FLUORIDE FREE WA Inc.

PO Box 8009
Subiaco East WA 6008

Michael Lusk, Committee member

Hon Aaron Stonehouse MLC
Chair
Select Committee on Personal Choice and Community Safety
Legislative Council of Western Australia

BY EMAIL pccs@parliament.wa.gov.au

12 December 2018

Dear Mr. Stonehouse,

Submission of Fluoride Free WA Inc. ("FFWA")

to the Select Committee on Personal Choice and Community Safety Inquiry on Personal Choice and Community Safety ("Inquiry")

As foreshadowed in recent communications, FFWA makes this submission to your committee's Inquiry. Thank you for the committee's willingness to consider submissions made later than the advertised deadline of 5 October 2018.

This submission concerns fluoridation of public water supplies, a matter seemingly falling within item 3 of the Inquiry's terms of reference, viz. "any other measures introduced to restrict personal choice for individuals as a means of preventing harm to themselves". It is well known that each of WA Health and the Fluoridation of Public Water Supplies Advisory Committee ("FPWSAC") routinely represents that fluoridation of public water supplies is for preventing dental caries.

However, it is apparent that such representations lack either legislative or factual basis. Two matters must particularly be noted. First, nothing in the *Fluoridation of Public Water Supplies Act 1966* (WA) ("FPWS Act") evinces a legislative intention to prevent dental disease. Secondly, international dental health data since 1960 compiled for the World Health Organization Global Oral Health Program[1] indicate that, compared to no water fluoridation, water fluoridation is not effective for preventing

[1] Country/Area Profile Project (CAPP) database supporting the World Health Organization Global Oral Health Program for oral health surveillance. Available at www.mah.se/CAPP/Country-Oral-Health-Profiles. Accessed at 16:40 hours CET on 11 December 2018. See the corresponding chart at Annexure "A" to this letter. See further Diesendorf M, The mystery of declining tooth decay, *Nature*, July 1986, 322:125-129. Available at www.researchgate.net/publication/19639179_The_Mystery_of_Declining_Tooth_Decay. Accessed at 23:25 hours CET on 11 December 2018.

dental caries. Whatever may be the WA government's purpose in treating Western Australians with a proven low-dose neurotoxicant[2] and endocrine disruptor[3], that purpose evidently is not prevention of dental caries.

Statement of the problem

Fluoridation of public water supplies as practiced in Western Australia is a form of compulsory medical treatment. It uses the infrastructure of public water supplies to administer fluoride to members of communities without individual dosage control or medical supervision. The FPWSAC asserts that the measure prevents dental caries "regardless of age [or] individual motivation"[4].

The core legal and ethical problem is that medical treatment without informed consent constitutes common law battery. The law presumes adult patients to be competent to refuse medical treatment. The burden of rebutting this presumption lies on the practitioner who wishes to treat a non-compliant patient. In maintaining the FPWS Act in force, Parliament engages in gross and inappropriate disregard of these basic legal principles.

Medical treatment

The Supreme Court of New Zealand recently dispelled any remaining doubts as to whether fluoridation of a public water supply comprises medical treatment. In *New Health New Zealand Incorporated v South Taranaki District Council*[5] four of the five judges hearing the case held that fluoridation of public water supplies is a form of medical treatment within the meaning of s. 11 of the *New Zealand Bill of Rights Act 1990* (NZ)[6]. O'Reagan and Ellen France JJ concluded: "we do not consider that ingesting fluoride added to water can be said to be qualitatively different from ingesting a fluoride tablet provided by a health practitioner".[7]

The Supreme Court of Victoria recognized long ago in *Kelberg v. City of Sale*[8] that water fluoridation is a method of treating persons with fluoride. Gillard J emphasized: "I repeat, fluoridation of a. town water supply is an easy method of distributing fluoride for consumption by its inhabitants".

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[2] Bashash M *et al.*, Prenatal Fluoride Exposure and Cognitive Outcomes in Children at 4 and 6–12 Years of Age in Mexico, *Environmental Health Perspectives*, 19 September 2017; 125(9):097017. Available at https://ehp.niehs.nih.gov/doi/10.1289/EHP655. Accessed at 23:55 hours CET on 11 December 2018.

[3] Kheradpisheh *et al.*, Impact of Drinking Water Fluoride on Human Thyroid Hormones: A Case Control Study, *Scientific Reports*, 8 February 2018;8(1): 2674. Available at: www.nature.com/articles/s41598-018-20696-4. Accessed at 23:55 hours CET on 11 December 2018.

[4] Fluoridation of Public Water Supplies Advisory Committee. *Minutes of the 46th Meeting*. 18 September 2013, at page 3.

[5] [2018] NZSC 59. Available at www.courtsofnz.govt.nz/cases/new-health-new-zealand-incorporated-v-south-taranaki-district-council-1. Retrieved at 22:15 hours CET on 2 November 2018.

[6] [2018] NZSC 59 at [97]–[100] per O'Regan J and Ellen France J; at [172] per Glazebrook J; at [212] per Elias CJ; cf. William Young J at [207]–[210].

[7] [2018] NZSC 59 at [99].

[8] [1964] VR 383 per Gillard J at 392.

The 'Bolam' test in medical negligence law

Less than a decade prior to enactment of the FPWS Act an English judge held that a medical practitioner "is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a reasonable body of medical men skilled in that particular art". This test of law was stated by Justice McNair in *Bolam v Friern Hospital Management Committee*[9] and became known as the *Bolam* test.

During the time when Justice Kirby was President of the New South Wales Court of Appeal, he remarked in a learned article that the *Bolam* test "was criticized roundly both in the United Kingdom itself and in other countries of the common law which have inherited the English legal system. In fact, it was suggested that the test was simply a hang-over from the Victorian age when 'Nanny' was supposed to 'know best'"[10].

In 1985 a majority of the House of Lords nevertheless confirmed the *Bolam* test in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital and Ors*[11]. However, the law established by *Sidaway* is followed only in the UK. For Australian – and also Canadian and U.S. – purposes, Lord Scarman's dissent is of greater importance:

> "*The implications of this view of the law are disturbing. It leaves the determination of a legal duty to the judgement of doctors. Responsible medical judgement may, indeed, provide the law with an acceptable standard in determining whether a doctor in diagnosis or treatment has complied with his duty. But is it right that medical judgement should determine whether there exists a duty to warn of risk and its scope? It would be a strange conclusion if the courts should be led to conclude that our law, which undoubtedly recognises a right in the patient to decide whether he will accept or reject the treatment proposed, should permit the doctors to determine whether and in what circumstances a duty arises requiring the doctor to warn his patient of the risks inherent in the treatment which he proposes*"[12].

In 1992 the High Court of Australia unanimously rejected the *Bolam* test in *Rogers v Whitaker*[13], preferring the approach indicated by Lord Scarman in *Sidaway*:

> "*The law should recognise that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that a particular patient, if warned of the risk, would be likely to attach significance to it*" [14].

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[9] (1957) 1 WLR 582 (QBD).

[10] Kirby M. Patients' rights - why the Australian courts have rejected 'Bolam'. *Journal of Medical Ethics* 1995; 21: 5-8 at 5. Available at https://jme.bmj.com/content/medethics/21/1/5.full.pdf. Retrieved at 23:05 hours CET on 2 November 2018.

[11] (1985) AC 871 (HL).

[12] (1985) AC 871 (HL) at 882.

[13] (1992) 175 CLR 479 (HC).

[14] (1992) 175 CLR 479 at 490 per Mason CJ, Brennan, Dawson J, Toohey J, and McHugh J.

Comparison of the FPWS Act to the Bolam test

In 1995 Justice Kirby remarked that "[t]he sun has set not only on the British Empire but upon the world in which 'Nanny', Sir Humphrey and others put in authority over us, always know best"[15]. That should be so, but it is not. Parliament even now has left 'Nanny' and Sir Humphrey very firmly in control of treatment of entire communities with fluoride – even over their express objections. In 2013 the FPWSAC observed in its meeting minutes:

> "*Important dental benefits are obtained for a community from fluoridation of its water supplies, particularly benefitting children and lower income sectors of society, but only poorer oral health outcomes result from denying this public health measure on account of the opposing views of a small number of vocal activists.*"[16]

Even if each of these assertions were not false[17], it still would be inappropriate for Parliament to presume that adults are not competent to decide either for themselves or in relation to their own children whether or not to accept internal treatment with fluoride. This presumption is diametrically opposed to the common law position established by the High Court of Australia.

Examination of the FPWS Act reveals the extraordinary extent of Parliament's presumption:

(a) The FPWS Act lacks any clear indication of legislative purpose. No provision states the Act's objects. The Act's long title is simply a circumlocutory restatement of its short title, viz. "[a]n Act relating to fluoridation of public water supplies". No Explanatory Memorandum accompanies the corresponding Bill. In enacting the FPWS Act, Parliament provided for compulsory medical treatment without explicitly disclosing its intention that the population be medically treated – not to mention that such treatment was to be administered on a compulsory basis.

(b) The only legislative indication that the FPWS Act in any way is connected with health is to be found in s. 5, which establishes the FPWSAC. Provision for the membership of FPWSAC indicates that at least some of its members could – but might not – be health professionals:

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[15] *Op. cit.* note 10 at 8.

[16] FPWSAC. *Minutes of the 46th Meeting*. 18 September 2013, at pages 2-3.

[17] The claim that treatment with fluoridated drinking water "particularly [benefits] … lower income sectors of society" is false. Two years after FPWSAC minuted this claim, the Cochrane Collaboration published a review authoritatively rejecting it: Z. Iheozor-Ejiofor *et al.* Water fluoridation for the prevention of dental caries (Review). *Cochrane Database of Systematic Reviews*. Issue 6, 2015 at pages 2 and 21-22. Available at http://onlinelibrary.wiley.com/doi/10.1002/14651858.CD010856.pub2/epdf, downloaded at CET 20:50 hours on 3 November 2018. The claims that treatment with fluoridated drinking water "particularly [benefits] … children" and that "only poorer oral health outcomes [otherwise] result" are false. According to data supplied by the Australian Research Centre for Population Oral Health to the Country/Area Profile Project (CAPP) supporting the WHO Global Oral Health Program for oral health surveillance, oral health outcomes in Australia have deteriorated since 2000. This deterioration matches with marked increase in the extent of water fluoridation during the same period. By contrast, in comparable countries which do not practice water fluoridation at all, including Denmark, Germany, Sweden and Switzerland, positive oral health outcomes eclipsed those of Australia and showed a trend of improvement. The UK Ministry of Health in 2009 reported oral health outcomes for 12-year olds about 30% better than Australia's for that year, whereby less than 10% of the UK population was treated with fluoridated drinking water. A chart of relevant CAPP data and citation of the source appears at Annexure "A" of this letter. See further footnote 1.

(i) By ss. 5(2)(a) and 5(4) of the FPWS Act, FPWSAC shall be chaired by the Chief Health Officer[18]. However, s. 5(4) allows that if "for any reason" the Chief Health Officer is unable to attend a meeting of FPWSAC, "a person designated by the Chief Health Officer" may act as Chairman at that meeting and, while so acting, has all the powers of the Chairman and of a member. In other words, the Chief Health Officer may designate anyone at all to act in his or her place as Chairman of FPWSAC.

(ii) By s. 5(3)(a) of the FPWS Act, FPWSAC shall include a person appointed from a panel submitted to the Minister by the Australian Medical Association (WA Branch) ("AMA"). However, any person at all, whether or not a medical practitioner and whether or not a member of the AMA, is qualified for nomination as a panelist.

(iii) By s. 5(3)(b) of the FPWS Act, FPWSAC shall include a person appointed from a panel submitted to the Minister by the Australian Dental Association (WA Branch) ("ADA"). However, any person at all, whether or not a dentist and whether or not a member of the ADA, is qualified for nomination as a panelist.

(c) By s. 9(2)(a) of the FPWS Act, a water supply authority to whom a direction to fluoridate has been given shall, "[n]otwithstanding anything contained in any other Act", add fluorine to any public water supply under its control and to which the direction relates. The apparent significance of s. 9(2)(a) is that it purports to preclude the operation of laws which prohibit poisoning of water supplies, e.g. s. 301(2) of The Criminal Code (WA).

(d) By s. 8 of the FPWS Act, current and former members and acting members of FPWSAC purportedly are broadly exempted from liability for "anything done or omitted in good faith" in, among other things, "exercise or purported exercise" of any power conferred by the FPWS Act. Moreover, by s. 5(8)(c) of the FPWS Act, in legal proceedings no appointment of an acting member of FPWSAC, or any acts done by him or her in such capacity, may be questioned on the ground that the occasion for his or her appointment had not arisen or had ceased.

(e) The s. 8 exemption purports to grant a general immunity from – not an indemnity in relation to – civil and criminal liability. The distinction between immunity and indemnity is very significant. An indemnity would transfer to the State of Western Australia civil liability for loss and damage suffered by a person on account of FPWSAC's negligent medical advice. By contrast, the apparently intended effect of the purported immunity is that a person who suffers loss or injury by reason of FPWSAC's negligence is deprived of any legal remedy.

The FPWS Act amounts to enactment of the *Bolam* test in monstrous form. Application of the *Bolam* test at least would have required FPWSAC to act in a manner "accepted as proper by a reasonable body of medical men skilled in that particular art" – or else be liable to compensate those injured by its negligence. By comparison, the FPWS Act omits even those rudimentary safeguards. The FPWSAC is not constituted as a body of medical practitioners skilled in toxicology. It need not include any toxicologist or even any person with medical qualifications. Further to the extraordinary

[18] Prior to 24 January 2017 by the Director-General of Health.

failure of governance inherent in the provision of the FPWS Act governing FPWSAC's membership, Parliament immunized every current and former member and acting member of FPWSAC from all criminal and civil liability connected with his or her FPWSAC activities provided only that he or she acted "in good faith".

Apparent invalidity of the FPWS Act

As FFWA previously has brought to Parliament's attention[19], it is apparent that ss. 9, 10 and further provisions[20] of the FPWS Act are invalid by reason of inconsistency with the regulatory framework established by the *Therapeutic Goods Act 1989* (CTH) ("TG Act"). The TG Act evidently is applicable to artificially fluoridated reticulated drinking water[21] because WA Health, FPWSAC and others represent[22] that it is for the therapeutic use of preventing dental caries. By s. 109 of the Australian Constitution, a State law is invalid to the extent of its inconsistency with a law of the Commonwealth. It apparently follows that the core provisions of the FPWS Act have been invalid ever since commencement of the TG Act on 15 February 1991 and that all directions to fluoridate public water supplies in Western Australia now are void because the enabling legislation has become invalid.

It generally is poor legislative practice to permit invalid legislation to remain on the current statute book. Allowing such a situation to persist for more than two decades, as apparently has occurred in case of the FPWS Act, suggests either a persistent lack of adequate legislative oversight or a most unfortunate and entrenched contempt for the Rule of Law.

Proposals for resolution

FFWA submits that your committee would do the State of Western Australia and its people a great service by strongly recommending to Parliament that it repeal the FPWS Act.

Not only does the FPWS Act purport massively and inappropriately to trespass upon individuals' common law right to refuse medical treatment, but (unauthorized) water fluoridation activities purportedly based upon the FPWS Act impair rather promote community health. Core provisions of the FPWS Act – including s. 9, which purportedly enables the Minister to make directions to fluoridate a public water supply – apparently have been invalid for more than two decades. In view of these circumstances, FFWA encourages your committee to recommend that Parliament repeal the FPWS Act both in the public interest and for the sake of legislative good order.

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[19] E.g. submission of FFWA to the Environment and Public Affairs Committee of the Legislative Council of Western Australia, 19 October 2017. Available at http://www.parliament.wa.gov.au/Parliament/petitionsdb.nsf/($all)/4A0DC96341005DA7482581D1001D62BB/$file/ev.016.171019.sub.001.Hayley%20Green.pdf. Accessed at 01:45 hours CET on 12 December 2018. See also petition to the Legislative Assembly of Western Australia, tabled 15 August 2018. Available at www.parliament.wa.gov.au/Hansard/hansard.nsf/0/B69EFC1A6F72685E482582FE001A1F98/$file/A40%20S1%2020180815%20All.pdf, page 4588. Accessed at 01:05 hours CET on 12 December 2018.

[20] Arguably including s. 8 of the FPWS Act.

[21] See paragraph (a) of the definition of "therapeutic goods" in s. 3(1) of the *Therapeutic Goods Act 1989* (CTH).

[22] E.g. WA Health, Fluoridated drinking water, Internet resource. Available at https://healthywa.wa.gov.au/Articles/F_I/Fluoridated-drinking-water. Accessed at 01:35 hours CET on 12 December 2018; see also footnote 4.

FFWA further suggests that your committee consider recommending appropriate consequential measures. These might include provision for a water levy specifically for financing a long-term statutory compensation fund for the benefit of those who suffer fluoride intake-related loss or injury. In FFWA's view, orderly management of such claims in the context of a purpose-built statutory compensation fund would be preferable to a welter of personal injury litigation with potential defendants including Water Corporation, officers and former officers of WA Health, and members and former members of the FPWSAC.

Closing remarks

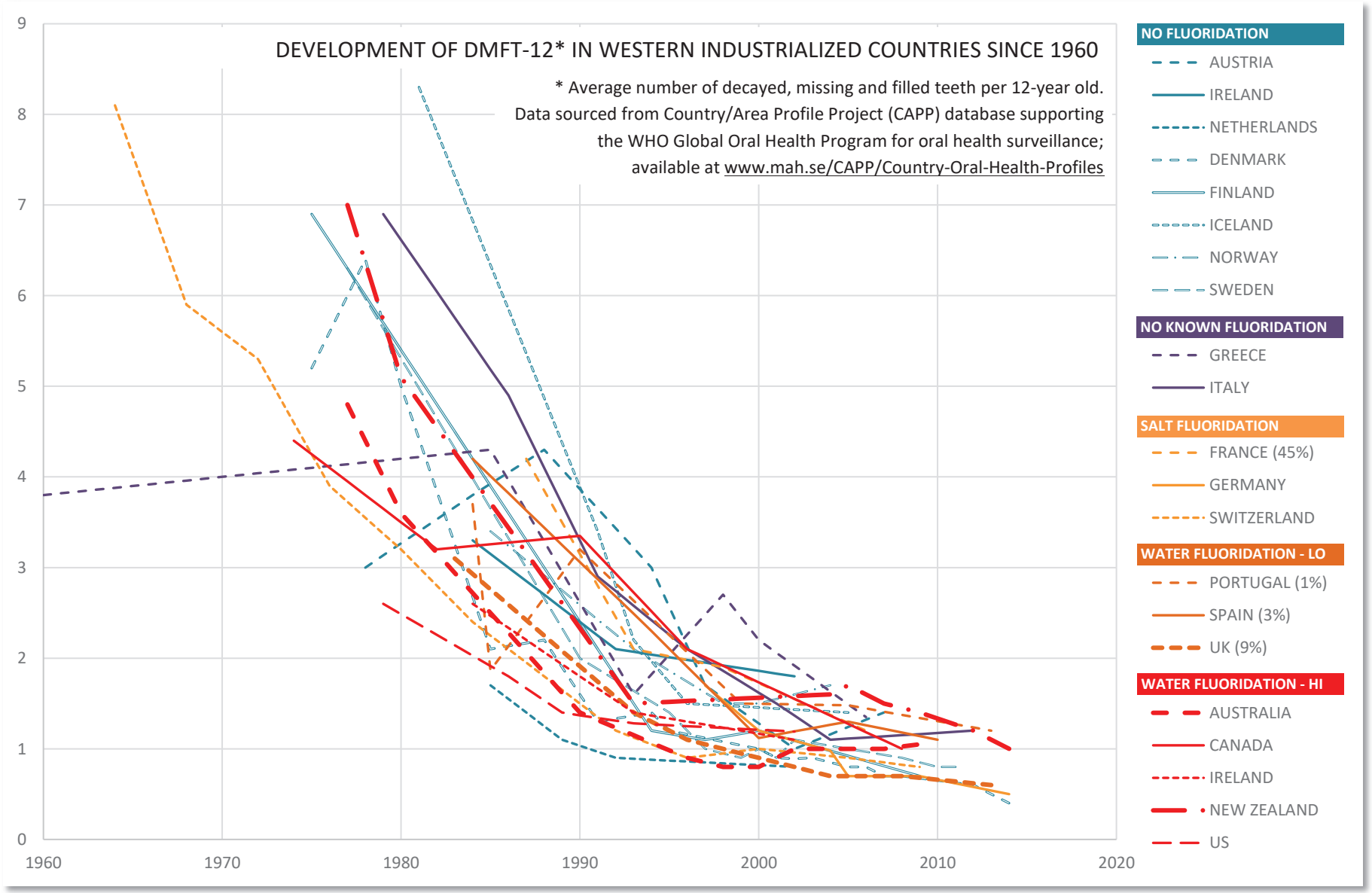
FFWA thanks you and members of your committee for considering these submissions. Members of FFWA are available to give evidence if requested to do so. Please contact us at the address indicated.

Fluoride Free WA Inc.
Michael Lusk BSc. LLB (Hons. I), Australian lawyer
Committee member

Annexure

Annexure "A" – Chart: Development of DMFT-12 in Western Industrialized Countries since 1960

ANNEXURE "A"



Development of DMFT-12 1960 – 2014. Percentages in parenthesis show the part of population covered by fluoridation measures, where reported by Cheng *et al.* (2007).

Source: Affidavit of Michael Lusk, affirmed on 27 April 2017, filed in *Lusk v. Tong and Commonwealth Ombudsman*, Federal Circuit Court of Australia, Sydney Registry, File No.1354/2017.