

EXPLANATORY MEMORANDUM TO
THE WATER FLUORIDATION (CONSULTATION) (ENGLAND) REGULATIONS
2022

2022 No. 1163

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care (DHSC) and is laid before Parliament by Command of His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument relates to the addition of fluoride to drinking water to reduce the incidence of tooth decay. The Health and Care Act 2022 (“the 2022 Act”) amends the Water Industry Act 1991 (“the 1991 Act”) to transfer responsibility for introducing new water fluoridation schemes, and for varying or terminating existing schemes, from local authorities to the Secretary of State. Accordingly, the duty to conduct public consultations in respect of water fluoridation will also transfer to the Secretary of State. This instrument sets out conditions for the conduct of consultations and decision-making on water fluoridation proposals following the transfer of responsibility to the Secretary of State. This instrument also revokes the current regulations, the Water Fluoridation (Consultation) (England) Regulations 2013, which made provision for local authorities to consult in relation to fluoridation arrangements.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 DHSC relies on section 13 of the Interpretation Act 1978 in relation to section 175(5) of the 2022 Act. As discussed in more detail below, section 175(5) of the 2022 Act will amend section 89 of the 1991 Act to apply section 89 in relation to England (it currently only applies in relation to Wales, though not in force). This instrument will be made in exercise of the powers in section 89 of the 1991 Act, as amended by the 2022 Act.
- 3.2 Other amendments made by sections 175 and 176 of the 2022 Act will set out, in conjunction with the provision made by this instrument, the complete legislative framework for the water fluoridation regime in England. DHSC intends to commence sections 175 and 176 of the 2022 Act to coincide with the coming into force of this instrument, therefore, this instrument is stated to come into force on the day after the date on which it is made. This instrument does not impose duties on persons which are significantly onerous than before, nor does it require them to adopt different patterns of behaviour such as would require a longer period between making and coming into force.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

5.1 The Parliamentary Under-Secretary of State for Primary Care and Public Health, Neil O'Brien MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Water Fluoridation (Consultation) (England) Regulations 2022 are compatible with the Convention rights.”

6. Legislative Context

6.1 Sections 175 and 176 of the 2022 Act will amend Chapter IV of Part III of the 1991 Act to transfer responsibility for water fluoridation from local authorities to the Secretary of State. This will allow the Secretary of State to introduce new schemes and to vary or terminate existing schemes.

6.2 In particular, section 175(5) amends section 89 of the 1991 Act so that it applies in relation to England (as well as in relation to Wales, as currently). Section 89 deals with the consultation requirements for the proposed introduction of new fluoridation schemes, and variations and terminations of existing schemes.

6.3 Section 89(1) will require the Secretary of State to consult in accordance with regulations made by the Secretary of State, and to comply with requirements set out in such regulations, before taking any of the following steps (as set out in section 89(2)) in relation to fluoridation:

- requesting a water undertaker to enter into new fluoridation arrangements;
- requesting a water undertaker to vary any such arrangements in, or except in, prescribed circumstances or cases;
- giving notice to a water undertaker to terminate such arrangements;
- maintaining any such arrangements in prescribed circumstances.

6.4 Section 89(3) will provide that the regulations made under section 89(1) must include (a) provision about the process which the Secretary of State must follow for the purposes of complying with the consultation requirements and (b) provision about the requirements which must be satisfied (with respect to the outcome of that process or otherwise) before any of the steps listed in paragraph 6.3 above can be taken.

6.5 This instrument sets out the requirements and process referred to in section 89(1) and (3). It also prescribes the circumstances in which requesting a water undertaker to vary fluoridation arrangements will trigger the consultation requirements as referred to in section 89(2).

6.6 The affirmative resolution procedure applies to this instrument by virtue of section 213(1A) of the 1991 Act, which requires such procedure for the first exercise of the power to make regulations under section 89. Section 175(9) of the 2022 Act provides that the reference in section 213(1A) to the first exercise of the power to make regulations under section 89 is to be read as a reference to the first exercise of the power to make regulations under that section as amended by section 175(5) of the 2022 Act.

7. Policy background

What is being done and why?

- 7.1 Tooth decay is a significant, yet largely preventable, public health problem that can affect people at all stages of life and can have a considerable impact on the NHS. Tooth decay is the most common oral disease in children and there is a strong association with deprivation leading to disparities, with prevalence of tooth decay amongst 5-year-olds at a local authority level ranging from 9% in East Sussex to 51% in Blackburn with Darwen.
- 7.2 There is strong scientific evidence that water fluoridation is a safe and effective public health intervention to reduce tooth decay and improve oral health inequalities.
- 7.3 As a result of the feedback received during our recent consultation, set out in paragraph 10 below, any future consultation carried out under this instrument will not be restricted to individuals affected and/or bodies with an interest. The Secretary of State will, however, be required to consider, when deciding whether to proceed with the fluoridation proposal in question, whether additional weight should be given to representations made by individuals who would be affected by the proposal and/or bodies with an interest in the proposal. Individuals affected by the proposals are those who reside or work in the area subject to the proposal.
- 7.4 Since 2013, local authorities have had the responsibility to initiate new water fluoridation schemes or to propose that existing schemes are varied or terminated. The transfer of responsibility for water fluoridation to the Secretary of State recognised that local authorities have reported difficulties with the current process and there is the added complication that local authority boundaries are not coterminous with water flows. If the water supply crosses into neighbouring authorities it requires the involvement of several authorities in the development of schemes, which may be complex and burdensome.
- 7.5 This instrument supports the requirement in primary legislation for the Secretary of State to consult before taking particular steps (see paragraph 6.3 above) in relation to water fluoridation.
- 7.6 Given the ongoing role of local authorities in oral health improvement the regulations set down a requirement to give notice of any proposals to a local authority whose area falls either partly or wholly within a proposal so that they can make representations through the consultation process. Notice may also be given to any other such person or body as the Secretary of State considers appropriate, this may include, for example, NHS bodies such as NHS Trusts and Integrated Care Boards (as introduced by the 2022 Act).
- 7.7 For the purposes of proposed variations of existing schemes, consultation in accordance with the regulations will be required where such variation affects the boundary of the area to which the fluoridation arrangements apply and would bring in or exclude more than 20 per cent of houses within the area of an existing scheme.
- 7.8 It is not intended that consultations will be a referendum but that a range of factors will be taken into account when deciding whether to proceed with a proposal following consultation including, but not limited to, support for any proposal, cogency of the argument made by respondents, available data or evidence on health need and the impact on health and wellbeing of the proposals, scientific evidence and the associated costs.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 This instrument does not amend or consolidate any other instruments.

10. Consultation outcome

10.1 DHSC ran a public consultation between 8th April and 3rd June 2022, seeking views on the process for future water fluoridation consultation, in order to inform this instrument.

10.2 The consultation received 1228 responses from a range of individuals (94%) and organisations (6%).

10.3 When asked whether future consultations should be limited to individuals living in areas directly affected and bodies with an interest, 65% of organisations agreed, 34% disagreed and 1% did not know. Of individuals that responded 73% disagreed, 23% agreed and 3% did not know.

10.4 When asked whether consultation responses should be considered from individuals living in areas not directly affected of individuals that responded 80% agreed, 17% disagreed and 4% did not know. Of organisations that responded 38% agreed, 58% disagreed and 4% did not know.

11. Guidance

11.1 Given that central government will be responsible for conducting consultations in line with these regulations, no guidance is intended.

12. Impact

12.1 Given that consultations will be run by central government there is no impact on business, charities or voluntary bodies in relation to these regulations.

12.2 The 2022 Act will, when commenced, transfer responsibility for water fluoridation from local authorities to the Secretary of State. This included the transfer of the duty to consult on future water fluoridation proposals. The Impact Assessment prepared for the Health and Care Bill can be found here: <https://www.gov.uk/government/publications/health-and-care-bill-combined-impact-assessments>. A separate impact assessment has not been prepared for these regulations.

13. Regulating small business

13.1 This instrument does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 This instrument does not include a statutory review clause since it governs how central government must consult in relation to water fluoridation proposals and does not regulate business activity. There are currently no specific plans to review this legislation.

15. Contact

- 15.1 Helena Maxwell-Hyde and Daisy Jones at the Department of Health and Social Care, email: Helena.Maxwell-Hyde@dhsc.gov.uk/telephone: 02079724068; email: Daisy.Jones@dhsc.gov.uk/telephone: 01132545589, can be contacted with any queries regarding this instrument.
- 15.2 Alette Addison, Deputy Director for Pharmacy, Dental & Eye Care, at the Department of Health and Social Care can confirm that this explanatory memorandum meets the required standard.
- 15.3 Neil O'Brien, Parliamentary Under-Secretary of State for Primary Care and Public Health at the Department of Health and Social Care can confirm that this explanatory memorandum meets the required standard.