

Matthew Hopkins
w4r210r9@gmail.com

Ms Elizabeth Koff
Secretary of Health
NSW Department of Health
Locked Mail Bag 2030
St Leonards NSW 1590
Australia

7 December 2020

By email and registered post

**Constitutional invalidity of Approvals and Directions made by the Secretary of Health NSW to add
fluorine to a Public Water Supply**

Dear Ms Koff

I write to you concerning the many Approvals and Directions given by either the Secretary or the Director General of Health (the Secretary) to add fluorine to public water supplies.

I have come to understand that these Directions and Approvals are invalid and unlawful, as they are expressly prohibited by s51xxiiiA of the *Constitution of Australia Act 1901 (Cth) (Constitution)*.

S51(xxiiiA) states:

51 Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;

...

Adding fluorine to public water supplies is a dental service. S51(xxiiiA) expressly prohibits the provision of dental services in circumstances that amount to any form of civil conscription.

Fluoridation of Public Water Supplies

The purported power to direct or approve the adding of fluorine to a public water supply is sourced from ss 6 and 6A of the *Fluoridation of Public Water Supplies Act 1957* (NSW).

6 Addition of fluorine to public water supplies

(1) Notwithstanding anything contained in any other Act, a water supply authority may, subject to the provisions of this section and the regulations, add fluorine to any public water supply under its control.

(1A) Notwithstanding anything contained in any other Act, a water supply authority shall, subject to this Act and the regulations, add fluorine to any public water supply under its control, if directed to do so by the Secretary.

(2) A water supply authority shall not add fluorine to any public water supply except with the approval of or at the direction of the Secretary.

6A Directions

(1) The Secretary may, by notification published in the Gazette, direct a water supply authority to add fluorine to a public water supply.

By directing or approving water authorities to add fluorine to public water supplies, the Secretary is in effect, conscripting individuals into the dental service of fluoridated water.

The adding of fluorine to public water supplies is done without the consent of the individuals who are subjected to this dental service. Individuals are practically compelled to receive this dental service, and there is no practical way for an individual to opt out. Furthermore, the addition of fluorine is often done against the will of the individuals upon whom this dental service is forced.

Commonwealth law prevails over state law

Pursuant to s109 of the *Constitution*, where there is an inconsistency between a state law and a law of the Commonwealth, including the *Constitution*, the State law is invalid to the extent of that inconsistency.

109 Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Therefore, NSW legislation that operates to provide the dental service of adding fluorine to public water supplies in circumstances that amount to civil conscription, is operating inconsistently with s51xxiiiA of the *Constitution* and is thus invalid and unlawful.

The operation of s109 of the *Constitution* also renders invalid any NSW legislation that attempts to confer power upon the Secretary to approve or direct to the addition of fluorine to public water supplies, in circumstances that amount to a form of civil conscription.

As demonstrated in the following passages, the law clearly shows that the Approvals and Directions made by Secretary to add fluorine to public water supplies do amount to a form to civil conscription. The result is that all Directions and Approvals made by the Secretary to add fluorine to public water supplies are inconsistent with s51(xxiiiA) of the *Constitution* and are therefore unlawful.

All Directions and Approvals to add fluorine to public water supplies should be immediately revoked by you.

Civil Conscription

The High Court has made it clear that the s51(xxiiA) prohibition against civil conscription is a constitutional guarantee. This constitutional guarantee operates to protect personal liberty and freedom, and to ensure that people are not conscripted into medical and dental treatments against their will, or absent their consent.

In *Wong v Commonwealth*,¹ a case concerning s51(xxiiiA), Heydon J stated that the prohibition on any form of civil conscription concerns the protection of individual freedom:

*the phrase "any form of civil conscription" operates to confer a type of constitutional guarantee. It creates a deliberate constitutional restraint on a head of Commonwealth legislative power. It relates to individual freedom. It should thus be treated as a matter of substance. It should be read purposively. It should not be construed narrowly. The Commonwealth accepted this ...*²

Kirby J also describes in *Wong* each Australian's constitutional protection from medical and dental conscription:

*the prohibition on "any form of civil conscription" is designed to protect patients from having the supply of "medical and dental services", otherwise than by private contract, forced upon them without their consent.*³

¹ *Wong v Commonwealth* [2009] HCA 3.

² *Ibid* [252].

³ *Ibid* [127].

French CJ and Gummow J in *Wong* described civil conscription as involving practical compulsion and coercion:

*The legislative history and the genesis of s 51(xxiiiA) supports a construction of the phrase "(but not so as to authorize any form of civil conscription)" which treats "civil conscription" as involving some form of compulsion or coercion, in a legal or practical sense, to carry out work or provide services ...*⁴

The High Court judgements over the years concerning s51(xxiiiA) is very clear. This provision expressly guarantees an individual's constitutional right to not have medical and dental services forced upon them through subordinate legislation.

The Justices of the High Court of Australia have also made it clear that the words 'any form of' means that civil conscription is to be given a wide interpretation. In *General Practitioners*, Aickin J stated:

*any form of civil conscription' indicates to my mind an intention to give the term a wide rather than a narrow meaning, the precise extent of which cannot be determined in advance*⁵

Further, as Dixon J pointed out in the *BMA Case*⁶

the meaning of an indefinite expression like "civil conscription" "cannot often be determined in the abstract [and it] is only by settling what application an expression like 'civil conscription' has to definite situations that its exact scope can be worked out

In his Judgement in *Wong* Kirby J also provides a test to determine instances of civil conscription. Again, the protection of an individual's right to choose their medical and dental services is clear.

Test for the prohibition: *The test for attracting the prohibition contained in s 51(xxiiiA) is whether the impugned regulation, by its details and burdens, intrudes impermissibly into the private consensual arrangements between the providers of "medical and dental services" and the individual recipients of such services. It is this consensual feature of those arrangements which the head of power postulates will be undisturbed.*

⁴ Ibid [60].

⁵ *General Practitioners Society v The Commonwealth* [1980] HCA 30[33], cited by French CJ and Gummow J in *Wong v Cth* 2009 [25].

⁶ *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 262.

At 158 in *Wong Kirby J*, in applying this test for prohibition, found that the impugned laws in that particular case were lawful as the impugned laws did not attempt to force forms of medical practice, to advance a health policy, in a manner inconsistent with the proper conduct of the individual arrangements between the patient their healthcare provider.⁷

The corollary of Kirby's J statement is that legislating to force a dental service upon an individual, especially under the guise of advancing a health policy, amounts to a form of civil conscription.

Health policies come and go, but they are always subordinate to the *Constitution*.

What the case law makes clear is that any laws that operate to advance a health policy by compelling or coercing participants, whether those participants are medical or dental professionals, or individual members of the public, or the public at large, amounts to a form of civil conscription.

While the case law of s51(xxiiiA) to date has been confined to adjudicating matters concerning the regulation of the health professionals, the case law is crystal clear; legislation that compels or coerces people to receive a particular form of medical or dental service, such as fluorine added to public water supplies, is prohibited.

Simply put, s51(xxiiiA) expressly invalidates legislation that operates to compel or coerce people into receiving medical or dental services.

The Secretary's Directions and Approvals operate to practically compel people to participate in the Government's water fluoridation scheme, often against their will, and always without their consent being necessary. Each of the Justices of the High Court in *Wong* stated that laws that either legally or practically compel participation in a medical or dental scheme, amounts to a form of civil conscription.⁸

For most people there is no escaping the Government's water fluoridation policy. Most people are compulsorily conscripted into the provision of this dental service by the Secretary's Directions and approvals, with no practical means of opting out. To opt out a household would have to go to the extreme measure of becoming water independent, and many households live in apartments and many households rent, and some people reside in places where utilities are shared, meaning there is no escape for those from this form of civil conscription.

⁷ *Wong v Cth* (2009) HCA 3 [158].

⁸ *Ibid* [209].

What is indisputable is the residents of those municipalities whose public water authorities have been directed or approved by the Secretary to add fluorine to their public water supplies, are practically compelled to participate in this government scheme. These participants are conscripts.

How to act

You have inherited this unconstitutional practice, and many Directions and Approvals were made prior to your tenure. However, now furnished with the knowledge that Directions and Approvals to add fluorine to public water supplies are constitutionally prohibited, it is necessary that all these Directions and Approvals be immediately revoked.

You have this power of revocation under s6(5)(d)(1) of the *Fluoridation of Public Water Supplies Act 1957 No 58* (NSW):

6 Addition of fluorine to public water supplies

...

5 (d) The Secretary may at any time after granting any such approval:

(i) revoke the approval,

6A Directions

(4) The Secretary may at any time after giving a direction:

(a) revoke the direction,

There are other ways to advance the dental health policy that is purported to be the basis upon which fluorine is added to public water. Ways that do not infringe upon millions of people's guaranteed Constitutional right to not have dental services forced upon them without their consent.

The Department could make fluorine available to people to add to their water themselves if they so choose, although I understand fluorine is categorised as hazardous material.

Your personal liability in tort

This letter also has the effect of putting you on notice that the Directions and Approvals to add fluorine to public water supplies are beyond the power of the Secretary of Health. This means that you could be liable in tort in a private capacity should you act with reckless indifference to the extent of public power conferred upon the office of the Secretary of Health.

I trust you will give the matters raised in this letter due attention.

Please understand that if there is no immediate steps to resolve the matters raised, then legal action will be taken to compel the revocation of unconstitutional Approvals and Directions to add fluorine to Public Water Supplies.

I look forward to your timely and appropriate response to the matters raised.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Hopkins', with a small dot at the end.

Matthew Hopkins

LLB, BEnvM