LEGISLATION DESIGN AND ADVISORY COMMITTEE

9 February 2017

Simon O'Connor MP
Health Committee
Parliament Buildings
PO Box 18 041
Wellington 6160

Dear Mr O'Connor

Health (Fluoridation of Drinking Water) Amendment Bill

1. The Legislation Design and Advisory Committee (**LDAC**) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. The LDAC provides advice on design, framework, constitutional and public law issues arising out of legislative proposals. It is responsible for the LAC Guidelines (2014 edition), which have been adopted by Cabinet.

2. In particular, the LDAC's terms of reference include these dual roles:
    a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
    b. through its External Subcommittee, scrutinising and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.

3. The External Subcommittee of the LDAC referred to in paragraph 2b above is comprised of independent advisers, from outside Government, who have been appointed by the Attorney-General. Under LDAC's mandate, that External Subcommittee is empowered to review and make submissions on those bills that were not reviewed by the LDAC prior to their introduction.

4. The Health (Fluoridation of Drinking Water) Amendment Bill is one that was not reviewed by LDAC prior to introduction. The External Subcommittee has therefore reviewed it, and desires to make the attached submission. This submission was principally prepared by David Cochrane and James Wilding, with input from other members of the Subcommittee.

5. Thank you for taking the time to consider the Subcommittee's submission. It wishes to be heard on this submission.

Yours sincerely

Paul Rishworth QC
Chairperson
Legislation Design and Advisory Committee

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Health (Fluoridation of Drinking Water) Amendment Bill – supplementary submission

1. Introduction

1.1. The Legislation Design and Advisory External Subcommittee (the **Subcommittee**) has been given a mandate by Cabinet to review introduced Bills against the LAC Guidelines on Process and Content of Legislation (2014 edition) (the **Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on legislative design and the consistency of a Bill with fundamental legal and constitutional principles.

1.2. This submission supplements the initial written submission to the Committee dated 2 February 2017. This submission focusses on aspects of the Health (Fluoridation of Drinking Water) Amendment Bill (the **Bill**) that appear to be inconsistent with the Guidelines or could be refined to improve the quality of the legislation. In particular, the Subcommittee makes the following recommendations:

(a) The Committee should satisfy itself that District Health Boards (**DHBs**) are the appropriate body to exercise this decision-making power, having regard to the appropriate level of the authority, expertise, and accountability.
(b) The relationship with territorial local authorities' decision-making responsibility about fluoridation under the Local Government Act 2002 should be clearer.
(c) The new power to direct fluoridation should include a requirement to consult.
(d) The power to direct should be more flexible, and relate to "all or part of a local government drinking-water supplier's district" and accommodate different levels of naturally occurring fluoridation.

(e) The Committee should clarify the intention of referring to "resident population" in new section 69ZJA(2)(b)(ii).

(f) The reference to scientific evidence in new section 69ZJA(2)(a) should be framed neutrally.

(g) Directions made under new section 69ZJA should be subject to internal review.

(h) The defences in the Bill do not sufficiently address foreseeable situations that are likely to arise in the context of fluoridating drinking water; a court order may be a more appropriate remedy in some cases and should be provided in addition to criminal offences.

(i) The Subcommittee notes that the Bill relates to matters that are the subject of ongoing litigation.

1.3. We make suggestions where provisions of the Bill could be amended or reconsidered in light of the principles in the Guidelines. We have endeavoured to make suggestions that will result in an accessible and quality piece of legislation.

2. New statutory power created for DHBs – clause 8

2.1. The Bill creates a power for DHBs to make decisions and give directions about the fluoridation of local government drinking water supplies in their areas.[1] The Explanatory Note provides that this power replaces territorial local authorities' decision-making responsibilities about fluoridation of drinking water.[2] Aspects of the proposed power are not consistent with the principles in Chapter 16 of the Guidelines (creating a new statutory power).

Is the DHB the appropriate body to hold this power, having regard to the appropriate level of authority, expertise and accountability?

2.2. The Guidelines provide that legislation should identify who holds a new power, and that a power should be held by the person or body that holds the appropriate level of authority, expertise and accountability.[3]

2.3. On the one hand, DHBs are a more centralised decision-maker,[4] more likely to have relevant expertise, but might not be appropriate in the context of the power being exercised. The power to direct fluoridation of drinking water supplies may significantly impact local communities and individuals. On this basis, local authorities may be a more appropriate decision-maker as they are directly accountable to those who might be affected by the decision through democratic processes, and are better equipped to access information and make a quality decision through

[1] Clause 8, new sections 69ZJA and 69ZJB.
[2] Explanatory Note, Health (Fluoridation of Drinking Water) Amendment Bill at 1. In fact, that is not the case. A local authority that is not fluoridating can decide to continue not to do so, unless the DHB exercises its discretion to give a direction.
[3] LAC Guidelines (2014 edition) at 16.2.
[4] DHBs are crown agents and must give effect to government policy when directed by the responsible Minister – Crown Entities Act 2004, section 7(1)(a) and Schedule 1, Part 1.. DHBs have a mixed membership of locally elected and Government appointed members.

existing local government consultation processes. (As the Bill stands, there is no requirement for DHBs to consult with affected communities before directing a water supplier to fluoridate or not.)

2.4. On the other hand, DHBs might not be central enough to appropriately exercise this power. Some DHB members are locally elected and DHBs relate to geographical areas. The Bill provides that DHBs must consider scientific evidence on the effectiveness of adding fluoride to drinking water in reducing the prevalence and severity of dental decay.[5] If the preponderance of scientific evidence is clearly one way, then it would seem odd if DHBs reach different decisions based on the same evidence, and conceivably might prompt legal challenge. That is exacerbated should DHBs with the same Crown appointed members reach different decisions on the same evidence.

2.5. The Subcommittee believes the Committee should itself analyse whether fluoridation decisions should be at national, DHB, or local government level in order best to achieve the policy objective.

The relationship with territorial local authorities' decision-making responsibility about fluoridation under the Local Government Act 2002 should be clearer

2.6. The Explanatory Note provides that the power of DHBs replaces territorial local authorities' decision-making responsibilities about fluoridation of drinking water. The Subcommittee understands that territorial local authorities' decision-making responsibilities are implied in section 130 of the Local Government Act 2002 (**LGA**).[6] However, the Bill does not expressly address how it relates to section 130 of the LGA. It is not clear whether territorial local authorities retain decision-making power about non-fluoridation, but can then be directed by DHBs (effectively overriding local authorities' decisions). Or is DHBs' new power intended to entirely replace and remove any territorial local authorities' decision-making responsibilities about fluoridation? It is clear from the Schedule that if a local authority is fluoridating it cannot unilaterally stop doing so, even if residents want that.

2.7. The Subcommittee submits that the Bill should be express if it intends to replace and remove any decision-making responsibility under section 130 of the LGA. The Guidelines provide:[7]

> If there is already clear authority in existing legislation, it will be inappropriate to grant the same power in new legislation. This will lead to duplication and a lack of certainty in the law, particularly where only one Act is amended (this may create an unintended distinction between the two provisions. …

[5] New section 69ZJA(2)(a).
[6] *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395 at [25]; affirmed in *New Health New Zealand Inc v South Taranaki District Council* [2016] NZCA 462 at [32].
[7] LAC Guidelines (2014 edition) at 16.1.

If the intention is to limit or extinguish the common law power, the new legislation must clearly state that.

2.8. Alternatively, the Bill should be clearer about the relationship between territorial local authorities' decision-making responsibility and the ability for DHBs to direct and override those decisions, if the intention is for local authorities to continue having responsibility under section 130 of the LGA. For example, what process will apply if a territorial local authority wishes to change the fluoridation status of one or more of its water supplies? Is it intended that the authority should go through the usual consultation for its decision-making process under the LGA, or should it bypass that process and seek a direction form the DHB as to whether it should start to fluoridate, continue to fluoridate, or can cease fluoridation?

The new power to direct fluoridation should include a requirement to consult

2.9. Currently, a territorial local authority making a fluoridation decision (or at least proposing to change the status quo) would have to consult its community under the LGA. As the Bill is currently drafted, there are no consultation obligations on DHBs when exercising powers under new section 69ZJA – neither public consultation nor consultation with the relevant local territorial authority. This is a significant change from the status quo and removes community input from a decision that could significantly impact those communities.

2.10. The Guidelines provide that legislation should include safeguards that will provide adequate protection for the rights of individuals affected by the decision, and that any pre-requisite circumstances or procedural steps (such as consultation) should be specified in the legislation.[8] Requiring consultation in this Bill will help ensure DHBs have regard to the full range of people who are affected and have access to the full range of relevant scientific evidence.

2.11. The Subcommittee submits that new section 69ZJA should be amended to require DHBs to consult with those likely to be affected by the decision. This could be based on the consultation or special consultative procedures in the LGA, either by direct provision, or by reference. If a more streamlined consultation process is needed here, then the legislation should provide that.

2.12. As a minimum, if the intention is for territorial local authorities to retain some decision-making responsibility (see paragraph 2.8 above), then DHBs should be required to consult with the relevant local territorial authority and have regard to the outcome of any consultation process conducted by that local authority. This would help to ensure community views are taken into account and reflect that local government would bear the resulting costs of any decision.

[8] LAC Guidelines (2014 edition) at 16.5 and 16.6.

The power to direct should be more flexible, and relate to "all or part of a local government drinking-water supplier's district" and accommodate different levels of naturally occurring fluoridation

2.13. The power to direct in new section 69ZJA appears to apply to all communities of a local government drinking-water supplier. The Subcommittee notes that at present, local government drinking-water suppliers fluoridate some communities but not others.[9]

2.14. The Subcommittee suggests the power to direct should be for "all or part of a local government drinking-water supplier's district". This would create flexibility, increase cost efficiencies, and avoid duplication where a local drinking-water supplier is already doing what the DHB wants to see done in some communities. It would also allow the DHB to accommodate different levels of fluoride that might be required for different sources[10] that are all supplied by the same local government drinking-water supplier.

The intent of referring to "resident population" in new section 69ZJA(2)(b)(ii) should be clarified

2.15. The Bill provides that in deciding whether to make a direction, a DHB must consider, et al, "the number of its resident population to whom the local government drinking-water supplier supplies drinking water".[11]

2.16. It is unclear why the number of "resident population" is relevant. The Regulatory Impact Statement discusses the cost effectiveness of fluoridation, and notes that it is cost effective for populations of more than 1000 people. However, financial costs and savings will be considered under paragraph (b)(iii).

2.17. Referring to the resident population supplied draws a distinction between residents and non-residents, and it is not clear from the departmental material why this is the case. It is foreseeable that territorial local authorities may supply drinking-water to non-residents in a number of situations, for example where populations have seasonal variations, authorities supply other authorities, or supplies are on a commercial basis e.g. to cruise ships. The Committee should ask officials to explain the intention of this provision, and it according in the legislation.

The reference to scientific evidence should be framed neutrally

2.18. The Bill requires the DHB to consider "scientific evidence on the effectiveness of adding fluoride to drinking water in reducing the prevalence and severity of dental decay"[12]. The Subcommittee considers this provision assumes the benefits of fluoridation and suggests this provision should

[9] For example, the RIS refers to Onehunga being unfluoridated, but it is only a small part of the Auckland Council area.
[10] RIS at [10] provides that natural fluoride levels vary.
[11] New section 69ZJA(2)(b)(ii). From the current litigation it is clear that Hawea is fluoridated and the issue is whether that should be extended to Waverly and Patea.
[12] New section 69ZJA(2)(a).

be more neutral. For example, it should require DHBs to consider "scientific evidence regarding the health risks and benefits of adding fluoride to drinking water".

3. Review process – directions under new section 69ZJA should be subject to internal review

3.1. The Bill does not provide for an internal review of directions made under new section 69ZJA. The Guidelines provide that the prospect of review and scrutiny encourages first instance decision makers to produce decisions of the highest possible quality.[13] Further, the Guidelines provide:[14]

> A process of internal review should be provided as the first stage in the complaints/appeal process. Judicial review should not be relied on as the sole process of challenge. It is good practice to provide for a process of internal review through which complaints are considered … Where used in appropriate cases … internal reviews are an effective way of identifying and correcting mistakes without the cost and publicity that an appeal to an external body or judicial review may attract.

3.2. The Subcommittee submits that a mandatory review period after a direction has been made under new section 69ZJA would help ensure there is proper consideration of matters and increase the quality and legitimacy of decisions.

3.3. Because the Bill has no process for public notice of an impending consideration of a fluoridation proposal, no provision for public input, and no scope for affected parties to provide scientific evidence, the prospects of complaints about the process, may be high. The expensive process of judicial review should not be the only process for challenge.

4. Defences and strict liability offences – clause 9, new section 69ZZR(1)(fa)

The defences in the Bill do not sufficiently address foreseeable situations that are likely to arise in the context of fluoridating drinking water; a court order may be a more appropriate remedy in some cases and should be provided in addition to criminal offences

4.1. The Bill provides that failure to comply with a direction under section 69ZJA is a strict liability offence under section 69ZZR of the Health Act.[15] Existing section 69ZZS(2) provides it is a defence to that offence if the defendant did not intend to commit the offence and all practicable steps were taken to prevent the commission of the offence.

[13] LAC Guidelines (2014 edition) at 25.
[14] LAC Guidelines (2014 edition) at 25.2.
[15] Section 69ZZS(1) of the Health Act 1956 provides the prosecution is not required to prove that the defendant intended to commit the offence.

4.2. The Guidelines provide that "regulatory options should be effective and efficient, workable in the circumstances that they are required to operate in, and be appropriate in light of the nature of the conduct and potential harm they are intended to address".[16]

4.3. The defences provided in the Bill are not sufficient to deal with particular situations that are likely to arise in the case of fluoridating water. For example, in some cases it may be preferable to continue to "offend" rather than shut down a water supply until the failure can be remedied[17]. In such cases the current defences may not help a drinking-water supplier because once it knows of the failure it intends to commit the offence if it then continues to supply water that does not comply with the DHB's direction.

4.4. The defences in the Bill are not appropriate for situations where a drinking-water supplier failed to comply with a DHB direction because of an emergency (that is not declared to be a "drinking water emergency" under the Health Act 1956 or a "state of emergency" under the Civil Defence and Emergency Management Act 2002) or where local authorities have to make special provisions where drinking-water demand exceeds usual supplies. A suitable provision could be drafted based on section 330 of the Resource Management Act 1991 (emergency works and power to take preventative or remedial action) (and of course, section 329 is of direct interest in this area).

The Subcommittee suggests that rather than criminalising all local drinking-water suppliers who do not comply with DHB directions, a court order forcing compliance may be a more appropriate remedy in some circumstances and should be provided in addition to criminal offences. Allowing a court to examine the circumstances would ensure truly defiant local drinking-water suppliers acting in bad faith are brought into line, but the various non-standard but foreseeable circumstances like those addressed above could be more appropriately addressed.

5. Relationship between the Bill and relevant litigation

5.1. For the sake of completeness, the Subcommittee notes that the Bill relates to matters that are the subject of ongoing litigation. Application for leave to the Supreme Court has been sought from the Court of Appeal decision in *New Health New Zealand Inc v South Taranaki District Council*[18].

[16] LAC Guidelines (2014 edition) at 19.2.
[17] For example, if the water supply in Havelock North or Kaikoura was fluoridated, but trucked in water was not, the territorial authority would have known it was offending and the defences would not be available. Surely it is better to truck in un-fluoridated water than to provide no water?
[18] [2016] NZCA 462.

5.2. The Guidelines provide:[19]

> New legislation should not pre-empt matters that are currently before the courts or deprive successful litigants of the benefit of any court decision in their favour … However, in some cases ongoing or prospective litigation may identify an area of the law that requires an amendment or new legislation, and it would be inappropriate for the Government to await the outcome of the litigation before taking action.

6. Conclusion

6.1. Thank you for taking the time to consider the Subcommittee's submission. We wish to be heard on this submission.

Yours sincerely

Geoff McLay
Chairperson
Legislation Design and Advisory External Subcommittee

[19] LAC Guidelines (2014 edition) at 11.4.