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# Improving Laws and Legal Authorities for Public Health Emergency Legal Preparedness

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## Introduction

This paper is one of the four interrelated action agenda papers resulting from the National Summit on Public Health Legal Preparedness (Summit) convened in June 2007 by the Centers for Disease Control and Prevention and multi-disciplinary partners. Each of the action agenda papers deals with one of the four core elements of legal preparedness: laws and legal authorities; competency in using those laws; coordination of law-based public health actions; and information. Options presented in this paper are for consideration by policymakers and practitioners – in all jurisdictions and all relevant sectors and disciplines – with responsibilities for all-hazards emergency preparedness.

### *Law and Public Health Preparedness*

One expert's framing of the mission of public health may help improve understanding of the range of hazards for which to be legally prepared.<sup>1</sup> These hazards include urgent realities – such as chronic disease, injury, disabilities, conventional communicable diseases, and an aging and obese population – and urgent threats, such as pandemic influenza, natural disasters,

and terrorism. The impact of both types of hazards is exacerbated by such factors as conditions of extreme poverty, climate change, and ideological extremism. Both types have the potential to cause grave disruptions in the functioning of society. Reviewing, assessing the adequacy of, and, if necessary, creating laws which support all-hazards preparedness will help assure legal preparedness.<sup>2</sup> Legal preparedness is an essential part of public health preparedness.

Summit participants engaged in discussions on these aspects of public health legal preparedness and deliberated about what laws are essential to prevent hazards, to protect people from threats that can not be or are not prevented, to respond effectively to the impact of hazards, and to recover comprehensively from the aftermath of an emergency or disaster.

Participants stressed the importance of doing more than identifying gaps in existing law. They pointed to many examples of existing law that reveal complexities and contradictions, barriers to practical action, inflexibility in the face of rapidly changing circumstances, jurisdictional conflicts, and operational difficulties during day-to-day work and emergencies. Examples cited in the companion assessment paper

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on laws and legal authorities illustrate the breadth and depth of such challenges. They include: the need for surge capacity in operation of health care systems during emergency; timely procurement of goods and services in crisis situations; the protection of privacy of medical information; the use of the National Guard and military to assist public health officials; seizure of private property; the role of legal counsel during emergencies; and the “fit” of the federal Pandemic and All-Hazards Preparedness Act and the World Health Organization’s new International Health Regulations (IHR) with U.S. constitutional law and other domestic legal and political considerations.

#### *Use and Assess Existing Law*

Although Summit participants identified some areas where new law would be useful, they did not believe that developing new law was the first priority. Instead, those who make, use, and are affected by law should become more familiar with the scope, substance, and application of existing laws. Closer scrutiny of present law and its use should reveal the need for not only better competence in its application but also more precise understandings of where new law might be required.

Summit participants also noted that public health practitioners and their counsel are not in all cases comfortable making use of existing legal authorities, even if they are familiar with those laws, or are using versions of law that are not up-to-date. Reasons suggested for this include: lack of familiarity with the law; confusion over perceived and actual conflicting authorities; distress over conflicting ethical considerations; and perceived and real political considerations. Further, Summit participants noted that attorneys, practitioners, elected and appointed officials, and the general public may need ongoing training and education to continuously improve their understanding, use, and reaction to application of the law in situations involving public health emergencies.

Continuously improving the substance and use of laws and legal authorities will require many steps at all levels of government and governance over time including better means to share legal best practices with those needing to be legally prepared; skillfully facilitated dialog among diverse groups (with particular attention to documenting the discoveries from dialog and making them widely available or, perhaps, requiring specific evidence of that dialog through reports to policymakers and funders); ongoing efforts to train practitioners and inform community members; continuous assessment of existing law; and where necessary, adoption of new law.

#### *Threats to Legal Preparedness*

Despite best intentions, significant obstacles confront efforts to have the best law in place. Personal and professional energy and attention-span are finite and regularly committed to other important tasks. In addition, limitations in resources may constrain day-to-day legal work related to preparedness and training necessary to sustain preparedness for specific hazards. The experienced workforce, needed to create and effectively employ laws and legal authorities, is in a constant state of turnover and is now beginning to leave the workforce permanently because of retirement and the perception of better career options elsewhere. Their successors will lack training and experience unless better and more effective ways are developed to preserve capacity and competency among public health practitioners and their counsel. Time really is of the essence to assess and, where indicated, improve the law.

#### **Options for Improving Laws and Legal Authorities for Public Health Legal Preparedness**

This section presents selected options that policymakers and practitioners – in all jurisdictions and in all the relevant sectors and disciplines – may consider taking toward the goal of full legal preparedness for all-hazards public health emergencies.

#### *Near-Term Actionable Options*

- Jurisdictions should consider: conducting regular, periodic assessments, including exercises, analysis, and other tests of sufficiency of laws for public health emergency response to identify potential gaps in these powers and authorities; avoiding unnecessary overlapping authorities or create necessary ones; clarifying the balance of powers and responsibilities among jurisdictional officials; and facilitating smooth operations during emergencies.
- Following final rulemaking and adoption of the new federal quarantine regulations, develop methods for optimizing understanding of approaches to coordinating implementation between different jurisdictional levels.
- Assess the adequacy of law at all jurisdictional levels to control the entry and exit of persons at ports of entry with suspected or known highly infectious diseases.
- Within specific jurisdictions, through multi-disciplinary groups (comprising public health and other government agencies concerned with wild animals, livestock and pets, veterinarians, and

others) examine the laws needed to protect people and animals from zoonotic-related threats, and prevent and detect outbreaks of transmissible zoonotic diseases.

- Assess the adequacy of, enhance, and give visibility to existing domestic cross-jurisdictional agreements and compacts (e.g., EMAC, regionalized public health services, and tribal/non-tribal agreements) and encourage the adoption of similar effective compacts.
- Assess the implications of the 2005 International Health Regulations (IHR 2005), including the degree to which federal, state, local, tribal, and territorial laws are consistent with the new surveillance and reporting requirements.
- Assess the extent to which regulatory requirements related to health care systems operations may impede availability of needed surge capacity during emergencies.
- Assess and improve, as needed, the ability of federal, state, local, tribal or territorial governments to waive, suspend, modify or flexibly apply existing laws and regulations, including certain standards applicable to healthcare systems and personnel licensing, during emergencies.
- Draft executive orders to waive, suspend, modify or flexibly apply certain, relevant standards during emergency.
- Review, assess, and as needed, draft alternative approaches for jurisdictions to protect privacy of medical information as much as possible during emergencies.
- Review, assess, and as needed, draft alternative procedures for the emergency procurement of medical supplies, protective equipment, and other materiel.
- Review, assess, and as needed, draft alternative laws and policies related to the evacuation of people, pets, livestock, and other animals during emergencies.
- Assess and clarify legal authorities for states' activation of the National Guard during public health emergencies.
- Clarify laws related to the dissemination and use of medical countermeasures during emergencies (e.g., mass distribution of prescription drugs).
- Assess the sufficiency of, and improve as necessary, local state, and tribal laws for social distancing (e.g., isolation, quarantine, closure of public facilities, curfews, and relevant procedural due process considerations).

#### *Long-Term Actionable Options*

- Review, assess, and, if indicated, improve laws for appropriate immunity for emergency responders (e.g., government officials, businesses, non-governmental organizations, and volunteers).
- Review, assess, and if indicated, improve laws regarding liability for emergency response.
- Assess jurisdictions' legal authorities to allocate and gain access to adequate resources to support response efforts that may extend over long periods of time (e.g., during responses to pandemic influenza that may span many months).
- Review, assess, and if indicated, improve laws regarding compensation to workers and organizations for injury or property damage incurred during emergency response.
- Review and assess laws regarding employer/employee relations in the context of a public health emergency (e.g., policies and contractual terms related to leave and compensation).
- Review, assess, and clarify laws regarding authorization of specific government agencies (e.g., law enforcement and public health agencies) to implement and enforce differing public health interventions (e.g., social distancing measures, mandatory vaccinations and treatment, or screening) during an emergency.
- Review, clarify, and, if needed, modify laws regarding compensation for private property (e.g., real property, pharmaceuticals, and other supplies) seized by public agencies for emergency response purposes.
- Review, assess, and if needed, improve law regarding the disposal and transport of human remains.
- Clarify the role for legal counsel, including states' attorneys general, private counsel for corporations and non-profit entities in public health emergency matters.
- During and after a public health emergency, systematically identify, document, and disseminate information on the effectiveness of laws and legal authorities.

#### **Discussion**

In the course of identifying and enumerating action options for laws and legal authorities, three salient themes emerged at the Summit that are particularly relevant for guiding the strengthening of legal preparedness for public health emergencies. These themes relate to U.S. legal preparedness in the context of global preparedness for emergencies; coordination between the public and private sectors in legal pre-

paredness; and advocacy for public health emergency preparedness.

#### *U.S. Legal Preparedness in the Global Context*

Legal preparedness efforts in the United States must take account of the global context in which serious threats to public health arise and are handled. As efforts to address the threat of SARS and pandemic influenza have demonstrated, U.S. health security can be enhanced through improvements in public health globally.

In this context, review is needed of the implications of such developments as the proposed revisions to the federal quarantine regulations. Clarification is also needed with regard to the reservation filed by the United States with respect to the IHR 2005 as well as federal action and federal-state coordination for their effective implementation. The IHR 2005's entry into force provides an exceptional opportunity to make legal preparedness an integral part of the strategy to protect U.S. health security and contribute to global health. Moreover, additional work is needed to clarify, strengthen, and expand certain legal preparedness aspects of the bilateral public health cooperative arrangements with Canada, Mexico, and other countries; to embed aspects of legal preparedness in the work of the Global Health Security Initiative; and to incorporate legal preparedness concepts within U.S. efforts to help other countries with the implementation of the IHR 2005 and otherwise prepare for public health emergencies.

#### *Public/Private Coordination in Legal Preparedness*

Many of the action options identified by the Summit participants – including considerations regarding liability, immunity, status of volunteers, and compensation – resonate with concerns expressed in the business and private non-profit sectors. These issues were cited in analyses of responses to the 2003 SARS outbreak in Ontario.<sup>3</sup> More recently, the Hurricane Katrina response effort underscored the need to identify and address any legal barriers to public/private cooperation and coordination.<sup>4</sup>

Some states have considered providing incentives for voluntary participation in emergency response from the private sector by individuals, businesses, non-profit organizations, and professional groups, and further consideration of this approach is warranted.<sup>5</sup>

#### *Practitioners, Legal Preparedness, and Advocacy*

Advocacy for public health legal preparedness involves effective communication of the importance of adopting and implementing a particular law or legal authority that advances the public's health. Law frames the

rules under which advocates may seek to influence lawmakers. More specifically, laws govern the ways in which government employees may legitimately inform lawmakers without crossing the line into prohibited forms of advocacy. Three aspects of these relationships are particularly important for executive-branch officials concerned with public health emergency legal preparedness: legal restrictions on lobbying, ethics rules, and agency policies. While legal requirements in this area probably are well defined in most jurisdictions, periodic training can help government employees identify and comply with the fine line between lobbying and advocacy.

#### **Conclusion**

While an action agenda for laws and legal authorities should address a wide range of hazards and threats, heightened attention in the United States has been paid to threats of a biological nature since the anthrax attacks of 2001. As a result, public health practitioners in the governmental and non-governmental sectors have taken appropriate steps in their practice and have worked systematically to assess and make needed revisions to relevant legal authorities. In addition, they have projected themselves into future scenarios that require strengthened legal preparedness for the anticipated challenging environment of the 21st century.

Pandemic diseases, among which influenza is just one example, highlight the need to assess, clarify and identify gaps in laws and legal authorities. Hazards and threats will prompt use of and challenges to traditional and untested public health law. Relief from liability and immunity will be sought by manufacturers of countermeasures, members of the governmental and non-governmental workforce (including medical and non-medical care personnel and organizations), and other community members. Legal and other forms of advocacy will continue to reshape laws and legal authorities.

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