



Healthy Lives, Healthy People:
**Consultation on the arrangements
for consideration of proposals on
the fluoridation of drinking water**

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Contents

Contents	1
Executive Summary	4
Scope of consultation document	5
Proposed options in consultation document	6
How to respond	6
Introduction to fluoridation and the new public health system	7
Public Health.....	7
Fluoridation.....	7
Current system.....	9
Relevant provisions in Health and Social Care Act 2012	11
Overview.....	12
The conduct of consultations	13
Participation in initial decision-making on a fluoridation proposal	15
Preliminary consultations.....	15
Notification process for the proposing local authority.....	15
Reaching a decision on whether to consult.....	16
Background.....	16
Arrangements for a decision on whether to proceed to consultation.....	17
Proposal.....	17
Conditions on the decision to proceed with a consultation.....	18
Proposal.....	19
Committee membership and procedures	19
Introduction.....	20
Membership of a decision-making committee.....	21
Background.....	21
Proposal.....	22
Minimum and Maximum Numbers of Members of Joint Committees.....	22
Background.....	23
Proposal.....	23
Varying approach based on number of local authorities involved.....	23
Background.....	23
Proposal.....	24
Fluoridation decision-making, the consultation procedure and assessing public opinion	26

Introduction	26
Consultation process.....	27
Background.....	27
Proposal.....	28
Information provided to the public	30
Background.....	30
Proposal.....	32
Evidence Base – Role of Public Health England.....	32
Background.....	32
Assessment of public opinion.....	34
Background.....	34
Reaching a decision on whether to proceed with a fluoridation proposal.....	35
Background.....	35
Proposal.....	36
Seeking agreement to fluoridate	38
Seeking agreement to fluoridate (two or three local authorities)	39
Proposal.....	39
Seeking agreement to fluoridate (four or more local authorities).....	40
Proposal.....	41
Variation, termination and maintenance of fluoridation arrangements	44
Circumstances where the Secretary of State may vary or terminate arrangements without a request from a local authority.....	45
Proposal.....	46
Variation of arrangements.....	47
Proposal.....	48
Maintenance of existing arrangements	48
Proposal.....	49
Termination of fluoridation schemes (process).....	50
Termination of fluoridation schemes (Timescales).....	52
Proposal.....	52
Consultation Questions	54
Comments on the consultation process itself.....	57
Confidentiality of information	58
Summary of the consultation response	58
Glossary.....	59

ANNEX A: Overview of the Health and Social Care Act 2012 provisions	62
Overview of Health and Social Care Act 2012 provisions: initial participation in decision-making (sections 88C, 88D, 88J and 88K).....	64
Overview of the Health and Social Care Act 2012 provisions: committee membership and procedures (sections 88F and 88M).....	65
Overview of Health and Social Care Act 2012 provisions: fluoridation decision-making (section 88E and 88L).....	65
Overview of Health and Social Care Act 2012 provisions: variation, termination and maintenance of arrangements (sections 88I to 88O).	66
ANNEX B: Summary of Action Points from the Equality Analysis on the Fluoridation Regulations	68

Executive Summary

The White Paper, *Healthy Lives, Healthy People*¹, described a new era for public health with a higher priority on the promotion of good health and wellbeing and dedicated resources to support these objectives. As part of this new era, local authorities will have a new role in improving the health of their population as part of a changed system with localism at its heart. Their new public health responsibilities will be supported by directors of public health and a ring-fenced budget. They will be assisted by a new integrated public health service, Public Health England, which will be the principal advisor on health to the local authority and will protect the population from any threats to health and drive delivery of improved outcomes for the population.

The new system means that the existing framework for consultation on fluoridation schemes needs to be changed. The piece of legislation that introduces this new system, the Health and Social Care Act 2012 ('the 2012 Act'), gained royal assent on 27 March 2012 and the large part of the changes it introduces will come into effect on 1 April 2013. The effect of the Act is that the Secretary of State for Health has powers to make regulations in relation to consultation and decision-making on new and existing fluoridation proposals.² This is a key focus of this document.

Importantly, the 2012 Act also transfers responsibility for proposing fluoridation schemes and conducting consultations on such schemes from Strategic Health Authorities, which will be abolished from 2013, to local authorities. Instead of having one Strategic Health Authority making decisions on fluoridation, local authorities will be required to undertake Joint Strategic Needs Assessments³ that will determine whether it is appropriate to draw up proposals for all or part of their populations to receive fluoridated water.

The new legislative provisions are not necessarily intended to increase the likelihood of fluoridating water supplies. The Department of Health's aim is simply to put in place a fair and practical way to re-allocate and amend powers for the fluoridation of water. This will provide for the maintenance of existing fluoridation schemes and consideration of proposals for new schemes or proposals to vary or terminate existing schemes.

The Department's view is that it is appropriate that decisions on fluoridation are locally determined. Local authorities, as democratically accountable bodies, are

¹ Department of Health (2010) *Healthy Lives Healthy People: our strategy for public health in England*, http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_121941

² To note, the 2012 Act amends the 1991 Water Industry Act in the main. The only powers for the Secretary of State for Health under the 2012 Act are in section 37.

³ For further information on Joint Strategic Needs Assessments, see the glossary section to this document.

viewed as being best placed to make a decision on behalf of their local population. As well as improving the accountability within the system, the responsibility fits well with local authorities' wider public health functions. Many water supply zones cover a larger area than, or do not map the area exactly to that of a single authority therefore it is likely that under the new arrangements, multiple local authorities will need to come together to make joint decisions on fluoridation.

Scope of consultation document

The consultation document is split into four broad themes:

- participation in initial decision-making on a fluoridation proposal;
- committee membership and procedures;
- fluoridation decision-making (including consultation and ascertaining opinion); and
- variation, termination and maintenance of fluoridation arrangements.

The scope of this consultation is confined to the *process* for considering proposals for fluoridation schemes. We are not therefore consulting on the perceived benefits or disadvantages of fluoridation. We are also not consulting on the level at which (national or local) decisions about fluoridation should be taken. Instead, we are seeking views on specific questions relating to the conduct of consultations on fluoridation proposals to ensure that the legislation and guidance supports the process.

This document deals with regulations that we propose to make on the legal and technical aspects of the process for considering proposals for the fluoridation of drinking water as well as for the variation and termination of existing fluoridation schemes. However, we also recognise that there may be the option to include further detail in guidance or other publications.

The (regulatory) impact assessment is accompanied by an equality analysis which assesses the proposed changes in line with the public sector equality duty.

This consultation document is an opportunity for the Department to obtain the views of local authorities, NHS commissioners, public health professionals, service providers, equality representatives and all other interested parties on the future arrangements for considering proposals for fluoridation schemes.

Notably, the proposals in this consultation document apply to England only. The Water Industry Act 1991 as amended by the 2012 Act ("the 1991 Act") contains provisions for cross-border arrangements but these provisions will need to be commenced with approval from Welsh Ministers. The Department will continue to work closely with the devolved administrations on any area of shared interest.

Proposed options in consultation document

We propose a number of options throughout this document for *how* the Secretary of State for Health would exercise the powers to make regulations set out under the 1991 Act as amended by the 2012 Act. In some cases, the Department has a clear preferred option. The rationale for selecting preferred options is described within the accompanying regulatory impact assessment (Ref No: 3075-RC).

The key decision-making criteria in choosing an option include:

- does the option increase democratic accountability in the decision-making process?
- does the option minimise the likelihood of disputes between local authorities?
- does the option minimise the likelihood of disputes between local authorities and members of the population?
- does the option increase the likelihood of local authorities maximising the health benefit to the local population?

In most cases, our consultation question for each theme asks about the options that we have considered and the requisite level of prescription to ensure that the system works as effectively as possible.

How to respond

For more detail about the consultation process and for a full list of the consultation questions, see pages 54 -56 of this document.

This consultation will run from 4 September 2012 and close on 27 November 2012.

You can contribute to the consultation by providing written comments :

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Introduction to fluoridation and the new public health system

Public Health

1. For the first time in a generation, local government will be given the responsibility to make a major impact in improving people's health and tackling health inequalities in every community. This will include responsibility for developing proposals to fluoridate water supplies and consulting on those proposals. We envisage that such proposals will be developed where they are agreed to be a priority, based on local oral health needs and the need to reduce tooth decay.
2. The White Paper, *Healthy Lives, Healthy People: Our strategy for public health in England*⁴ ('the White Paper') outlined our commitment to protecting the population from serious health threats, helping people live longer, healthier and more fulfilling lives and improving the health of the poorest people. The 2012 Act transposes these proposed changes into law so that, in general, the Secretary of State for Health will have responsibility for health protection. Additionally, local authorities will have responsibility for health improvement although they will retain certain responsibilities for health protection under existing legislation.
3. The 2012 Act amends the 1991 Act to include enabling powers for new regulations on consultations on proposals for the introduction of new fluoridation schemes or for the variation or termination of existing fluoridation schemes. These provisions will come into force from 1 April 2013.
4. The Department now seeks your views on our proposals for these new regulations.

Fluoridation

5. Fluoride is a natural mineral that is found in many foods. Fluoride is present in most water supplies and it was from noticing different patterns of dental decay in areas of naturally fluoridated water that the benefits of fluoride were first observed. Information from the British Fluoridation Society shows that as a result, arrangements were made to add fluoride to drinking water in many countries including the United States of America, Australia and parts of

⁴http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_117353http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_117353

England.⁵ Accordingly, when we refer to fluoridation, we mean the process of adding fluoride to the water supply with a view to reaching a general target concentration of 1 milligram per litre level, or lower if that is not reasonably practicable.⁶ At present, approximately six million people in England receive water that has had its level of fluoride adjusted and in excess of a further million receive naturally fluoridated water at a value greater than 0.5 mg/l.⁷

6. In the last few decades, there have been a number of reports published on fluoridation. In September 2000, the University of York published a report called *A Systematic Review of Water Fluoridation*⁸. This report concluded that, in cases where the water had been fluoridated, 15 per cent more children did not have tooth decay compared to those who were drinking unfluoridated water. It also showed that children in fluoridated areas had, on average, 2.25 fewer teeth affected by decay than children in non-fluoridated areas.
7. There is further evidence of the potential that fluoridation has in reducing health inequalities. In Sandwell, where the water supply was fluoridated in 1986, five-year-old children in 2007 have an average of one decayed, missing or filled tooth ('dmft'). By contrast, in Bolton which has a comparable population mix to Sandwell, but where there has been no fluoride added to the water supply, nearly twice the level of dental disease exists in children (an average dmft of 1.9)⁹.
8. The only proven side effect of fluoridation is dental fluorosis¹⁰. Dental fluorosis is a cosmetic effect involving a white flecking of the tooth enamel. Estimates of the extent to which fluorosis has been found to be of aesthetic concern vary between 13%¹¹ and 4%¹² of cases. Through its research, the University of York has found no clear association between fluoride in drinking water at the target concentration (1 milligram per litre) and adverse effects on general health.

⁵ British Fluoridation Society, *One in a Million 2012*, see <http://www.bfsweb.org/onemillion/onemillion2012.html>.

⁶ Ibid.

⁷ Ibid.

⁸ The University of York, *A Systematic Review of Water Fluoridation* see <http://www.york.ac.uk/inst/crd/fluores.htm>.

⁹ NHS, *Dental Epidemiological Programme for England Oral Health Survey of 5 year old children in 2007/08*, see <http://www.nwph.net/dentalhealth/>

¹⁰ The University of York, *A Systematic Review of Water Fluoridation* see <http://www.york.ac.uk/inst/crd/fluores.htm>.

¹¹ Ibid.

¹² Water Fluoridation and Health Medical Research Council 2002 see <http://www.mrc.ac.uk/Utilities/Documentrecord/Index/htm?d=MRC002482>.

9. The Department recognises that fluoridation is not the only possible way to achieve better oral health. For example, the European Community’s Scientific Committee of Health and Environmental Risk (SCHER)¹³ suggests that water fluoridation as well as topical fluoride applications (e.g. fluoridated toothpaste or varnish), appear to prevent caries. In children, a narrow margin exists between achieving the beneficial effects of fluoride in caries prevention and the adverse effects of dental fluorosis.
10. The Department also recognises that there is a range of opinion on the benefits and risks of fluoridation and that some people have concerns based on ethical reasons. Our view, supported by an opinion of the European Commission on Human Rights¹⁴, is that fluoridation does not constitute compulsory medical treatment and may be a proportionate measure to address the legitimate public health aim of preventing tooth decay in the population. Nonetheless, when local authorities consider a fluoridation proposal, they should balance the perceived benefit of fluoridation with the potential risks, including the risk of dental fluorosis, as well as economic, environmental or social concerns.

Current system

11. Currently, the Water Industry Act 1991 (‘the 1991 Act’), as amended by the Water Act 2003¹⁵, is the primary legislation relating to fluoridation. The 1991 Act provides that, if requested in writing to do so by a relevant authority, a water undertaker must enter into arrangements with the relevant authority to increase the fluoride content of the water supplied to premises within the specified area¹⁶. In this context, references to a “relevant authority” are to a Strategic Health Authority in England and in Wales it means the Welsh Ministers.¹⁷
12. At present, Strategic Health Authorities in England have responsibility for the conduct of consultations on a water fluoridation scheme because water supply zones are generally larger than the area covered by a single Primary Care Trust. Primary Care Trusts also contribute to such consultations because they are responsible for assessing the oral health needs of their population, and commissioning the services required to meet these needs.

¹³ Director General for Health & Consumers, Scientific Committee on Health and Environmental Risks, http://ec.europa.eu/health/scientific_committees/environmental_risks/docs/scher_o_139.pdf.

¹⁴ EC, *Guy Jehl-Doberer v Switzerland* (Application No. 17667/91).

¹⁵ Water Industry Act 2003, chapter 4 of part 3, *see* <http://www.legislation.gov.uk/ukpga/2012/7/contents/enacted>.

¹⁶ See section 87(1) of the Water Industry Act 1991, as inserted by s 58(2) of the Water Act 2003.

¹⁷ *Ibid.*, see section 87(3)(a).

13. The Water Fluoridation (Consultation) (England) Regulations 2005 ('the 2005 Regulations') set out the steps that a Strategic Health Authority must take in order to consult and ascertain opinion before taking any steps concerning fluoridation arrangements.¹⁸ The Strategic Health Authority must publish details of the step that they propose to take. They must also publish details of the manner in which individuals who are affected by it (and bodies with an interest) can make representations regarding the proposal in one or more newspapers circulating in the area and in such other media accessible within that area as the Authority considers appropriate to bring the proposal to their attention.¹⁹
14. The 2005 Regulations also require a Strategic Health Authority to give notice of the proposal to every local authority whose area falls (wholly or partly) within the area affected by the proposal.²⁰ "Local authority" can include a county council, a district council, a London borough council, or the Common Council of the City of London.²¹ However, as the fluoridation of water is undertaken by water undertakers, it is not deemed to be a substantial development or change to the health service and the consultation arrangements required for proposals for the reconfiguration of local health services under the Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Regulations 2002²² do not apply to fluoridation proposals.
15. In addition, the 2005 Regulations prescribe that, in publishing details of their proposals, Strategic Health Authorities shall include the following details:
- the nature of the step the Authority propose to take;
 - the reasons for the proposal;
 - the area affected by the proposal; and
 - the period, which must not be less than 3 months from the date when the details are first published, in which representations can be made to the Authority²³.
16. The 2005 Regulations also prescribe the circumstances in which a request to vary an existing scheme requires consultation:
- a) the variation concerns the boundary of the area (water supply zone) to which the fluoridation arrangements relate; and

¹⁸ The Water Fluoridation (Consultation) (England) Regulations 2005, regulation 3(1).

¹⁹ Ibid, regulation 3(1)(a).

²⁰ Ibid, regulation 3(1)(b).

²¹ Ibid, regulation 2(1).

²² <http://www.legislation.gov.uk/uksi/2002/3048/contents/made>

²³ The Water Fluoridation (Consultation) (England) Regulations 2005, regulation 3(2).

- b) the number of houses that would be affected by the variation, either by being brought within the area (i.e. new fluoridation) or from it, exceeds 20% of the number of houses within the area at the time the request is made.²⁴

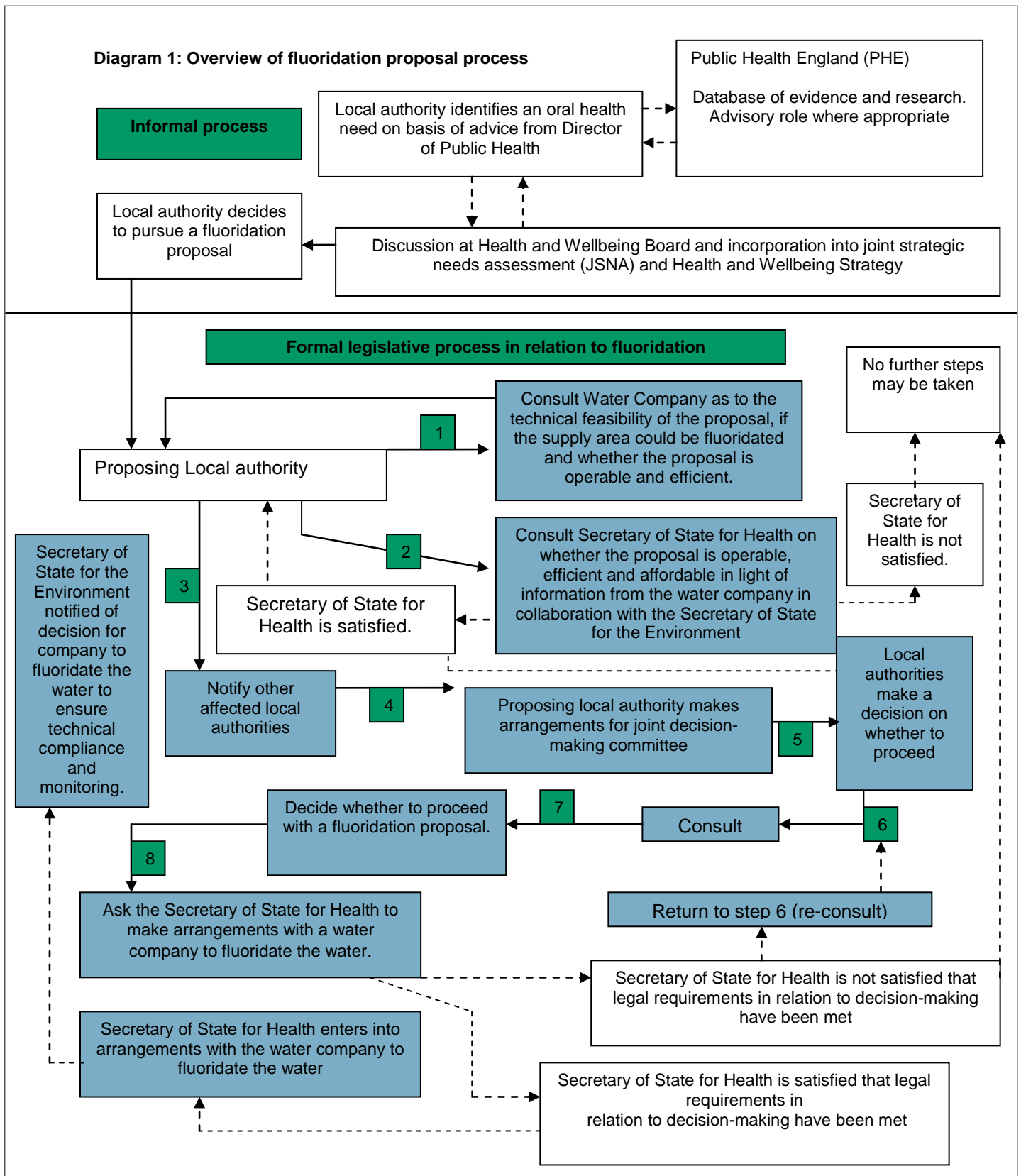
Relevant provisions in the Health and Social Care Act 2012

17. The relevant provisions on water fluoridation can be found at sections 35-37 of the 2012 Act. These sections amend chapter 4 of Part 3 of the Water Industry Act 1991²⁵ relating to fluoridation and are not of themselves subject to further consultation.
18. The new provisions are not intended to make fluoridation of water supply more or less likely. The Department's aim is simply to put in place a fair and practical way to reallocate and amend statutory powers for water fluoridation. These statutory powers relate to considering proposals for new schemes or to vary, terminate or maintain existing fluoridation schemes.
19. Section 35 of the 2012 Act amends section 87 of the 1991 Act, so as to transfer the responsibility for entering into contracts for fluoridation schemes with the water undertaker to fluoridate a water supply from Strategic Health Authorities to the Secretary of State. In practice, we intend this function to be exercised by Public Health England, which will be an executive agency of the Department. We believe that, as negotiating and managing contracts with water companies for fluoridation is a complex legal and technical process, this process can most efficiently be carried out at a national level. However, a local authority served by that water supply must request it. This ensures that the system is driven from a local level.
20. The procedural requirements are then set out in section 36 of the 2012 Act that amends sections 88B to 88O of the 1991 Act. The new sections include powers for the Secretary of State to make regulations as to the procedure to be adopted by local authorities in ascertaining public opinion on new or existing proposals for fluoridation schemes. As before, the detail of the consultation requirements is left to regulations. We have set out a full description of the relevant provisions of the 2012 Act at **Annex A** to this document.

²⁴ The Water Fluoridation (Consultation) (England) Regulations 2005, regulation 4(1).

²⁵ Water Industry Act 1991, see <http://www.legislation.gov.uk/ukpga/1991/56/contents>.

Diagram 1 (below) gives a high-level overview of the process that would need to be followed where a local authority wishes to pursue a proposal to fluoridate its water supply.



The conduct of consultations

21. The existing legislative framework related to consultation on proposals for fluoridation schemes needs to be amended to reflect the new public health system. The Department seeks your views for proposals for the operation of the new system that gives new functions to local authorities with the abolition of Strategic Health Authorities.
22. The Department's view is that decisions on fluoridation should be determined locally and that local authorities, as democratically accountable bodies, are best placed to make a decision on behalf of their local population. The scope of this consultation is therefore focused (and limited to) consultation on the *process* for considering proposals relating to fluoridation.
23. The Department is not consulting on the perceived benefits or disadvantages of fluoridation, nor are we consulting on whether decisions relating to fluoridation should be taken at a national or local level. (The 2012 Act already provides that the development and consideration of proposals is for local authorities, with the Secretary of State holding responsibility for making arrangements with the water undertakers).
24. In the 2012 Act, there are a large number of regulation-making powers relating to water supply fluoridation within the new provisions of the Water Industry Act 1991 (as inserted by section 35 - 37 of the 2012 Act). Before the relevant regulations can be drafted, the Department needs the advice and experience of those working at a local level and wishes to ensure that people with protected characteristics²⁶ contribute to the consultation to create legislation that is relevant, practicable and proportionate. (Please also see the accompanying equality analysis document.)
25. The Department is seeking views on a number of specific questions relating to the process for considering fluoridation proposals to ensure legislation and guidance support the process. To make the issues more accessible, we have grouped the regulation-making powers within four themes:
1. participation in initial decision-making;
 2. committee membership and procedures;
 3. fluoridation decision-making, including the consultation procedure and assessing public opinion;

²⁶ 'Protected characteristics' references the equality strands that are protected under equality legislation. Namely: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation; see section 149 of the Equality Act 2010 for a list of the protected characteristics and the obligations on public authorities.

4. variation, termination and maintenance of fluoridation arrangements.

26. Each theme corresponds to a chapter heading within the consultation document and each chapter will:

1. explain the background;
2. include a discussion of the issue;
3. include options (where possible); and
4. set out the consultation question(s).

Participation in initial decision-making on a fluoridation proposal

Cross Reference to relevant sections of the Water Industry Act 1991 as inserted by the 2012 Act:

Section 88D – Procedural requirements and additional requirements where other local authorities are affected in connection with fluoridation of water supplies

Section 88K – Variation or termination and additional requirements where other local authorities are affected

Preliminary consultations

27. The 1991 Act sets out a number of initial steps that a local authority must take when making a fluoridation proposal. These initial steps include the local authority (“the proposer”)²⁷ consulting with the relevant water undertakers and the Secretary of State to ensure that the proposed scheme is operable and efficient²⁸. A proposal needs to be operable and efficient to be approved. (In practice, we expect that the Secretary of State of Health’s duty to ensure that a proposed scheme is operable and efficient will, in practice, be carried out by Public Health England, the Department of Health’s executive agency in consultation with the Drinking Water Inspectorate.)

Notification process for the proposing local authority

28. Once this preparatory work has been completed including confirmation from the water company of the area it would be practicable to fluoridate, section 88D(2) of the 1991 Act requires the proposing local authority to notify any other local authority affected by the proposal. An affected local authority is one whose area, or any part of it, is within the proposed area of the fluoridation scheme²⁹. Under section 88D(3) of the 1991 Act, the proposer must then make arrangements to enable the affected local authorities to decide whether further steps in relation to the proposal should be taken.

29. Section 88J of the 1991 Act requires a similar procedural process for proposals to vary or terminate a fluoridation scheme.³⁰ However, sections 88K-M also provide powers to make regulations to specify when the procedural requirements do not apply to such proposals (see paragraphs 145 - 151 for further detail).

²⁷ See section 88B(5) of the Water Industry Act 1991 as inserted by s 36 of the Health and Social Care Act 2012 (“the 2012 Act”).

²⁸ See section 88B and C of the Water Industry Act 1991 as inserted by s 36 of the 2012 Act.

²⁹ Ibid., see section 88B.

³⁰ Ibid., see section 88J.

30. In a case where the proposed area for fluoridation falls within the area of a single local authority, the authority may proceed to consult without going through the joint decision making process prescribed by section 88D of the 1991 Act. (This is discussed in further detail below).

31. Under the new section 88D(2) of the 1991 Act, for any new proposal, the proposing local authority must notify any other local authority which is affected.

32. The new section 88K(2) of the 1991 Act contains a similar requirement for a local authority that proposes a variation or termination of a fluoridation scheme.

Reaching a decision on whether to consult

Issue for discussion:

How should affected local authorities decide on whether or not to proceed with a proposal?

Background

33. The proposing local authority and the other local authorities affected by the proposal need to decide whether to proceed with a fluoridation proposal.

34. Under section 88D(3) of the 1991 Act, the proposer must make arrangements for enabling the authorities affected by the proposal to decide whether further steps should be taken in relation to the proposal. Further, under section 88D(4), the Secretary of State must by regulations make provision as to the arrangements which must be made for this purpose and prescribe conditions, with respect to the outcome of the arrangements which must be satisfied before any further steps in relation to the proposal may be taken.

35. We consider that there should be a less formal approach for a decision on whether to proceed to consult on a proposal in comparison to the process by which local authorities determine whether a fluoridation request should be accepted.

Arrangements for a decision on whether to proceed to consultation

Option 1: Require the proposing local authority to provide sufficient information on the reasons why it is considering a proposal on fluoridation. This would allow the local authorities affected to make a decision on whether to proceed with consultations on the proposal. In addition, require the proposing local authority to respond to requests for further information about the background to the proposal.

Option 2: As option 1 but, in addition, the proposer should request confirmation that each authority consider the relevance of the proposal to its Joint Strategic Needs Assessment³¹ and its Joint Health and Wellbeing Strategy.

Option 3: As option 2 but, in addition, the proposer should request that each affected local authority has consulted its director of public health about the proposal.

Proposal

36. Our preferred option is option 1. In relation to the arrangements to enable a decision, we propose that, as a minimum, the regulations should require the proposing local authority to provide sufficient information on its proposal to allow the local authorities affected to make a decision whether to proceed with the consultation process. We consider that the information should include a copy of the water undertaker's report on the proposal's feasibility including the likely supply area that would result from such a proposal, the Secretary of State for Health's confirmation that the proposal is operable and efficient, and early cost estimates.

37. We also suggest that the proposing local authority should be required to respond to requests for further information from an affected local authority. For example, the background to a proposal, its technical details or such other issues as the Department might include in guidance. The proposer should then request that each affected local authority notifies them of whether or not they wish to proceed with consultations on the proposal, within 3 calendar months.

38. We propose that we include in the regulations to be made under section 88D(4) that affected local authorities do not have to participate in the collective decision-making process but, if they choose not to participate, a decision would be made by the other local authorities. Where a local authority has failed

³¹ See the "glossary" section of this document for an explanation of a Joints Strategic Needs Assessment (JSNA).

to inform the proposing authority of its decision whether to proceed with the proposal within the 3 calendar months, the local authority is assumed to be opting out of the decision-making process. Any local authority that opts out is not to be counted for the purposes of determining whether there is a sufficient majority in favour of proceeding.

39. In addition to those requirements, we are also considering whether to adopt option 2 or 3. That is, the proposer should be required to request or require confirmation that:

- each authority has considered the relevance of the proposal to its Joint Strategic Needs Assessment and its Joint Health and Well-Being Strategy;³² and/or
- each authority has consulted its director of public health.

40. We seek your views on which option is the most appropriate.

Conditions on the decision to proceed with a consultation

41. Section 88D(4) of the 1991 Act has been inserted to require the Secretary of State of Health to prescribe conditions with respect to the outcome of the affected local authorities' consideration of whether to proceed to consult on a fluoridation proposal. These conditions must be satisfied before any further steps may be taken in relation to the proposal.

42. We suggest that it would be inappropriate if one or more local authorities, with only a small proportion of the population that would be affected by the proposal, had a right of veto. Our intention in making this set of regulations is to ensure that the process for this initial joint decision on a proposal is as simple as possible whilst taking account of the interests of the majority of the people that would be affected.

43. We seek your views on the following options on conditions that the Secretary of State may prescribe:

Option 1: Require only that the proposing local authority needs to agree to the proposal before proceeding to consultation.

Option 2 Require that the proposing local authority plus a *simple* majority of affected local authorities to agree in order to proceed.

³² See sections 116 and 116B of the Local Government and Public Involvement in Health Act 2007, as amended by chapter 2, Part 5 (section 192, 193, 196) of the 2012 Act.

Option 3: Require that the proposing local authority plus a *super*-majority (eg two-thirds) of affected local authorities need to agree in order to proceed.

Option 4: Require *all* affected local authorities need to agree to proceed.

Proposal

44. Our preferred option is 3. We suggest that this is the most appropriate option because, for a proposal to proceed to consultation, it seems sensible that a significant number (two-thirds) of local authorities are in favour of proceeding with the consultation exercise. (Any local authority which does not reply to the proposer within the 3 months would be excluded from this calculation.)

45. Additionally, there is existing precedent in local government legislation to use a two-thirds super-majority for collective decision-making. This is used, for example, in section 48 of the Local Government Act 1985 which requires a two-thirds majority of London boroughs to agree to a pan-London voluntary sector grant funded by all boroughs.³³ Once a joint decision to proceed has been reached, the joint committee can determine its membership, conduct a consultation on the proposal and decide its outcome as below.

Consultation questions 1-3:

1. Do you agree with our proposals for the arrangements to enable a joint decision to proceed with a proposal?
2. Do you agree that a decision to proceed with fluoridation should be made on a super-majority basis (option 3)?
3. Are there any other approaches that you believe could work better?

Committee membership and procedures

Cross Reference to relevant sections of the Water Industry Act 1991 as inserted by the 2012 Act:

Section 88F – Decision-making procedure: exercise of functions by committee

Section 88M– Decision-making procedure: exercise of functions by committee (variation or termination)

³³The Local Government Act 1985 can be accessed at:

http://www.lexisnexis.com/uk/legal/search/runRemoteLink.do?bct=A&risb=21_T15103353214&homeCsi=274768&A=0.15492146306341736&urlEnc=ISO-8859-1&&dpsi=0200&remotekey1=DOC-ID&remotekey2=58837&service=DOC-ID&origdpsi=0200

Introduction

46. Subject to some exceptions, local authorities must use a joint committee to exercise the fluoridation functions, such as complying with requirements to consult and make final decisions in relation to a fluoridation proposal (see section 88F(1) and (2) of the 1991 Act).
47. The 1991 Act as amended by the 2012 Act provides that local authorities who are affected by a fluoridation proposal must arrange for an existing joint committee to exercise the fluoridation functions, establish a joint committee of the authorities for that purpose or arrange for their Health and Wellbeing Boards established under section 194 of the Health and Social Care Act 2012 to exercise the fluoridation functions (see section 88F(2)). The two circumstances where this requirement does not apply is where there is only one local authority (the proposer) or where no other affected local authority has informed the proposer that they wish to participate in the exercise of the fluoridation functions (see section 88F(1)(b)).
48. Section 88F(4) and 88M(6) of the 1991 Act enable the Secretary of State to make regulations related to committee membership and procedures, including:
- the membership of an existing joint committee established to perform this role which meets prescribed conditions as to its membership;
 - the membership of any new joint committee established to perform this role which meets prescribed conditions as to its membership;
 - the membership of a joint sub-committee of Health and Wellbeing Boards established under section 198(b) of the 2012 Act to perform this role; and
 - the procedure to be followed by any joint committee or any joint sub-committee of Health and Wellbeing Boards in exercising the fluoridation functions³⁴.
49. To note, in relation to the Health and Wellbeing Boards, section 88F(2) and (3) and 88M(2) and (5) of the 1991 Act provide that, as an alternative to establishing a new joint committee or using an existing one, local authorities may arrange for their Health and Wellbeing Boards to exercise their fluoridation functions. The Boards must then exercise their powers under section 198(b) of the 2012 Act to establish a joint sub-committee to exercise those functions. Any references to a “joint committee” in this document include a joint sub-committee of Health and Wellbeing Boards established under this provision.

³⁴ We see that it will be important to ensure that the joint committee, in whatever manifestation it takes, has a broad range of representatives. We would expect the committee to include public health staff from the local authorities as well as democratically elected members see section 88F(4) of the 2012 Act.

Membership of a decision-making committee

Background

50. A significant advantage of transferring responsibility from Strategic Health Authorities to local authorities is that democratically-elected representatives will be able to feed into the decision-making process directly.
51. Under sections 88F and 88M, the local authority affected by the proposal must establish a joint committee or sub-committee or use an existing joint sub-committee. The Secretary of State of Health then has powers to make regulations specifying the membership of a joint committee or sub-committee exercising the fluoridation functions (see sections 88F(4) and 88M(6) of the 1991 Act). In addition, HealthWatch, or other patient representatives, could be required to contribute to the decision-making process.
52. Whilst the Department values the experience and expertise of health professionals, its view is that, as well as experts, the membership of the committee should be drawn from a wider range of people who represent the broader community interests.'
53. In order to maintain and promote transparency, the Department recommends that as much accurate and evidence based information as possible be placed in the public domain, and that the joint committee hold its meetings in public to ensure accountable and transparent decision making. These meetings will be subject to regulations set out in Part 5A of the Local Government Act 1972.

Issues for discussion

- **Who should be a member of a joint committee exercising fluoridation functions?**

54. The main options for membership that we have considered are:

Option 1: No prescription through regulations.

Option 2: Some prescription through regulations, for example specifying that elected representatives must form a majority of the committee.

Proposal

55. We suggest that the most appropriate option is 1. The Department's view is that decisions on committee membership be determined by local authorities because these authorities are democratically accountable bodies so are best placed to make decisions on behalf of their local population. This fits well with the wider public health functions carried out by local authorities and we believe that, by placing these meetings in the public domain, there will be improved transparency and accountability within the system.

56. The Department is considering altering the approach where there are four or more committees. Section 88F(4)(b) and 88M(6)(b) of the 1991 Act gives the Secretary of State regulation making powers to specify the rules for holding and vacating office. For example, regulations could specify who appoints the members, on what terms, and how they could be removed.

57. We propose that the regulatory framework should leave these decisions to local determination – an affected locally authority ought to decide the membership of a joint committee - but we would appreciate your views on whether this is an appropriate approach.

Consultation questions 45:

4. Do you agree that the membership of the committee established to progress a proposal on fluoridation does not need to be prescribed in regulations?

5. Do you agree that we do not need to make regulations in relation to holding and vacating office?

Minimum and Maximum Numbers of Members of Joint Committees

58. The regulations to be made under section 88F(4) of the 1991 Act could also prescribe that for a joint committee there should be:

- a specified minimum membership;
- a specified maximum membership; or
- both a minimum and maximum number of members.

Issues for discussion

Should there be a minimum number membership for a joint committee, a maximum number membership or both a minimum or maximum number membership specified in legislation?

Background

59. The Department is considering a range of options on membership numbers as set out below:

Option 1: Impose no requirements as to numbers.

Option 2: Prescribe a minimum number of members to ensure that decisions are not made by a small group, which may not represent the wider view.

Option 3: Prescribe both a minimum and maximum number of members.

Option 4: Prescribe a maximum number of members.

Proposal

60. We suggest that option 1 would be the most appropriate. We do not feel that legislation is necessary. We want to ensure maximum flexibility for the affected local authorities to engage with whomever they feel is appropriate. We expect that local authorities would want to involve a range of professional and public representatives as part of the decision-making process. However, we also recognise that there is a risk that committees could become unwieldy and heavily weighted in favour of one viewpoint.

Consultation question 6:

6. Do you agree that regulations for minimum and maximum membership of a joint committee would be too prescriptive?

Varying approach based on number of local authorities involved

Issue for discussion:

Should the statutory approach vary depending on the number of local authorities involved?

Background

61. We suggest that the membership of a joint committee may need to be adapted in the regulations to be made under sections 88F (4) and 88M (6) of the 1991 Act where there are a large number of local authorities involved. This is because the proposed membership criteria may make the joint committee too large and therefore unwieldy and less effective.

62. Where there are only two or three local authorities affected, discussion of a fluoridation proposal is likely to be less complex than reaching consensus

amongst more local authorities. Therefore, where there are a large number of local authorities³⁵, we anticipate that there will need to be an alternative approach to allow all of the local authorities to feed in effectively to the consultation and decision-making process. We have suggested four local authorities as a cut-off because we believe that, with two or three local authorities, it would be possible for the local authorities to agree membership of the joint committee without the committee becoming too large. .

Option 1: Make no prescription in regulations.

Option 2: Prescribe an alternative approach for joint committees where there are a large number of local authorities as in a major conurbation like Greater Manchester. For example, include a straight forward requirement in the regulations that the committee needs to consist of equal numbers of representatives from each local authority. (The number would be agreed by the authorities or prescribed in regulations.)

Proposal

63. Our preferred option is 2 in circumstances where there are a large number of local authorities involved.

64. We propose that the regulations to be made under sections 88F(4) and 88M(6) of the 1991 Act will need to provide for specification of the membership of joint committees representing four or more local authorities. As required by the 1991 Act, the joint committee would have the responsibility for conducting the consultation and deciding on whether to fluoridate, but it would be required to consider the views of each local authority Health and Wellbeing Board. We therefore suggest prescribing an alternative set of requirements for membership where there are four or more local authorities affected.

65. We also propose that when these authorities reach the point of making a decision on whether to proceed with a fluoridation proposal and consensus cannot be, then the decision be determined by population-weighted voting (see paragraph 127 for further detail.)

66. For joint committees of local authorities, we propose to lay out our thoughts on best practice in guidance. We envisage that best practice will be for each local authority to appoint a committee or use an existing committee of the authority. For example, a local authority could use the power in section 196(2) of the 2012 Act to give its Health and Wellbeing Board responsibility for a fluoridation proposal. If so, a joint sub-committee of the Health and Wellbeing Boards of all the affected local authorities might be established. It would then be for the individual Boards to decide how to appoint and liaise with their representative on the joint sub-committee.

³⁵ The Department considers that, where fluoridation proposals are under consideration, a large number of local authorities is four or more.

67. When there are four or more affected local authorities, we think that a joint committee would be the least burdensome and the most democratic approach. The nominated representative(s) should be appointed to the joint committee and should represent the agreed position of the relevant authority or Board. The procedure to be adopted by the joint committee would not be prescribed in regulations.

Consultation questions 7-9:

- 7. Do you agree that there should be an alternative approach in the regulations when there are a large number of affected local authorities?**
- 8. If so, should this be adopted when there are four or more local authorities?**
- 9. Do you agree that a joint committee of Health and Wellbeing Boards might be an efficient approach?**

Fluoridation decision-making, the consultation procedure and assessing public opinion

Cross Reference to relevant sections of the Water Industry Act 1991 inserted by the 2012 Act:

Section 88E – Decision on fluoridation proposal

Section 88L(2) and (8) – Decisions on variation or termination proposals

Section 88F(4)(d) and 88M (6)(d) – procedures to be followed by a joint committee considering proposals

Introduction

68. Once the affected local authorities have decided that they wish to proceed with a proposal for a new scheme or a proposal to vary or terminate a scheme, the 1991 Act (as inserted by the 2012 Act) provides that the proposing authority would need to consult and ascertain opinion in relation to the proposal. The proposer would then make a final decision on whether to request the Secretary of State for Health to enter arrangements with the water undertaker.
69. However, in cases where there are one or more local authorities, other than the proposing authority affected by the proposals, and one or more of those authorities wish to participate in the consultation and decision making process, the authorities must establish a joint committee (see section 88F(2) and 88M(2)). The joint committee will conduct the consultation and make the final decision on the fluoridation proposal. This chapter deals with the proposed requirements related to consulting and ascertaining opinion and the proposed requirements relating to the final decision
70. Sections 88E(2) and 88L(2) of the 1991 Act give the Secretary of State power to prescribe the steps to be taken for the purposes of consulting and ascertaining opinion on a fluoridation proposal. The Secretary of State for Health can prescribe the procedure to be followed by the proposer when consulting (see sections 88E(6)(b) and 88L(6)(b)).
71. Notably, the 2005 Regulations³⁶ will be replaced by new regulations on consultations made under the powers in sections 88E and 88L of the 1991 Act and there are exceptions to the requirement to consult in the case of a proposal to vary or terminate a fluoridation scheme (see paragraphs 145 and 151 below).
72. Following consultation, the joint committee (or proposing authority if there is no such committee) must consider the outcome of the consultation and decide whether to request the Secretary of State for Health to make arrangements with the water undertaker as in section 88E(5) of the 1991 Act. The Secretary of State for Health has powers to make regulations specifying the factors

³⁶ see <http://www.legislation.gov.uk/uksi/2005/921/contents/made>

which a joint committee (or proposing authority) must consider in deciding whether to proceed with a proposal (sections 88E(6)(a) and 88L(6)(a)) and to make provision as to the procedure to be followed in making that decision (sections 88E(6)(b) and 88L(8)(b)).

Consultation process

Issues for discussion:

What should the requirements be for a consultation on a fluoridation proposal?

Background

73. Sections 88E(2) and 88L(2) of the 1991 Act give the Secretary of State for Health power to prescribe the steps to be taken for the purposes of consulting and ascertaining opinion on a fluoridation proposal. The Secretary of State for Health can prescribe the procedure to be followed by the proposer when consulting (see sections 88E(6)(b) and 88L(6)(b)).

74. Currently, the 2005 Regulations specify a number of steps that must be taken to ensure a wide-ranging and well-informed consultation. As discussed above in the introduction, Strategic Health Authorities are under a duty to publish details of each step that they propose to take and the manner in which affected individuals or interested bodies can make representations regarding the proposal:

- in one or more newspapers circulating within the relevant area; and
- in other such accessible media considered appropriate³⁷.

75. The published details must then include:

- the nature of the step the Authority propose to take;
- the reasons for the proposal;
- the area affected by the proposal; and
- the period, being a period of not less than 3 months from the date on which the details are first published, within which representations can be made to the Authority³⁸.

76. In addition, the 2005 Regulations require the Strategic Health Authority to notify every affected local authority.³⁹ Naturally, this requirement will not be relevant under the 1991 Act as amended by the 2012 Act.

³⁷ Water Fluoridation (Consultation) (England) Regulations 2005, regulation 3.

³⁸ Ibid, regulation 3(2).

³⁹ Ibid, regulation 3(1)(b).

77. We seek your views on the following options for the requirements to be imposed for consultation purposes:

- Option 1:** Impose no requirements on local authorities and joint committees.
- Option 2:** Retain existing provision with minor revisions (e.g. without the requirement for a Strategic Health Authority to notify affected local authorities).
- Option 3:** Retain existing provision and specify in guidance some additional steps for local authorities, such as:
- a requirement to circulate an information pack containing copies of the formal consultation document to Members of Parliament to affected constituencies;
 - a requirement to hold a press conference to announce the proposals;
 - a requirement to hold a public meeting; and
 - a requirement to display posters on affected local authorities' premises.

Proposal

78. We propose that the most appropriate option is 2. It is important that a local authority or a joint committee has the discretion to determine the most effective way to undertake a consultation exercise for their local population. This approach is likely to be different depending on the local population and it is considered that it may not be appropriate for the Department to prescribe each and every step.

79. Option 3 could be considered too prescriptive. We consider that the current 2005 Regulations prescribe the minimum requirements for the conduct of a consultation in enabling the public and other interested parties to make an informed response to the consultation. However, we do recognise that we could adopt a set of new and/or additional requirements. We therefore invite views on the options here.

80. We expect local authorities, as public bodies, to act in accordance with their existing duties under the Equality Act 2010⁴⁰. We are nevertheless seeking advice on best practice examples or suggestions for specific steps that local authorities should take in relation to consulting vulnerable groups on fluoridation. We would like to ensure that vulnerable groups are able to access

⁴⁰ Equality Act 2010, see section 149 at <http://www.legislation.gov.uk/ukpga/2010/15/contents>.

and participate in consultation. We seek any information or views on whether any specific requirements are necessary in the regulations to minimise any potential adverse impacts or disadvantages for groups with a “protected characteristic” under the Equality Act.

81. Under the Equality Act, the eight protected characteristics that relate to obligations on public authorities are:

1. age;
2. disability;
3. gender reassignment;
4. pregnancy and maternity;
5. race;
6. religion or belief;
7. sex; and
8. sexual orientation⁴¹.

82. Alternatively, advice on how to encourage people with protected characteristics to participate in consultations could be included in our guidance.

83. In fact, the guidance could go wider to reflect the new duty which is due to be imposed on the Secretary of State by new section 1C of the 2006 NHS Act to have regard to the need to reduce inequality between people with respect to the benefits that they can obtain from the health service. This will require the Secretary of State “to have regard to the need to reduce health inequalities, whatever their cause, including those caused by socio-economic status and geography.”

84. Taking account of the likelihood that children in deprived areas have most to benefit from fluoridation, the guidance could, for example, include advice on how children and families with young children can contribute to consultations. Similarly, the guidance could recommend that advice is sought from community advocates for ethnic minority groups on how to communicate the arrangements for a consultation to their members. In this way, we have included at Annex B a summary of action points from the Equality Analysis on these regulations.

Consultation questions 10-15

10. Do you agree that the existing requirements for conducting consultations remain appropriate; or are there any further steps in relation to consultations that you feel a local authority or the joint committee should take?

11. Should there be any other further changes to the proposed consultation requirements?

⁴¹ Equality Act 2010, section 149(1).

12. Are there any requirements that you would like to suggest that we include in regulations to minimise or remove any potential adverse impacts or disadvantages for groups with a “protected characteristic” as set out under the Equality Act?

13. Do you agree that children and young families in deprived areas should be encouraged to participate in consultations on proposals for new fluoridation schemes?

14. Will this contribute to implementation of the duty on the Secretary of State to have regard to the need to reduce health inequalities between people with respect to the benefits they can obtain from the health service?

15. Do you agree that the new duty which is due to be imposed on the Secretary of State to have regard to the need to reduce inequality- whatever its cause - is relevant to proposals to introduce fluoridation schemes?

85. Finally with regard to the conduct of consultations, in giving initial approval to an impact assessment on our proposals for the fluoridation regulations, the Regulatory Policy Committee requested that during the consultation we asked for any information available on estimates of the cost benefits of fluoridation and the costs that local authorities would be likely to incur in preparing for and conducting consultations.

Consultation question 16: Do you have any information:

- **on the cost benefits of fluoridation schemes and/or**
- **the costs a local authority would incur in conducting a consultation**

Information provided to the public

Issues for discussion:

Should there be any additional requirements on local authorities in relation to informing the public about fluoridation?

Background

86. Although we do not want to be overly prescriptive as to how a consultation exercise is undertaken, it is important to consider and clarify the role that local authorities should have in informing the public about a fluoridation proposal.

87. In any given consultation, it is likely that the controversial nature of fluoridation could create misunderstandings. The Department therefore believes that the

public should receive information from a local authority or joint committee that is factual and reflects a balance of arguments for and against fluoridation. This is not to say that a local authority or a joint committee should not be able to make a statement in support of fluoridation.

88. As the director of public health for the local authority may be a member of the joint committee, directors of public health may already have a role in the decision-making process. However, there may be scope for a formal requirement for the joint committee to take the advice of the director of public health on the content of the consultation material, to ensure an additional check for it to ensure that it is evidence-based.
89. A key role of the director of public health will be to facilitate innovation and new approaches to promoting and protecting health. Whilst, at the same time, bringing a rigorous approach to evaluating what works, using the resources of Public Health England. Directors of public health will represent the interests of their local authorities, but also exercise the appropriate professional independence where necessary to advocate for the health of the local population. During a consultation exercise, it will be vitally important that the public are able to have trust in the decision-making process and understand the evidence both for and against fluoridation. In the Department's view, therefore, the director of public health is best placed to ensure consultation material accurately reflects the most up-to-date evidence.
90. To facilitate the role of directors of public health, the options appear to be:

Option 1: No additional prescription.

Option 2: Prescribe in regulations that a local authority or a joint committee must, in preparing the consultation material, take advice from the relevant director (or directors) of public health.

Option 3: Prescribe what type of information that a local authority or a joint committee should provide to support a consultation.

Proposal

91. On balance, we propose that option 3 is too prescriptive and unnecessary. In particular, a local authority or a joint committee charged with a duty to carry out consultation must comply with the requirements of public law (including the Equality Act) which require a public body to provide sufficient information during a consultation exercise and to make the consultation process equally accessible to all persons. We think any detail about how such information is to be provided would be more appropriate for the guidance that we intend to issue on implementation of the regulations. This is consistent with the existing approach.
92. We believe that a local authority or the joint committee would take a pragmatic and responsible approach to consultation, and comply with the usual legal requirements, and that further prescription would be unnecessary or overly burdensome. However, directors of public health have an important role to play in both preparation of the consultation process. We suggest that there should be a prescribed procedural requirement to obtain the advice of the director of public health (option 2).

Consultation questions 17-19:

17. Do you agree that no specific requirements are needed on consultation material or other information provided to the public (other than those specified in public law and in paragraphs 73- 76)?

18. Do you agree that the proposing local authority or joint committee should nevertheless be required to obtain advice from the director(s) of public health?

19. If no, what requirements do you think should be imposed?

Evidence Base – Role of Public Health England

Background

93. *The Public Health Outcomes Framework*⁴² (“the Framework document”) aligned with the NHS outcomes framework⁴³ and the *Adult Social Care Outcomes Framework*⁴⁴ will provide a basis for analysis of the health and wellbeing of the local population. We have set out a broad structure in the

⁴² Department of Health, *Public Health Outcomes Framework*, see <http://www.dh.gov.uk/health/2012/01/public-health-outcomes/>

⁴³ Department of Health *NHS Outcomes Framework* 2012.13 see http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_131700

⁴⁴ Department of Health *Adult Social Care Outcomes Framework* see http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_133334

Framework document to show a high-level vision for public health outcomes, supported by a broad set of indicators grouped into four domains. Indicators have been included which cover the spectrum of public health, and what we can realistically measure.

94. Data relating to outcomes will be published in one place by Public Health England to enable national and local democratic accountability for performance against those outcomes. This will make it easy for local areas to benchmark local performance and compare themselves with others across the country. The Framework document includes an indicator on tooth decay in children aged 5 years old. Inclusion of this indicator will encourage local areas to focus on and prioritise oral health and oral health improvement initiatives which can be very effective in preventing tooth decay. The fluoridation of water is one measure that helps to reduce the rate of tooth decay in children.
95. The Department believes that Public Health England could play a valuable role in collecting evidence on the effects on health of the fluoridation of water as well as providing evidence on any alternative options relating to dental public health. However, Public Health England will only ever play an advisory role. Public Health England will never make a decision on whether an area should be subject to fluoridation because we feel that these types of key decisions on fluoridation should be made at a local level.
96. It is intended, however, that Public Health England maintain a database on the effects of fluoridation by monitoring relevant research conducted globally in liaison with the Drinking Water Inspectorate which has the statutory responsibility for the quality of drinking water. Public Health England could also coordinate the monitoring and reporting on the health of populations in the UK receiving fluoridated water in accordance with section 90A of the 1991 Act.
97. We would like your views on the role that Public Health England could have within the new system in assisting local authorities with their fluoridation responsibilities.

Consultation questions 20- 21:

20. What role should Public Health England play in supporting local authorities with their fluoridation functions?

21. What role (if any) should Public Health England play in supporting local authorities to gather data on the effects of fluoridation?

Assessment of public opinion

Issues for discussion:

How should public opinion be assessed in the consultation process?

Background

98. We are clear that the decision-making process for fluoridation will be assisted by consultation and that a key element of consultation is the evaluation of public opinion. However, the Department could impose specific procedural requirements in relation to the manner in which a local authority or a joint committee approaches this.
99. The 2012 Act gives the Secretary of State power to prescribe in regulations the steps that a proposing authority or a joint committee must take for the purposes of consulting and ascertaining opinion. In addition to the requirements at section 88E(2) and 88L(2) of the 1991 Act, discussed above. We are also considering whether any further requirements are appropriate in relation to how a local authority or joint committee should assess public opinion.
100. We suggest that there are the following options for guidance or regulations on how a local authority or joint committee should assess public opinion:
- Option 1** Impose no specific procedural requirements in relation to the process for ascertaining public opinion.
- Option 2** Require that the local authority or joint committee must canvass the views of their resident populations on fluoridation proposals in a manner left to the local authorities' discretion.
- Option 3** Specify particular polling mechanisms, for example, public meetings and/or focus groups at which votes are taken; an opinion survey or a referendum.
101. In our view, option 1 is the most appropriate as it provides flexibility for a local authority to decide what is best on a case-by-case basis. We believe that local authorities have the experience in conducting consultations to exercise discretion in evaluating public opinion. To impose regulatory requirements such as those proposed in option 3 could be considered unnecessarily prescriptive. We propose therefore that the method by which they ascertain public opinion is left to the discretion of local authorities.

Consultation question 22-23:

22. Do you agree that the method by which local authorities ascertain public opinion on fluoridation proposals be left to their discretion?

23. If not, what methods of ascertainment would you wish to see imposed in regulations?

Reaching a decision on whether to proceed with a fluoridation proposal

Issues for discussion

- **Which factors should a proposing local authority or joint committee take into account when considering whether to ask the Secretary of State for Health to make fluoridation arrangements, or to vary or terminate an existing scheme?**

Background

102. Section 88E(6)(a) of the 1991 Act provides the Secretary of State may by regulations make provision as to factors which the proposing local authority or decision-making committee must or may take into account when making a final decision on whether to proceed with a fluoridation proposal. Section 88L(8)(a) provides the same power in respect of decisions on the variation or termination of existing fluoridation schemes.

103. Section 88E(6)(a) of the 1991 Act provides that the Secretary of State may by regulations make provision as to factors which the proposing local authority or decision-making committee must or may take into account when making a final decision on whether to proceed with a fluoridation proposal. Section 88L(8)(a) provides the same power in respect of decisions on the variation or termination of existing fluoridation schemes.

104. Under the 2005 Regulations, a Strategic Health Authority shall not proceed with any step regarding fluoridation arrangements unless, having regard to the extent of support for the proposal and the cogency of the arguments advanced, the Authority is satisfied that the health arguments in favour of proceeding with the proposal outweigh all arguments against proceeding.⁴⁵

105. In making the regulations, it is important that the Department does not simply seek to replicate existing provisions without further consideration of other options and their relevance to the new structure of the health system.

106. We therefore seek your views on the following proposed options:

⁴⁵ The Water Fluoridation (Consultation) (England) Regulations 2005, regulation 5.

Option 1: No prescription in regulations on how local authorities should reach a decision.

Option 2: Replicate the requirements in the current regulations.

Option 3: Prescribe different requirements in regulations. For example, that a local authority or joint committee when determining whether to proceed with a fluoridation proposal should have regard to:

- the views of the local population, and the extent of support for the proposal;
- the validity of the arguments advanced, having particular regard to the scientific basis of the representations for and against as well as views on the ethical arguments about fluoridation;
- whether the Joint Strategic Needs Assessment and the Health and Wellbeing Strategy for the affected supply areas support the proposal;
- the financial implications of a fluoridation proposal; and
- whether the health arguments in favour of proceeding with the proposal outweigh all arguments against proceeding with the proposal.

Proposal

107. The Department's preferred approach is option 3. In our view, this option better reflects the range of considerations that local government will want to take into account and highlights the importance of the relevance of the Joint Strategic Needs Assessment and the Health and Wellbeing Strategy to the proposal. Option 3 also better reflects the collective decision-making of a range of organisations that are within the local area and reflects the need to have regard to the views of the local population.

108. It is important that the joint committee or local authority is able to consider the validity of the arguments advanced during a consultation, including their scientific basis. In the Department's view, representations which have no scientific basis should not carry the same weight as those based on validated scientific evidence. It will be critical that the local authority or joint committee disseminate the evidence on the effects of fluoridation to the affected population. There are also a range of views on the ethics of fluoridation and this is a factor that local authorities should consider as well as the evidence on its effects.

109. It is equally important that decision-makers have the opportunity to weigh-up a range of factors before deciding whether to proceed with a proposal. Ministers have indicated that they wish full account to be taken of public opinion in decisions on fluoridation proposals.

110. The Department does not consider that the local authority or joint committee should be mandated to base their decisions solely on its consideration of the specific numbers of responses for or against the proposal. A simple count is unlikely to take into account all relevant factors or fully reflect the range and content of the responses to the consultation. Instead, it is suggested that an authority or joint committee should take account of the views of the local population, the extent to which they are evidence-based and the extent of support for the proposal. In the Department's view, this improves the test in the existing regulations by emphasising the need for a critical evaluation of the responses to a consultation.

111. In determining the overall health benefits of a scheme, there must be evidence that the fluoridation of water will have a positive impact on the population's health and that this benefit outweighs all arguments against proceedings. Public Health England will play a key role in providing information on the evidence base and local authorities should consider their Joint Strategic Needs Assessments and Joint Health and Wellbeing Strategies.

112. The Department considers that it is important that the financial implications are a factor that must be considered by the local authority. This factor may be important, for example, where a local authority could get better value from spending the money on improved oral health education rather than fluoridation.

Consultation question 24:

24. Do you agree that option 3 is the most appropriate option and that existing provision should be revised so that, in particular, an authority or committee is specifically required to have regard to the views of the local population and to the financial implications of the proposal?

113. The paragraphs above have covered the conduct of a consultation exercise and the factors that must be taken into account when determining its outcome and deciding on the fluoridation proposal. The Department also has to ensure that there is an effective mechanism in place for where a number of upper-tier local authorities would be affected by a fluoridation proposal. The 2012 Act already provides for local authorities to arrange for a joint committee to take a decision on the proposal.

114. The paragraphs below cover our proposals for the procedures to be followed by such a committee when making that decision. In particular, in cases where there is disagreement amongst the members of the committee and the decision needs to be put to a vote.

Seeking agreement to fluoridate

115. Section 88F relates to how a committee will reach a decision as to whether to proceed with a fluoridation proposal (new or existing) once the consultation process has closed.
116. There may be circumstances where the committee might not reach consensus through discussion alone, particularly in cases where large numbers of local authorities are involved. It is important therefore to establish a mechanism for the decision-making committee to make a decision through majority voting. Similar to the proposed approach for seeking agreement to consult, the Department suggests that a requirement for a majority vote should be applied rather than a unanimous decision.
117. However, it is suggested that the threshold should be higher than a simple majority. In most circumstances, one local authority should not be able to veto a decision of the majority. Nevertheless, this raises issues of fairness if an area of one local authority is fluoridated against the wishes of that authority due to majority decision-making. Local decision makers will also need to consider the wider impact of a decision to fluoridate on their ability to fund other public health intervention functions. Paragraph 51 has set out where section 88F(2) of the 1991 Act requires that a joint committee be established to conduct the consultation and make the final decision.
118. Where there is only one local authority affected (the proposing authority) or where other authorities affected do not wish to participate in the process, the decision rests with the proposing authority. The Secretary of State has the power to make regulations for the procedure to be followed by that authority (section 88F(4)(d)). The Department's view is that local authorities should be required to seek the views of their Health and Wellbeing Boards before making a decision on fluoridation proposals. The Board would be able to advise on the relevance of a fluoridation proposal to other proposals that the local authority had for health improvements and on priorities.
119. In addition, paragraphs 121 to 136 set out our proposals to establish two processes for voting by joint committees. One process applies where there are a small number of affected local authorities and the other where there is a larger number of local authorities that would be affected.
120. Section 88E(4) of the 1991 Act gives the Secretary of State for Health powers to prescribe the circumstances where a proposal may be modified by the proposing authority or joint committee to extend the boundary of the area in the proposal (i.e. the boundary of the water supply zone in which the water

is fluoridated). We do not intend to use this power. Over time, variations may be required and section 88J of the 2012 Act sets out a mechanism for local authorities to consult on a variation of a proposal that has been implemented. However, the Department does not feel that a variation to extend an area after the consultation has taken place is necessary. The proposal should have been developed in sufficient detail to ensure that water supply area is already considered and clearly defined in consultation with the water supplier and the people living in an affected area have had the opportunity to respond to the consultation.

Seeking agreement to fluoridate (two or three local authorities)

121. Where there are only two or three local authorities affected, it would be possible to make regulations under section 88F(4)(d) of the 1991 Act to provide for a decision on whether to continue with a fluoridation proposal by voting.

122. We have considered the following options for local authorities in making decisions on fluoridation proposals:

Option 1: No procedure prescribed in regulations. The joint committee would determine its own procedure for making the final decision.

Option 2: Prescribe that the joint committee must make a decision by majority voting but that the committee is free to determine whether a simple majority is sufficient, or whether a larger majority would be more appropriate under its own rules of procedure.

Option 3: Prescribe that the joint committee must make a decision by a super-majority (two-thirds) where equal numbers of members from each local authority have a vote but no other members of the committee.

Option 4 Prescribe that the joint committee must make a decision by a super-majority (two-thirds) but that local authorities would be free to determine their own rules of procedure, including which members of the committee would be eligible to vote.

Proposal

123. The Department's preferred approach is either option 3 or option 4. Options 1 or 2 would give the most discretion to the joint committee at a local level. However, given that the responsibility for consultation on fluoridation ultimately rests with the local authority, option 3 would ensure that the local authorities would be in control of the final decision. Nevertheless, if the Department

pursued option 3, there would need to be some clear rules around how the prescribed majority is to be calculated. We suggest that a super-majority would be the most appropriate option as this is well established in existing local government legislation.

124. We suggest that for the purposes of establishing a majority, equal numbers of representatives from each local authority would have a vote. It would be unfair if one local authority had four votes because they had extra elected members on the joint committee when compared to a local authority with just the statutory minimum membership.

125. Alternatively, option 4 could provide a wider voting system with representatives of Clinical Commissioning Groups having voting rights if that is the preferred approach of the joint committee.

126. With two or three local authorities, it would be possible to prescribe that all of the members would have one vote each with a tie resulting in retaining the status quo. However, on balance, we do not feel that this approach would be fair to the individual local authorities who would be required to fund a fluoridation scheme from their public health ring-fenced budgets.

Consultation questions 25 to 26 :

25. Do you agree that a decision for two or three local authorities should be made by a super-majority?

26. What alternative mechanisms might work better?

Seeking agreement to fluoridate (four or more local authorities)

127. Where there are large numbers of affected local authorities, a voting system for the joint committee weighted by the population of each local authority may be more appropriate than a simple super-majority approach. As the most appropriate method of funding a fluoridation scheme would be by population covered, population weighting would relate the means by which agreement on a proposal was reached to the contribution to the costs that would be incurred by the local authorities. There would then be two points to consider:

- whether all members of the committee should have a vote; and
- what happens, where there is an even number of local authorities affected, in the event of a tie.

128. At paragraph 61 - 62, we suggested that our preferred model for four or more local authorities would be for the joint committee to consist of an equal number of representatives nominated by each authority (or in the case of a joint sub-committee of the Health and Wellbeing Boards, by each Board). The representative would then put forward that agreed position at the joint committee.

129. Similarly, at paragraph 124, we suggest that when a joint committee cannot reach a consensus through discussion equal numbers from each authority or Board should be able to cast a vote.

130. We set out the following options for determining the outcome of consultations on proposals for a new fluoridation scheme:

Option 1: No prescribed procedure. The joint committee would determine its own procedure for making the final decision.

Option 2: Prescribe that the joint committee must make a decision through majority voting (with one vote per local authority) but that the detailed rules of procedure on what form that majority could take would be determined by the committee's own rules of procedure.

Option 3: Prescribe a requirement for a super-majority threshold, where only one representative from each local authority has a vote.

Option 4 Prescribe a requirement for population-weighted voting in the joint committee with a super-majority threshold for proceeding, again where only one representative from each local authority has a vote.

Proposal

131. The Department's preferred approach is option 2 or option 4. There needs to be a legislative mechanism to determine how the joint committee decides on behalf of a large number of local authorities whether to fluoridate or not as reaching consensus could be difficult. In addition, there may be circumstances where one local authority would be disproportionately affected by a proposal compared to others.

132. For example, if the proposing local authority had identified a need in relation to poor oral health and had 90% of the affected population, it could be unfair if another local authority that only had a small percentage of the affected population vetoed their proposal.

133. This could equally apply where there are only two or three local authorities. However, the decision-making process here would be more straightforward. We therefore invite views on whether population-weighted voting should also apply to proposals where there are only two or three affected local authorities.
134. If, as in paragraph 123 a super-majority based on population-weighted voting was required, there would only be one vote for each local authority regardless of the number of representatives on the decision-making committee. **Table 1** below illustrates three example scenarios where the vote is weighted for population assuming a two-thirds threshold. In all cases, there are four affected local authorities with two local authorities voting “yes” and two voting “no”.
135. If the decision was made through non-weighted votes, no account would be taken of disparities in the size of the populations in the affected local authorities and a fluoridation proposal which commanded widespread support would not proceed. However, if votes were weighted according to population size, as in scenario 1, the local authorities would proceed with a fluoridation proposal. The model for population-weighting in **Table 1** is not the only possible approach. However, this option would allocate votes precisely in proportion to the affected population and would be relatively simple to administer. It is therefore proposed that, for the purpose of agreeing the outcome of a consultation, voting should be weighted by, the population of the area of the local authorities that would be affected and not the whole population of the local authorities.
136. We invite views on the most appropriate mechanism for making decisions on fluoridation proposals where there is no consensus among the affected local authorities.

Table 1: Example scenario of population-weighted voting							
Vote and Population value	Local authority A	Local authority B	Local authority C	Local authority D	Total	Percentage Yes	Outcome
Vote	Yes	No	No	Yes	-	-	-
Scenario 1	100,000	20,000	100	5,000	125,100	83.94%	Proceed with proposal
Scenario 2	4,000	4,000	4,000	5,000	16,000	56.00%	Proceed with proposal
Scenario 3	2,000	100,000	2,000	2,000	106,000	3.77%	Do not Proceed with proposal

Consultation questions 27-32:

- 27. Do you agree that there should be a different voting mechanism for a joint committee of four or more affected local authorities?**
- 28. Should population-weighted voting be prescribed?**
- 29. What other factors should be considered?**
- 30. Do you agree with the proposed model of population weighting and the approach to calculating the affected population?**
- 31. How easy will it be to determine an accurate population number?**
- 32. Should population-weighted voting also apply to proposals where there are only two or three affected local authorities?**

Variation, termination and maintenance of fluoridation arrangements

Cross Reference to relevant sections of the Water Industry Act 1991 inserted by the 2012 Act:

Section 88I – Variation or termination of arrangements under section 87(1)

Section 88K – Additional requirements where other local authorities affected

Section 88L– Decisions on variation or termination proposal

Section 88M – Decision-making procedure: exercise of functions by committee

Section 88N – Maintenance of section 87 arrangements

Introduction

137. In addition to the provisions on making new arrangements for a fluoridation scheme, section 36 of the 2012 Act inserts provisions to allow schemes to be varied, maintained or terminated (see sections 88I to 88N of the 1991 Act).

138. Local authorities will need to consult not only on proposals for fluoridation schemes but also on proposals to vary or terminate an existing scheme. A variation might arise where the water undertaker needs to carry out long term changes to the engineering for the water supply zone. (i.e. those which are not temporary changes for operational purposes). This could result in changes in the area receiving fluoridation water. Alternatively, a local authority might wish to extend the boundary of a water supply zone to fluoridate a new wider area.

139. As we have indicated above, we intend that the questions we have raised on consultations and decision making on proposals for new fluoridation schemes should also apply to proposals for variations or terminations of existing fluoridation schemes. The issues discussed below refer specifically to varying, maintaining and terminating existing fluoridation schemes.

140. Notably, the 2005 Regulations prescribe that maintaining an existing fluoridation scheme requires consultation if it involves the replacement or upgrading of the fluoridation plant, other than for the purpose of meeting operational or health and safety standards.⁴⁶ In practice, a Strategic Health Authority would decide to take such a step on the advice of the water undertaker.

141. The Department's view is that the consultation and procedural requirements for varying, maintaining or terminating a scheme should be the same as for

⁴⁶ The Water Fluoridation (Consultation) (England) Regulations 2005, regulation 4(2).

initiating a proposal, unless exemptions apply (see paragraphs 145-151). As a consequence, the proposals set out above for consultations and decision making on proposals for new fluoridation schemes would apply to the maintenance, variation or termination of existing schemes unless exempted by regulations.

142. The Secretary of State for Health has the power to prescribe the circumstances where he can request that a water undertaker vary fluoridation arrangements, without a variation proposal under section 88I(4) of the 1991 Act. The Secretary of State for Health also has powers to specify that in certain circumstances a proposer can proceed without the full consultation processes for arrangements with other local authorities, joint committees and consultation that would otherwise apply (see section 88K, 88L and 88M).

143. In addition, the Secretary of State for Health may make regulations as to the maintenance of schemes, including for consulting and ascertaining opinion on whether arrangements should be maintained and for enabling authorities affected to decide whether to propose to the Secretary of State that they be maintained (see section 88O(1) of the 1991 Act).

144. The arrangements for variation, termination and maintenance will apply to both existing and new schemes on or after 1 April 2013. This is the intended date for commencement of the new system. Thus, existing schemes will generally need to be varied or terminated by local authorities even if they were originally established by Strategic Health Authorities.

Circumstances where the Secretary of State may vary or terminate arrangements without a request from a local authority

145. Under normal circumstances, the Secretary of State for Health may not request variation of fluoridation arrangements or require a water undertaker to terminate such arrangements unless a proposal has been made by one or more affected local authorities (see section 88I(1) and(2) of the 1991 Act). However, section 88I(4) and (5) give the Secretary of State of Health power to prescribe the circumstances where he can vary or terminate a contract without such a proposal. The Secretary of State could use these powers in collaboration with the Secretary of State for the Environment Food and Rural Affairs as a fail-safe option to be used to preserve the safety of the water.

146. We are considering the following options:

Option 1: The Secretary of State of Health has no powers to vary or terminate a contract without receiving a proposal from a local authority.

Option 2: The Secretary of State of Health has power to terminate or vary a contract without a local authority proposal where a general risk to health is identified from fluoridation or a specific risk emerges due to actions of a particular water undertaker.

Proposal

147. In the Department's view, option 2 provides an appropriate balance between local authority autonomy and the Secretary of State for Health's over-arching responsibility for public health. It is important to note that the Secretary of State for Health would have powers to terminate a contract in contrast to those of the Secretary of State for Environment Food and Rural Affairs. Through the Chief Inspector of Water, (DWI), Secretary of State for Environment Food and Rural Affairs may if necessary stop, for instance, fluoridation of a water supply or the supply itself where there is identified a significant risk of a potential danger to health and until such time that appropriate remedial action is taken to secure compliance.

148. In our view, the Secretary of State for Health would only wish to mandate local authorities in exceptional circumstances, but the Department considers that a fail-safe option is needed to ensure the Secretary of State is able to protect the health of the population in such circumstances. For example, if a risk to general health was identified from fluoridation (not yet identified), the Secretary of State would have the power to terminate fluoridation without delay.

Consultation question 33:

33. Do you agree that the Secretary of State of Health should have regulatory powers to vary or terminate a contract without a local authority proposal where a risk to general health is identified from fluoridation or a specific local risk emerges?

Variation of arrangements

149. The Secretary of State may prescribe circumstances where the duty of the proposer to comply with prescribed requirements as to the steps to be taken for consultation on a variation proposal does not apply (see section 88L(4)). The Secretary of State for Health also has the power to make regulations that the local authorities' duty to arrange for an existing joint committee, or appoint a joint committee or Health and Wellbeing Board, to exercise the relevant functions does not apply.

150. Many variations are likely to be minor and technical and so may not require consultation. Under the 2005 Regulations, it is the more significant variations that require consultation. These Regulations state that consultation is required on a proposal to vary fluoridation arrangements where:

- the variation concerns the boundary of the area to which the arrangements relate (i.e. the boundary of the water supply zone which the water company is contracted to fluoridate may vary for operational reasons); and
- the number of houses that would be affected by the variation, either by being brought within the area or by being excluded from it, exceeds 20% of the number of houses within the area at the time the request is made⁴⁷.

151. **We are considering the following options in relation to varying arrangements:**

Option 1: No prescription in regulations: local authorities would have to consult on *all* variation proposals.

Option 2: Prescribe in regulations that the consultation process is only required for significant variations and is not required for minor changes for a variation proposal, for example if:

- (a) it does not concern the boundary of an area to which arrangements relate; or
- (b) it does concern the boundary of an area, but the number of houses that would be affected by the variation, either by being brought within the area or by being excluded from it, is fewer than 20% of the number of houses within the area at the time

⁴⁷ The Water Fluoridation (Consultation) (England) Regulations 2005, regulation 4(1).

the request is made and this variation occurs within the proposing local authority.

(N:B in circumstances where more than one local authority is affected by the variation, we intend to issue guidance to the effect that the proposing local authority should notify and seek agreement from any other affected local authorities. This process would not be a statutory process.)

Option 3: Prescribe other set of circumstances where a variation does not require consultation.

Proposal

152. We suggest replicating the current position as closely as possible (option 2). Minor variations in the boundary should not need a formal consultation and joint committee process and the current flexibilities within the system should be maintained. This option strikes the balance of avoiding consultation exercises for minor variations whilst still ensuring that significant changes in the boundaries of fluoridation schemes are subject to public consultation.

153. In addition, section 88K(5) gives the Secretary of State for Health the power to dis-apply the duty of a proposer to enable the authorities affected by a proposal to vary a fluoridation scheme to decide whether further steps should be taken on the proposal. These powers provide flexibility to the process but we have not identified a specific situation where we would need to use these powers. We seek your views on any specific circumstances where you consider that it might be useful to use these powers.

Consultation questions 34-36:

34. Do you agree that, as with the current provisions, consultations should not be required for minor variation of schemes?

35. If not, in what cases should consultation be required?

36. Does the power in section 88K(5) whereby the Secretary of State of health can dis-apply the duty of a proposer local authority to enable the authorities affected by a proposal to vary a fluoridation scheme to decide whether further steps should be taken on the proposal need to be exercised?

Maintenance of existing arrangements

154. The Secretary of State may make regulations under section 88O(1) to specify the circumstances in which local authorities must consult and ascertain opinion on whether arrangements should be maintained and, whether to propose to the Secretary of State that existing arrangements be maintained.

155. If the Secretary of State prescribes such circumstances, the regulations must also require the Secretary of State to give notice to the water undertaker to terminate the arrangements, if the authorities affected decide that the arrangements should not be maintained and the Secretary of State is satisfied that any related requirements imposed by regulations have been met (see section 88O(2)).

156. The 2005 Regulations state that consultation is required for maintaining fluoridation arrangements if it involves the upgrading or replacement of fluoridation plant, otherwise than for the purpose of meeting operational or health and safety standards.⁴⁸

157. The Department is considering the following options for regulations under the 1991 Act:

Option 1: No prescription. There would not be any cases in which local authorities would be required to consult on maintaining a fluoridation scheme. Consultation would only be required if a local authority proposed variation or termination of the scheme.

Option 2: In addition to option 1, replicate the existing provision: the 2005 Regulations state that consultation is required for maintaining fluoridation arrangements if it involves the upgrading or replacement of fluoridation plant other than for the purpose of meeting operational and health and safety standards.

Option 3: Impose a requirement to consult on the continued operation of fluoridation schemes at specific intervals. For example, the requirement could be imposed every twenty years and/or for a maintenance consultation if oral health had substantially improved.

Option 4: Impose conditions relating to the cost of replacing or upgrading the plant. That is, a consultation must take place where these costs exceed a certain cost threshold based on an options appraisal.

Proposal

158. We invite views on the best approach to take with regard to the maintenance of existing arrangements. There will need to be a balance between being

⁴⁸ The Water Fluoridation (Consultation) (England) Regulations 2005, regulation 4(2).

overly burdensome on administrators and allowing local communities to have a say in the continuation of water fluoridation schemes.

159. In the Department's view any procedural arrangements including the joint committee process and consultation requirements proposed earlier in this document for initiating a scheme would be required here. It is therefore proposed that the circumstances in which consultation should be required should replicate the requirements of the current regulations.

160. In addition, it is the Department's view that any proposed regulations should provide that the process for a proposal under option 2 should replicate the provisions for a variation of a scheme. The regulations would therefore require affected local authorities to establish a joint committee to conduct the consultation and make the final decision on whether to maintain or request the Secretary of State to terminate the arrangements. The requirements for consultation and the factors to consider in deciding whether to maintain or request termination, would be the same as those for proposals to establish or vary a fluoridation scheme.

161. The Department's initial view is that option 3 could disrupt fluoridation schemes that are functioning well and are popular locally. This could produce a destabilising effect on the provision of dental public health services. Local authorities would have the ability to consult on terminating a contract under section 88I of the 1991 Act if they considered this an appropriate step. At this stage, it is not considered necessary to require a local authority to consult on the continued operation of a scheme at specified intervals but we invite your views on this matter.

Consultation question 37-39:

37. What are your views on the benefits of consultation in relation to the maintenance of existing arrangements?

38. Should the regulations prescribe a process for requiring local authorities to consult and decide on whether to maintain or request termination of a fluoridation scheme, and

39. If so, what should the procedural requirements be in such cases eg should time intervals be set at which the continuation of the scheme should be reviewed as suggested at paragraph 157?

Termination of fluoridation schemes (process)

162. Paragraph 147 outlines the circumstances when the Secretary of State for Health may require a water undertaker to terminate a contract for a fluoridation

scheme without a proposal from one or more local authorities. The Department intends to use these regulations as a fail-safe option.

163. In addition, the Secretary of State may, by regulations, provide circumstances where the duty does not apply for the proposer to make arrangements to enable affected authorities to decide whether further steps (including consultation) should be taken for a termination proposal (see section 88K(5)).

164. The Secretary of State may also prescribe circumstances where the duty of the proposer to comply with prescribed requirements about the steps to be taken for consultation on a termination proposal does not apply (see section 88L(4) and 88M(5)). We do not intend to exercise these powers. Given that the Secretary of State will hold the contracts and have the relationship with the water company, the Secretary of State will be able to react more quickly to any health protection issues where termination is required. We do not believe that a local authority should be able to vary or terminate a contract unilaterally and without consultation.

165. Under section 88L(8) and 88M(6), the Secretary of State has powers to prescribe the membership of a joint committee to conduct the consultation and final decision-making process in relation to a termination proposal, and a power to prescribe the procedure to be followed by such a committee. We suggest that these requirements should be the same as the requirements needed for a proposal for a new fluoridation scheme. This ensures consistency of standards for the approach to a fluoridation proposal. We believe that a proposal to terminate a contract is as significant as a new proposal to fluoridate and could be equally controversial. We feel that it is important for local areas to have the option to propose a termination proposal and agree that the arrangements for final decisions, including voting procedures, should be the same as for new proposals.

166. We propose that a local authority or the joint committee need to take into account the same factors when deciding on terminations as they do for new proposals. However, it may be necessary to slightly alter the decision-making criteria outlined in paragraph 106 to ensure that they are still applicable for a termination scheme. For example, it may be difficult to terminate a contract if a condition is that the demonstrable health arguments in favour of proceeding with the termination outweigh the arguments against proceeding. For a termination proposal, we suggest that the criteria may need to be reversed so that local authorities must consider whether the benefits in favour of terminating a contract for a scheme outweigh the health arguments in favour of maintaining the scheme.

Consultation questions 40-41:

40. Do you agree that the procedural approach for a consultation proposal on terminating a contract for a fluoridation scheme should mirror the approach for a new proposal.

41. Are there any additional requirements that local authorities should be required to take or factors that they should consider?

Termination of contracts for fluoridation schemes (Timescales)

167. The Secretary of State may make regulations to provide that, where a termination proposal is made, no further termination proposal can be made until the end of such a period specified in the regulations (see section 88(6) of the 1991 Act). In effect, the regulations would allow the Secretary of State to specify the intervals at which local authorities would be required to undertake consultations on the termination of existing fluoridation schemes.

168. As both the conduct of a consultation and the installation of a fluoridation scheme would be costly, we believe that a group of local authorities should not be expected to undertake consultation on terminating the contract for the fluoridation scheme at unreasonably short intervals. Such practical considerations would need to be balanced with the need to allow local authorities, and their democratically elected leaders, to make decisions on oral health promotion and capital investment.

Option 1: No prescription in regulations.

Option 2: Prescribe in regulations that there should be a minimum (and maximum) term between the conduct of a consultation to terminate a contract for a fluoridation scheme.

Option 3: Prescribe in regulations other criteria to ensure that local authorities and joint committees have to carry out consultations at reasonable time intervals.

Proposal

169. The Department favours the prescription of minimum intervals between termination consultations. However, we welcome views on what a minimum interval should be.

Consultation questions 42-43:

42. What are your views on the benefits of imposing a minimum interval between termination consultation proposals?

43. If so, what interval do you suggest would be appropriate?

Consultation Questions (Summary)

1. Do you agree with our proposals for the arrangements to enable a joint decision to proceed with a proposal?
2. Do you agree that a decision to proceed with fluoridation should be made on a super-majority basis?
3. Are there any other approaches that you believe could work better?
4. Do you agree that: the membership of the committee established to progress a proposal on fluoridation should be prescribed in regulations
5. Do you agree that we do not need to make regulations in relation to holding and vacating office?
6. Do you agree that regulation in relation to minimum and maximum membership would be too prescriptive?
7. Do you agree that there should be an alternative approach in the regulations when there are a large number of affected local authorities?
8. If so, would this be adopted when there are four or more local authorities?
9. Do you agree a joint committee of Health and Wellbeing Boards might be an efficient approach?
10. Do you agree that the existing requirements for conducting consultations at option 2 remain appropriate; or are there any further steps in relation to consultations that you feel a local authority or the joint committee should take?
11. Should there be any other further changes to the proposed consultation requirements?
12. Are there any requirements that you would like to suggest that we include in regulations to minimise or remove any potential adverse impacts or disadvantages for groups with a “protected characteristic” as set out under the Equality Act?
13. Do you agree that children and young families in deprived areas be encouraged to participate in consultations on proposals for new fluoridation schemes
14. Will this contribute to implementation of the duty on the Secretary of State to have regard to the need to reduce health inequalities between people with respect to the benefits they can obtain from the health service?
15. Do you agree that the new duty which is due to be imposed on the Secretary of State to have regard to the need to reduce inequality- whatever its cause - is relevant to proposals to introduce fluoridation schemes?
16. Do you have any information
 - on the cost benefits of fluoridation schemes and/or
 - the costs a local authority would incur in conducting a consultation?
17. Do you agree that: no specific requirements are needed on consultation material or other information provided to the public (other than those specified in public law and in paragraphs 74 – 76)?
18. Do you agree that the proposing local authority or joint committee should nevertheless be required to obtain advice from the director(s) of public health?

19. If no, what requirements do you think should be imposed?
20. What role should Public Health England play in supporting local authorities with their fluoridation functions?
21. What role (if any) should Public Health England play in supporting local authorities to gather equality data?
22. Do you agree that the method by which local authorities ascertain public opinion on fluoridation proposals be left to their discretion?
23. If not, what methods of ascertainment would you wish to see imposed in regulations?
24. Do you agree that option 3 is the most appropriate option and that existing provision should be revised so that, in particular, an authority or committee is specifically required to have regard to the views of the local population and to the financial implications of the proposal?
25. Do you agree that a decision for two or three local authorities should be made by a super-majority?
26. What alternative mechanisms might work better?
27. Do you agree that there should be a different voting mechanism for a joint committee of four or more affected local authorities?
28. Should population-weighted voting be prescribed?
29. What other factors should be considered?
30. Do you agree with the proposed model of population weighting and the approach to calculating the affected population?
31. How easy will it be to determine an accurate population number?
32. Should population-weighted voting also apply to proposals where there are only two or three affected local authorities?
33. Do you agree that the Secretary of State should have regulatory powers to vary or terminate a fluoridation scheme without a local authority proposal where a general risk to health is identified from fluoridation or a specific local risk emerges?
34. Do you agree that, as with the current provisions, consultation should not be required for minor variation of schemes ,
35. If not, in what cases should consultation be required?
36. Does the power in section 88K(5) whereby the Secretary of State can dis-apply the duty of a proposer local authority to enable the authorities affected by a proposal to terminate a fluoridation scheme to decide whether further steps should be taken on the proposal need to be exercised?
37. What are your views on the benefits of consultation in relation to the maintenance of existing arrangements?
38. Should the regulations prescribe a process for requiring local authorities to consult and decide on whether to maintain or request a termination of a fluoridation scheme?
39. If so, what should the procedural requirements be in such cases eg should time intervals be set at which the continuation of the scheme should be reviewed as suggested at paragraph 157?
40. Do you agree that the procedural approach for a consultation proposal on terminating a contract for a fluoridation scheme should mirror the approach for a new proposal?
41. Are there any additional requirements that local authorities should be required to consider?

42. What are your views on the benefits of imposing minimum interval between consultations on the termination of existing fluoridation schemes?
43. If so, what interval do you suggest would be appropriate?

Comments on the consultation process itself

If you have concerns or comments which you would like to make relating specifically to the consultation process itself then please send your comments to the following addresses:

contact Consultations Co-ordinator
Department of Health
3E48, Quarry House
Leeds
LS2 7UE

OR

e-mail consultations.co-ordinator@dh.gsi.gov.uk

Please do not send consultation responses to this address.

Confidentiality of information

We manage the information you provide in response to this consultation in accordance with the Department of Health's [Information Charter](#).

Information we receive, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the Freedom of Information Act, there is a statutory Code of Practice that public authorities must comply with and which deals with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the Data Protection Act and, in most circumstances; this will mean that your personal data will not be disclosed to third parties.

Summary of the consultation response

A summary of the response to this consultation will be made available before or alongside any further action, such as laying legislation before Parliament, and it will be placed on the Consultations website at:

<http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/index.htm>

Glossary

Commissioning – the process of assessing the needs of a local population and putting in place services to meet those needs.

Devolved Administrations – refers generally to the governments of Scotland (the Scottish Government), Wales (the Welsh Ministers) and Northern Ireland (the Northern Ireland Ministers).

Directors of Public Health (DsPH) – currently a role within NHS Primary Care Trusts, moving to local authorities under the Health and Social Care Act 2012; the lead public health professionals who focus on protecting and improving the health of the local population. Under the 2012 Act they would be responsible for the performance of their local authority's public health functions.

Drinking Water Inspectorate (DWI) – Acting as Secretary of State for the Environment Food and Rural Affairs in the assessment and enforcement of water quality.

Health and Social Care Act 2012 – proposals for a Health Bill were included in the Queen's Speech for the first Parliamentary session of the Coalition Government. The Health and Social Care Act 2012 contains the legislative changes required to implement the proposals set out in this document.

Health and Wellbeing Boards – are a forum for local commissioners across the NHS, public health and social care, elected representatives and representative of Healthwatch to discuss how to better the health and wellbeing outcomes for the people in their area.

Healthwatch – will be the new consumer champion for health and social care. It will exist in two distinct forms. At a local level, there will be 'Local Healthwatch' and a national level, Healthwatch England.

Joint Strategic Needs Assessments (JSNAs) – are assessments of current and future health and social care needs in relation to an area, which fall to Clinical Commissioning Groups and local authorities and must be carried out by Health and Wellbeing Boards in accordance with section 116 of the Local Government and Public Involvement in Health Act 2007 as amended by the Health and Social Care Act 2012. Based on JSNAs, Health and Wellbeing Boards will develop Joint Health and Wellbeing Strategies (JHWS) which will underpin commissioning of health and social care and possibly inform commissioning of health-related services. The JSNA and JHWS process provides the local evidence base for services unique to the area.

Local authorities – see **Local government**, below.

Local government – refers collectively to administrative authorities for local areas within England, with different arrangements in different areas, including:

- two-tier authorities: several district councils ('lower-tier', responsible for, for example, council housing, leisure services, recycling, etc.) overlap with a single county council ('upper-tier', responsible for, for example, schools, social services and public transport);
- unitary: a single layer of administration responsible for local public services, including: metropolitan district councils; boroughs; and city, county or district councils;
- town and parish councils: cover a smaller area than district councils and are responsible for, for example, allotments, public toilets, parks and ponds, war memorials, local halls and community centres; and
- shared services: where it is considered appropriate, local government may share services across areas greater than individual administrative bodies, for example, for policing, fire services and public transport.

HealthWatch - HealthWatch England will be a national consumer champion that enables the collective views of the people who use health and social care services to influence national policy, advice and guidance.

Population weighting –through population weighting the local authorities with the largest population effected would have most votes in reaching decisions on fluoridation proposals

Primary Care Trust (PCT) – the NHS body currently responsible for commissioning most healthcare services – and, in some cases, providing community-based services, such as district nursing, for a local area. The Health and Social Care Act 2012 will abolish these bodies on 1 April 2013.

Provider – an organisation that provides services directly to patients, including hospitals, mental health services and ambulance services.

Public Health England (PHE) – A new integrated public health service that will be set up as an executive agency of the Department of Health, including the current functions exercised by the National Treatment Agency and the Health Protection Agency. PHE will exercise public health functions conferred on the Secretary of State by the Health and Social Care Act 2012 and will be operational on 1 April 2013.

Strategic Health Authority (SHA) – the NHS body currently responsible for developing strategies for local health services and ensuring high-quality performance at a regional level. They oversee the NHS locally and are a key link between the Department of Health and the NHS. The Health and Social Care Act 2012 will abolish these bodies on 1 April 2013.

Unitary authority – see **Local government**, above.

Upper-tier authority – see **Local government**, above.

Water undertaker – a company that undertakes to supply water (and in some instances a sewerage system).

Water Industries Act 1991 – sections 87 – 91 of the Act, as amended by sections 35 to 37 of the Health and Social Care Act 2012, contain the primary legislation on fluoridation.

ANNEX A: Overview of the Health and Social Care Act 2012 provisions

As explained in paragraphs 17 – 20, the Health and Social Care Act 2012 ('the 2012 Act') transfers responsibility for proposing fluoridation schemes and conducting consultations on such schemes from Strategic Health Authorities to local authorities. The new sections set out the consultation process on proposals for fluoridation schemes but also contain regulation-making powers for the Secretary of State.

Sections 35 to 37 are the relevant sections of the 2012 Act that amend parts of the Water Industry Act 1991⁴⁹ ('the 1991 Act'). In broad terms, these sections amend the 1991 Act so that the Secretary of State may enter fluoridation arrangements with water undertakers in prescribed circumstances and the consultation processes with local authorities who also may make fluoridation proposals. New section 88H deals with payments by local authorities towards fluoridation costs and new sections 88I to 88O deal with the procedure for varying, terminating and maintaining fluoridation schemes.

The new sections are described below followed by an overview of each area dealt with in this consultation process.

Section 88B allows a fluoridation proposal to be made by one or more local authorities in England. A fluoridation proposal is a proposal on which the Secretary of State enters into arrangements with one or more water undertakers to increase the fluoride content of the water supplied by the undertaker or undertakers to a specific area. Whilst local authorities will undertake consultations on fluoridation schemes, the Secretary of State will manage the contracts with water undertakers which put them into effect. (In practice, it is anticipated that Public Health England will undertake this function of the Secretary of State.) Subsection (4) allows for local authorities to propose fluoridation for their own population, or a larger population which includes some or all of their area.

Section 88C applies if a fluoridation proposal is made. The proposer must consult with the Secretary of State and the water undertaker as to whether the proposal would be operable and efficient. The proposer must inform the Secretary of State of the opinion of the water undertaker. Only if the Secretary of State is of the opinion that the proposals are operable and efficient can the proposals proceed.

Section 88D provides that once the Secretary of State for Health has agreed that the proposal is operable and efficient and the proposer wishes to take further steps in relation to the proposal, the proposer must notify all other local authorities affected

⁴⁹ See <http://www.legislation.gov.uk/ukpga/1991/56/contents>

by the proposal and make arrangements for the authorities to decide how to proceed. Subsection (4) requires the Secretary of State for Health to make regulations on the details of how these decisions should be reached by the local authorities concerned.

Section 88E provides that where the proposer decides to proceed with the proposal, it must comply with any requirements provided for in regulations made by the Secretary of State as to the steps to be taken for consultation and ascertaining opinion. The proposer may then decide to modify the proposal (only within the water supply zone of the relevant area, or in certain circumstances, to add another area. The proposer must then decide whether to request the Secretary of State to make such necessary requests to implement the proposal. Subsection (6) empowers the Secretary of State for Health to make regulations specifying the factors which the proposer must consider in deciding whether to proceed and the procedure to be followed in reaching that decision or in consulting and ascertaining opinion for the proposal.

Section 88F requires that, unless either the proposal affects only a single local authority or it affects more than one authority, but the other authorities do not wish to participate in the decision, the affected local authorities must exercise functions under section 88E either through an existing joint committee, a new joint committee or a joint subcommittee of health and wellbeing boards. Subsection (4) empowers the Secretary of State to make regulations on the composition and procedures of these joint committees or joint sub-committees.

Section 88G places a duty on the Secretary of State for Health to implement a fluoridation proposal by entering into arrangements with a water undertaker. The 2012 Act ensures that the Secretary of State has initially satisfied himself that a scheme is operable and efficient (see section 88C of the 1991 Act). In addition, subsection (2) of section 88G requires that the Secretary of State be satisfied that the requirements imposed by sections 88B to 88F of the 1991 Act have been met. This does not require the Secretary of State to consider the adequacy of any steps taken for the purposes of complying with any requirement to consult or to ascertain opinion.

Section 88H provides a mechanism under which local authorities can be made to bear the full cost of fluoridation. Under subsection (2), the Secretary of State for Health can require the local authorities affected by arrangements made by the Secretary of State for the fluoridation of water with a water undertaker to meet the Secretary of State's costs incurred under the terms of the arrangement. Subsection (4) provides for the Secretary of State to determine what amounts are payable by each authority in the absence of an agreement between the local authorities (or by a joint committee of the local authorities or joint sub-committee of health and wellbeing

boards), with a power to appoint an independent person to arbitrate if he wishes. Subsections (5) and (6) provide for requests for variations in the amounts agreed, once a fluoridation scheme is set up, to be treated in the same way.

Sections 88I to 88N relate to the variation or termination of arrangements for the fluoridation of water. They largely replicate the provisions concerning new fluoridation proposals in sections 88B to 88G. The Secretary of State for Health is able to vary or terminate arrangements without a proposal from a local authority, in certain limited cases. Section 88I(4) provides for regulations to be made prescribing the cases where the Secretary of State can vary or terminate arrangements without a local authority making a proposal.

Section 88O contains a regulation-making power in relation to consultation or ascertaining opinion on the maintenance of existing fluoridation arrangements. The power also covers the procedures to be followed in relation to a proposal to maintain arrangements. The regulations must make provision requiring the Secretary of State of Health to give notice to the water undertaker under section 87C(7) of the 1991 Act if the local authorities do not want to maintain fluoridation arrangements and the Secretary of State is satisfied that any requirements imposed by regulations have been met.

Overview of Health and Social Care Act 2012 provisions: initial participation in decision-making (sections 88C, 88D, 88J and 88K)

The 2012 Act sets out a number of initial steps that a local authority making a fluoridation proposal (“the proposer”) must take, including consulting with relevant water undertakers and the Secretary of State to ensure a proposed scheme is operable and efficient. (In practice, we expect this function to be undertaken by Public Health England.) Once this initial preparatory work has been completed, the proposing local authority must notify any other local authority affected by the proposal. A local authority is affected if its area, or any part of it, is within the proposed area of the fluoridation scheme. The proposer must then make arrangements for enabling the affected local authorities to decide whether further steps should be taken.

The 2012 Act requires a similar initial process for proposals to vary or terminate a fluoridation scheme. As set out in paragraph 145 - 151 of this document, there are powers to make regulations to specify when the procedural requirements described below do not apply.

In a case where the proposed area for fluoridation falls within the area of a single local authority, the authority may proceed to consult without going through the joint

decision making process discussed below. In practice, we think such cases are unlikely.

Overview of the Health and Social Care Act 2012 provisions: committee membership and procedures (sections 88F and 88M)

The 2012 Act requires that, subject to some exceptions, local authorities must use a joint committee to carry out the consultation and make final decisions in relation a fluoridation proposal. The 2012 Act provides that local authorities who are affected by a fluoridation proposal must use an existing joint committee or set up a new joint committee or arrange for their Health and Wellbeing Boards to set up a joint sub-committee. The only circumstances where this requirement does not apply is where there is only one local authority (the proposer) or where all the other affected local authorities have opted-out of the decision-making.

Section 88F of the 1991 Act enables the Secretary of State to make regulations on the following matters:

- any conditions as to the membership of any existing committee, if that committee is to perform the functions of consulting and deciding on fluoridation proposals;
- the membership of any new joint committee established to perform this role;
- the membership of a joint sub-committee of Health and Wellbeing Boards established to perform this role; and
- the procedure to be followed by any joint committee or any joint sub-committee of the Health and Wellbeing Boards.

In relation to Health and Wellbeing Boards, the 2012 Act provides that as an alternative to establishing a new joint committee or using an existing one, the local authorities may arrange for their Health and Wellbeing Boards to perform the functions of consulting and deciding on the fluoridation proposal. The Boards can then exercise their powers under section 198 of the 2012 Act to establish a joint sub-committee to perform these functions.

Overview of Health and Social Care Act 2012 provisions: fluoridation decision-making (section 88E and 88L)

Once the affected local authorities have decided that they wish to proceed with a proposal for a new scheme or a proposal to vary/terminate, they would need to consult and ascertain opinion in relation to the proposal, in accordance with requirements set out in regulations made by the Secretary of State. However, in the case of a proposal to vary or terminate, there are exceptions to the requirement to consult (see paragraph 145 - 151).

The Secretary of State also has powers to make regulations specifying the factors which local authorities must consider in deciding whether to proceed with a proposal and the procedure to be followed in carrying out the consultation, ascertaining the views of the local population and making a decision. Section 88E of the 1991 Act gives the Secretary of State powers to:

- prescribe the steps that local authorities should take for the purposes of consulting and ascertaining opinion in relation to the proposal; the process that local authorities should follow when carrying out a consultation exercise;
- prescribe the procedures to be followed in relation to the consultation process and post-consultation decision-making; and
- prescribe factors which the proposer must or may take into account in making a decision on proceeding with a fluoridation proposal.

Regulations are currently in place to prescribe the consultation procedure for Strategic Health Authorities. The Water Fluoridation (Consultation) (England) Regulations 2005⁵⁰ will be replaced by new regulations made under the powers in section 88E(2) and (6) of the 1991 Act).

In cases where there is one or more local authorities affected by the proposal, other than the proposing authority, and one or more of those authorities wishes to participate in the consultation and decision making process, then the authorities must establish a joint committee to conduct the consultation. This joint committee will also make the final decision on whether to request the Secretary of State to make the fluoridation arrangements. This process is described in Chapter 5.

Overview of Health and Social Care Act 2012 provisions: variation, termination and maintenance of arrangements (sections 88I to 88O).

In addition to the provisions on making new arrangements for a fluoridation scheme, schemes can be varied, terminated and maintained (see sections 88I to 88O inserted under section 36 of the 2012 Act) Local authorities will therefore need to consult not only on proposals for fluoridation schemes but also on proposals to vary or terminate an existing scheme. This may arise, for example, where the water undertaker has to carry out changes to the engineering of the water supply zone, which would result in changes in the area receiving fluoridated water.

The consultation and procedural requirements should mirror those set out previously for initiating a proposal unless exemptions apply (see paragraphs 145 - 151 In effect, the proposals for establishing new fluoridation schemes would apply to all proposals

⁵⁰ see <http://www.legislation.gov.uk/ukxi/2005/921/contents/made>

relating to fluoridation, whether the proposal concerns a new fluoridation scheme, maintenance, variation or termination unless exempted by regulations.

The Secretary of State for Health has regulation-making powers to set out the circumstances where the Secretary of State can vary or terminate arrangements with the proposer without a request from local authorities (section 88L(4)). The Secretary of State also has powers to specify the circumstances where a local authority's proposal can proceed with the full joint committee and consultation processes that would otherwise apply (see section 88K(4), 88L(3) and 88M(2)).

Section 36 of the 2012 Act (and thus 88O the 1991 Act) enables the Secretary of State for Health to make regulations as to the maintenance of schemes, including the circumstances in which local authorities must consult and ascertain opinion on maintaining a scheme.

By virtue of section 37 of the 2012 Act, the arrangements for variation, termination and maintenance will apply to existing and new schemes on or after 1 April 2013. Therefore, existing schemes will have to be varied or terminated in accordance with the new local authority arrangements even if they were originally established by Strategic Health Authorities.

ANNEX B: Summary of Action Points from the Equality Analysis on the Fluoridation Regulations.

Category	Actions	Target date	Person responsible and their Directorate
Involvement and consultation	<ul style="list-style-type: none"> • DH will consider the consultation responses including further evidence for the equality analysis in the development of the regulations. • DH proposes to issue guidance to local authorities to clarify their responsibilities in respect to consultations on fluoridation proposals. 	December 2012	Chief Dental Officer
		March 2013	Chief Dental Officer
Data collection and evidencing	The Department will develop its policy on the collection of information about oral health of the national / local population to feed into Joint Strategic Needs Assessments, for example, by sponsoring epidemiological surveys. This also applies to the arrangement for ensuring that any evidence is made available to relevant local authority staff. The Department/ Public Health England, will work with local authorities in developing arrangements for collecting equality data.	Recurring	Chief Dental Officer
Analysis of evidence and assessment	The Department/ Public Health England will then analyse the data to assess whether the views of people with protected characteristics have been captured in the consultation.	Recurring	PHE-TT
Monitoring, evaluating and reviewing	In the light of the data obtained from the above analysis, the Department will seek to gather more evidence about how those with protected characteristics engage or are involved in consultations on fluoridation (or more widely on other health matters) to strengthen the analysis of the Department's proposals and their implementation.	Recurring	Chief Dental Officer
Transparency (including publication)	The Department will publish an updated equality analysis alongside the final regulations.	2013	Chief Dental Officer