

CHAPTER 4

COMMONWEALTH'S RESPONSIBILITY FOR THE PROVISION OF DENTAL SERVICES

4.1 This Chapter considers the terms of reference dealing with the nature of the Commonwealth's responsibility to make laws for the provision of dental services pursuant to section 51(xxiiiA) of the Australian Constitution and the extent to which the Commonwealth is currently fulfilling that responsibility.

Constitutional powers

4.2 Section 51 of the Constitution states that:

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 authorise any form of civil conscription), benefits to students and family allowances.

4.3 The Attorney-General, the Hon Daryl Williams, advised the Committee that 'although section 51(xxiiiA) of the Australian Constitution empowers the Commonwealth Parliament to make laws with respect to the provision of dental services, the section imposes no "responsibility" of a legal nature to make such laws'.¹

4.4 While the argument as to legal responsibility was not disputed in evidence given to the Committee, the clear indication of Commonwealth power was emphasised in a number of submissions. As Dental Health Services Victoria stated:

There is no legal or constitutional compulsion on either the Commonwealth or state governments to provide public dental services. The fact that both levels of government have the power to fund dental services does not mean that there is a legal obligation on either level of government to do so.²

4.5 The history and importance of the power inserted in section 51(xxiiiA), often called the health and welfare or social security power, were referred to in submissions. This particular power was not included in the original Constitution drafted late last century, when health and welfare matters were considered to be a private responsibility, supported by some State provisions and services by philanthropic and

1 Letter from the Attorney-General, the Hon Daryl Williams to the Committee Chairman, Senator Mark Bishop, 10.12.97.

2 Submission No.67, p.21.

charitable organisations. The power was granted to the Commonwealth at a referendum in 1946 when the government wanted to provide a wider range of health and social security benefits, on a national basis, to Australians in the post-war period.³

4.6 The importance of dental services as a primary health need was indicated by its inclusion, along with medical services, in the Constitution. Medical and dental practitioners were accorded the same status in the Constitution in terms of the prohibition on their civil conscription. It is argued that this implies that medical and dental services were accorded equal status as elements of primary health care. As the Council on the Ageing (COTA) submitted ‘the reading of the Constitution leaves little doubt that at the time of the 1946 amendment, a role for the Commonwealth was envisaged in the provision of dental services’.⁴

4.7 Ms Karen Wheelwright, from the Deakin University School of Law informed the Committee of two main limitations on what the Commonwealth can do in the provision of dental services by relying upon s.51(xxiiiA). Firstly, the Commonwealth cannot require the States or private dentists to provide dental services and, secondly, it cannot compel anyone to practise as a doctor or dentist or to perform particular medical or dental services.⁵

4.8 This second limitation derives from the words in the Constitution: ‘but not so as to authorise any form of civil conscription’. John McMillan, Senior Lecturer in Law at the ANU, has written that civil conscription refers to any sort of compulsion to engage in practice as a doctor or dentist or to perform particular medical or dental services. The term involves compulsion rather than regulation and hence the constitutional provision will not necessarily be infringed by Commonwealth laws which attach conditions and administrative procedures to the payment of Commonwealth benefits, and in that way affect the way in which medical and dental services are rendered.⁶

4.9 Since the inclusion of the ‘social security’ power into the Constitution, the Commonwealth has legislated extensively on health and welfare issues, including pharmaceutical, sickness and hospital benefits and medical services, but with the notable exception of dental services. This point, repeatedly made in evidence to the Committee, was summed up by the South Australian Dental Service when it stated:

3 Submission No.36, p.2 and Submission No.67, pp.21-2.

4 Submission No.97, p.11.

5 Submission No.36, pp.2-3.

6 John McMillan, Senior Lecturer in Law, ANU, *Commonwealth Constitutional Power over Health*, pp.42-45. McMillan’s comments are summarised in Submission No.125, p.9.

The Commonwealth Government has exercised its powers and responsibilities for all other areas listed in the subsection and whilst there is no compulsion here for the Commonwealth to exercise its powers in the provision of dental services, its failure to do so is a demonstrable inequity.⁷

4.10 The Commonwealth's power to support publicly funded dental services is not limited to s.51(xxiiiA). Section 96 of the Constitution, the so-called States grants power, enables the Commonwealth to grant financial assistance to the States on such terms and conditions as it thinks fit. However, the reality is that the amount of funds and the terms and conditions attaching thereto is a matter of considerable negotiation between the Commonwealth and the States. Under s.96, the Commonwealth has provided, and continues to provide, substantial grants to the States for a very wide range of purposes, including for example, funding for hospitals under the Medicare Agreements. It was argued that the power in s.96 would support a jointly funded Commonwealth-State public dental service.⁸

4.11 Section 81 of the Constitution, the 'Appropriations' power, was also identified as allowing the funding of dental services. Ms Wheelwright noted that 'grants to the States for local government purposes already provide some support (inadequate) for dental services through community health services'.⁹ John McMillan has commented that the interpretation of s.81 assumed by the Parliament is that an appropriation can be made for any purpose, including a purpose that is not expressed or implied in the Constitution as a subject of Commonwealth legislative power.¹⁰

4.12 It was, therefore, widely accepted in evidence that the Constitution gives the Commonwealth the power, if not the legal responsibility, to provide or regulate dental services. The Attorney-General's Department confirmed that it was a matter of choice for the Commonwealth to exercise the power or not as it wishes.¹¹ The point of contention became to what extent the Commonwealth should avail itself of the power.

4.13 The Queensland Government proposed that 'the Constitution provides the opportunity for the Commonwealth to recognise responsibility for leadership and support in the provision of public oral health services'.¹² Given the interrelationship between oral health and general health, as discussed in Chapter 2, many have similarly argued, as the Consumers' Health Forum has, 'that the Commonwealth has a strong social and practical responsibility to become involved in an ongoing way in relation to the nation's dental health'.¹³

7 Submission No.86, p.18. See also Submissions No.57, p.2; No.76, p.2; No.98, p.6; No.107, p.6; No.120, p.5; and No.133, p.7.

8 Submissions No.36, p.3; No.48, p.7; No.67, p.22; and No.86, p.18.

9 Submission No.36, p.3.

10 McMillan, *op.cit.*, pp.11-15.

11 *Committee Hansard*, 6.3.98, p.16.

12 Submission No.128, p.7.

13 Submission No.125, p.9.

State powers

4.14 The States and Territories also have powers to provide and fund dental health services. In her submission, Karen Wheelwright noted that for historical reasons, public health services have traditionally been provided by the States. Unlike the Commonwealth, State constitutions do not limit the subjects about which State parliaments can legislate, although there are parts of the Commonwealth Constitution which place limits on the powers of the States.

4.15 Ms Wheelwright contends that in the area of dental services, the main limitation would be in the case where both the Commonwealth and a State legislated to provide dental services. In that scenario, the Commonwealth law would prevail insofar as there was a direct conflict between the Commonwealth and State laws or the Commonwealth intended to cover the field. Ms Wheelwright commented that to acknowledge the States' historical dominance is not the same thing as saying that dental services are a State responsibility.¹⁴

Commonwealth involvement in dental services

4.16 As has been noted, the Commonwealth was the subject of much critical comment over its minimal involvement in the provision of dental services over many years. Nevertheless, there are a number of useful and positive examples of where the Commonwealth has been involved, or is currently involved, with the States and Territories in the provision of dental services.¹⁵ Programs that the Commonwealth has been or is currently involved with are noted below:

- *Australian School Dental Program*: The Commonwealth's first major involvement in the provision of oral health care was in the early 1970s through the Australian School Dental Program. The program was aimed at providing treatment for all school children up to the age of 15 years and with Commonwealth funding to be 100 per cent of capital costs and 75 per cent of recurrent operational costs. While funding was initially by specific purpose Commonwealth grants to the States, Commonwealth funding progressively decreased until the Commonwealth had effectively withdrawn from the program by the early 1980s after funding was subsumed into general purpose grants.¹⁶
- *Commonwealth Dental Health Program*: In 1992, the National Health Strategy recommended a program to support the States to provide basic dental care for holders of Commonwealth Health Care Cards. The subsequent response in 1994 was the introduction of the Commonwealth Dental Health Program (CDHP). The operation of the CDHP and the impact on dental services since its cessation are discussed in detail in Chapter 3.

14 Submission No.36, p.3.

15 Submissions No.67, p.23 and No.127, p.12.

16 Submission No.131, pp.4-5. See also *Committee Hansard*, 6.3.98, pp.4-5 and 23.3.98, p.128.

- *Veterans' Affairs programs:* Eligible Department of Veterans' Affairs (DVA) beneficiaries are entitled to the full range of dental services, although entitlements vary between eligibility for treatment of war-caused conditions only (White Health Care Card holder) and eligibility for treatment of all conditions (Gold Health Care Card holder). There are also financial limitations on the provision of some services. The Government recently announced an extension of Gold Health Care Card availability to an additional number of World War II veterans.

Dental services, provided through the Local Dental Officer Scheme, are regarded by DVA as an important part of the arrangements for the provision of health care services for eligible veterans, war widows and dependants.¹⁷ The RSL also places great importance upon the maintenance of this Scheme 'so that these deserving persons have an assured avenue of access to dental care'.¹⁸

- *Armed Forces and Army Reserve Dental Scheme:* Members of the Australian Defence Force (ADF) and the Army Reserve are provided with dental services as part of their overall health status. The full range of dental services that are available to the civilian community are provided to ADF personnel at no charge. The primary aim of ADF dental services is to maintain personnel at a level of dental fitness such that they are unlikely to become dental casualties while deployed. Hence dental treatment is largely preventive in nature.¹⁹
- The provision of Medicare benefits for dental services to inpatients and patients in public hospitals (eg oral surgery, cleft lip and cleft palate scheme, x-rays ordered by dentists but performed by radiologists).
- Subsidised drugs which may be prescribed by dentists under the Pharmaceutical Benefits Scheme.
- Funding of university training of dentists and dental auxiliaries.

4.17 The Victorian Government commented that 'these are significant contributions and illustrate not only the role of the Commonwealth, but the importance of partnership approaches to health care between the different levels of government'.²⁰

17 Department of Veterans' Affairs, Notes for Local Dental Officers and LDO Fees Bulletin – Effective 1 January 1998.

18 Submission No.19, p.1.

19 Australian National Audit Office, *Australian Defence Force Health Services*, Audit Report No.34 1996-97, pp.71-72.

20 Submission No.127, p.12.

4.18 The Committee considers that, while the Commonwealth does not have a legal responsibility pursuant to the Constitution to legislate for the provision of dental services, the Commonwealth should use its power within this area to take a leadership role in developing strategies for the improvement of national oral health standards. Chapter 5 discusses options by which the Commonwealth could undertake this role.