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22 February 2024

Gina Rangi  
Chief Executive  
Rotorua Lakes Council  
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Tēnā koe Gina

### **Community water fluoridation court decision update**

I am contacting you to provide an update on the judicial review of the directions issued by the Director-General of Health in July 2022, that required 14 local authorities to fluoridate one or more of their drinking water supplies.

As you are aware, on 10 November 2023, the High Court issued its judgment on the preliminary issue, finding that the Director-General of Health made an error of law by not explicitly considering the rights under the New Zealand Bill of Rights Act 1990 in making a decision on each direction. There was a second hearing on 2 February 2024 to consider the validity of the current directions, and any relief.

The Judge decided that the directions remain in place. However, the Judge directed the Director-General of Health to assess whether each of the 14 directions made in 2022 were, in terms of section 5 of the New Zealand Bill of Rights Act, a justified limit on the right to refuse medical treatment that is provided for in section 11 of the New Zealand Bill of Rights Act.

As directed by the Judge, I will carry out this assessment against the New Zealand Bill of Rights Act, for each of the directions. I will continue to update you as this process progresses.

Manatū Hauora is continuing to provide support to local authorities that are implementing their directions, including by providing funding for the capital works.

Thank you for your ongoing collaboration as we work together to improve the oral health of the communities we serve.

Nāku noa, nā



Dr Diana Sarfati  
**Director-General of Health**  
**Te Tumu Whakarae mō te Hauora**



**THE OFFICE OF THE MAYOR**

17 May 2024

Doc No: 20290404

Hon Dr Shane Reti  
Minister of Health

By email: [s.reti@ministers.govt.nz](mailto:s.reti@ministers.govt.nz)

c.c. Dr Diana Sarfati  
Director-General of Health  
By email: [diana.sarfati@health.govt.nz](mailto:diana.sarfati@health.govt.nz)

Kia ora Minister Reti

**Time Extension for Direction to Fluoridate the Rotorua Water Supplies (Central and East)**

I seek your assistance regarding my Council's obligations arising from the directive to fluoridate our two largest water supplies (central and east).

In July 2023 the Director-General of Health made a direction under the Health Act (section 116E) requiring the Rotorua Lakes Council to fluoridate two of its largest water supply catchments by April 2024. Council commenced, in collaboration with the Fluoridation Administration, to prepare the necessary system design and the procurement process required to comply with the directive. However, in November 2023 the High Court issued a judgement, finding the Director-General made an error of law with the decision-making process over the Bill of Rights considerations. My Council decided to pause the implementation of the fluoridation directive until those legal matters were addressed and clarified.

Council staff continued to seek clarification on these matters from the Ministry of Health and especially on the potential implications of compliance failure due to the uncertainty created. Our Council is concerned that failure to implement the directive could result in fines of \$200,000 and potentially \$10,000 for each day beyond the specified compliance date.

In February 2024 the Director-General of Health wrote to our Council advising that the Judge decided that the directions remain in place. However, the judge directed the Director-General of Health to assess whether the directions were in alignment with section 5 of the New Zealand Bill of Rights Act. The Director-General of Health will carry out the assessment as directed by the Judge and will continue to update the Council as this process progresses. This process has not yet been completed.

Council staff and the Fluoridation Administration continued to collaborate on the system implementation and in April 2024 agreement was reached on the system procurement and the available



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funding support. Our staff have been advised that the funding support may only be available until the end of June 2024.

However, as you know the issue is very contentious with some members of the community, and Council is concerned that proceeding to implementation faces the potential risk of legal challenge and unnecessary additional costs to defend such challenge. We are ready to physically proceed to award the contract for the physical equipment installation to commence fluoridation. However, we would prefer to commence work only after a high degree of certainty that our actions are beyond legal challenge.

We therefore seek your confirmation on the following matters:

1. Grant an extension of time to the directive for implementation, and to the available funding support to that effect, of six (6) months (for practical implementation reasons) after confirmation that the Director-General of Health has satisfied the requirements of the High Court judgement regarding the section 50 of the Bill of Rights Act.
2. Confirm that Rotorua Lakes Council will not be prosecuted for non-compliance with the directive in view of our ongoing engagement and cooperation with the Ministry of Health.

Thank you for the consideration of these matters and our request.

Ngā mihi



Tania Tapsell  
Her Worship the Mayor

5 June 2024

Gina Rangi  
Chief Executive  
Rotorua Lakes Council  
Gina.Rangi@rotorualc.nz

Tēnā koe Gina

### Information relevant to community water fluoridation Bill of Rights Act analysis

As you are aware, I am currently carrying out an analysis against the New Zealand Bill of Rights Act 1990 (NZBORA) for each of the 14 directions to fluoridate made in 2022. This analysis was directed by the judge in the February 2024 High Court decision. The judge also decided that the directions remain in place.

I am writing to outline the local information I'll be considering as part of the NZBORA analysis and also to invite you to provide comment on this information or on any other local matters which in your view may be relevant to my NZBORA analysis.

My analysis will follow the framework commonly used for analyses against the NZBORA, which includes the following considerations:

- a. Does community water fluoridation serve a purpose sufficiently important to justify curtailment of the right or freedom (specifically the right in section 11 of the NZBORA)?
- b. Is community water fluoridation rationally connected with its purpose (to improve oral health)?
- c. Does community water fluoridation impair the right or freedom (specifically the right in section 11 of the NZBORA) no more than is reasonably necessary for sufficient achievement of its purpose?
- d. Is the limit in due proportion to the importance of the objective?

As part of this analysis, I will be considering the oral health outcomes and the profile of the population served by each water supply that is being considered.

I'm considering the following information for the Lakes Te Whatu Ora district:

		Experienced caries (2022 data)	Mean dmft/DMFT (2022 data)
<b>Aged 5</b>	<b>All children</b>	54.28%	2.79
	<b>Māori children</b>	68.07%	3.82
	<b>Pacific children</b>	78.95%	4.00
<b>Year 8</b>	<b>All children</b>	50.55%	1.62
	<b>Māori children</b>	59.90%	2.38
	<b>Pacific children</b>	61.76%	1.26



<b>Percentage of population children under 14 and adults over 65 (2018 data)</b>	22.4% children aged 0-14-years 14.4% adults aged 65-years or older
<b>Percentage pacific population (2018 data)</b>	5.4%
<b>ASH rate for dental events that could be impacted by fluoridation (dental caries and diseases of pulp and periapical tissues) (2022 data)</b>	4,519 per 100,000 population

I'm considering the following data relevant to the Rotorua Central water supply:

<b>Total population (2022 data)</b>	43,064
<b>Percentage Māori population (2022 data)</b>	43.2%
<b>Percentage of the population considered high deprivation (score 8-10 on the 2018 NZDep Index)</b>	65.8%

I'm considering the following data relevant to the Rotorua East water supply:

<b>Total population (2022 data)</b>	11,179
<b>Percentage Māori population (2022 data)</b>	38.7%
<b>Percentage of the population considered high deprivation (score 8-10 on the 2018 NZDep Index)</b>	41.5%

If you have any comments on the above data or any other additional information regarding local matters that you consider may be relevant to my NZBORA analysis, please provide this to my team using the [fluoride@health.govt.nz](mailto:fluoride@health.govt.nz) email address. I request that any additional information be provided to me by 27 June 2024.

Consistent with the statutory policy in section 116H of the Health Act 1956, you are not required to consult with your communities when responding to this invitation.

Please also note that you are not required to respond to this letter, which instead simply provides an opportunity for you to comment if you wish.

If you have any questions, my team will be happy to help if you contact them at the email address above.

Thank you for your ongoing collaboration to improve the oral health of your communities.

Nāku noa, nā

**Dr Diana Sarfati**  
**Director-General of Health**  
**Te Tumu Whakarae mō te Hauora**



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6 June 2024

Tania Tapsell  
Mayor of Rotorua  
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Tēnā koe Tania

### **Community water fluoridation extension request**

Thank you for your letter of 17 May 2024, to the Minister of Health, seeking amendments to the compliance date for the Director-General of Health direction to the Rotorua Lakes Council to fluoridate the Rotorua Central and Rotorua East water supplies.

Your letter seeks an extension of 6 months after my reconsideration of the direction as a result of the New Zealand Bill of Rights Act 1990 analysis. As was confirmed by the High Court in the 16 February relief decision, the directions remain valid. This was again confirmed in a recent decision of the High Court on 24 May 2024<sup>1</sup>, in which the Court dismissed a challenge which sought to prevent a local authority's implementation of my directions to fluoridate. That being so, I will not be granting extensions because of legal uncertainty raised by litigation processes.

However, my team informs me that the Council has been working with the Ministry to progress this work. I understand that you are currently going through procurement processes for the capital works.

As you continue to progress implementation of your direction, I have decided to provide you with an extension to your compliance date, to allow time for the completion of the capital works.

In accordance with section 116I of the Health Act 1956, you are required to ensure that you are fluoridating at the optimal levels (between 0.7mg/L and 1.0mg/L) at the Rotorua East and Rotorua Central water supplies by 28 March 2025.

### **Funding and compliance**

Your letter also seeks confirmation of availability of funding and that the Council will not be prosecuted for non-compliance with the direction to fluoridate.

I can confirm that the Ministry of Health can fund the capital costs of implementing fluoridation if Rotorua Lakes Council is able to sign a contract for funding by 30 June 2024. Beyond that date availability of funding is less certain.

It would be inappropriate and possibly unlawful for the Ministry to constrain its enforcement function through private contract. The Ministry is not permitted to fetter its discretion to prosecute through private arrangements and must not act inconsistently with the purposes of the Health Act 1956 and Solicitor-General's Prosecution Guidelines. The Ministry's responsibility

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<sup>1</sup> Fluoride Action Network (NZ) Inc v Hastings District Council [2024] NZHC 1313, available at [https://www.justice.govt.nz/jdo/documents/workspace\\_SpacesStore\\_e63abcf0\\_b2d7\\_4e9c\\_bbfd\\_8907f82dca16.pdf](https://www.justice.govt.nz/jdo/documents/workspace_SpacesStore_e63abcf0_b2d7_4e9c_bbfd_8907f82dca16.pdf)



is to uphold the public interest when exercising its regulatory functions and it should not be constrained by any private law contractual arrangement.

**Rotorua Lakes Council's role in community water fluoridation**

I would like to take this opportunity to remind you that by amendments passed in 2021 Parliament added Part 5A to the Health Act 1956. That Part empowers the Director-General of Health to direct councils to fluoridate water supplies, and provides that councils must comply with the Director-General's directions. The recent decision of the High Court on 24 May 2024 confirmed that the current directions are valid, and that councils subject to a direction are under a statutory duty of mandatory compliance. Under Part 5A contravening a direction is an offence, and the statute provides for potentially significant penalties.

Thank you for your ongoing collaboration as we work to improve the oral health of the communities we each serve.

Nāku noa, nā



Dr Diana Sarfati  
**Director-General of Health**  
**Te Tumu Whakarae mō te Hauora**

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