

2 November 2016

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Health (Fluoridation of Drinking Water) Amendment Bill

Purpose

1. We have considered whether the Health (Fluoridation of Drinking Water) Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with the rights set out in s 10 (right not to be subjected to medical or scientific experimentation), s 11 (right to refuse to undergo medical treatment) and s 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

The Bill

3. The Bill amends the Health Act 1956 ('the Act') by transferring decision-making on fluoridation from territorial local authorities to District Health Boards ('DHBs'). The Bill sets out the factors that DHBs must consider when directing a local government drinking-water supplier to add or not add fluoride to drinking water supplied by that supplier.

Consistency of the Bill with the Bill of Rights Act

Section 10 – Right not to be subjected to medical or scientific experimentation

4. Section 10 of the Bill of Rights Act affirms that every person has the right not to be subjected to medical or scientific experimentation without that person's consent. Experimentation concerns a medical intervention that aims to lead to a new standard of treatment.¹
5. The practice of water fluoridation is supported by New Zealand research and a large body of international evidence. We therefore do not consider that water fluoridation constitutes medical experimentation.

Section 11 – Right to Refuse to Undergo Medical Treatment

6. Section 11 of the Bill of Rights Act affirms that everyone has the right to refuse to undergo medical treatment. A broad and purposive interpretation of the section would conclude that s 11 not only encompasses a right to refuse medical treatment, but also a

¹ Deutsch E (1989) "Medical experimentation: International rules and practice" in (1989) 19 *VUWLR* 1, 1.

right not to be medically treated without consent. In order for a statutory power to be consistent with s 11, any intrusion into the right must be justified by a sufficiently compelling public interest.

7. Clause 8 of the Bill introduces a new s 69ZJA into the Act to confer a power on DHBs to direct drinking-water suppliers to add fluoride to drinking water within the DHB's geographical area at a level specified by the DHB.
8. In 2014 the High Court concluded that water fluoridation does not constitute medical treatment, on the basis that:²
 - a. medical treatment involves direct interference with an individual's body or state of mind, and
 - b. medical treatment does not extend to public health interventions imposed on a particular locality or the population at large.
9. The High Court found that there was no material distinction between fluoridation and other established public health measures to disinfect water.³
10. The High Court also held that, even if water fluoridation were to be considered medical treatment, the benefits of fluoridation are sufficiently important to justify curtailment of the right to refuse medical treatment. Additionally, the Court stated that water fluoridation is a proportionate response to the objective of preventing tooth decay and improving oral health.⁴
11. Similarly, we do not consider fluoridation to be medical treatment. However, even if it was, we consider that any limitation of the right to refuse medical treatment in s 11 of the Bill of Rights Act is justified under s 5 of the Bill of Rights Act because:
 - a. the objective of preventing or reducing tooth decay and improving oral health across the community is sufficiently important
 - b. there is a rational connection (supported by significant New Zealand and international research) between fluoridation of drinking water and the objective of preventing or reducing tooth decay and improving oral health
 - c. significant evidence demonstrates that water fluoridation at appropriate levels is within the range of reasonable alternatives to address the problem of tooth decay, and
 - d. there is a sufficient evidential basis to support the conclusion that the significant advantages of water fluoridation clearly outweigh the increased risk of fluorosis associated with it.
12. The Bill also provides adequate safeguards to mitigate any intrusion into the right to refuse medical treatment and to ensure that DHBs do not exercise the new power unreasonably. New s 69ZJA requires DHBs to consider scientific evidence on the effectiveness of fluoride for reducing dental decay, the number of people who will be

² *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395 at [118].

³ *Ibid.*

⁴ *Ibid* at [101] – [111].

affected by the decision to fluoridate or not fluoridate the drinking water, and whether the benefits of adding fluoride to the drinking water outweigh the financial costs.

13. For these reasons, we conclude that any limits to the right to refuse to undergo medical treatment imposed by the Bill are justified.

Section 25(c) – Right to be presumed innocent until proved guilty

14. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.
15. The Bill creates two new strict liability offences:
 - a. failing to comply with fluoridation direction (cl 9), and
 - b. ceasing to add fluoride without direction by the relevant DHB (cl 10).
16. Strict liability offences raise a prima facie issue of inconsistency with s 25(c) because, once the prosecution has proven the defendant committed the act in question, the defendant must prove a defence, or disprove a presumption, on the balance of probabilities in order to escape liability. In the case of strict liability offences, a defendant who is unable to prove a defence, or disprove a presumption, could be convicted even if reasonable doubt exists as to their guilt.
17. The offences in the Bill are public welfare regulatory offences designed to protect the general public from possible harm and to regulate an industry. The offence provisions provide only for the imposition of a fine and not a sentence of imprisonment. Courts have previously been prepared to impose an offence of strict liability for provisions of this kind.
18. These offences exist to encourage compliance with a DHB's direction, the underlying objective being protection of the general public's oral health. It is a defence to a prosecution under these offences if a drinking-water supplier can show that it did not intend to commit the offence and that it took all practicable steps to prevent the commission of the offence. As these are matters that would fall peculiarly within the knowledge of the drinking-water supplier, it is reasonable to require the drinking-water provider to prove a lack of intent and fault in order to escape liability.
19. We therefore consider that the strict liability offences in the Bill appear to be justified.

Conclusion

20. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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