

CONTACT:  
EMAIL:  
DIRECT LINE:  
PARTNER:  
OUR REFERENCE: [REDACTED]

21 June 2017

LAWYERS. ADVISORS.

Mrs

[REDACTED] School

[REDACTED] VIC

**By email:**

Dear Mrs

**RE: Admission of**

**Factual background**

1. We act for [REDACTED] and [REDACTED], the parents of [REDACTED]. Our clients have sought to enrol [REDACTED] at the Early Learning Centre of [REDACTED] School.
2. On 21 February 2017, our clients obtained an Immunisation Status Certificate from Dr John Piesse of NIIM Clinic, certifying that, based on the evidence before him, he determined that the immunisation of [REDACTED] would be medically contraindicated under the specifications set out in the Australian Immunisation Handbook.
3. [REDACTED] Immunisation Status Certificate was provided to [REDACTED] under cover of a letter dated 30 April 2017, in compliance with ss 143B and 147 of the *Public Health and Wellbeing Act 2008 (Vic)* (**Public Health Act**).
4. On 11 May 2017, [REDACTED] responded by email from [REDACTED], stating that an Offer of Enrolment would not be provided to [REDACTED] unless our clients completed the Australian Immunisation Register's Immunisation Medical Exemption form. The Commonwealth Department of Human Services administers the Australian Immunisation Register.

5. Therefore, notwithstanding the fact that our clients have provided evidence from Dr Piesse that the immunisation of \_\_\_\_\_ would be medically contraindicated under the specifications set out in the Australian Immunisation Handbook, \_\_\_\_\_ has refused to allow \_\_\_\_\_ to enrol at the Early Learning Centre.

### Requirements under the Public Health Act

6. In Victoria, the relevance of a child's immunisation status to their enrolment at childcare and kindergarten service providers is regulated by ss 143B and 147 of the Public Health Act. These sections provide as follows:

#### **143B: Obligation of person in charge of early childhood service**

- (1) *The person in charge of an early childhood service must ensure that the enrolment of a child at the early childhood service is not confirmed **unless a parent of the child has provided to the early childhood service an immunisation status certificate** indicating that, in relation to a date that is not more than 2 months immediately before the date that the child first attends the early childhood service—*
- (a) *the child is age appropriately immunised; or*
  - (b) *immunisation of the child with one or more vaccines so that the child is age appropriately immunised would be medically contraindicated under the specifications set out in the Australian Immunisation Handbook within the meaning of section 3(1) of the A New Tax (Family Assistance) Act 1999 of the Commonwealth.*

(our emphasis)

And

#### **147: Immunisation status certificate**

- (1) *An **immunisation status certificate** is a document or a **combination of documents**—*
- (a) *which is an extract of an entry in the Australian Childhood Immunisation Register kept under section 46B of the Health Insurance Act 1973 of the Commonwealth; **or***
  - (b) *which is issued by—*
    - (i) *a person authorised to do so by a Council; or*
    - (ii) *a person who is a recognised immunisation provider within the meaning of section 46A of the Health Insurance Act 1973 of the Commonwealth; or*
    - (iii) *a person who is prescribed to be a prescribed person for the purposes of this section—*

**which certifies that the person issuing the document has been given the evidence required by subsection (2) in respect of each vaccine-preventable disease; or**
  - (c) *which is a document which is prescribed to be a prescribed document for the purposes of this section.*

- (2) *The evidence required is one of the following—*

- (a) evidence as to whether or not the child has been immunised against the vaccine-preventable disease;
- (b) laboratory evidence that the child has developed a natural immunity against the vaccine-preventable disease and does not require immunisation;
- (c) **evidence that the immunisation of the child would be medically contraindicated under the specifications set out in the Australian Immunisation Handbook** within the meaning of section 3(1) of the A New Tax (Family Assistance) Act 1999 of the Commonwealth;
- (d) a document of a kind specified in a notice made by the Secretary and published in the Government Gazette that sets out the immunisation history of the child.

(our emphasis)

7. S 147(1) provides for three different types of document (or a combination of documents) that may satisfy the definition of an immunisation status certificate. S 147(1)(c) is not presently relevant, accordingly, a parent may supply to the early childhood service an immunisation status certificate that complies with the requirements of either ss 147(1)(a) or 147(1)(b).
8. In the present case, our clients have provided with an immunisation status certificate that complies with the requirements of s 147(1)(b). As stated in paragraph 2 above, Dr Piesse certified that the immunisation of would be medically contraindicated under the specifications set out in the Australian Immunisation Handbook. That publication clearly states that: "*This Handbook is a general guide to appropriate practice subject to clinician's judgment in each individual case*".
9. In the circumstances, the Australian Immunisation Handbook, and therefore by definition s 147(2)(c), preserves the autonomy of medical practitioners to apply their clinical judgment in order to decide whether a child should be vaccinated or not.
10. In this regard we refer you to the decision by the Administrative Appeals Tribunal, review number 2016/S099196, a copy of which is **attached** hereto. In paragraph 45 of that decision, the AAT held that certification by a doctor satisfied the exemption under s 6(3)(a) of the A New Tax System (Family Assistance) Act 1999 (Cth). The wording of s 6(3)(a) and s 147(2)(c) of the Public Health Act are similar and the two provisions set the same requirement, namely, that a medical practitioner certify that the immunisation of the child would be medically contraindicated under the specifications in the Australian Immunisation Handbook. The AAT held that it was unlawful for Centrelink to require completion of the prescribed Immunisation Medical Exemption form in circumstances where a parent obtained a certification by a medical practitioner that a child should be exempted from being vaccinated.

11. Our clients have complied with the provisions of s 147 of the Public Health Act and there is no reason why [redacted] should not be allowed to enrol at [redacted] Early Learning Centre.

### Unfair Discrimination

12. By refusing to enrol [redacted], [redacted] is engaging in unlawful discrimination under the *Equal Opportunity Act 2010* (Vic) (**the Act**). Unvaccinated children fall within the definition of having a disability as defined in s 4 the Act. Therefore such children have a protected attribute under s 6 of the Act. Excluding such children from childcare facilities because of their disability is direct discrimination under s 8 of the Act. Moreover, the discrimination is prohibited under s 44 of the Act, because it relates to discrimination in the provision of services.
13. With respect to matters relating to public health, an exception operates pursuant to s 86 of the Act. Therefore, discrimination that is *prima facie* unlawful may be lawful if the [redacted] can bring itself within the operation of the exception under s 86. However, that exception only applies, if the discriminatory conduct is “reasonably necessary”.
14. In the circumstances for this case, [redacted] cannot rely on s 86 because the measures that are “reasonably necessary” to protect other children at its Early Learning Centre are set out in the provisions of the Public Health. The provisions of the Public Health Act set out what the Victorian Parliament considers reasonably necessary to protect against the risk presented by unvaccinated children. By setting a requirement that a parent complete an Immunisation Medical Exemption form as prescribed by the Commonwealth’s Department of Human Services - in circumstances where a medical practitioner has already certified that the child should not be vaccinated as is required by s 147(1)(b) of the Public Health Act - [redacted] is engaging in discriminatory conduct that goes beyond what is “reasonably necessary” and therefore cannot rely on the exception in s 86 of the Act.
15. Accordingly, your conduct in refusing [redacted] admission on the basis of her immunisation status amounts to unlawful discrimination under the Act.

### Conclusion

16. In light of the matters set out above, we ask that you allow [redacted] to enrol at the Early Learning Centre at [redacted]. Our clients have complied with the legal requires set

out under the provisions of the Public Health Act and their eldest daughter is already enrolled at your school. In the circumstances of this case it would not be lawful to deny enrolment on the basis of her vaccination status.

Yours faithfully

**managing Partner**

Attach.