acts or omissions, of the related party which affect that risk;
- (e) in relation to applications seeking an order under section 45G(2), an assessment of the options available to deal with the risk that P presents; and
- (f) in relation to applications seeking an order under section 45G(4), an assessment of the options available to deal with the risk that the related party presents.

63. Regulation 4 further provides that a report under para. 2(1) must include the details mentioned in at least one of paragraphs 2(a)(i) to (iv); the evidence must be given by persons suitably qualified to give the evidence, and the evidence may be given orally or in writing.

64. Regulation 8 stipulates that, where an order has been made in relation to a person, the local authority must take all reasonable steps to ensure that the person who is the subject of the order understands the effect of the order, the reason it has been made,

the power under which it has been made and the person's right to apply for a variation or revocation of the order, and the relevant support services available to the person, and how to access them. These steps must be taken as soon as reasonably practicable after the order is made.

65. Once an order has been made, the local authority which made the application for the Part 2A order must have regard to the impact of the order on the welfare of the person subject to the order, and his or her dependants, for the duration of the order.<sup>85</sup>
66. Legislative provision concerning infected things has considerable pedigree.<sup>86</sup> Section 45H makes provision for seizure, quarantine, disinfection, cremation, destruction etc. of a "thing" which is thought may be infected or contaminated. A "thing" includes human tissue, a dead body or human remains, animals, and plant material.<sup>87</sup> It also provides a power for the owner of a thing to provide information about a thing. Section 45I provides a like power in relation to premises.<sup>88</sup> Orders under ss. 45G, 45H and 45I can be made in relation to groups of persons, things or premises.<sup>89</sup> Such orders are known as "Part 2A Orders".<sup>90</sup> The issue of a Part 2A order is authority for those to whom it is addressed to do the things necessary to give effect to the order.<sup>91</sup>
67. The local authority must give notice to specified persons, set out in Regulation 3 of the Health Protection (Part 2A Orders) Regulations 2010, when applying for a Part 2A Order. However, notice need not be given where the person subject to an order, in the reasonable view of the local authority, is likely to abscond or otherwise take steps to undermine the order applied for.<sup>92</sup> It is also not necessary to give notice to a person

<sup>85</sup> Health Protection (Part 2A Orders) Regulations 2010, Regulation 9.

<sup>86</sup> It features in Old Testament law: Leviticus 13:47ff and has been the subject of a series of specific laws over the centuries.

<sup>87</sup> Section 45T(5).

<sup>88</sup> Which also features in the Old Testament: Leviticus 14:33ff. As with s.45I(2)(d), Old Testament law provided that contamination of premises could lead to their demolition: Leviticus 14:45.

<sup>89</sup> Section 45J.

<sup>90</sup> Section 45K(1).

<sup>91</sup> Section 45K(8).

<sup>92</sup> Regulation 3(8).

with parental responsibility for a child, where exceptional circumstances exist such that notifying such a person would not be in the child's best interests.<sup>93</sup>

68. Part 2A orders may order the payment of compensation or expenses.<sup>94</sup> Where an order is made under s.45H or 45I, the local authority may impose a charge upon the owner or person with custody or control of a thing subject to a s.45H order, or the owner or occupier of the premises subject to an order under s.45I. The amount of the charge must not exceed the actual costs (including staff costs) to the local authority in taking measures in relation to the thing or premises pursuant to the order, and must be reasonable in all the circumstances.<sup>95</sup> Questions may arise regarding the phrase "pursuant to the order": one reading of this could be that costs can arise pursuant to an order only once the order has been made. However, such costs will not be quantifiable in the order itself. This reading would also exclude costs incurred in investigating the need for an order.

69. A justice of the peace may vary or revoke a Part 2A order made under s.45G on the application of:<sup>96</sup>

- (a) A local authority
- (b) An authority with the function of executing or enforcing the order in question;
- (c) The person in hospital or quarantine;
- (d) The hospitalised/quarantined person's husband, wife or civil partner;
- (e) Someone living with the hospitalised/quarantined person as a husband, wife or civil partner;
- (f) A person holding power of attorney.<sup>97</sup>

70. A justice of the peace may vary or revoke a Part 2A order made under s.45H on application by the owner of the thing, or the person with custody or control of the thing, or any person required to provide information or answer questions.<sup>98</sup> Likewise, a justice

---

<sup>93</sup> Regulation 3(9).

<sup>94</sup> Section 45K(7).

<sup>95</sup> Health Protection (Part 2A Orders) Regulations 2010, Regulation 7.

<sup>96</sup> Section 45M.

<sup>97</sup> Health Protection (Part 2A Orders) Regulations 2010, Regulation 6(2).

<sup>98</sup> Section 45M(7), (9).

of the peace may vary or revoke a Part 2A order made under s.45I on application by the owner of the premises, or the occupier of the premises, or any person required to provide information or answer questions.<sup>99</sup> However, where a Part 2A order is varied or revoked, that does not invalidate anything done under the order prior to the variation or revocation.<sup>100</sup>

71. Part 2A orders must be for a specified period, but this period can be extended.<sup>101</sup> However, such an order cannot authorise keeping a person in hospital or in quarantine for a period of more than 28 days.<sup>102</sup> The period of any extension may not exceed 28 days.<sup>103</sup> Where the order is varied to impose a new restriction or requirement, the period of that restriction or requirement must not exceed 28 days beginning with the day of variation of the order.<sup>104</sup>
72. A failure without reasonable excuse to comply with a restriction or requirement imposed by or under a Part 2A order, or wilfully obstructing anyone acting in the execution of a Part 2A order, commits an offence, which is punishable by a fine.<sup>105</sup> If infection or contamination spreads as a result, then the court may order that the person take or pay for remedial action.<sup>106</sup>
73. Every time a local authority makes a Part 2A application, it must provide a written report to the chief executive of Public Health England, including the name of the local authority, contact details of a responsible officer, a copy of the Part 2A application (with details enabling the identification of the person subject to the application redacted), a copy of the order (again with identifying details redacted), and a reason for the Part 2A order not being made, if it is not made.<sup>107</sup> The time period for providing the report is

---

<sup>99</sup> Section 45M(8)-(9).

<sup>100</sup> Section 45M(10).

<sup>101</sup> Section 45L(1)-(2).

<sup>102</sup> Section 45L(3).

<sup>103</sup> Health Protection (Part 2A Orders) Regulations 2010, Regulation 5(3).

<sup>104</sup> Health Protection (Part 2A Orders) Regulations 2010, Regulation 5(4).

<sup>105</sup> Section 45O(1)-(2).

<sup>106</sup> Section 45O(3).

<sup>107</sup> Health Protection (Part 2A Orders) Regulations 2010, Regulation 10(1)-(2).

short: as soon as practicable after determination of the application, and no later than 10 days beginning with the day of determination of the application.<sup>108</sup> There is a similar duty to report variations or revocations (but only when these are granted; there is no need to report unsuccessful applications for variations or revocations).<sup>109</sup>

74. Local authorities have powers connected to Part 2A under the Health Protection (Local Authority Powers) Regulations 2010: on the request of owners or persons with custody or control of a thing, they may disinfect or decontaminate (or cause to be disinfected or decontaminated) the thing. The local authority may charge for doing so, but the charge must not exceed the costs of doing so. A charge can be imposed only where the owner or person with custody or control of the thing was made aware of the charge in advance, and agrees to pay it. Where the request is made by a person with custody or control, the local authority may take steps only if reasonably satisfied that the financial value of the thing will not be reduced as a consequence of the disinfection or decontamination.<sup>110</sup>
75. Equivalent powers apply in relation to disinfection of premises on request of the owner or tenant of the premises.<sup>111</sup>

#### Other Powers of Local Authorities under the 1984 Act

##### *Children and School*

76. Where a local authority is satisfied that a child is or may be infected or contaminated, such as to potentially pose a significant risk to human health, there is a risk of infection or contamination of others, it is necessary to keep the child away from school in order to reduce or remove the risk, and doing so is proportionate, then the local authority may serve notice on the child's parent requiring the parent to keep the child away from

---

<sup>108</sup> Health Protection (Part 2A Orders) Regulations 2010, Regulation 10(3).

<sup>109</sup> Health Protection (Part 2A Orders) Regulations 2010, Regulation 11.

<sup>110</sup> Health Protection (Local Authority Powers) Regulations 2010, Regulations 4-5.

<sup>111</sup> Health Protection (Local Authority Powers) Regulations 2010, Regulations 6-7.

school. The headteacher of the school must be informed as soon as reasonably practicable. The maximum period for the notice is 28 days, but consecutive notices may be served. A local authority may vary or revoke a notice. The child's parents may request a review. The local authority must review the notice on the first request, but has discretion thereafter. Failure to comply with a notice is an offence which gives rise to the payment of a fine.<sup>112</sup>

77. Where a local authority is satisfied that a person who is or has recently been on the school's premises is or may be infected or contaminated, such as to potentially pose a significant risk to human health, there is a risk of infection or contamination of pupils at the school, and it is necessary for the local authority to have a list of names, addresses and contact telephone numbers for all the pupils of the school (or a group of pupils which the local authority specifies), then it may serve a notice on the headteacher of the school, requiring provision of the list. Failure without reasonable excuse to comply with the notice constitutes an offence. <sup>113</sup>

### *Requests for Cooperation*

78. A local authority has power to serve notice on a person or group of persons, to request that they do, or refrain from doing, anything for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination which presents or could present significant harm to human health. Such a notice must provide contact details for an officer of the local authority who is able to discuss the notice. The local authority may offer compensation or expenses in connection with the request.<sup>114</sup>

### Notification Duties

---

<sup>112</sup> Health Protection (Local Authority Powers) Regulations 2010, Regulation 2.

<sup>113</sup> Health Protection (Local Authority Powers) Regulations 2010, Regulation 3.

<sup>114</sup> Health Protection (Local Authority Powers) Regulations 2010, Regulation 8.

79. The Health Protection (Notification) Regulations 2010 impose duties upon registered medical practitioners to notify the proper officer of a local authority of suspected disease, infection or contamination in patients or corpses, where he or she considers that the infection or contamination presents or could present (or may have done whilst the dead person was alive) significant harm to human health.<sup>115</sup> Where the proper officer has received such notification, he or she must inform Public Health England, the proper officer of the local authority in whose area the person usual resides, or the proper officer of the port health authority or local authority if the person has recently disembarked, and the officer considers disclosure appropriate.<sup>116</sup> There is a similar duty upon diagnostic laboratories to notify Public Health England where the laboratory identifies a causative agent<sup>117</sup> in a human sample.<sup>118</sup> In the case of the latter duty, failure to comply is an offence which can result in the imposition of a fine.<sup>119</sup>

The Public Health (Aircraft) Regulations 1979 and the Public Health (Ships) Regulations 1979

80. These Regulations contain provisions concerning the prevention of infection or disease spreading from aircraft or ships. The detail of these Regulations is beyond the scope of this book.

**Charging for Local Authority Functions**

81. Local authorities have a wide general power to charge for their public health functions when:<sup>120</sup>

- (a) providing information and advice;
- (b) providing service or facilities designed to promote healthy living (whether by helping individuals to address behaviour that is detrimental to health or in any other way);
- (c) providing or participating in the provision of training for persons working or seeking to work in the field of health improvement;

<sup>115</sup> Regulations 2-3.

<sup>116</sup> Health Protection (Notification) Regulations 2010, Regulation 6.

<sup>117</sup> Listed in Schedule 2 to the Regulations.

<sup>118</sup> Health Protection (Notification) Regulations 2010, Regulation 4.

<sup>119</sup> Health Protection (Notification) Regulations 2010, Regulation 4(9)-(10).

<sup>120</sup> Public Health Functions Regulations, Regulation 9.

(d) making available the services of any person or any facilities.

82. The Secretary of State has issued guidance in relation to charging in respect of public health functions: *'Guidance: local authority charging for public health activity'*.<sup>121</sup> The Guidance provides two circumstances where local authorities may decide to charge:<sup>122</sup>

- where the activity relates to an organisation, not an individual – private companies, academic institutions, etc; and
- where the activity relates to an individual, but is not for the purposes of improving that individual's health – training an individual to provide public health advice, for example. The regulations provide specifically that an individual cannot be charged for any service or facility provided to them, or any other step take [sic] in relation to them, if that service, facility or other step is for the purpose of improving their health.

83. However, the power to charge in respect of public health functions only applies where the person who would be charged has requested or agreed the provision of those functions.<sup>123</sup> Additionally, "*[n]o charges may be recovered from an individual in respect of the provision of a service or facility to that individual, or the taking of any other step in relation to that individual, for the purpose of improving the individual's health*".<sup>124</sup>

84. There can be no charge for a function which the local authority is required to take under Part 2 of the Public Health Functions Regulations.<sup>125</sup> This excludes the power to charge from the following functions:<sup>126</sup>

- dental public health functions under regulations under section 111 of the 2006 Act;
- arranging the weighing and measuring of children at school under paragraph 7A of Schedule 1 to the 2006 Act;

<sup>121</sup> Available online at <https://www.gov.uk/government/publications/guidance-for-local-authority-charging-on-public-health-activity--2> (accessed 16 November 2017).

<sup>122</sup> Para. 1.6.

<sup>123</sup> Public Health Functions Regulations, Regulation 9(3).

<sup>124</sup> Public Health Functions Regulations, Regulation 9(4).

<sup>125</sup> Public Health Functions Regulations, Regulation 9(5).

<sup>126</sup> Guidance, para. 1.11.

- provision of contraceptive services under the Secretary of State’s duty under paragraph 8 of the Schedule 1 to the 2006 Act (which local authorities must exercise under regulation [6] of the 2013 Regulations); and
- provision of information and advice with a view to promoting local health protection arrangements (local authorities must provide such information in exercise of the Secretary of State’s duty under section 2A of the 2006 Act, as required by the 2013 Regulations).

85. The Guidance indicates that charges should not be applied so as to make a profit, but they may be calculated so as to cover the costs of the local authority.<sup>127</sup>

---

<sup>127</sup> Guidance, para. 1.12.