

**Health (Fluoridation of Drinking Water)
Amendment Bill 2017
Departmental Report**

Prepared by the Ministry of Health

12 April 2017

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Introduction

1. This report provides an overview of submissions on the Health (Fluoridation of Drinking Water) Amendment Bill, and advice on proposed changes to the Bill.
2. The Parliamentary Counsel Office has been consulted in the development of this report.
3. In accordance with advice from the Health Committee on the scope of the Bill, the advice in this report focuses on the issue of giving District Health Boards (DHBs) the power to direct local government water supplies in their area to fluoridate or not fluoridate a drinking water supply.

Submissions

Overview

4. The Committee received 1107 written submissions on the Bill, along with 208 supplementary written submissions.
5. There were 1013 individual submissions and 94 submissions from organisations, including:
 - 25 health organisations
 - 21 local government organisations
 - 8 DHBs
 - 18 individuals identifying as health practitioners.
6. The Committee heard 145 submitters speak to their submissions on 15, 16, 22, and 23 March 2017.
7. The majority of submissions (93 percent) opposed the Bill. The overwhelming majority of those expressing opposition did so due to concerns about water fluoridation, and made no comment about giving DHBs powers in relation to water fluoridation.
8. Of the submitters who did make comment about giving DHBs these powers, 20 percent were in support of the Bill, and 80 percent were opposed to the Bill as currently drafted. Many of those opposed to the Bill supported the intent of the Bill to extend fluoridation coverage, but disagreed with specific parts of the Bill.
9. Most health organisations, DHBs and local government organisations generally showed support for the intent of the Bill, although some opposed the Bill as drafted for reasons including who the decision-maker should be, local authority powers under the Bill as drafted, and the DHB responsibilities under the Bill. These are discussed below.
10. The range of issues traversed was relatively narrow. The key topics arising from submissions were:
 - a) concern about water fluoridation
 - b) decision-making responsibility, including:
 - i. who should be the decision-maker
 - ii. decision-making hierarchy
 - c) consultation requirements

- d) DHB responsibilities under the Bill, including:
 - i. assessment and monitoring of fluoridation
 - ii. fluoride free water sources
- e) funding water fluoridation
- f) other issues, including:
 - i. offence provisions
 - ii. bulk suppliers
 - iii. adopting standards requiring fluoridation
 - iv. miscellaneous amendments.

Key topics raised in submissions

a) Concern about water fluoridation

11. The majority of submissions (85%) voiced concerns about water fluoridation, rather than referencing the Bill specifically, and opposed the Bill solely on these grounds. The concerns put forward included:

- fluoridating water is mass medication
- people should have individual choice about whether their water is fluoridated, and be asked to provide informed consent
- there is no evidence of its safety and effectiveness (or that there is evidence to the contrary)
- fluoride is an industrial waste product, and an environmental toxin
- fluoride is not an essential nutrient, and has negative health effects.

12. Some submitters opposing fluoridation also suggested that there are better alternatives, and said that fluoride is best applied topically rather than ingested.

13. Many submitters referenced the New Zealand Bill of Rights Act 1990, and considered that introducing fluoride to water would breach section 11, which states “everyone has the right to refuse to undergo any medical treatment”.

Comment

14. The concerns voiced about water fluoridation fall outside of the scope of the Bill, as acknowledged by the Health Committee. The Bill does not require DHBs to make a direction about fluoridation. If DHBs decide to make a direction, the Bill does require DHBs to consider evidence on the effectiveness of fluoridation in reducing dental decay before they make a direction.

15. The Ministry of Health has considered water fluoridation carefully and concluded that it is a safe and effective measure that prevents and reduces dental decay and does not cause harmful health effects. The evidence for fluoridation was discussed in the Regulatory Impact Statement, should the Committee require further information.

16. The Court of Appeal recently considered New Zealand Bill of Rights Act issues related to fluoridation in a case involving the South Taranaki District Council (*New Health New Zealand Incorporated v South Taranaki District Council* [2016] NZCA 462). In that case, the Court of Appeal found that the extension of section 11 to public health measures intended to benefit the public at large, such as fluoridation of drinking water, was not justified. This was due to the language of

section 11 itself, the human rights values underlying it and the common law at the time New Zealand Bill of Rights Act was enacted.

17. The Court of Appeal also found that even if water fluoridation did engage section 11 of the New Zealand Bill of Rights Act, local authorities' power to fluoridate water is a justified restriction of the rights to refuse medical treatment, because the benefits of fluoridation far outweigh its risks.

18. This decision has been granted leave to appeal to the Supreme Court.

b) Decision-making responsibility

Who should be the decision-maker

19. Those who supported the intent of the Bill, including Local Government New Zealand and most local government organisations, agreed that local authorities should no longer be the decision-makers about water fluoridation. However, there were mixed views about which agency should be the decision-maker.

20. Of those submitters opposing the Bill, many asserted that local authorities should continue to be responsible for decision-making about fluoridation. They considered that local authorities were best placed to take account of community views and decide what was best for the community. They also commented that DHBs are obligated to the Ministry of Health, and consequently would follow any recommendations the Ministry makes about fluoridation without taking account of all of the evidence.

21. Other submitters suggested that the decision-maker should be the Director-General of Health or central government. Some submitters, including several health organisations, added that the Health Committee should consider making fluoridation mandatory by legislation, which would remove the need for an elected body being responsible for the decision-making. Reasons for this included:

- concerns that DHBs would face legal challenges against their decisions
- concerns that, given low voter turnout in DHB elections, there is a risk that anti-fluoridation groups may secure disproportionate representation on DHB boards, which would impact their decision-making
- concerns that DHBs do not have the expertise to make the decision, and that the Ministry of Health is better placed to assess the appropriate information for making a decision about fluoridation.

22. Despite this, most DHBs who made submissions agreed that DHB involvement would enable a better balance between local decision-making and national policy than is currently being achieved.

Comment

23. The Government considered a range of options for increasing access to fluoridated water supplies, including giving decision-making power to the Director-General of Health. It was decided that giving decision-making powers about fluoridation to DHBs represents a significant advance on current arrangements and fits well with DHBs' statutory objectives and responsibilities. DHBs have a statutory mandate to improve, promote and protect the health of people and communities and to reduce outcome disparities between various population groups. They would have an additional public health intervention at their disposal and would be able to link fluoridation to local health needs and priorities.

24. Although there is a risk of legal challenge, this is a feature of the status quo. The Bill specifies what DHBs must consider in their decision-making, which will help DHBs defend their decision where a challenge is made. The Ministry of Health is also working with DHB representatives to develop a decision-tree to assist DHBs to take a structured approach to their decision-making.

Decision-making hierarchy

25. Some submitters, including local government organisations, health organisations and DHBs, suggested the Bill should oblige DHBs to consider fluoridation. These submitters proposed amending the Bill to say a DHB “must direct” a local government water supplier to fluoridate or not fluoridate, instead of “may” in new section 69ZJA(1). The submitters showed concern that if DHBs are not required to consider fluoridation, DHBs may choose not to consider fluoridation to avoid the difficulties that some local authorities have faced when considering fluoridation.

26. Some submitters, including local government organisations and health organisations, were concerned that, given DHBs are not required to consider fluoridation, local authorities will continue to have the power to make a decision to fluoridate their water supplies if the DHB does not elect to consider fluoridation. The submitters suggested that further clarity is needed about what powers local authorities will have under the Bill in relation to fluoridation.

27. South Taranaki District Council in particular was concerned about this, as they have recently undergone a court challenge after they made a decision to fluoridate Patea and Waverley communities. They requested that the Bill allow for the fluoridation of these water supplies, should the court challenge be successful.

Comment

28. Officials do not consider it necessary for the Bill to require DHBs to consider water fluoridation, and it is unlikely to be appropriate for all DHBs to consider fluoridation within similar timeframes. The Minister of Health, if necessary, can require DHBs to consider fluoridation in their district through the existing DHB annual accountability arrangements.

29. As noted by submitters, local authorities will continue to have the power to direct fluoridation of drinking water supplies where a DHB has not elected to make a direction regarding fluoridation. However, the offence provision in sections 1(1) and (2) of new schedule 1AA does not enable them to stop fluoridating a water supply if they are already doing so, unless directed not to by the relevant DHB. This supports the intent of the Bill, which is to enable the extension of fluoridated areas. To make the powers of local authorities explicit, officials recommend amending the Bill to clarify that, in the absence of a direction by a DHB, local authorities have the power to decide whether or not to fluoridate the water in their area. This is consistent with the decision made by the Court of Appeal in *New Health New Zealand Incorporated v South Taranaki District Council* [2016] NZCA 462.

30. In relation to this, officials have recently become aware that the wording in the general policy statement in the Bill is inaccurate, as outlined by the Legislation Design and Advisory Committee. The policy statement incorrectly states that the Bill transfers decision-making powers about fluoridation from local authorities to DHBs. Instead, the Bill gives DHBs the power to direct local government water supplies to fluoridate or not fluoridate their water supplies.

Recommendation 1

That the Bill is amended to clarify that territorial local authorities will continue to have the power to make decisions on fluoridating their water supplies, if they are not already fluoridating, in the absence of a direction from the relevant DHB.

c) Consultation requirements

31. Many submitters (12%) both for and against the Bill showed concern that the Bill does not make any requirement for DHBs to consider community/public views.
32. Some submitters, particularly local government organisations, pointed out that the Local Government Act 2002 (LGA) requires local authorities to consider community views where they are making a substantial service change. They suggested the Bill should make it clear whether local authorities are still responsible for following requirements under the LGA if given a direction by a DHB in relation to fluoridation under the Bill.
33. Other submitters, including DHBs, supported the current drafting, that consultation with communities is not required under the Bill. Submitters who proposed that the decision be given to the Director-General of Health, or that fluoridation was made mandatory, suggested that this would reduce the risk of challenge or public debate.
34. Submitters, including local government organisations, also expressed concern that the Bill does not require DHBs to consider the views of the local government drinking water supplier involved, which includes the local authority. They suggested amending the Bill to require the decision-maker to at least inform local authorities that it is considering fluoridation and seek comments on any such proposal. Some submitters additionally recommended that the Bill should outline the role of local authorities in fluoridation considerations.

Comment

35. DHBs make local decisions about when and how to consult with their communities, rather than being required to do so by law. While DHBs have an objective under the New Zealand Health and Disability Act 2000 to foster community participation in health improvement, and in planning for the provision of services and for significant changes to the provision of services (section 22(1)(h)), DHBs have no express duty to consult their community when making a decision under that Act, and DHB accountability arrangements do not include any community consultation requirements.
36. However, DHBs are required by regulations made under the Act to consult on significant service changes. Specifically, sections 7(1) and 9(1) of the New Zealand Public Health and Disability (Planning) Regulations 2011 state that when DHBs are preparing regional service plans and DHB annual plans they must consult with the public in relation to that plan if the Minister of Health considers that:
 - “(a) the plan proposes changes to services, including to service eligibility, access, or the way services are provided; and
 - (b) the proposed changes will have a significant impact on recipients of services, their caregivers, or providers.”

When DHBs are preparing regional service plans and annual plans, the Minister will consider at that time whether a significant service change is proposed.

37. While local authorities have some discretion about whether to consult their community when implementing a direction from a DHB, it would not be appropriate to do so as the DHB has the

ultimate decision-making power about fluoridation. Officials consider that the Bill should be amended to clarify that local authorities do not need to follow any requirements in relation to consultation under the LGA when given a direction by a DHB about fluoridation.

38. Although it is not made explicit in the Bill, officials would expect that DHBs would engage with water suppliers when considering fluoridation, to access the information needed to make a decision. This is supported by section 50(c) of the Crown Entities Act 2004, which states that a DHB must perform its functions in collaboration with other public entities where practicable, and also sections 23(1)(b) and 23(1)(ba) of the New Zealand Public Health and Disability Act 2000 which list DHBs functions, including to develop co-operative and collaborative arrangements with those in the health sector, and to collaborate with relevant organisations to plan and co-ordinate at local, regional and national levels. However, for clarity, officials recommend amending the Bill to ensure that DHBs engage the relevant local government water supplier(s) when considering fluoridation.

Recommendation 2

That the Bill is amended to clarify that territorial local authorities will not be required to consult their community under the Local Government Act 2002 if a DHB makes a direction to fluoridate or not fluoridate.

Recommendation 3

That the Bill is amended to clarify that DHBs should engage with local government water suppliers in considering water fluoridation.

Recommendation 4

That the Ministry of Health and PCO work together to determine the details of the engagement process between DHBs and local government water suppliers in Recommendation 3.

d) DHB responsibilities under the Bill

Assessment and monitoring of fluoridation

39. Many submitters showed concern that the Bill has no requirement for DHBs to consider other health effects of fluoridation, aside from oral health effects.
40. A few submitters, including the Legislation Design and Advisory Committee, said the Bill should require DHBs to consider all people affected by a decision and remove the word “resident” when referring to the population, since a decision would affect those who are temporarily passing through a region.
41. Several submitters expressed concerns about the monitoring and reporting of fluoride levels in fluoridated water. Some of these submitters suggested adding a clause to describe the duties and responsibilities for monitoring and reporting fluoride levels in fluoridated water.
42. Some submitters, including DHBs, were concerned that decisions about fluoridation may not be applied consistently between DHBs. They suggested that the assessment and ongoing review of the scientific evidence of the effectiveness and safety water fluoridation should be led by the Ministry of Health and summarised for DHBs as a policy direction. A couple of DHBs mentioned that a national entity should be established to provide this, similar to the National Fluoridation Information Service previously held. It was suggested that having the Ministry responsible for assessing the evidence could manage the legal costs DHBs may face if they have to defend their view.

43. There was a suggestion that the new section 69ZJA(2) could be worded more neutrally, as it currently assumes the benefits of fluoridation.
44. A couple of submitters suggested removing “outweigh” from new section 69ZJA(2)(b) to recognise that the whole range of benefits may not always be amenable to quantification in financial terms and that proving benefit in financial terms may not always be practical in every situation. They suggested that this would also more readily allow DHBs to consider other factors besides financial costs.
45. Another couple of submitters, particularly health organisations, suggested that DHBs should not have to carry out a cost benefit analysis as they consider that this sits outside of the expertise of DHBs.

Comment

46. Evidence for fluoridating drinking water at the established and recommended levels consistently shows that it prevents and reduces dental decay, and does not cause harmful health effects. The Bill specifies that DHBs must consider fluoride in relation to oral health because fluoridation is primarily beneficial for oral health. While DHBs are required to consider the evidence in relation to oral health, DHBs are not prevented from considering other factors, including the effect of fluoridation on overall health. However, officials do not consider it necessary for the Bill to require DHBs to consider these other factors.
47. As DHBs will only have access to information regarding their resident population, officials do not consider it necessary for the Bill to require them to consider other people passing through their region in their decision-making. There are no risks for people, regardless of whether a decision is made to fluoridate drinking water or not.
48. Duties and responsibilities for monitoring fluoride levels are covered by the Drinking-water Standards for New Zealand 2005 (Revised 2008), which provides the guideline values for constituents or properties in a water supply. Officials do not consider it necessary for the Bill to reference the duties and responsibilities in relation to monitoring fluoride, as this is referenced in section 69Y of the Health Act 1956. This section sets out the duty of suppliers to monitor drinking water to determine whether it complies with the drinking water standards and to detect and assess public health risks generally.
49. The National Fluoridation Information Service was a group of experts who were established between 2010 and 2015 to monitor, assess and provide technical advice on the effectiveness and safety of fluoridation. The Ministry of Health is currently exploring options for the ongoing monitoring and assessment of research on fluoridation within the Ministry to align with the implementation of the Bill.
50. As outlined previously, the Ministry of Health is working with DHB representatives to develop a decision-tree that will assist DHBs to take a structured approach to their decision-making, based on the Bill.
51. Although the Ministry of Health recognises that benefits may not always be quantifiable, officials do not consider it necessary to remove the word "outweigh" from section 69ZJA(2)(b). As drafted, the Bill does not require the benefits to be quantified. The term "outweigh" is often used in legislation to compare factors that cannot be quantified, but requires equal consideration of the factors.

Fluoride free water sources

52. Many submitters, including health organisations, local government organisations and DHBs, showed concern that that the Bill does not explicitly allow DHBs to provide alternative non-fluoridated water sources where a direction has been made to fluoridate drinking water supplies.
53. Many submitters from particular areas requested that their regions be excluded, for example Petone in the Hutt region and Christchurch. These submitters have generally voiced sentiments against fluoridation, and the desire to keep their water sources pure and product-free.

Comment

54. If a DHB issues a direction for a local government drinking-water supplier to add fluoride to a water supply, the Bill does not prevent fluoride being taken out of the water at private or publically available sources via a filtration system, provided the direction is followed.
55. Alternatively, a DHB may choose to direct the fluoridation of select drinking water supplies, and leave others unfluoridated. Although the Bill does not require that a direction from a DHB must cover the entire relevant geographical area, officials suggest that the wording in the Bill should make clear that DHBs can direct local government water supplies in their region on a supply by supply basis, if they wish.

Recommendation 5

New section 69ZJA(1) is amended to make clear that DHBs can direct any select local government water supply in their geographical region to be fluoridated or not.

e) Funding water fluoridation

56. Some submitters had concerns about the funding arrangements for fluoridation. In particular, there was concern that the Bill does establish who will fund the capital and ongoing costs for fluoridation, and any associated legal challenges against decisions made.
57. A few submitters suggested that a clause be added to the Bill to outline the funding arrangements.
58. Some submitters, mainly local government organisations, suggested that the decision-maker (DHBs) should be responsible for funding fluoridation, rather than local authorities. They were concerned that if local authorities continued to be responsible for funding fluoridation, they would need to consult with the community as part of their long-term plan, as the funding would come out of rate payments.
59. A few submitters urged the committee to recommend that the Government provide financial support to local authorities for funding either the initial capital costs of fluoridation, the ongoing costs, or both.
60. A few submitters recommended that financial support should be provided to DHBs should they face any legal challenges after making a direction. A couple of submitters added that there may be financial impacts on DHBs for undertaking assessments during decision-making. They recommended that the Government provide funding to assist with such assessments if required.

Comment

61. Funding arrangements do not need to be included in the Bill and officials consider it would be beneficial to keep them outside of the Bill to allow flexibility in decisions about funding arrangements.

62. While local authorities would normally consult communities about policies that have funding implications, as previously discussed, it would not be appropriate for them to do so when following a direction from a DHB, as the DHB will have ultimate decision-making power.

f) Other issues

Penalties

63. There was some concern by submitters that the proposed penalties under the Bill are significant. Concerns included comments that penalties would cover periods of emergency, or where maintenance work is being undertaken. They suggested that the offence provisions should not apply when a plant is required to be shut down for maintenance purposes.

Comment

64. As the Ministry of Health administers the Health Act 1956, it would investigate and make any referral for prosecution (to the relevant Crown Solicitor) in the event that a drinking water supplier didn't comply or stopped adding fluoride to the drinking water where it was already fluoridating. Even though the offences are strict liability offences, in practice, where prosecutions are taken they will be managed on a public interest basis and unless a supplier had not complied on purpose for an extended amount of time the Ministry of Health would be very unlikely to prosecute.

65. In emergency circumstances, there is also a power for the Minister to declare a drinking-water emergency under section 69ZZA(1) of the Health Act 1956, if the Minister believes there is serious risk of harm to the health or safety of any people arising from the drinking water supplied to those people or from a lack of drinking water available to those people. If an emergency is declared, section 69ZZD(2)(k) would allow a drinking-water supplier to be exempted from the duty to comply with a DHB direction to fluoridate.

Water supplies shared across DHBs

66. One submitter¹ expressed concern that section 69ZJA(3) of the Bill may be misinterpreted, such that DHBs would need to consult other DHBs when a water supply does not cross DHB boundaries, because other networks in those DHBs' areas do cross DHB boundaries. They suggested making an amendment to ensure the provision reads as intended, which is that a DHB must consult other DHBs only where the supply in question crosses a DHB boundary.

Comment

67. Officials agree that the wording in the Bill could be clarified to ensure that DHBs don't have to consult other DHBs about a water supply that does not cross DHB boundaries.

Recommendation 6

New section 69ZJA(3) is amended to ensure that DHBs are only required to consult other DHBs where a water supply is shared by their resident populations.

Bulk suppliers

68. The submission from Greater Wellington Regional Council commented that bulk water suppliers are not included in the definition of a local government drinking-water supplier in the Bill as drafted, which is (see section 124 of the Local Government Act 2002) a local authority or council-controlled organisation that provides water services; water services meaning the provision of drinking water to communities by network reticulation to the point of supply of each

¹ Auckland Regional Public Health

dwellinghouse and commercial premise. Greater Wellington Regional Council, as a bulk supplier, does not fall within the definition of water supply, as it provides water to other drinking-water suppliers and not to the point of supply at each dwellinghouse and commercial premise. They were concerned about this as a local DHB would not have the power to require a bulk supplier to fluoridate or not fluoridate the bulk water supply, which may be problematic if the bulk supplier has conflicting views about fluoridation.

Comment

69. Officials agree that bulk suppliers are not included in the definition of a local government drinking-water supplier. This is not considered an issue as a water supplier would have to follow a direction from a DHB, regardless of the bulk water supplier's view on fluoridation. However, it may be useful to include all local authorities in the definition of a local government water supplier to avoid any issues. Rather than include bulk water suppliers within the definition, which would also mean that directions could be made to privately owned water suppliers, officials recommend making an amendment to the Bill so that the definition of local government drinking-water supplier includes a local authority controlled drinking-water supply, which covers Greater Wellington Regional Council within the definition.

Recommendation 7

That the definition of a local government drinking-water supplier in clause 6 be amended to include local authority controlled drinking-water suppliers.

Adopting standards requiring fluoridation

70. Some submitters supported clause 7, which repeals section 690(3)(c) of the Health Act 1956 that allows the Minister to "issue, adopt, amend, or revoke drinking-water standards", but "must not include any requirement that fluoride be added to drinking water". They assumed this meant the Minister would have the power to require fluoride to be added to drinking water, and recommended this power be extended to include the Director-General of Health.

Comment

71. Although clause 7 does remove the prohibition on the Minister requiring fluoride to be added to drinking water via the drinking-water standards, this does not mean the Minister has that power. Under the Act, guidelines can only be issued to set a maximum level of fluoride in drinking water, they cannot set minimum values. The reason for repealing this clause was not to give the Minister the power to require DHBs to fluoridate, but because it appeared to conflict with the purpose of the Bill, although the effect of the provision was negligible.

72. The Ministry does not consider it necessary for the Minister or the Director-General of Health to be able to adopt minimum standards for fluoride. As stated earlier in this report, the Government considered a range of options for increasing access to fluoridated water, including giving a decision-making power to the Director-General of Health, but decided DHBs were best placed to make this decision because of their ability to consider local health needs and priorities.

Miscellaneous amendments

73. A few submissions made comments about Part 2 Miscellaneous amendments of the Bill. In particular, they voiced concerns that the Bill should not repeal the Hospitals Act 1957.

Comment

74. The Hospitals Act 1957 was repealed by the Health and Disability Services (Safety) Act 2001. This clause has been included in the Health (Fluoridation of Drinking Water) Amendment Bill to "tidy

up" the Health Act 1956 by removing the reference to an Act that is no longer in force. It is not related to fluoridation, and has only been included because the Bill provides an opportunity to make other miscellaneous amendments to the Health Act 1956.

Summary of recommendations

75. Ministry of Health officials recommend 6 specific amendments to the Health (Fluoridation of Drinking Water) Amendment Bill:

Recommendation 1: that the Bill is amended to clarify that territorial local authorities will continue to have the power to make decisions on fluoridating their water supplies, if they are not already fluoridating, in the absence of a direction from the relevant DHB.
Recommendation 2: that the Bill is amended to clarify that territorial local authorities will not be required to consult their community under the Local Government Act 2002 if a DHB makes a direction to fluoridate or not fluoridate.
Recommendation 3: that the Bill is amended to clarify that DHBs should engage with local government water suppliers in considering water fluoridation.
Recommendation 4: that the Ministry of Health and PCO work together to determine the details of the engagement process between DHBs and local government water suppliers in Recommendation 3.
Recommendation 5: new section 69ZJA(1) is amended to make clear that DHBs can direct any select local government water supply in their geographical region to be fluoridated or not.
Recommendation 6: new section 69ZJA(3) is amended to ensure that DHBs are only required to consult other DHBs where a water supply is shared by their resident populations.
Recommendation 7: that the definition of water supplier in clause 6 be amended to include local authority controlled drinking-water suppliers.