

Memo

Proposed process for assessment of fluoridation directions against the Bill of Rights Act

Date:	2 April 2024
To:	Dr Diana Sarfati, Director-General of Health, Te Tumu Whakarae mō te Hauora
From:	Dr Andrew Old, Deputy Director-General, Public Health Agency Te Pou Hauora Tūmatanui
For your:	Information

Purpose of report

1. This memo proposes a process for undertaking a New Zealand Bill of Rights Act 1990 (NZBORA) assessment of the 14 Director-General of Health directions to fluoridate that were made in July 2022. Such an assessment is a requirement, directed by the February 2024 High Court judgment.

Background and context

2. In June 2023, New Health New Zealand Inc. (New Health) filed legal proceedings challenging the 2022 directions made by the Director-General of Health to 14 local authorities to fluoridate some, or all, of their drinking water supplies.
3. In November 2023 the Judge found that the right to refuse medical treatment that is provided for in section 11 of the NZBORA should have been expressly considered by the Director-General of Health when considering each direction. The Judge found that this is a procedural duty.
4. The Judge kept the directions in place. However, in February 2024, the Judge directed the Director-General of Health to assess whether each of the 14 directions made in 2022 was, in terms of section 5 of the NZBORA, a reasonable limit on the right to refuse medical treatment prescribed by law.
5. The Public Health Agency (PHA) is working with Health Legal and Crown Law to determine the implications of the February 2024 High Court direction, including identifying and delivering each element of the particular NZBORA assessment that is required. It is of particular significance here that the Judge ruled that the Director-General of Health's NZBORA analysis should take into account the views of New Health.

Process for the NZBORA analysis

6. In 2018, the Supreme Court considered at judicial review the South Taranaki District Council's decision to fluoridate drinking water. It ruled that fluoridation of water does engage section 11 of the NZBORA (the right to refuse medical treatment). The judgment uses the common

framework applicable to any analysis of whether a particular limitation on a right is a justified limit, under section 5 of the NZBORA. That framework consists of the following:

- a. Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
 - b. Is the limiting measure rationally connected with its purpose?
 - c. Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
 - d. Is the limit in due proportion to the importance of the objective?
7. The PHA is using this framework to structure its analysis of whether each of the 14 directions made in 2022 is a justified limitation on the NZBORA.
 8. The PHA considers that adherence to the High Court Judge's direction that the Director-General of Health's NZBORA analysis should take into account the views of New Health requires consideration to be given to New Health's submission that the safety and efficacy of community water fluoridation is not supported by the scientific evidence.
 9. As you are aware the Royal Society Te Apārangi published a comprehensive review in 2014 assessing the health effects of community water fluoridation. This review found that there were no adverse effects of fluoride of any significance arising from fluoridation at the levels used in Aotearoa New Zealand. In 2021, the Office of the Prime Minister's Chief Science Advisor considered primary research and comprehensive reviews published subsequently and found that the conclusions of the 2014 review remain appropriate.
 10. Manatū Hauora's Chief Science Advisor, in collaboration with the PHA's Intelligence, Surveillance and Knowledge Group, is presently assessing whether, in light of the scientific evidence published since 2021, the conclusions reached by 2014 and 2021 reviews remain appropriate. As part of its process, the current Manatū Hauora evidence update will also seek independent expert peer review and will take that into account in making its findings.

Next steps

11. The timeframe for the PHA to complete the NZBORA analysis for your consideration is largely dependent on the completion date of Manatū Hauora's current evidence update. The PHA's present estimate is that it will provide you with advice by the end of June 2024 to support your NZBORA assessment of each direction.

Ongoing work with the local authorities directed to fluoridate

12. Given that the High Court has left in place the current directions to fluoridate, the PHA is continuing to provide support to local authorities that are implementing their directions. This includes by providing funding for the capital works. For example, Manatū Hauora signed funding contracts with Whangarei District Council in November 2023 and Tararua District Council in December 2023. The PHA is also currently finalising contracts with Tauranga District Council, Kawerau District Council, Hastings District Council and Horowhenua District Council.
13. The PHA is aware that a number of local authorities have passed or are close to reaching their compliance dates and may be unable to meet these dates due to circumstances outside of their control. The PHA's February 2024 memo to you outlining the recent High Court

decision, stated that we would provide you further advice on whether any compliance dates for other local authorities should be amended.

14. The PHA recommends you continue to consider any requests for changes to compliance dates on a case-by-case basis.

Recommendations

It is recommended that you:

1.	Note	that the PHA has established a process for your reconsideration of the 14 directions to fluoridate, against the NZBORA	Noted ✓
2.	Note	that the PHA anticipates it will provide the related advice to you by the end of June 2024	Noted ✓
3.	Note	that the PHA will provide you with advice on any local authority requests to change to compliance dates as these arise	Noted ✓

Signature _____



Date: _____

4/4/24

Dr Diana Sarfati
Director-General of Health
Te Tumu Whakarae mō te Hauora

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