

Fluoridation decisions - coming to a District Health Board near you

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Voting is about to close in the local body elections, including for elected members of District Health Boards (DHBs). It is well known that the government intends to change the law to make DHBs rather than local authorities responsible for deciding whether to fluoridate community drinking water supplies. Legislation will likely be introduced before the end of this year to give effect to that decision.

Transferring decision-making responsibility to DHBs is largely a response to lobbying and legal challenges to local authorities' fluoridation decisions. Recent [Court of Appeal decisions](#) in relation to three separate challenges by New Health New Zealand, an anti-fluoridation group, provide examples of such challenges.

We discuss the proposal to make DHBs responsible for fluoridation decisions, and the Court of Appeal decisions, below.

Fluoridation decisions to be made by DHBs

In April 2016 Cabinet approved a proposal to make DHBs rather than local authorities responsible for fluoridation decisions. At present 27 out of 67 local authorities fluoridate their community drinking water supplies, and about 54% of the population receives fluoridated drinking water. Moving decision-making responsibilities to DHBs reflects that Cabinet considers that DHBs are best placed to assess health-related evidence and make decisions on health priorities that affect communities. We consider that there is also an expectation that moving decision-making responsibility to DHBs will result in more drinking water supplies being fluoridated, and better oral health outcomes.

DHBs will not be given complete discretion to decide whether community drinking water supplies should be fluoridated. Rather, it is proposed that each DHB would be required to:

- Collect and review data on community oral health
- Apply a national tool developed by the Ministry of Health to generate information about drinking water supplies and affected population groups and communities
- Based on the information gathered, direct drinking water suppliers such as local authorities to either fluoridate or not fluoridate community drinking water supplies.

The Cabinet paper recognises that fluoridation has become 'an increasingly contentious issue for local authorities, because of active lobbying and court action against councils by anti-fluoridation groups and controversy at local body elections and referendums.' The Cabinet paper recognises that moving responsibility to DHBs will not resolve issues created by lobbying and court action. The paper also makes the observation that DHBs will face the same scrutiny that local authorities have faced at election time, and that the election of anti-fluoride advocates could lead to a stalemate or reversal of fluoridation.

To address those issues, it is proposed that the Ministry of Health develop a regulatory framework so that DHBs can take a structured and nationally consistent approach. The paper suggests judicial review would be limited to the DHB's use of national tools (eg its analysis of data and application within a regulated set of tools and decision-making criteria). The paper also suggests that the Ministry may provide additional financial support to DHBs to help them meet legal costs.

Court of Appeal rejects challenges to fluoridation decisions

One lobby group that objects to the fluoridation of drinking water supplies is New Health New Zealand. New Health has recently lost its appeals against three separate High Court decisions (heard together) relating to the fluoridation of drinking water; one relating to the right of local authorities to fluoridate drinking water supplies, and the other two relating to whether certain compounds used to fluoridate drinking water are 'medicines' for the purposes of the Medicines Act (and whether regulations made confirming that the compounds are not medicines, are lawful).

We discuss those decisions below.

Fluoridation not a New Zealand Bill of Rights Act breach

In 2012 the South Taranaki District Council decided to fluoridate the drinking water supplies at Patea and Waverley. New Health judicially reviewed that decision, arguing that the Council does not have a legal power to fluoridate drinking water and, even if it did, doing so breached the rights of persons to refuse medical treatment under the New Zealand Bill of Rights Act 1990 (NZBOR Act). The High Court held that the Council does have the legal power to fluoridate drinking water and that there is no NZBOR Act breach. A legal alert prepared by Buddle Findlay relating to that judgment is available [here](#).

New Health appealed the decision, and the Council put the fluoridation of drinking water supplies at Patea and Waverley on hold pending the outcome of the appeal.

The Court of Appeal upheld the High Court decision. The Court's finding that the Council has the legal power to fluoridate drinking water supplies will effectively be moot once decision-making responsibility is moved to DHBs. However, the Court's finding on the claim that fluoridation breaches the right of individuals to refuse to undergo medical treatment under section 11 of the NZBOR Act will remain relevant.

The Court held that section 11 cannot be read so widely as to extend to public health measures such as the fluoridation of drinking water intended to benefit the public at large. In particular the Court:

- Held that section 11 does not apply in respect of public health measures that do not involve direct interference with bodily integrity and personal autonomy
- Observed that to describe a person as drinking fluoridated drinking water as 'undergoing medical treatment' is inapt and could not have been what Parliament contemplated when the NZBOR Act was passed
- Agreed with the High Court's view that the fluoridation of drinking water cannot be distinguished from other public health measures, such as adding iodine to salt, folic acid to bread, and pasteurisation of milk
- Noted that to extend section 11 as New Health had advanced would lead to a clash between the rights of an individual and the rights of the population, and would conflict with statutory obligations of central and local government to promote public health.

The Court also held that even if fluoridation did infringe the right in section 11, that infringement would be a justified and reasonable limitation for the purposes of section 5 of the NZBOR Act. Although the Court expressed reluctance to enter the debate about the merits or otherwise of fluoridation, the Court nevertheless heard scientific evidence from both parties on this point. The Court held that "...there is a substantial body of research both in New Zealand and elsewhere to support the proposition that the fluoridation of community drinking water has a beneficial effect in reducing the incidence of tooth decay. While there may be some room for debate about the extent of that reduction, the evidence produced in this case shows it is significant."

Medicines Act and regulations

Separate to the proceedings it brought against the South Taranaki District Council, New Health sought a declaration that two compounds added to drinking water supplies for fluoridation purposes (hydrofluorosilicic acid (HFA) and sodium silico fluoride (SSF)) were 'medicines' for the purposes of the Medicines Act 1981, and must therefore be regulated as such by the Ministry of Health.

The High Court dismissed the application (the 'Medicines Act judgment'). A legal alert prepared by Buddle Findlay relating to that judgment is available [here](#). New Health appealed.

Section 105(1)(i) of the Medicines Act provides that regulations may be made specifying that a substance is not a medicine for the purposes of the Act. In the Medicines Act judgment the Court suggested that the Ministry consider exempting fluoridating agents from the definition of 'medicine' in the Act, presumably to put the issue beyond doubt. Accordingly, the regulations were amended in January 2015 to make it clear that neither a 'fluoridating agent' such as HFA or SSF, nor fluoridated drinking water, are 'medicines' for the purposes of the Act (see [regulation 58B](#) of the Medicines Regulations 1984). The explanatory note to the regulations expressly states that the regulations are made in response to the High Court's suggestion in the Medicines Act judgment.

New Health challenged, by judicial review, whether the amendment to the regulations was lawfully made. That challenge was rejected by the High Court (the 'Regulations judgment'). New Health appealed that judgment too.

The Court of Appeal first considered the appeal against the Regulations judgment, which New Health challenged on the grounds that:

- The regulations were made by the Minister and the Executive Council on the advice that HFA and SSF are not medicines – New Health argued that those compounds are medicines, and that the regulations were therefore made on the basis of a material error of law
- The regulations were made for an improper purpose, being to extinguish New Health's right to appeal the 9 October 2014 decision that HFA and SSF are not medicines.

The Court found that the power to make the regulations exists whether or not a substance is a medicine, and that the first ground of challenge therefore fails. The Court also found that there is nothing improper in the passing of regulations for the purpose of providing legal certainty as to whether HFA and SSF are medicines when used to fluoridate drinking water supplies, and noted that

as the High Court had suggested amending the regulations 'The executive could not be faulted for moving to clarify the position beyond doubt'.

Having reached the above conclusion, the Court observed that New Health's appeal against the Medicines Act judgment is effectively moot. That is because even if the Court was incorrect to find that HFA and SSF were not medicines, the amendment to the regulations makes it clear that HFA and SSF are not medicines. The Court found that there is no public interest in having the appeal determined because the amendment to the regulations has settled this point.

Final observations

We agree that if the law is changed as described in the Cabinet paper, legal scrutiny and challenge of fluoridation decisions will move to DHBs. It is difficult to imagine that an anti-fluoridation group could challenge a DHB's legal right to direct the fluoridation of drinking water. However, we anticipate that any Ministry decisions relating to the development of a national tool, and DHB decisions on whether to fluoridate community drinking water supplies, will be closely scrutinised, including by groups strongly motivated to challenge decisions to fluoridate drinking water.

We also expect that, come the next DHB elections, each candidate's position on fluoridation will become an even more pertinent issue. Both voters strongly opposed to fluoridation and those strongly in favour will likely want clear indications from candidates as to their position on this vexed issue.

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