

11 February 2019

The Hon Brad Hazzard MP
NSW Minister for Health
Parliament of New South Wales
52 Martin Place
SYDNEY NSW 2000

Dear Minister Hazzard,

**Re: Request urgent regulatory amendment to
Public Health Regulation 2012 addressing an existing permanent
exemption for all Aboriginal and Torres Strait Islander children to
not be immunised while attending any NSW early childhood education
and care services**

I wish to bring to your attention what appears to be a regulatory irregularity that enables Aboriginal and Torres Strait Islander children to be exempt from being immunised while attending any NSW early childhood education and care approved services.

This regulatory irregularity puts NSW-based early childhood education and care services in a most conflicted position where all other children and their families may be exposed to an unimmunised child. Moreover, should any NSW-based early childhood education and care service refuse to enrol an unimmunised Aboriginal and Torres Strait Islander child, that service could be the subject of a racial discrimination complaint.

The *Public Health Regulation 2012*'s s44a(1)(e) suggests a permanent exemption for all Aboriginal or Torres Strait Islander children from immunisation. This is opposite to the NSW Health's Immunisation Enrolment Toolkit where on page 4's section 1.3, it states Aboriginal and Torres Strait Islander children are allowed temporary exemptions to the immunisation enrolments up to a 12 week period.

NSW Health formally has advised us that they are “... *aware of this inconsistency and will be reviewing it in 2019. In the interim, providers should continue to request approved forms for Aboriginal children in the 12 weeks after enrolment, noting that in practice there is no mechanism to de-enrol children in the event that approved documentation is not provided.*”

This presents early childhood education and care providers with a grave dilemma – to risk being publicly accused of racial discrimination, or to risk negative health impacts on other children emanating from an unimmunised child.

Would you please advise what the NSW Government will do to resolve this issue urgently?

Thanking you in anticipation.

Yours sincerely,



Chiang Lim
CEO

encl 1. Legal advice from Belinda Kenneally dated 4 February 2019
 2. Advice from NSW Health dated 22 January 2019

cc The Hon Sarah Mitchell MLC, NSW Minister for Early Childhood
 Education, NSW Minister for Aboriginal Affairs

Donna Wehbe

From: Anne Allen (South Eastern Sydney LHD) <Anne.Allen@health.nsw.gov.au> on behalf of SESLHD-PublicHealthUnit-IMMTeam <SESLHD-PublicHealthUnit-IMMTeam@health.nsw.gov.au>
Sent: Tuesday, 22 January 2019 9:38 AM
To: Donna Wehbe; SESLHD-PublicHealthUnit-IMMTeam
Cc: Sonya Ennis; Dennis Meijer; Mark Ferson (South Eastern Sydney LHD)
Subject: RE: Immunisation Enquiry

Follow Up Flag: Follow up
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Dear Donna,

The advice on your query from HPNSW is as follows:

“Please advise Donna at ACA that we’re aware of this inconsistency in the legislation and will be reviewing it during 2019. In the interim, providers should continue to request approved forms for Aboriginal children in the 12 weeks after enrolment, noting that in practice there is no mechanism to de-enrol children in the event that approved documentation is not provided. If ACA intends to communicate to members about this, please ask that they run any wording by us first please.”

Kind regards

Anne Allen

Immunisation Coordinator (CNC)
(SESLHD-PublicHealthUnit-IMMTeam@health.nsw.gov.au)



Planning, Population Health and Equity,
South Eastern Sydney Public Health Unit
Locked Mail Bag 88
Randwick NSW 2031
Ph: 9382 8333 Fax: 9382 4309

SESLHD Public Health Unit Website: <https://www.seslhd.health.nsw.gov.au/public-health>

The South Eastern Sydney Local Health District, Public Health Unit pays respect to the Aboriginal Elders past & present and would like to acknowledge the traditional owners of the land on which we work.



Health
South Eastern Sydney
Local Health District
Public Health Unit



From: Donna Wehbe [mailto:Donna.Wehbe@childcarealliance.org.au]
Sent: Friday, 18 January 2019 2:47 PM
To: SESLHD-PublicHealthUnit-IMMTeam <SESLHD-PublicHealthUnit-IMMTeam@health.nsw.gov.au>
Subject: RE: Immunisation Enquiry

Dear NSW Health,

The Childcare Alliance NSW is the peak body for 1,600 child care services across NSW.

One of our members has highlighted what appears to be conflicting regulatory information.

On Immunisation Enrolment Toolkit (see <https://www.health.nsw.gov.au/immunisation/Publications/immunisation-enrolment-toolkit.pdf> page 4 undersection 1.3), you will find that it states Aboriginal or Torres Strait Islander children are allowed temporary exemptions to the immunisation enrolment requirements up to a 12 week period.

However, under the Public Health Regulation 2012 s44a (1)(e), it suggests that it's a permanent exemption (not up to 12 weeks) for all Aboriginal or Torres Strait Islander children. (see [https://www.legislation.nsw.gov.au/#/view/regulation/2012/311/part7/div2/sec44a?autoquery=\(Content%3D\(\(%22public%20health%20regulation%22\)\)\)%20AND%20\(\(Type%3D%22act%22%20AND%20Repealed%3D%22N%22\)%20OR%20\(Type%3D%22subordleg%22%20AND%20Repealed%3D%22N%22\)\)%20AND%20\(%22Historical%20Document%22%3D%22O%22\)&dq=Document%20Types%3D%22%3Cspan%20class%3D%22dq%22%3EActs%3C%2Fspan%3E,%20%3Cspan%20class%3D%22dq%22%3ERegs%3C%2Fspan%3E%22,%20Exact%20Phrase%3D%22%3Cspan%20class%3D%22dq%22%3Epublic%20health%20regulation%3C%2Fspan%3E%22,%20Search%20In%3D%22%3Cspan%20class%3D%22dq%22%3EText%3C%2Fspan%3E%22&fullquery=\(\(\(%22public%20health%20regulation%22\)\)\)](https://www.legislation.nsw.gov.au/#/view/regulation/2012/311/part7/div2/sec44a?autoquery=(Content%3D((%22public%20health%20regulation%22)))%20AND%20((Type%3D%22act%22%20AND%20Repealed%3D%22N%22)%20OR%20(Type%3D%22subordleg%22%20AND%20Repealed%3D%22N%22))%20AND%20(%22Historical%20Document%22%3D%22O%22)&dq=Document%20Types%3D%22%3Cspan%20class%3D%22dq%22%3EActs%3C%2Fspan%3E,%20%3Cspan%20class%3D%22dq%22%3ERegs%3C%2Fspan%3E%22,%20Exact%20Phrase%3D%22%3Cspan%20class%3D%22dq%22%3Epublic%20health%20regulation%3C%2Fspan%3E%22,%20Search%20In%3D%22%3Cspan%20class%3D%22dq%22%3EText%3C%2Fspan%3E%22&fullquery=(((%22public%20health%20regulation%22)))))

Given that the public health regulation 2012 is a statutory instrument, does it not mean that the Immunisation Enrolment Toolkit is technically incorrect.

Would you kindly advise /clarify so that we can advise our member accordingly.

Thank you in anticipation.

Kind Regards



(formerly Child Care New South Wales)

Donna Wehbe
Member Support Officer

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From: Meegan Treuberg (South Eastern Sydney LHD) [mailto:Meegan.Treuberg@health.nsw.gov.au] **On Behalf Of** SESLHD-PublicHealthUnit-IMMTeam

Sent: Friday, 18 January 2019 2:38 PM
To: NSW
Subject: Immunisation Enquiry

Good afternoon

Thank you for your immunisation enquiry.

In order to provide a full response please can you send an email to SESLHD-PublicHealthUnit-ImmTeam@health.nsw.gov.au

Please include:

Name:
Phone number:
Email address:
Postcode:
Details of enquiry:

Please **provide times** you are available if call-back from a nurse is required:

One of our nurses will provide a **response within 24-48hrs**. If your enquiry is urgent please outline the urgency in your email so that we can prioritise.

In the meantime you may wish to access immunisation resources at the following links:

Public Health Unit website Immunisation pages:

Information for the public

<https://www.seslhd.health.nsw.gov.au/services-clinics/directory/public-health/information-for-general-public/immunisation-information-for-public>

Information for health professionals

<https://www.seslhd.health.nsw.gov.au/services-clinics/directory/public-health/information-for-health-professionals/immunisation-information-for-health-professionals>

Other weblinks

The new NSW Immunisation Schedule

<http://www.health.nsw.gov.au/immunisation/Pages/schedule-changes.aspx>

Childcare vaccination requirements

http://www.health.nsw.gov.au/immunisation/Pages/childcare_ga.aspx

Primary and secondary school vaccination requirements

<http://www.health.nsw.gov.au/immunisation/Pages/Immunisation-in-schools.aspx>

Influenza vaccination for children under 5 years

http://www.health.nsw.gov.au/immunisation/Pages/seasonal_flu_vaccination.aspx

Information about different vaccines

<http://www.ncirs.edu.au/provider-resources/ncirs-fact-sheets/>

Catch-up tables (still to be updated for new schedule)

<http://ncirs.edu.au/provider-resources/immunisation-handbook-tables/>

The digital Australian Immunisation Handbook is now available from

<https://immunisationhandbook.health.gov.au/>

If you are a health professional you may find it helpful to consult the immunisation handbook - please note this was update in April 2018 and the online version is more up-to-date than the printed version. You can access the online version here: <http://www.immunise.health.gov.au/internet/immunise/publishing.nsf/Content/Handbook10-home>

Kind regards

Immunisation Team | Public Health Unit

Randwick Hospitals Campus, Hut 'U' Easy Street, Locked Bag 88, Randwick NSW 2031

Tel (02) 9382 8333 | Fax (02) 9382 8334 |

<https://www.seslhd.health.nsw.gov.au/public-health>

E: SESLHD-PublicHealthUnit-IMMTeam@health.nsw.gov.au

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Chiang Lim

From: Belinda Kenneally <kenlaw@bigpond.net.au>
Sent: Monday, 4 February 2019 11:59 AM
To: Chiang Lim
Subject: RE: possible immunisation loophole issue with aboriginal and torres strait islanders

Dear Chiang

This is an interesting dilemma.

I have reviewed the Public Health Act and double-checked that the amendments have been made to it which appears to have been the case.

Section 87 appears to be the relevant clause.

Section 87(3) states:

(3) Exemptions from pre-enrolment requirement A principal of a child care facility is not required to comply with subsection (1) before enrolling, or permitting the enrolment of, a child at the child care facility in the circumstances prescribed by the regulations for the purposes of this section.

As Donna pointed out the updated Regulation 44A(2) specifically excludes reference to Regulation 44A(1)(e).

The contents of the various Public Health Websites that you have shown me are therefore incorrect. Until the Regulation is amended the members will be in breach of the Act if they do not grant Aboriginals or Torres Strait Islanders children enrolment via the exemption. It is not only a question of statutory interpretation, which is quite clear, it also raised the dilemma of being able to obtain federal funding under the "No Jab No pay policy". I also note that the Department's email to you acknowledges that there is no mechanism to de-enrol such children. I therefore find the representation made in that email unsatisfactory.

I think that this should be presented and that the statutory problem be formally brought to the attention of the Attorney General's Department as well as DECS, and the Federal Department of Education and Training and the Federal Department of Health. They should be the ones to fix this, and in the meantime the State Department of Health should amend its publication which is not only incorrect at law, as you have pointed out if members rely upon such representations, then they could potentially face an antidiscrimination claim, as well as a breach of the said Public Health Act provisions.

Would you please chase up before we speak-what is the position with the other states in their public health acts? Why were Aboriginals and Torres Strait Islanders not included in Re 44A(2)-was it a drafting error or was there a political reason behind this-do you know?

At this stage to answer your questions, I think members would be vulnerable to a possible discrimination claim if they refused to enrol such children, particularly in circumstances whereby the parents were prepared to fund the fees without the Federal Government Assistance.

As to joining the Department of Health, if it is not prepared to correct its website publications, then I think it has engaged in misleading and deceptive conduct. However, whether that is sufficient to join a Department, or to join it because the case has been caused by its own act is poorly drafted legislation, that may be a possibility, but I would prefer to double check this with a Barrister before I provided a firm opinion.

I note that we will talk later today.

Kind regards

Belinda Kenneally
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From: Chiang Lim <chiang.lim@childcarealliance.org.au>
Sent: Wednesday, 30 January 2019 1:38 PM
To: Belinda Kenneally <kenlaw@bigpond.net.au>
Cc: Donna Wehbe <Donna.Wehebe@childcarealliance.org.au>; Katrina Leonardi <katrina.leonardi@childcarealliance.org.au>
Subject: possible immunisation loophole issue with aboriginal and torres strait islanders

Hi Belinda,

Thank you for our chat today.

Can you please have a read of the e-mail thread between ourselves and NSW Health?

Basically, I would like your written legal advice on:

- (a) whether childcare services could be in a difficult position in terms of perceived racial discrimination if they refuse any Aboriginal or Torres Strait Islander families from insisting on enrolling despite their child(ren) not being immunised; and
- (b) whether the NSW Government could be named to join any official complaint to the Commonwealth's Human Rights Commission and/or other government agencies.

Looking forward to your advice.

Chiang



Chiang (Xavier) Lim
Chief Executive Officer

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