

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – The Health Service in England

Functions relating to fluoridation of water

Section 35 - Fluoridation of water supplies

406. This section amends Chapter 4 of Part 3 of the Water Industry Act 1991 (fluoridation), as amended by the Water Act 2003. Subsections (2) to (8) amend the Act to provide for the Secretary of State to make arrangements with a water undertaker to fluoridate a water supply. However, he may only do so if a local authority has made a fluoridation proposal, consulted on that proposal, and taken a final decision in accordance with the new sections of the 1991 Act inserted by section 36.
407. *Subsection (5)* inserts new subsections (7A) and (7B) of section 87 of the 1991 Act. Subsection (7A) requires the Secretary of State to consult local authorities on the terms of any fluoridation arrangements entered into with a water undertaker. Subsection (7B) defines local authorities for the purposes of the provisions. The effect is that upper-tier authorities are responsible for fluoridation proposals – i.e. county councils, a district council for an area in England where there is no county council (which includes “unitary boroughs”), London borough councils and the Common Council of the City of London.
408. *Subsection (6)* inserts new subsections (7C) to (7F) of section 87 of the 1991 Act. These subsections require co-ordination between the Secretary of State and Welsh Ministers in relation to schemes adjoining areas either side of the border. Currently there are no cross-border fluoridation schemes between England and Wales, nor are there any proposals for any. The requirements to co-ordinate would only be in place once the legislation was brought into force in relation to both England and Wales. It is for Welsh Ministers to commence the provisions in relation to Wales.
409. *Subsection (9)* inserts new subsection (3A) into section 87A of the 1991 Act (target concentration of fluoridation). Currently the target concentration for fluoridation schemes is 1 milligram per litre - 1 part per million. Subsection (9) provides for a situation where, for technical reasons, a water undertaker is unable to provide this level of concentration to an area covered by a fluoridation scheme. For example, this might apply to an area that is distant from the water treatment works at which the fluoride is added to the water. New subsection (3A) ensures that when the Secretary of State receives a notification of such a technical problem, he would have to enter new arrangements or vary existing arrangements, so as to have a lower target concentration, but only having consulted the local authorities affected. The local authorities would in practice need to consider if the benefits to oral health at this lower concentration were still equal to the cost of fluoridating the area.
410. Arrangements (contracts) for water fluoridation schemes contain complex legal and technical requirements. It is possible that there will on occasions be disagreements as to the exact terms of these requirements. *Subsection (10)* therefore amends section 87B of

the 1991 Act so that in the event that the Secretary of State and the water undertaker are unable to agree the terms of an arrangement, or a variation in those terms, the Secretary of State may determine the terms of the arrangement or he could appoint an independent person to arbitrate if he so wished.

411. *Subsection (14)* amends section 90A (review of fluoridation) of the 1991 Act which relates to monitoring the effect of fluoridation schemes on the health of the population affected. The new subsection (5A) requires the Secretary of State to consult the relevant local authorities when carrying out such monitoring, and in particular before producing the report required by section 90A(1)(b) of the 1991 Act. This ensures that affected local authorities would be fully conversant with any effects identified and that the Secretary of State is provided with relevant information and views.

Section 36 - Procedural requirements in connection with fluoridation of water supplies

412. This section inserts new sections 88A to 88O into the Water Industry Act 1991 (the 1991 Act). These sections provide for a local authority or a group of local authorities, to make a fluoridation proposal to the Secretary of State. They provide for consultation on the proposal and set out the procedures and duties relevant to the taking of decisions. They also cover the variation and termination of fluoridation schemes. Finally, they contain a regulation making power in relation to the maintenance of a fluoridation scheme.

Section 88B of the 1991 Act – requirement for fluoridation proposal: England

413. Section 88B allows for a fluoridation proposal to be made by one or more local authorities in England. A fluoridation proposal is a proposal that 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. Subsection (4) allows for local authorities to propose fluoridation for their own area, or a larger area which includes some or all of their area.

Section 88C of the 1991 Act – Initial consultation etc. on fluoridation proposal

414. 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 of the 1991 Act – Additional requirements where other local authorities affected

415. Once the Secretary of State 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 by the proposal and make arrangements for the authorities to decide how to proceed. Subsection (4) requires the Secretary of State to make regulations on the details of how these decisions should be reached by the local authorities concerned. For example, the regulations might provide for voting and might further provide that votes be weighted by the proportion of population in each local authority that would be affected by the proposal.

Section 88E of the 1991 Act - Decision on fluoridation proposal

416. Section 88E of the 1991 Act provides that where the proposer decides to proceed with the proposal, it must comply with any requirements provided for in regulations as to the steps to be taken for consultation and ascertaining opinion. The proposer must then decide whether to proceed in the light of the views expressed. Subsection (6) empowers the Secretary of State 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.

Section 88F of the 1991 Act - Decision-making procedure: exercise of functions by committee

417. 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 of the 1991 Act either through an existing joint committee, a new joint committee or a joint sub-committee of health and wellbeing boards. Subsection (4) of section 88F of the 1991 Act empowers the Secretary of State to make regulations on the composition and procedures of these joint committees or joint sub-committees.

Section 88G of the 1991 Act– Secretary of State’s duty in relation to fluoridation proposal

418. Section 88G of the 1991 Act places a duty on the Secretary of State to implement a fluoridation proposal by entering into arrangements with a water undertaker.
419. The 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 of the 1991 Act 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 of the 1991 Act – Payments by local authorities towards fluoridation costs

420. Section 88H of the 1991 Act provides a mechanism under which local authorities can be made to bear the full cost of fluoridation. Under section 88H(2) of the 1991 Act, the Secretary of State 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) of section 88H 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 of the 1991 Act -Variation and/or termination

421. Sections 88J to 88N of the 1991 Act 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 of the 1991 Act.
422. The Secretary of State 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 of the 1991 Act – Variation and termination

423. Subsection 88O of the 1991 Act 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 to give notice to the water undertaker under section 87C(7) of the

*These notes refer to the Health and Social Care Act 2012
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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.

Section 37 - Fluoridation of water supplies: transitional provision

424. *Subsections (1) and (2)* provide for existing fluoridation arrangements between water undertakers and SHAs to be treated as if they were arrangements entered into by the water undertaker with the Secretary of State under section 87(1) of the 1991 Act.
425. *Subsection (3)* provides that where arrangements are to be treated as existing arrangements, payments by local authorities towards fluoridation costs are to be determined by agreement between the affected local authorities.