

Legal Aspects and Decision Making

Key points

- In England local strategic health authorities are responsible for deciding whether fluoride should be added to the water supplies consumed by their populations.
- If formal consultation demonstrates local support, the strategic health authority may then request the relevant water supplier to make the necessary technical arrangements.
- Recent changes to the legislation for England and Wales mean that, in future, water suppliers will be obliged to fluoridate supplies when asked to do so by a strategic health authority in England, or, in Wales, the National Assembly.
- New regulations on the detailed requirements on consultations are in preparation.

Flawed legislation

In the United Kingdom decisions about fluoridation have always been made locally. Prior to 1974 decisions were made by local authorities. Responsibility passed to the NHS when local government and the NHS were reorganised in 1974. The 1985 Water (Fluoridation) Act (subsequently incorporated into the Water Industry Act 1991) [1, 2], made health authorities in England and Wales and Health Boards in Scotland responsible. In Northern Ireland, the relevant legislation entrusts the decision to area health and social services boards, and ultimately to the Department of the Environment.

In theory, the 1985 Act made decision-making on fluoridation a straightforward process. In practice however, the Act proved to be defective as it allowed water suppliers to refuse health authorities' requests for fluoridation – even where strong local support for fluoridation had been demonstrated. As a result, no new fluoridation schemes were started under its provisions.

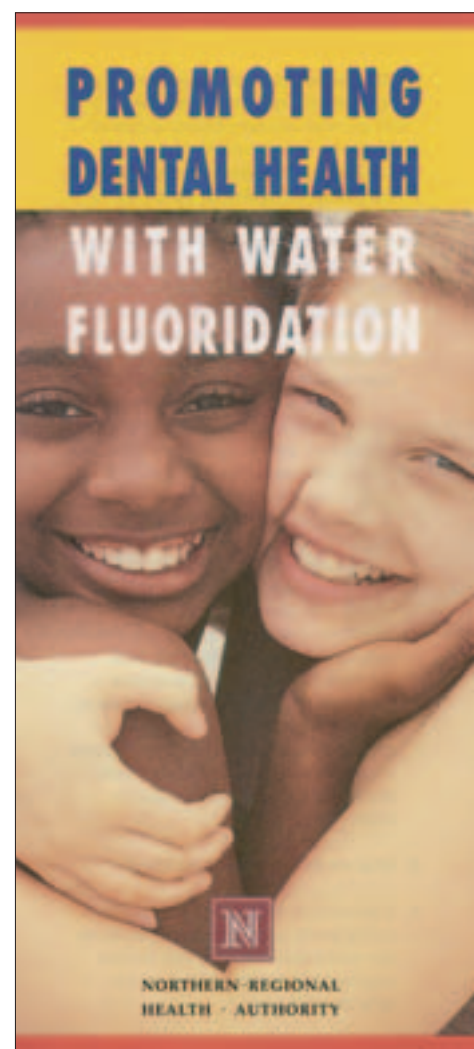
The wording of the relevant clause stated that, when requested by a health authority, the water supplier '*may, while the application remains in force, increase the fluoride content of the water supplied by them within that area*' (our emphasis). Following unsuccessful attempts to implement fluoridation under the Act by many health authorities across the UK (as outlined below), in 1998 a judicial review confirmed that the 1985 Act did indeed give water companies discretion on whether or not to fluoridate [3]. As a result of the legislation failing to deliver what had been intended Parliament passed new legislation in 2003 [4].

Futile attempts to implement fluoridation

As has been discussed in Section 2 of this report, severe tooth decay is a particular problem among young children in disadvantaged communities, and tooth extraction is the most common form of treatment in such young children. Therefore, in light of the proven benefits of water fluoridation, and the absence of evidence of harm, many health authorities have been doing their best to make the 1985 Act work. Between 1987 and 1992, parts of the UK where they have sought to use the Act to obtain or extend fluoridation include:

- The former North Western Health Region;
- The former Mersey Health Region;
- The former Northern Health Region;
- The former Yorkshire Health Region;
- The former Trent Health Region;
- The former West Midlands Region;
- The former Wessex Health Region;
- Scotland;
- Wales;
- Northern Ireland.

In all cases, where the formal consultation and decision-making processes have been concluded and written applications made to the appropriate



Leaflet used during the 1994 public consultation about fluoridation in the North East

water suppliers, either a negative or a non-committal response has been received. Perhaps the most interesting and well documented example is in the North East of England where Northumbrian Water has refused fluoridation applications from eight health authorities – despite the support of the general public, 19 of the 24 local authorities concerned, and 10 of the 11 Community Health Councils, and the fact that the company already fluoridates supplies for around 1 million of its customers.

In 1998 a judicial review of Northumbrian Water's decision not to fluoridate supplies at the request of Newcastle and North Tyneside Health Authority (and the seven other health authorities of the region) confirmed that the 1985 Act did give water companies discretion on whether or not to fluoridate [3, 5].

Ruling against the Health Authority, the judge, Mr Justice Collins, said,

'In the exercise of its discretion, the respondent water company was entitled to reject the applicant health authority's proposal to extend the artificial fluoride in its water supplies. It did not have a public body duty and was entitled to take the interests of its shareholders into account'. He went on to say 'with some regret' that it was open to the water company to adopt the attitude that it had.

Justice Collins indicated that a change in the law would be necessary to rectify the situation. And, indeed, the 'shortcomings in the effectiveness of the legislation' had been acknowledged earlier that year by the, then, Public Health Minister, Tessa Jowell. In a Commons debate she described the situation as 'a mess' [6], and promised action by the Government to find a 'workable' way forward. As outlined later in this Section, in November 2003 the necessary legislation to remove the water suppliers right to refuse to fluoridate was passed by Parliament [7].

Scotland

In Scotland the 1985 Water (Fluoridation) Act, and subsequent guidance issued as NHS Circular No 1991(GEN)16, remain in force. The Act and guidance give Health Boards the power to decide whether or not to apply for fluoridation of supplies in their area, and set out the procedure to be followed in using that power. Publicity and consultation are an important part of the process.

Scotland now has its own Parliament, with health among its devolved powers. A further

major difference between England and Scotland is that Scottish water supplies are under public, not private, ownership which since February 2001 has been a single water authority – Scottish Water. Unlike the privatised water industry in England and Wales, Scottish Water remains a publicly owned organisation directly answerable to the Scottish Parliament.

Northern Ireland

The recent Water Act (2003) does not cover Northern Ireland. Water supplies in Northern Ireland are not privatised and the 'may/shall' wording issue that has dogged fluoridation in England and Wales has not affected the province.

Legislation enabling fluoridation of the public water supplies in Northern Ireland was updated in 1987. The Water Order (1987) empowers the Department of the Environment (NI), on application from a Health Board, to fluoridate the water supplied within the area (or part of the area) of that Board [8]. Before making an application to fluoridate, Boards are required to:

- Publish details of their proposal;
- Consult district councils for the area affected by the proposal;
- Obtain the approval of the Department of Health and Social Services.

There are currently no water fluoridation schemes in Northern Ireland. A consultation exercise took place in 1996/7 with all four Health Boards proposing schemes. Twenty-five out of the 26 district councils opposed the schemes. Although the support of the councils is not required by the Order, in practice it was not possible to proceed in the face of this level of opposition.

The publication of the interim report of the North-South Children's Oral Health Survey[9] has reactivated the fluoridation debate within the Department of Health (NI) but the defeat of 1996/7 has left deep wounds. It remains to be seen whether progress made on starting new schemes in England will have any effect on the situation in Northern Ireland.

New legislation

Since 1996, the National Alliance for Equity in Dental Health (an alliance of over 100 leading health and voluntary organisations including the British Dental Association, the British Medical Association, and the British Fluoridation Society) has worked with Water UK (the water industry's trade organisation) to bring about the 2003 change in the law. Whilst remaining neutral on

fluoridation *per se*, Water UK made clear that it wanted the Government to act to enable the long-standing impasse between the industry and the NHS over fluoridation to be resolved. In Spring 2003 Water UK issued a news release stating that the industry strongly supported a proposed amendment to the Water Industry Act 1991. The news release left no doubt that the water industry as a whole believed that water fluoridation is ‘a health issue’ and that ‘current discretion for water companies to agree to an application from a health authority should be removed’. In the news release Water UK Chief Executive, Pamela Taylor said:

‘The current situation is frustrating for everyone with an interest in this important issue. Water UK wants to see the stalemate resolved and decision-making placed securely with health professionals, where it belongs.’

Such a statement from the industry made it clear to all concerned that without new legislation there could be no progress on fluoridation; however, equally importantly, it made clear that the industry as a whole welcomed the proposed change, and would support the Government’s efforts to change the law – provided that the position of water companies is ‘properly safeguarded in respect of operating arrangements, costs and indemnities’.

From the outset the Alliance campaign had been actively supported by several Members of Parliament, and in December 2002 Andy Burnham, Labour MP for Leigh, tabled an Early Day Motion calling for an amendment to the Water Bill that would require water companies to fluoridate supplies where health authorities have demonstrated that there is strong local support. His motion was signed by 149 MPs.

On the 9th of July 2003, encouraged by the water industry’s attitude, and the support of backbench MPs on all sides of the Commons, the Government put down an amendment to the Water Bill then being discussed in the Lords[7]. In a free, unwhipped, vote Peers supported the Government’s amendment by a convincing 153 votes to 31, and the amendment was incorporated into the Bill. At the Commons Committee Stage the amendment was supported by 14 votes to 6, and on Monday 10 November 2003 in a free vote MPs voted overwhelmingly (284 votes to 181) in support of fluoridation. The Water Act 2003 became law on 20th November 2003 [4]. On fluoridation, Section 58 says, *inter alia*,

‘If requested to do so by a relevant authority, a water undertaker shall enter into arrangements with the relevant authority to increase the fluoride content of the water supplied by that undertaker to premises specified in the arrangements’.

The replacement of the word ‘may’ by the word ‘shall’ was the critically important change.

Section 58 also put new emphasis on the requirement for consultation before any new fluoridation scheme is requested (or an existing scheme terminated). A new section on consultation confirmed that Regulations are to be drawn up about the process to be followed on consultation and assessment of public opinion. Furthermore, indicating how important public consultation is, such regulations must be ‘*laid before, and approved by a resolution of, each House of Parliament*’ or, in the case of Wales, ‘*The power of the Assembly to make regulations ...shall be exercisable by statutory instrument*’.

The Government has always indemnified water companies in respect of liabilities that they may incur in respect of fluoridation, and the new Act provided for Regulations to be drawn up governing future indemnities.

The way forward: public information and consultation

The 1985 Act and associated guidance (HC(87)18) required as a *statutory minimum* that health authorities:

- publish their proposals on two consecutive weeks in newspapers with the largest circulation in the relevant areas, mentioning by name all the districts to be fluoridated and inviting comments; and
- consult the relevant local authorities and community health councils.

The consultation period had to last for at least three months, and health authorities had to publicly consider the views which emerged.

However, the guidance made clear that a health authority might consult any other bodies, or use other means of sounding out local opinion it considered appropriate to ‘*ensure that no significant section of the population can reasonably complain that they did not have an opportunity to learn about the proposals*’. A good public information and consultation strategy has long been considered the cornerstone of decision-making about water fluoridation proposals, and,

in practice, health authorities have tended to go beyond the required minimum in order to maximise public involvement in the process.

As already noted, in the early to mid-1990s, health authorities in the North East and West Midlands of England mounted *very vigorous information campaigns* in support of fluoridation and sought the maximum possible response from relevant local organisations and the public. Successful publicity techniques used in one or both of these campaigns, included:

- pre-consultation *information campaigns* (through the media and through leaflets and posters widely distributed to dental surgeries, GP practices, health centres, clinics, hospital out-patient departments, libraries) on the state of local dental health, inequalities between different geographical areas or sections of the community, and the options for reducing those inequalities;
- offers to make *presentations on the state of dental health* to elected representatives, community organisations, parents' groups, schools and other interested bodies;
- at the commencement of the publicity and consultation exercise, *circulation to local authorities, Community Health Councils, MPs and town or parish councils of an information pack* containing copies of the formal consultation document supported by detailed background information and scientific evidence of the dental benefits and safety of fluoridation;
- an *initial press conference to announce the proposals*, followed up by a series of news releases and editorial features to explain the issues in greater detail and deal with queries and concerns which are raised during the three month consultation period;
- a willingness to supply *well-informed spokespersons for radio and television programmes and debates*;
- extensive circulation of a *summary version of the consultation document in leaflet form* on a door-to-door basis (subject to feasibility and cost) as well as to dental surgeries, GP practices, health centres, clinics, hospitals, libraries, council offices, schools, colleges and other public places;
- insertion of *advertising features in major local newspapers* to summarise the key points from the consultation document;
- *poster displays* in NHS premises;
- independently conducted *opinion surveys* asking a demographically representative sample of the population concerned whether they think fluoride should be

- added to water to reduce tooth decay;
- *briefing materials* distributed widely to health care professionals in order to enable them to respond to their patients' questions about fluoridation;
- establishment of a *free telephone information line* for people to obtain further information;
- provision of *speakers* on request for public meetings arranged by local community organisations to discuss the merits of fluoridation.

Future consultations

We believe that requirements for undertaking future consultation exercises on fluoridation should include all or most of the above publicity techniques to ensure that people are well informed about what is being proposed. However, other techniques that might also be included are:

- *focus groups* comprising a cross section of people from the communities affected, or a cross section of users of dental services or parents of children;
- consultation meetings with the *water company's customer liaison panel*;
- *inter-active web sites* through which people can seek information and/or record their views.

The new Act makes clear that the bodies responsible for future consultations about fluoridation will be, in England, Strategic Health Authorities (SHAs), and, in Wales, the Assembly. In recent times the NHS has developed considerable expertise in involving the public in large-scale consultation exercises which have informed the establishment of the Commission for Patient and Public Involvement in Health, and SHAs have played an important role in these consultations. They are therefore both knowledgeable about the health needs of their populations, and experienced in the process of engaging local stakeholders in consultations and drawing out the issues.

At the time of writing, the new Regulations governing fluoridation consultations were in preparation. The Government's declared intention to strengthen and make more explicit the publicity and consultation process by developing regulations that will:

- provide SHAs with appropriate guidance relating to public consultations about proposals for new fluoridation schemes;
- ensure that such guidance is based on best practice and the most up-to-date methods, satisfies the requirements of the water industry, and, as far as possible, meets the concerns

- of other interested bodies such as local authorities, professional and consumer groups;
- ensure that consultations provide communities with evidence-based information such that all can understand and are given an opportunity to participate;
 - ensure that consultations are capable of ascertaining the wishes of the population as a whole – particularly those in less privileged communities who have most to gain from fluoridation, but who often do not participate in the democratic process;
 - lay down the process that must be followed by SHAs, and the requirements that must be satisfied before new fluoridation schemes can go ahead.

The concept of involving local communities in policy-making has developed enormously since the late 1990s in both local government and the health service [10-12]. As a result improved methods of conducting public consultations have been developed. Simple ballots or referendums are no longer considered adequate to ensure that consultations range sufficiently widely to take in all shades of opinion – particularly on issues as complex as water fluoridation. Instead, a basket of consultation methods would be necessary [13]. Future consultations on fluoridation proposals should therefore use modern validated methods which provide a credible means of assessing the views of the local population.

In addition, since the 1990s, the statutory mechanisms for involving the local community in health policy have altered. Community Health Councils have been abolished, and the Commission for Patient and Public Involvement has been set up at a national level to ensure that patients and the public have a strong voice in all matters that affect their health and health services. Under the Commission's auspices, Patient and Public Involvement Forums are being established across England, attached to, but independent of, every NHS Trust and Primary Care Trust. They will be made up of patients and members of the public who will have powers to influence local health issues. The 'Our Health' network is also being created, to provide a two-way channel of communication between the PPI Forums and the communities they serve.

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