

Statement of Reasons

Pandemic Orders 12 January 2022

On 10 January 2022, I Martin Foley, Minister for Health, made the following pandemic orders under section 165A1 of the *Public Health and Wellbeing Act 2008*:

Pandemic (COVID-19 Mandatory Vaccination (General Workers)) Order 2022 (No. 2)
Pandemic (COVID-19 Mandatory Vaccination (Specified Facilities)) Order 2022 (No. 2)
Pandemic (COVID-19 Mandatory Vaccination (Specified Workers)) Order 2022 (No. 2)
Pandemic (Movement and Gathering) Order 2022 (No. 3)
Pandemic (Open Premises) Order 2022 (No. 3)
Pandemic (Quarantine, Isolation and Testing) Order 2022 (No. 4)
Pandemic (Visitors to Hospitals and Care Facilities) Order 22 (No. 2)
Pandemic (Detention) Order 2022 (No. 3)
Pandemic (Victorian Border Crossing) Order 2022 (No. 3)
Pandemic (Workplace) Order 2 Detention 2022 (No. 3)
Pandemic (Additional Industry Obligations) Order 2022 (No. 3)

In this document, I provide a statement of my reasons for the making of the above pandemic order. My statement of reasons for making the pandemic order consists of the general reasons in [1]-[8055] and the additional reasons set out in the applicable schedule for the order.

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About the pandemic orders

- 1 The pandemic orders were made under section 165AI of the *Public Health and Wellbeing Act 2008 (PHW Act)*.

Statutory power to make pandemic orders

- 2 Under section 165AI of the PHW Act, I may, at any time on or after the making of a pandemic declaration by the Premier under s 165AB (or extended under s 165AE(1)), make any order that I believe is reasonably necessary to protect public health. The Premier made a pandemic declaration on 9 December 2021 and then extended the pandemic declaration from 12 January 2022, on the basis that he was satisfied on reasonable grounds that there is a serious risk to public health throughout Victoria arising from the coronavirus (COVID-19) pandemic disease.
- 3 Pursuant to section 165AL(1), before making a pandemic order, I must request the advice of the Chief Health Officer in relation to the serious risk to public health posed by the disease specified in the pandemic declaration, and the public health measures that the Chief Health Officer considers are necessary or appropriate to address this risk.
- 4 On 9 January 2022, I requested advice of the Acting Chief Health Officer in relation to additional measures that could be put in place in response to the Omicron variant of concern. I received the Acting Chief Health Officer's written advice on 10 January 2022. That advice is supplemented by:
 - 4.1 the Chief Health Officer's advice provided on 10 December 2021;
 - 4.2 verbal advice of the Chief Health Officer provided on 14 December 2021;
 - 4.3 written advice the Chief Health Officer provided on 23 December 2021;
 - 4.4 verbal advice of the Acting Chief Health Officer provided on 29 December 2021;
 - 4.5 verbal advice of the Acting Chief Health Officer provided on 30 December 2021; and
 - 4.6 verbal advice of the Acting Chief Health Officer provided on 4 January 2022.
- 5 I have also reviewed the epidemiological data available to me on 10 January 2022 to affirm my positions on the orders made to commence 12 January 2022.
- 6 Under s 165AL(2), in making a pandemic order, I must have regard to the advice of the Chief Health Officer and may have regard to any other matter that I consider relevant including, but not limited to, social and economic matters. I may also consult any other person that I consider appropriate before making a pandemic order.
- 7 On the basis of the material provided to me by the Department of Health and the advice of the Chief Health Officer and Acting Chief Health Officer, I am satisfied that the proposed pandemic orders are reasonably necessary to protect public health. I consider that the limitations on human rights that will be imposed by the proposed pandemic orders are reasonable and justified in a free and democratic society based on human dignity, equality and freedom. I therefore make these pandemic orders under s 165AI of the PHW Act.

Guiding principles

- 8 I have made this decision informed by the guiding principles in sections 5 to 10 of the PHW Act. I note that the Chief Health Officer also had regard to those principles when providing his advice.

Principle of evidence-based decision-making

- 9 This principle is that decisions as to the most effective and efficient public health and wellbeing interventions should be based on evidence available in the circumstances that is relevant and reliable.¹
- 10 My decision to make the pandemic order has been informed by the expert advice of the Chief Health Officer and Acting Chief Health Officer about the serious risk to public health posed by COVID-19 and the public health measures that the Chief Health Officer and Acting Chief Health Officer considers are necessary or appropriate to address this risk.

Precautionary principle

- 11 This principle is that if a public health risk poses a serious threat, lack of full scientific certainty should not be used as a reason for postponing measures to prevent or control the public health risk.
- 12 COVID-19 is a serious risk to public health, and it would not be appropriate to defer action on the basis that complete information is not yet available. In such circumstances, as the PHW Act sets out, a lack of full scientific certainty is not a reason for postponing measures to prevent or control the public health risks associated with COVID-19.

Principle of primacy of prevention

- 13 This principle is that the prevention of disease, illness, injury, disability, or premature death is preferable to remedial measures.
- 14 Despite high vaccination coverage across Victoria, many situations involve a higher level of risk. Given the continuing risk of surging case numbers and outbreaks, particularly with a highly mobile population compared to lockdown periods, it is appropriate that the Victorian Government takes a conservative and cautious approach to manage risk in a targeted and efficient manner. This approach is supported by the principle of primacy of prevention in the PHW Act.²

Principle of accountability

- 15 This principle is that persons who are engaged in the administration of this Act should as far as is practicable ensure that decisions are transparent, systematic and appropriate.
- 16 Consistent with this principle, members of the public should be given access to reliable information in appropriate forms to facilitate a good understanding of public health issues, as well as opportunities to participate in policy and program development.

¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 5 at [18]-[19].

² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 14 at [50].

- 17 To promote accountability in the making of pandemic orders, the PHW Act requires that a copy or written record of the Chief Health Officer's advice, a statement of reasons, and a human rights statement (Human Rights Statement) are published in the case of the making, variation or extension of an order.
- 18 All the reasons I have made this order and the advice that has informed those decisions, as well as the expert assessments of the potential human rights impacts of my decisions, have been published according to this principle.

Principle of proportionality

- 19 The principle is that decisions made, and actions taken in the administration of the PHW Act should be proportionate to the risk sought to be prevented, minimised or controlled, and should not be made or taken in an arbitrary manner.
- 20 In deciding to make the pandemic order, I am required to be satisfied that the order is 'reasonably necessary' to protect public health, which requires consideration of the proportionality of those measures to the risk to public health.

Principle of collaboration.

- 21 The principle of collaboration is that public health and wellbeing, in Victoria and at a national and international level, can be enhanced through collaboration between all levels of Government and industry, business, communities and individuals.
- 22 In preparing the pandemic order, I consulted with the Premier and my Coordinating Ministers Committee colleagues.
- 23 Throughout the pandemic, there has been ongoing consultation between the Deputy Chief Health Officers and the Chief Health Officers of the States and Territories, including through the Australian Health Protection Principal Committee.
- 24 Victoria continues to work with other jurisdictions through National Cabinet to talk through plans for managing COVID-19. Victoria's Roadmap: Delivering the National Plan is aligned with vaccination targets set out in the *National Plan to transition Australia's National COVID-19 Response*, as agreed by National Cabinet.

Part 8A objectives

- 25 I have also had regard to the objectives of Part 8A in section 165A(1) of the PHW Act, which are to protect public health and wellbeing in Victoria by establishing a regulatory framework that:
 - 26 prevents and manages the serious risk to life, public health and wellbeing presented by the outbreak and spread of pandemics and diseases with pandemic potential; and
 - 27 supports proactive and responsive decision-making for the purposes of preventing and managing the outbreak and spread of pandemics and diseases with pandemic potential; and

- 28 ensures that decisions made and actions taken under Part 8A are informed by public health advice and other relevant information including, but not limited to, advice given by the Chief Health Officer; and
- 29 promotes transparency and accountability in relation to decisions made and actions taken under Part 8A; and
- 30 safeguards contact tracing information that is collected when a pandemic declaration is in force.

Human Rights

- 31 Under s 165A(2) of the PHW Act, the Parliament has recognised the importance of protecting human rights in managing the serious risk to life, public health and wellbeing presented by the outbreak or spread of pandemics and diseases of pandemic potential.
- 32 In addition, in making each pandemic order, I have proceeded on the basis that I should give proper consideration to relevant human rights under the *Charter of Human Rights and Responsibilities 2006* (Vic) (**Charter**). I therefore proceeded on the basis that, in making each order, I was required to take the following four steps:
 - 32.1 first, understand in general terms which human rights are relevant to the making of a pandemic order and whether, and if so, how those rights would be interfered with by a pandemic order;
 - 32.2 second, seriously turn my mind to the possible impact of the decision on human rights and the implications for affected persons;
 - 32.3 third, identify countervailing interests or obligations in a practical and common-sense way; and
 - 32.4 fourth, balance competing private and public interests as part of the exercise of 'justification'.
- 32.5 This statement of reasons must be read together with the Human Rights Statement.
- 33 I note also that in providing his advice, the Chief Health Officer had regard to the Charter.³

³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 14 at [51]; see also p. 4 at [7]; Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p.4 at [11].

Overview of public health advice

Background

- 34 Following the Premier making a pandemic declaration on 10 December 2021, I requested the Chief Health Officer's advice under this section. The Chief Health Officer provided his advice on 10 December 2021 and a verbal advice on 14 December 2021.
- 35 On 22 December 2021, I requested the advice of the Chief Health Officer in relation to measures that could be put in place in response to the Omicron variant of concern. I received the Chief Health Officer's advice on 23 December 2021. This advice supplemented both the advice the Chief Health Officer provided on 10 December 2021 and the verbal advice provided on 14 December 2021.
- 36 On 29 December 2021, I met with the Acting Chief Health Officer and asked him if the written advice that the Chief Health Officer provided on 23 December 2021 was still applicable at that time, specifically in relation to testing, tracing, isolation and quarantine advice. During that meeting, the Acting Chief Health Officer confirmed that, at that time, the advice that the Chief Health Officer provided on 23 December 2021 was still applicable.
- 37 On 30 December 2021, I met with the Acting Chief Health Officer for additional advice following the recommendations from The Australian Health Protection Principal Committee (AHPPC) and the outcomes of the meeting of National Cabinet on 30 December 2021. The Acting Chief Health Officer advised that the reporting from National Cabinet has significant implications for Victoria and recommended that Victoria aligns to the nationally endorsed positions for self-isolation and quarantining periods in reflection of the changing nature of the COVID-19 pandemic.⁴
- 38 On 4 January 2022, I requested confirmation and received confirmation from the Acting Chief Health Officer regarding whether the written advice that the Chief Health Officer provided to me on 23 December 2021 was still applicable in the current context. This included confirmation in relation to previous advice provided for density requirements for food and drink and entertainment premises, prohibiting indoor dancefloors, requiring seated service where possible for operators and shifting towards extending⁵ testing.⁶
- 39 The Acting Chief Health Officer's advice on 4 January 2022, considering the current context, advised that further measures such as mandating working from home, ceasing elective surgery, extending mandates for third vaccine doses, may be required in the immediate future.⁷
- 40 The Acting Chief Health Officer's advice on 10 January 2022, in the context of widespread incidence of Omicron in the community, advised additional public health measures beyond those outlined in the Chief Health Officer's advice to me on 23 December 2021.⁸

⁴ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

⁶ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

⁷ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 December 2021.

⁸ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 13 [55].

41 The Acting Chief Health Officer advised the following additional measures:⁹

- 41.1 testing measures prior to entering hospitals and residential aged care facilities;
- 41.2 mandatory vaccination policy for visitors to hospitals who are aged 18 years and over;
- 41.3 third dose vaccination mandates for specified high risk workforces;
- 41.4 workforce surveillance testing in care facilities;
- 41.5 an increase in the threshold number of positive cases that trigger a requirement for workforces to notify the Department of Health;
- 41.6 changes to the definition of a close contact, as it pertains to workers in care facilities, and changes to restrictions on worker mobility for the care facility workforce, particularly during outbreak periods.
- 41.7 In addition, the Acting Chief Health Officer advised the following measures to ensure interjurisdictional and national alignment of policies to promote greater compliance and understanding in the community for public health measures including:¹⁰
- 41.8 a continuation of Victoria's maritime policy;
- 41.9 alignment of the Testing, Tracing, Isolation and Quarantine policy in line with national changes;
- 41.10 review of existing mandatory hotel quarantine requirements for unvaccinated international air arrivals; and
- 41.11 changes to vaccination exemptions to include participants of COVID-19 vaccination clinical trials.

Current context

- 42 Victoria is currently experiencing an outbreak of both the Delta strain and Omicron strain of severe acute respiratory syndrome coronavirus 2, the virus which causes COVID-19. There continues to be global uncertainty and growing concern about the rapid spread of the Omicron Variant of concern (Variant of concern). When making this pandemic order, I have had regard to the advice provided by the Acting Chief Health Officer dated 10 January 2022 and the advice identified at paragraph 4 which supplements that advice in the context of all the relevant background matters I have identified, including in relation to current outbreak patterns, growth in case numbers, and vaccination rates.
- 43 Most relevantly, the public health advice is that the priority now is to reduce morbidity and mortality and limit the impact of the Omicron variant on Victoria's most vulnerable residents, our health

⁹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 13 [56].

¹⁰ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 14 [57].

system and other essential services and sectors and that it is necessary and appropriate to review and strengthen existing public health and social measures aimed at:

- 43.1 reducing the rate at which Victorians become infected (“spreading out the peak”); and
- 43.2 reducing the number of Victorians who become infected (“lowering the peak”).

Immediate situation: Phase D Settings for continued management of the COVID-19 Pandemic according to the Victorian Roadmap to deliver the National Plan

- 44 As of 10 January 2022, 34,808 new locally acquired cases (17,618 from polymerase chain reaction (PCR) test positive and 17,190 from self-reported rapid antigen (RA) test positive) and no new cases from overseas have been reported to the Department of Health within the preceding 24 hours. The state seven-day local case growth rate to 9 January was 249 per cent.
- 45 As at 10 January 2022, there are currently 161,065 active cases in Victoria. This includes, 97,247 locally acquired cases, 6 overseas acquired cases, and 63,812 probable cases from positive RA tests. There are 1,465 cases being managed as close contacts.
- 46 Two COVID-related deaths were reported in 24 hours preceding 10 January 2022, bringing the total number of COVID-19 related deaths in Victoria to 1,580.
- 47 From 10 January 2022, 682 three locally acquired cases associated with the Omicron (B.1.1.529) Variant of concern and genomic sequencing was underway for all newly identified cases.
- 48 Within the past seven days to 10 January 2022, there has been zero regional areas with unexpected wastewater detected reporting, one industry site with wastewater detections under active management for outbreak/exposure response and 21 industry sites with unexpected wastewater detections meeting escalation thresholds.
- 49 The state seven-day hospitalisation due to COVID growth rate to 10 January 2022 is 53 per cent. The state seven-day intensive care unit (ICU) admission due to COVID growth rate to 10 January is 11 per cent.

Test results

- 50 Victorians had been tested at a rate of 13,650 per 100,000 people over the 14 days to 10 January 2022.

Vaccinations

- 51 As at 10 January 2022:
 - 51.1 a total of 5,146,291 doses have been administered through the state’s vaccination program, contributing to a total of over 11,624,659 doses delivered in Victoria.
 - 51.2 93.1 per cent of Victorians over the age of 12 have been fully vaccinated

51.3 17 per cent of Victorians over the age of 18 have received their third dose of a COVID-19 vaccination.

The current global situation

52 The following situation update and data have been taken from the World Health Organisation, published 6 January 2022.

Statistic	
Global confirmed cumulative cases of COVID-19	Over 288.8 million
Global cumulative deaths	Over 5.4 million
Global trend in new weekly cases	Increasing: 71 per cent increase compared to the previous week
Global regions reporting the highest weekly case incidence per 100 000 population	<ul style="list-style-type: none"> • European Region (577.7 per 100 000 population) • Region of the Americas (319.0 per 100 000 population)
Global regions reporting the highest weekly incidence in deaths	<ul style="list-style-type: none"> • European Region (2.4 per 100 000 population) • Region of the Americas (1.1 per 100 000 population)
The highest numbers of new cases:	<ul style="list-style-type: none"> • United States of America (2 556 690 new cases; 92 per cent increase) • United Kingdom (1 104 316 new cases; 51 per cent increase) • France (1 093 162 new cases; 117 per cent increase) • Spain (649 832 new cases; 60 per cent increase) • Italy (644 508 new cases; 150 per cent increase)

Sources: World Health Organisation published 6 January 2022, WHO COVID-19 Weekly Epidemiology Update

Reasons for decision to make pandemic orders

Overview

- 53 Protecting public health and wellbeing in Victoria from the risks posed by the COVID-19 pandemic is of primary importance when I am deciding whether or not to issue pandemic orders. This is a priority supported by the PHW Act.
- 54 Section 165AL(2)(a) of the Act requires me to have regard to the advice of the Chief Health Officer, and I confirm that I have done so. That advice includes public measures that the Chief Health Officer recommends or considers reasonable.
- 55 Section 165AL(2)(b) permits me to have regard to any other matter I consider relevant, including (but not limited to) social and economic factors. Section 165AL(3) permits me to consult with any other person I consider appropriate before making pandemic orders.
- 56 In making the decision to issue the pandemic orders, I have had regard to current, detailed health advice. On the basis of that health advice, I believe that it is reasonably necessary for me to make the pandemic orders to protect public health.¹¹ In assessing what is 'reasonably necessary', I have had regard to Gleeson CJ's observation in *Thomas v Mowbray* (2007) 233 CLR 307 at [22] that "the

¹¹ See *Public Health and Wellbeing Act 2008* (Vic) section 3(1) for the definition of 'serious risk to public health'.

[decision-maker] has to consider whether the relevant obligation, prohibition or restriction imposes a greater degree of restraint than the reasonable protection of the public requires”.

- 57 The new orders I have made recognise that, although 93.0 per cent of the Victoria population aged 12 and above are fully vaccinated, other measures are still required to control the spread of COVID-19. It is still necessary to maintain safeguards to control the rate at which COVID-19 can spread given high levels of community transmission are still evident.¹²
- 58 The measures that I recommend are necessary and appropriate to manage the risk that COVID-19 presents, especially in light of the need to gather more information and evidence about the Omicron variant of concern; the potential waning of vaccine-induced immunity and the need for ‘booster’ vaccination; and how effective similar public health measures appear to be in containing COVID-19 in Northern Hemisphere countries as they enter winter.¹³
- 59 The correlation between the imposition of an immediate and strong public health response and case numbers has been evidenced not only in Australia but across the world. Although restrictions have been successful in preventing the significant numbers of deaths predicted by modelling in the absence of intervention, there is a clear link between unrestricted movement in the community, growth in case numbers, and the resulting number of deaths.¹⁴
- 60 Having had regard to the advice of the Chief Health Officer, Acting Chief Health Officer and after having consulted with the Premier, my Coordinating Ministers Committee 22^[REDACTED], it is my view that making these- pandemic orders is reasonably necessary to reduce the risk that COVID-19 poses by:
 - 60.1 Improving Victorians’ understanding of the transmissibility of COVID-19, and the actions that they can take to reduce the risk of transmission.
 - 60.2 Requiring people who have been diagnosed with, or exposed to, COVID-19 to undertake testing, and self-isolate or self-quarantine as necessary to reduce the risk of further transmission.
- 61 The Chief Health Officer and/or Acting Chief Health Officer has relevantly advised:
 - 61.1 That in the context of the rapidly escalating case numbers due to Omicron that I consider the following public health and social measures are recommended:
 - 61.1.1 a requirement that individuals work or study from home wherever possible (except Early Childhood Education and Care services (ECEC) and schools);
 - 61.1.2 continuing communication and health promotion activities;
 - 61.1.3 mandates for all individuals aged 8 years and over to wear face masks while in indoor spaces;

¹² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 2 [5].

¹³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 4 at [6].

¹⁴ Department of Health, *Chief Health Officer Advice to Premier – Advice Relating to the Making of a Pandemic Declaration* (8 December 2021), p. 13 at [47].

- 61.1.4 density limits of 1 person per 4 square metres in any indoor spaces of hospitality and entertainment venues such as cafes, restaurants, karaoke venues, bars and nightclubs;
 - 61.1.5 reinstatement of seated service requirement;
 - 61.1.6 the closure of indoor dance floors;
 - 61.1.7 capacity limits on events;
 - 61.1.8 undertaking RA tests prior to events; and
 - 61.1.9 restrictions on elective surgery in Victorian hospitals
 - 61.1.10 Mandating third doses of COVID-19 vaccination in select higher risk workforces, to ensure continued protection both for workers and vulnerable population groups, and to mitigate against the risk of rapidly escalating outbreaks. In relation to these higher risk workforces:
 - 61.1.10.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
 - 61.1.10.2 transmission is more likely to lead to severe health consequences for vulnerable individuals with whom the worker may regularly interact during the course of their work (i.e., higher risk for transmission to persons who are medically vulnerable to severe disease and death due to COVID-19 infection);
 - 61.1.10.3 the workplace setting involves high risk for viral amplification and rapid spread between workers due to factors inherent to the working environment or the nature of the work being undertaken; and
 - 61.1.10.4 the workforces provide essential services to the Victorian community, and the potential impacts from staffing shortfalls due to workers becoming sick with COVID-19 or being required to isolate as a close contact would be significant.
 - 61.1.11 A mandate rather than a recommendation to work from home is an appropriate measure to reduce transmission of COVID-19.
 - 61.1.12 reviewing the TTIQ approach in Victoria and making further changes to align with the national guidelines; and
 - 61.1.13 reviewing the approach to the management of unvaccinated international arrivals, as well as maritime arrivals generally.
- 61.2 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to vaccination mandates at this time is not recommended beyond the higher risk workforces identified. Additional mandates in relation to booster

vaccination doses could be considered appropriate in the future if evidence of certain groups falling behind in coverage or facing increased risk of transmission or adverse outcomes becomes apparent.

- 61.3 Given that hospitals are a high risk setting for COVID-19 outbreaks and that patients are particularly vulnerable to the negative impacts of COVID-19 a suite of measures is recommended including proposed third dose vaccination requirements for healthcare workers, and ongoing PPE requirements, would aim to both protect vulnerable groups and the capacity of Victoria's healthcare workforce and system.
- 61.4 The epidemiology in Victoria has shifted since the previous formal advice. As of 10 January 2022, 17,618 new cases and 17,190 probable cases (from a positive RA test) have been reported to Victoria's Department of Health in the previous 24 hours of which 17,618 confirmed cases were locally acquired and none acquired overseas. As of 10 January 2022, Victoria has 161,065 active cases, of which 97,247 were locally acquired and 6 were overseas acquired, 63,812 are probable cases from RA tests and 524 known active outbreaks.¹⁵ As of 10 January 2022, Victoria has recorded a cumulative 340,124 total cases of COVID-19 and 1,580 total deaths.¹⁶
- 61.5 Victoria's first case of Omicron was confirmed in an international traveller in hotel quarantine on 8 December 2021. Omicron has increased from 3% of sequenced isolates in the first half of December, to 30% of isolates by the 20 of December, to greater than 75% by 31 December 2021. As of 2 January 2022, Omicron cases comprise an estimated 76% of all Victorian COVID-19 cases.¹⁷
- 61.6 Public health and social measures (PHSMs), also known as non-pharmaceutical interventions (NPI), include physical distancing, density quotients, work from home measures and use of face masks. These measures have proven critical to suppressing transmission of COVID-19 globally and in Victoria. Despite widespread transmission and rising case numbers, PHSMs continue to be of critical importance to reduce the further spread of COVID-19 and the subsequent impact on the health system. Even in a highly vaccinated society PHSM continue to be highly effective at preventing transmission of SARS-CoV-2 by reducing amount of contact and likelihood of transmission during contact. PHSMs are often also feasible options to implement rapidly and at scale.¹⁸ The Australian Health Protection Principal Committee (AHPPC) recently reaffirmed its position on the importance of PHSM in managing the response to Omicron.¹⁹
- 61.7 The Minister should consider mandating the third dose of the COVID-19 vaccine for the following workers: health care workers, aged care workers, disability care workers, emergency services workers, workers in correctional facilities, hotel quarantine workers, and workers in abattoirs and meat and poultry processing facilities.²⁰

¹⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 6-7[24].

¹⁶ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 7 [26].

¹⁷ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 7 [25].

¹⁸ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 10 [42]-p. 14 [59].

¹⁹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 10 [43]-p.14 [60].

²⁰ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022 and Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 23 [90] p. 19 [73].

- 61.8 High levels of third dose COVID-19 vaccination coverage for early childhood learning staff and food distribution workers is highly desirable, but in the first instance there should be a strong engagement program for this industry and workers to promote high levels of vaccination uptake.²¹
- 61.9 A requirement that individuals work or study from home wherever possible (except Early Childhood Education and Care services (ECEC) and primary and secondary schools).²²
- 61.10 In making the recommendations to the Minister to consider a range of public health and social measures – including introducing DQ4 indoors (including cinemas and seated theatres), the closure of indoor dancefloors, seated service requirement in indoor hospitality settings, and a requirement to work or study from home where possible (excluding early childhood learning, primary and secondary schools) – these are considered the least restrictive measures to achieve maximum public health intent had been considered.
- 61.11 Previous advice from 23 December 2021²³ to mandate seated service in hospitality and entertainment and prohibiting dancefloors is still applicable in indoor settings.²⁴
- 61.12 Limiting all outdoor entertainment to 50 per cent capacity with the intent of capturing both larger and smaller events. There are pinch points at the start or end of events, with crowds congregating at an entry or exit point and increasing transmission risk.²⁵
- 61.13 Rapid Antigen tests in particular present a significant opportunity that can be harnessed to reduce the risk of COVID-19 incursion and transmission in a range of contexts including sensitive settings, as well as major events. However, supply and implementation issues pose significant constraints to taking this approach. If supply and implementation issues could be addressed, then deployment of RA tests could achieve the public health objective of reducing risk of amplification of COVID-19 transmission posed by major events with lesser, or even avoidance of capacity caps.²⁶
- 61.14 Extending mask use to include while patrons are seated at outdoor events (except while eating or drinking) could be an additional risk mitigant.²⁷
- 61.15 Less restrictive measures were considered, particularly considering the human rights objective of favouring less restrictive options whenever possible. These were not recommended given the transmissibility of the Omicron variant and the increasing pressures on the health system. Other measures for vulnerable communities should continue in tandem.

²¹ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

²² Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 13 [56]

²³ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 16 [80]-[81].

²⁴ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022. ~~Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 1 [4].~~

²⁵ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

²⁶ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

²⁷ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

- 61.16 The requirement for operators and employers to notify the department of health once outbreak thresholds should increase to help instigate public health measures while normalising the actions that individuals can take to help protect their contacts or settings, and hence the community. Increasing the current threshold for which workplaces must notify the department from every case to 5 cases over a 7-day period is reflective of not only the shift in epidemiology but also aligns to the approach taken for cases and contacts wherein the community plays a more active and self-directed model of management.²⁸
- 62 I accept the Chief Health Officer and Acting Chief Health Officer advice outlined above. Given the escalating case numbers and the seven-day local COVID-19 case average rising 249 per cent, I now consider it necessary to implement some further measures through pandemic orders.
- 63 I believe these measures are reasonably necessary and proportionate to the current risk of transmission in the community. I continue to consider the introduction of the following measures the Chief Health Officer and Acting Chief Health Officer have advised to mandate, and in the current context have opted to 'strongly recommend' these measures below. This is to best protect the community and vulnerable populations, while balancing the social and economic impacts to the broader community.
- 63.1 Mandated seated service for all food and drink spaces in premises; and
- 63.2 Mandate to work or study from home.
- 64 In particular, the Acting Chief Health noted that I may wish to review the requirement for remote work and learning in the coming weeks as more Victorians are expected to return to their workplace or learning environment following the holiday period.²⁹ To support this, I commit to reviewing mobility data regularly to monitor indicators of higher volumes of people returning to the office or study in person.
- 65 In maintaining this recommendation for remote work, I have been guided by the principal to seek the least restrictive approach to achieve a public health goal. I have been reassured by data on movement provided to me by the Department of Health regarding the substantial reductions we are seeing on movement of people as the result of earlier recommendations, aided by the mounting support of business and agencies for their staff to do so. I also have considered the policy positions being taken by many businesses, noting in particular the advice of the Chief Executive Officer of the Victorian Chamber of Commerce and Industry (VECCI) Paul Guerra.
- 66 My previous position was to strongly recommend a prohibition of indoor dancefloors. In the context of increasing cases and the advice from the Acting Chief Health Officer to provide additional social measures to limit the impact of the Omicron variant, I now believe it reasonably necessary to mandate this prohibition to close indoor dancefloors, with the only exception applicable to weddings. I support maintaining this exception as advised to me for the reasons that they are known guests that attend, the events holds cultural and wellbeing important to the community and significant impost caused by delay of dates.

²⁸Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 33 [134] ~~p. 31-32 [125]~~.

²⁹ ~~Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 13 [51].~~

Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

- 67 With regard to the density quotient requirement, I believe a density requirement of one person per two square ^{30[REDACTED]31}
- 68 The Department of Jobs, Precincts and Regions has provided estimates on impacts of proposed restrictions on hospitality and events.
- 69 People working in the affected sectors have a higher representation from economically vulnerable cohorts – such as younger people, women and culturally and linguistically diverse (CALD) communities – who will be disproportionately impacted by these public health measures.
- 70 The introduction of density quotient requirements for indoor spaces for food and drink and high-risk entertainment venues reduces the risk of transmission in these environments, and I therefore believe that a mandate for further restrictive measures is not necessary at this time. The Acting Chief Health Officer also noted that in considering any restrictions for outdoor settings, it was important to be encouraging ~~o~~-outdoor activities rather than introducing restrictions³².
- 71 Noting the extensive work underway between the Department of Health and the Department of Jobs, Precincts and Regions (DJPR) and industry sectors to deal with events in a safe manner, I have decided to hold all recommendations from the Acting Chief Health Officer and maintain current settings. I want to be clear that all events are under active consideration based on their risk profile and the rapidly changing position on alternative measures that could be landed to ensure safer events – RA tests prior to entry, other measures to make social distancing, distancing, masks, ticketing safer.
- 72 I note the recommendation of the Acting Chief Health Officer to reduce event capacity to 50 per cent and extend the density requirement to other premises, and will review as soon as possible in coming days in the light of other factor such as the scalability and the role of measures in the wider public health measures in the current environment. This extends beyond the Australian Open to the wider events calendar and the current Public Events Framework (PEF). The Tracing, Testing, Isolation and Quarantine (TTIQ) and social public health measures options as devised, the view of the VECCI Chief Executive Officer as to the importance of events to employment and recovery and the advice from the Acting Chief Health Officer on both the 6 January 2021 and 7 January 2021 prospects are all factors I have taken into account for the goal of safer events and compliance measures being achieved. In holding off acting on these recommendations presently, there are processes under way with public health's central role to offer me what I hope is an alternative to achieve public health goals in a less restrictive manner. The matter will need consistent reviewing.
- 73 I note and support the removal of the test obligation between five to seven days from arrival for international travelers, as recommended by National Cabinet and now in place in New South Wales and other arrival ports.
- 74 I note the Acting Chief Health Officer's advice that given that close contacts in the community are now required to undertake 7 days of quarantine, the quarantine duration for unvaccinated international arrivals who enter hotel quarantine could also be updated to 7 days in order to

³¹ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

³² Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 17 [83].

maintain a consistent approach.³³ I also note the Acting Chief Health Officer's recommendation that this change for unvaccinated international arrivals be considered pending further discussions at the national level to seek a consensus approach to this issue.³⁴ I accept the Acting Chief Health Officer's advice and will consider changes to the period for detention following discussion of this issue with National Cabinet.

- 75 In line with Chief Health Officer and Acting Chief Health Officer advice, I also consider it 'recommended' that individuals undertake a RA test prior to attending private gatherings, events and other entertainment activities. This is in recognition of the implementation and operational challenges posed by RA testing at this time.
- 76 I support the list of occupational groupings to be mandated for the third dose booster vaccine for COVID-19. I further support the inclusion of food distribution workers to be included in this mandate. I do so for the latter group noting the views of the leading distribution chain companies in the food chain who have made approaches to me in writing and via phone calls. This includes the Chief Operating Officer of Coles and the Chief Executive Officer of Woolworths who have made strong representations of support for the policy positions proposed. In addition, the Uniter Workers Union (UWU) have also expressed strong support. I also note the discussions I have had with the Acting Chief Health Officer around relocation of the distribution chain relationship to other areas of the food production and distribution system. Based on the advice of the Acting Chief Health, I do not support the inclusion of Early Childhood Education workers in the third dose mandate at the present moment.
- 77 I also note the advice the likely advice from the Acting Chief Health Officer as to a process via which the Chief Health Officer would be comfortable to be convinced of the urgency, need and proportionate nature of the third dose mandate being rapidly expanded to all the relevant sectors already subject to a mandatory vaccination requirement, noting the change circumstances of the current epidemiological conditions. I would seek to ensure strong messaging around the processes and engagement around future mandates - and the role they can play in delivering wider support at this critical time of community engagement and uptake of a third dose booster vaccine for COVID-19. I note the issues and strong support around the approach and the need for constructive engagement with the sectors not yet included in this mandate but are part of the existing mandatory vaccination requirement. I look forward to their inclusion as soon as possible in the third dose mandate based on direction from the Chief Health Officer advice.
- 78 I would seek to ensure in any reasons and public commentary the strong messaging around the processes and engagement around future mandates - and the role they can play in delivering wider support at this critical time of community engagement and uptake of third dose vaccination program. I note the issues and strong support around the approach and the need for constructive engagement with the sectors not yet included but subject to orders in 2021. I look forward to their inclusion as soon as possible based on the Chief Health Officer advice.

Risks of no action taken

- 79 Given all the above, if pandemic management measures had not been introduced and maintained in Victoria since early in the pandemic, the likely impact of COVID-19, particularly for older people,

³³ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 30 [116].

³⁴ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 30 [118].

people with certain chronic medical conditions and other vulnerable groups would have been far greater. In turn, an even more significant pressure would have been (and still could be) placed on the Victorian health system, to respond at a scale that has little precedent in the modern era. As Taylor and colleagues (2021) note:

“If Australia had experienced the same crude case and death rates as three comparable countries - Canada, Sweden and the United Kingdom - there would have been between 680,000 and 2 million cases instead of the 28,500 that did occur [during 2020], and between 15 and 46 times the number of deaths.”³⁵

Schedules

80 The specific Reasons for Decision for the Pandemic Orders is set out in the Schedules.

The Hon. Martin Foley

Minister for Health

10 January 2022

³⁵ Department of Health, *Chief Health Officer Advice to Premier – Advice Relating to the Making of a Pandemic Declaration* (8 December 2021), p. 13 at [48].

Schedule 1 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (General Workers) Order 2022 (No. 2)

Summary of Order

- 81 This Order requires employers to not permit general workers (for whom it is reasonably practicable to work at home) to work outside their homes if they are not fully vaccinated or exempt.

Purpose

- 82 The objective of this Order is to impose obligations upon employers in relation to the vaccination of general workers, in order to limit the spread of COVID-19 within the population of those workers.

Obligations

- 83 This Order requires:

- 83.1 an employer to not permit a general worker to work outside of the general worker's ordinary place of residence unless they are fully vaccinated or exempt; and
- 83.2 an employer of a general worker to collect, record and hold the general worker's vaccination status when they work outside their ordinary place of residence; and
- 83.3 an employer to disclose a general worker's vaccination information to an authorised officer upon request.

- 84 General workers are defined as:

- 84.1 A person who does work but is **not**:
- 84.2 a person under 12 years and two months of age
- 84.3 a person who is a worker within the meaning of the COVID-19 Mandatory Vaccination (Specified Workers) Order;
- 84.4 a person who is a worker in relation to a specified facility within the meaning of the COVID-19 Mandatory Vaccination (Specified Facilities) Order;
- 84.5 a person who is a worker within the meaning of the Open Premises Order;
- 84.6 a Commonwealth employee;
- 84.7 a judge or judicial registrar;
- 84.8 a person who works in connection with proceedings in a court, where that work cannot be done from the person's ordinary place of residence;
- 84.9 a person who is a member of the staff of Court Services Victoria within the meaning of the Court Services Victoria Act 2014;

- 84.10 a person employed or engaged by the Chief Executive Officer of the Victorian Civil and Administrative Tribunal;
- 84.11 a member of State Parliament;
- 84.12 the Clerk of the Legislative Assembly;
- 84.13 the Clerk of the Legislative Council;
- 84.14 an electorate officer within the meaning of the Parliamentary Administration Act 2004;
- 84.15 a parliamentary officer within the meaning of the Parliamentary Administration Act 2004;
- 84.16 a person who works at or in connection with a place of worship and:
 - 84.16.1 conducts services of public worship and acknowledgments of faith;
 - 84.16.2 performs marriages, funerals and special memorial services according to tradition and ecclesiastical and civil law;
 - 84.16.3 visits members of the community in their homes, hospitals and other institutions to provide advice and religious comfort for the purpose of end of life faith reasons;
- 84.17 a person identified in Article 1 of the Vienna Convention on Diplomatic Relations, as set out in the Schedule to the Diplomatic Privileges and Immunities Act 1967 of the Commonwealth;
- 84.18 a person identified in Article 1 of the Vienna Convention on Consular Relations, as set out in the Schedule to the Consular Privileges and Immunities Act 1972 of the Commonwealth;
- 84.19 the Governor and the Lieutenant Governor.

85 These obligations aim to reduce the risk of transmission of COVID-19 in the workplace and keep workers and the broader community safe. Failure to comply with this Order may result in penalties.

Changes from Pandemic COVID-19 Mandatory Vaccination (General Workers) Order 2021 (No. 1)

86 The definition of a medical contravention has been amended to include circumstances when an individual is in the process of completing a Federal Department of Health approved COVID-19 vaccine clinical trial.

Period

87 This Order will commence at 11:59:00pm on 12 January 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

- 88 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified in paragraph 141 of the Human Rights Statement.
- 89 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 90 The Human Rights Statement also sets out:
- 90.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
 - 90.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are affected, but not limited

- 91 Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights set out in paragraph 143 of the Human Rights Statement.
- 92 My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

- 93 I carefully read and considered the Chief Health Officer's advice. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
- 93.1 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to vaccination mandates at this time is not recommended beyond the higher risk workforces identified. Additional mandates in relation to booster vaccination doses could be considered appropriate in the future if evidence of certain groups falling behind in coverage or facing increased risk of transmission or adverse outcomes becomes apparent.
 - 93.2 COVID-19 case rates in Victoria remain elevated despite significant population coverage in Victoria of greater than 90 per cent full vaccination in those aged 12 years and above.³⁶
 - 93.3 The presence of the Omicron variant of concern has been confirmed in Victoria³⁷ and the variant "is not yet fully understood and will be the topic of continued interest internationally".³⁸

³⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 at [136].

³⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 8 at [30].

³⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 12 at [43].

- 93.4 Individual vaccination coverage reduces the risk to others in the same setting, who may not be eligible to be vaccinated.³⁹
- 93.5 Maintaining worker vaccine mandates in any setting where a patron must be vaccinated offers consistency, but also means the intent of a vaccination requirement for entry (that transmission risk is reduced) is achieved for all who attend.⁴⁰
- 93.6 Maintaining a general worker vaccine mandate delivers ongoing additional protection to workers returning to their workplaces, especially those who face challenges on associated with immunocompromise, other medical exceptions, and waning immunity.⁴¹
- 93.7 Maintaining a baseline vaccine mandate will protect workers from the increasing incursion and transmission risk represented by the return to onsite work, easing of restrictions in the Victorian community, and easing of domestic and international border restrictions, particularly in the face of the emerging threat posed by the Omicron variant of concern.⁴²
- 93.8 Workforce shortages resulting from the need to isolate or furlough infected staff and their contacts are a material threat to maintaining workplace operations. High workforce vaccination coverage, supported by vaccine mandates, can diminish these disruptions by reducing outbreaks in these settings.⁴³
- 93.9 Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.⁴⁴
- 93.10 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus.⁴⁵
- 93.11 COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates.⁴⁶
- 93.12 COVID-19 vaccines reduce the individual risk of experiencing more serious health outcomes from infection.⁴⁷
- 93.13 To align with Commonwealth policy, individuals on an approved COVID-19 vaccination clinical trial should be permitted to have a temporary exemption from receiving a COVID-19 vaccination.⁴⁸

94 I accepted that advice.

³⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 at [137].

⁴⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 at [144].

⁴¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 at [144].

⁴² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 28-29 at [137].

⁴³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28-29 at [137].

⁴⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 31 at [148].

⁴⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 at [137].

⁴⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28-29 at [137].

⁴⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 at [137].

⁴⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 January 2021) p. 32 [128].

95 Importantly, I noted that that the Chief Health Officer says the following at paragraph 146 of his Advice:

It would therefore be appropriate, and my recommendation, that the Minister uses discretion in deciding how public confidence in the administration of public health (and the improvements in compliance and prosocial behaviour that such confidence brings) would be best served. This may be by retaining a general vaccine mandate or by removing it, noting the possibility of having to reinstate it later.

96 The Chief Health Officer's Advice to me also:

96.1 notes that the "Omicron variant is not yet fully understood and will be the topic of continued interest internationally", and the challenge that reinstating any mandatory vaccination requirements would bring in terms of consistency of public policy settings, compliance and general community understanding and acceptance of these requirements; and

96.2 advises that "people need certainty to plan their lives: sweeping changes to impose or ease restrictions should be made carefully".¹⁴

97 Based on the global uncertainty regarding the impact of the Omicron variant of concern, the speed at which it is spreading and the knowledge these orders will be maintained for a maximum of 28 days, I have decided to retain a general vaccine mandate (which is partially implemented by this Order), rather than removing it. I have decided to take a precautionary approach and maintain mandatory vaccination requirements for workers in the settings previously mandated by the Chief Health Officer.

98 I also consider it is necessary and proportionate to maintain the mandatory vaccination settings for workers and many discretionary activities – such as hospitality and entertainment.

Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community

99 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.

100 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be affected and limited by the Order.

101 In addition, I have also considered the following additional potential negative impacts:

101.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. "There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs,

associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds.”⁴⁹

- 101.2 “Exclusion from a physical workplace based on vaccination status may be particularly onerous for single parents, for parents of younger children, and for parents of multiple children (who may find it impossible to work effectively at home). This may... disproportionately affect women who typically bear more of the child-minding or caring responsibilities in the home.”⁵⁰
- 101.3 The order “requires workers to provide evidence of their COVID-19 vaccination status to their employers by certain dates”.
- 101.4 The order “may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”¹⁹
- 101.5 The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.
- 101.6 As the order “prevents a person from working out of home if they are not vaccinated... they may require people to act inconsistently with [their] beliefs if they wish to be able to attend work at their workplace.”⁵¹

102 However, in considering the potential negative impacts, I also recognised:

- 102.1 The Order does not physically force anyone to receive a COVID-19 vaccine.
- 102.2 The Order does not prohibit the employment of any unvaccinated person. It only operates to prevent attendance at workplaces. It therefore allows unvaccinated people to remain employed if an employer could continue to employ them working from home.
- 102.3 The Order contains an exception for people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication or an acute medical illness.
- 102.4 Additionally, general workers who are not fully vaccinated or exempt may continue to work at their usual place of work if it is not reasonably practicable for the person to work at their ordinary place of residence (subject to any other vaccination requirements on workers contained in other orders).

⁴⁹ Department of Health, *Human Rights Statement: Pandemic (General Workers) Order* (11 December 2021), at [57.2].

⁵⁰ Department of Health, *Human Rights Statement: Pandemic (General Workers) Order* (11 December 2021), at [58.5].

⁵¹ Department of Health, *Human Rights Statement: Pandemic (General Workers) Order* (11 December 2021), at [57.3].

Whether there are any less restrictive alternatives that are reasonably available to protect public health

- 103 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).⁵²
- 104 The Chief Health Officer advises that even if measures which were less restrictive were implemented, residual risks would remain where using more restrictive measures would be necessary and proportionate as a response.⁵³
- 105 Public education and health promotion can provide community members with an understanding of COVIDSafe behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic. However, onsite work, particularly at specified facilities, typically involves a significant amount of workforce interaction and movement. In addition, it is possible for individuals to be asymptomatic and infectious. Education and practicing of COVIDSafe behaviours is consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 106 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19,¹⁵ the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community.¹⁶ Ensuring high vaccination coverage in specified facilities reduces the risk of individuals transmitting COVID-19 to others.
- 107 There are a number of challenges that prevent the combination of mask wearing and testing being an equally robust solution to the risks of exposure and transmission compared to vaccines.⁵⁴
- 108 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.⁵⁵ There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 109 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.⁵⁶ Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta Variant of concern, and increasingly with the Omicron Variant of concern.
- 110 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,⁵⁷ however surveillance testing as an alternative to mandatory vaccination requirements

⁵² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 14-15.

⁵³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 10-11 at [34]-[36].

⁵⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁵⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁵⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 at [132]; p. 30 at [147].

⁵⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 22 at [97].

for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.⁵⁸

- 111 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement for Specified Workers, fails to provide the same protection for workforces.⁵⁹ Currently, (PCR) and (RA) are approved for use in Australia.
- 112 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta variant of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 113 Generally, there is a minimum turnaround time of 6-24 hours between a test being administered and a result being received. During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.⁶⁰
- 114 Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to⁶¹ on-site RA tests and have allowed individuals to provide proof of a RA test. People would have to take a RA test every day and there are real challenges in overseeing compliance with the result.⁶²
- 115 RA tests are also subject to potential false negative resulting from the assay itself.⁶³ While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).
- 116 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are organised⁶⁴

Other considerations

- 117 The mandatory vaccination requirement for workers generally reduces the risk of transmission across workforces and the broader community. This provides greater workforce protection and

⁵⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 22 at [99]-[100].

⁵⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁶⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁶¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁶² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁶³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁶⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.⁶⁵

118 In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirements for general workers assists with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial⁶⁶

Conclusion

119 Taking into account all of the above factors (including those contained in the Human Rights Statement), and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.

120 For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

⁶⁵ Department of Treasury and Finance, *Coronavirus Economic Outlook* [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

⁶⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 at [146].

Schedule 2 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2022 (No. 2)

Summary of Order

121 This Order requires operators of specified facilities to not permit a worker to enter the premises if they are unvaccinated, partially vaccinated, or previously vaccinated (for residential aged care facilities and healthcare facilities), in order to limit the spread of COVID-19 within the population of those workers. Specified facilities are residential aged care facilities, construction sites, healthcare facilities and education facilities.

Purpose

122 The objective of this Order is to impose obligations upon operators of specified facilities in relation to the vaccination of workers, in order to limit the spread of COVID-19 within the population in these settings.

Obligations

123 This Order requires operators of specified facilities to manage the vaccination status of workers, in order to limit the spread of COVID-19 within the population in the following settings:

123.1 residential aged care facilities;

123.2 construction sites;

123.3 healthcare facilities; and

123.4 education facilities.

124 This Order requires operators of specified facilities to:

124.1 collect, record and hold vaccination information of workers;

124.2 take reasonable steps to prevent entry of unvaccinated, partially vaccinated, or previously vaccinated (for residential aged care facilities and healthcare facilities), workers to the specified facility for the purposes of working; and

124.3 notify current and new workers that the operator is obliged to collect, record and hold vaccination information about the worker and to take reasonable steps to prevent a worker who is unvaccinated, partially vaccinated or previously vaccinated (for residential aged care facilities and healthcare facilities), to enter or remain on the premises of a specified facility for the purposes of work.

125 Exceptional circumstances are set out in this Order where an operator is not required to comply with this Order. Otherwise, failure to comply with this Order may result in penalties.

Changes from Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2021 (No. 1)

126 Employers of workers in residential aged care facilities and health care facilities are required to:

126.1 Subject to limited exceptions to take reasonable steps to ensure that workers who have not had their booster vaccination dose do not enter or remain on the premises

126.2 Collect vaccination information about certain workers including whether those workers are fully vaccinated, and, for those workers if they are fully vaccinated (boosted) – the date on which that person became fully vaccinated (boosted)

Period

127 This Order will commence at 11:59:00pm on 12 January 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

128 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified in paragraph 168 of the Human Rights Statement.

129 My explanation for why those rights are limited by the Order is set out in the Human Rights Statement.

130 The Statement also sets out:

130.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and

130.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are affected, but not limited

131 Further, in my opinion, the obligations imposed by the Order will affect, but not limit, the human rights set out in paragraph 169 of the Human Rights Statement.

132 My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

133 I carefully read and considered the Chief Health Officer's advice. In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:

- 133.1 Mandating third doses of COVID-19 vaccination in select higher risk workforces, to ensure continued protection both for workers and vulnerable population groups, and to mitigate against the risk of rapidly escalating outbreaks. In relation to these higher risk workforces:
- 133.1.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
 - 133.1.2 transmission is more likely to lead to severe health consequences for vulnerable individuals with whom the worker may regularly interact during the course of their work (i.e., higher risk for transmission to persons who are medically vulnerable to severe disease and death due to COVID-19 infection);
 - 133.1.3 the workplace setting involves high risk for viral amplification and rapid spread between workers due to factors inherent to the working environment or the nature of the work being undertaken; and
 - 133.1.4 the workforces provide essential services to the Victorian community, and the potential impacts from staffing shortfalls due to workers becoming sick^{67,68}
- 133.2 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to vaccination mandates at this time is not recommended beyond the higher risk workforces^{69,70}
- 133.3 Given that hospitals are a high risk setting for COVID-19 outbreaks and that patients are particularly vulnerable to the negative impacts of COVID-19 a suite of measures is recommended including proposed third dose vaccination requirements for healthcare workers, and ongoing PPE requirements, would aim to both protect vulnerable groups and the capacity of Victoria's healthcare workforce and system.
- 133.4 COVID-19 case rates in Victoria remain elevated despite significant population coverage in Victoria of greater than 90 per cent full vaccination in those aged 12 years and above.⁷¹
- 133.5 The presence of the Omicron variant of concern has been confirmed in Victoria.⁷²
- 133.6 Individual vaccination coverage reduces the risk to others in the same setting, who may not be eligible to be vaccinated.⁷³

⁶⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 21 [87].

⁷⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 23-24 [92],[93].

⁷¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 [136].

⁷² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 8 [30]

⁷³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 [137].

- 133.7 Maintaining a baseline vaccine mandate will protect workers from the increasing incursion and transmission risk represented by the return to onsite work, easing of restrictions in the Victorian community, and easing of domestic and international border restrictions, particularly in the face of the emerging threat posed by the Omicron variant of concern.⁷⁴
- 133.8 Many workers are already required to be fully vaccinated (or exempt) to attend work and thus, continuing vaccination requirements for workforces that are already subject to a mandate would not be expected to result in significant disruption to affected industries or sectors, or an imposition on workers.⁷⁵
- 133.9 There are a series of workplaces that involve clearly higher risk and therefore it is important to ensure that workers and vulnerable populations within those settings are protected in a way that goes beyond what might be achieved by relying on the population vaccination coverage. For example, in settings where infection risk is greater due to vaccination ineligibility (e.g., education settings), the presence of vulnerable cohorts (e.g., residential aged care) or other transmission related factors are at play (e.g., meat processing).⁷⁶
- 133.10 Children of primary school age are not yet able to access COVID-19 vaccinations and remain at risk as a potential vector for viral transmission, so it remains critical to maintain mandates for workers in schools and early childhood education and care centres.⁷⁷
- 133.11 Workforce shortages resulting from the need to isolate or furlough infected staff and their contacts are a material threat to maintaining workplace operations. High workforce vaccination coverage, supported by vaccine mandates, can diminish these disruptions by reducing outbreaks in these settings.⁷⁸
- 133.12 Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.⁷⁹
- 133.13 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus.⁸⁰
- 133.14 COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates.⁸¹
- 133.15 COVID-19 vaccines reduce the individual risk of experiencing more serious health outcomes from infection.⁸²

⁷⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 28-29 [137].

⁷⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29 [137].

⁷⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29 [138].

⁷⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29 [139].

⁷⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29 [137].

⁷⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 31 [148].

⁸⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 [137].

⁸¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29 [137].

⁸² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 [137].

134 I accepted that advice.

135 Importantly, I noted that that the Chief Health Officer says the following at paragraph 146 of his Advice:

It would therefore be appropriate, and my recommendation, that the Minister uses discretion in deciding how public confidence in the administration of public health (and the improvements in compliance and prosocial behaviour that such confidence brings) would be best served. This may be by retaining a general vaccine mandate or by removing it, noting the possibility of having to reinstate it later.⁸³

136 The Acting Chief Health Officer's Advice to me also:

136.1 notes that a "given how recently Omicron was identified and how recently it has taken hold in various cities and countries, there are still large gaps in what we know about its impact. However, available laboratory and epidemiological evidence suggests that Omicron is highly transmissible, and therefore poses a clear and present risk above and beyond the risks posed by other Variants of Concern"⁸⁴, and

136.2 that "range of possible measures that are likely to assist with managing the health risks and community-wide impacts that are arising due to the Omicron outbreak"⁸⁵

137 Based on the large gaps in what we know about the impact of the Omicron variant of concern⁸⁶, and that it is highly transmissible, I have decided to retain a general vaccine mandate (which is partially implemented by this Order), rather than removing it. In addition, I have decided to take a precautionary approach and maintain mandatory vaccination requirements for workers in the settings previously mandated by the Chief Health Officer.

138 I also consider it is necessary and proportionate to maintain the mandatory vaccination settings for workers and many discretionary activities – such as hospitality and entertainment.

Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community

139 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.

140 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be affected and limited by the Order.

141 In addition, I have also considered the following additional potential negative impacts:

141.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief

⁸³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 [146].

⁸⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 January 2022), p.5 [19].

⁸⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 January 2022), p.3 [7].

⁸⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 5 [19].

systems. “There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds.”⁸⁷

- 141.2 The order “may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”⁸⁸
- 141.3 The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.⁸⁹
- 141.4 As the order “prevent[s] a person from working out of home if they are not vaccinated... they may require people to act inconsistently with [their] beliefs if they wish to be able to attend work at their workplace.”⁹⁰

142 However, in considering the potential negative impacts, I also recognised:

- 142.1 The Order does not physically force anyone to receive a COVID-19 vaccine.
- 142.2 The Order does not prohibit the employment of any unvaccinated person. It only operates to prevent attendance at workplaces. It therefore allows unvaccinated people to remain employed if an employer could continue to employ them working from home.
- 142.3 The Order contains an exception for people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication.
- 142.4 In making this order I have included limited exceptions to the mandatory vaccination requirement for specified facilities to ensure it is less onerous in specific circumstances including:
 - 142.4.1 to ensure workers can perform work or duties that is necessary to provide for urgent specialist clinical or medical care due to an emergency situation or a critical unforeseen circumstance; or
 - 142.4.2 a worker is required to fill a vacancy to provide urgent care, to maintain quality of care and/or to continue essential operations due to an emergency situation or a critical unforeseen circumstance; or

⁸⁷ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [84.2].

⁸⁸ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [93].

²³⁸ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [79].

⁹⁰ Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [84.3].

142.4.3 a worker is required to respond to an emergency; or

142.4.4 a worker is required to perform urgent and essential work to protect the health and safety of workers or members of the public, or to protect assets and infrastructure. Whether there are any less restrictive alternatives that are reasonably available to protect public health.

Whether there are any less restrictive alternatives that are reasonably available to protect public health

143 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).⁹¹

144 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.⁹²

145 Public education and health promotion can provide community members with an understanding of ⁹³ ⁹⁴ However, onsite work, particularly at specified facilities, typically involves a significant amount of workforce interaction and movement.⁹⁵ In addition, it is possible for individuals to be asymptomatic and infectious.⁹⁶ Education and practicing of ⁹⁷ behaviours is consequently not sufficient to manage the risk high levels of workforce interaction poses to public health. behaviours is consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.

146 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19,⁹⁸ the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community.⁹⁹ Ensuring high vaccination coverage in specified facilities reduces the risk of individuals transmitting COVID-19 to others.¹⁰⁰

⁹¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 14 – 20.

⁹² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 10-11 at [34]-[36].

⁹³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15 at [52]-[53].

⁹⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 21 at [91]; p. 30 at [142-143].

⁹⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15 at [62].

⁹⁸ World Health Organisation, *Contact Tracing in the context of COVID-19: Interim guidance* [Online, 2021] Available at: https://apps.who.int/iris/bitstream/handle/10665/339128/WHO-2019-nCoVContact_Tracing-2021.1-eng.pdf?sequence=24&isAllowed=y [Accessed 5 December 2021].

⁹⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 8 at [26].

¹⁰⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 at [137].

- 147 Wearing face masks and possibly even other forms of Personal Protective Equipment (PPE) is not regarded as an acceptable alternative to mandatory vaccination of workers due to a number of reasons. Training is required to ensure that users are aware of the correct level of PPE and know how to don and doff the PPE effectively.¹⁰¹ Studies show that auditing and additional training are required in healthcare settings to improve general compliance and PPE practice in front-line health workers, even those who face immediate threat of exposure to COVID-19. Inconsistent practices will increase the risk of transmission in various settings as protection is only afforded if correctly worn.
- 148 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.¹⁰² There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 149 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.¹⁰³ Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta variant of concern, and increasingly with the Omicron variant of concern.
- 150 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,¹⁰⁴ however surveillance testing as an alternative to mandatory vaccination requirements for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.¹⁰⁵
- 151 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement for Specified Workers, fails to provide the same protection for workforces.¹⁰⁶ PCR and RA tests are approved for use in Australia.
- 152 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta variant of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 153 Generally, there is a minimum turnaround time of 6-24 hours between a test being administered and a result being received. During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.¹⁰⁷

¹⁰¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁰² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁰³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 at [132]; p. 30 at [147].

¹⁰⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 22 at [97].

¹⁰⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 22 at [99]-[100].

¹⁰⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁰⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

- 154 Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to ¹⁰⁸ on-site RA tests and have allowed individuals to provide proof of a RA test. People would have to take a RA test every day and there are real challenges in overseeing compliance with the result. ¹⁰⁹
- 155 RATs are also subject to potential false negative resulting from the assay itself.¹¹⁰ While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).
- 156 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are organised¹¹¹
- 157 In making this order, I considered the Chief Health Officer’s Advice that “it would seem appropriate, given the interaction with vulnerable population groups that consideration be given to mandatory third dose booster vaccinations for healthcare workers, aged and disability care workers in the first instance.”¹¹² This was due to the workforces’ “interaction with vulnerable population groups” and a concern of “waning immunity [that] is associated with an increased incidence in breakthrough infections.”¹¹³ As there has not been national agreement or ATAGI advice issued for mandating booster vaccines for healthcare, aged care and disability workers, I have decided not to make orders mandating booster vaccine doses for healthcare, aged care and disability workers at this stage.

Other considerations

- 158 The mandatory vaccination requirement for Specified Facilities reduces the risk of transmission within those settings and the broader community. This provides greater workforce protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.¹¹⁴
- 159 In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirements for Specified Facilities assists with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial

¹⁰⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹¹⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹¹² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 at [147].

¹¹³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 at [147].

¹¹⁴ Department of Treasury and Finance, *Coronavirus Economic Outlook* [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

behaviours such as self-isolation when symptomatic, wearing a face covering in certain settings and maintaining social distancing.

Conclusion

- 160 Taking into account all of the above factors (including those contained in the Human Rights Statement) and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
- 161 For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

Schedule 3 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (Specified Workers) Order 2022 (No.2)

Summary of Order

162 This Order requires employers to not permit a worker to work outside their ordinary place of residence if they are unvaccinated or partially vaccinated in order to limit the spread of COVID-19 within the population of those workers. Specified workers are listed in Schedule 1 to the Order.

Purpose

163 The objective of this Order is to impose obligations upon employers in relation to the vaccination of workers, in order to limit the spread of COVID-19 within the population of those workers.

Obligations

164 This Order requires employers of specified workers to:

- 164.1 collect, record and hold vaccination information of workers;
- 164.2 not permit specific unvaccinated or partially vaccinated or previously vaccinated workers from working outside the worker's ordinary place of residence; and
- 164.3 notify current and new workers that the employer is obliged to collect, record and hold vaccination information about the worker and to not permit the worker who is unvaccinated or partially vaccinated from working outside the worker's ordinary place of residence.

165 The workers who are 'specified workers' for the purposes of this order are:

- | | | | |
|-------|---------------------------------------|--------|------------------------------------|
| 165.1 | accommodation worker | 165.10 | emergency service worker |
| 165.2 | agricultural and forestry worker | 165.11 | entertainment and function worker |
| 165.3 | airport worker | 165.12 | food distribution worker |
| 165.4 | ancillary, support and welfare worker | 165.13 | funeral worker |
| 165.5 | authorised officer | 165.14 | higher education worker |
| 165.6 | care worker | 165.15 | justice worker |
| 165.7 | community worker | 165.16 | manufacturing worker |
| 165.8 | creative arts worker | 165.17 | marriage celebrant |
| 165.9 | custodial worker | 165.18 | meat and seafood processing worker |

- 165.19 media and film production worker
- 165.20 mining worker
- 165.21 physical recreation worker
- 165.22 port or freight worker
- 165.23 professional sports, high-performance sports or racing person
- 165.24 professional services worker
- 165.25 public sector worker
- 165.26 quarantine accommodation worker
- 165.27 real estate worker
- 165.28 religious worker
- 165.29 repair and maintenance worker
- 165.30 retail worker
- 165.31 science and technology worker
- 165.32 social and community service worker
- 165.33 transport worker
- 165.34 utility and urban worker
- 165.35 veterinary and pet/animal care worker

166 Exceptional circumstances are set out in this Order where an operator is not required to comply with this Order. Otherwise, failure to comply with this Order may result in penalties.

Changes from Pandemic COVID-19 Mandatory Vaccination (Specified Workers) Order 2021 (No. 1)

167 Employers of certain of workers, including disability workers, custodial workers, emergency services workers, meat and seafood processing workers, quarantine accommodation workers, food distribution workers are required to:

167.1 Subject to limited exceptions not permit those classes of workers from working outside of their principal place of residence if those workers have not had their booster vaccination dose

167.2 Collect vaccination information about certain workers including whether those workers are fully vaccinated, and, for those workers if they are fully vaccinated (boosted) – the date on which that person became fully vaccinated (boosted)

Period

168 This Order will commence at 11:59:00pm on 12 January 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

169 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the Order will limit the human rights identified in paragraph 194 of the Human Rights Statement.

170 My explanation for why those rights are limited by the Order is also set out in that Statement.

171 The Statement also sets out:

171.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and

171.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are affected, but not limited

172 Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights set out in paragraph 195 of the Human Rights Statement.

173 My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

174 I carefully read and considered the Chief Health Officer's advice.

175 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:

175.1 Mandating third doses of COVID-19 vaccination in select higher risk workforces, to ensure continued protection both for workers and vulnerable population groups, and to mitigate against the risk of rapidly escalating outbreaks. In relation to these higher risk workforces:

175.1.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);

175.1.2 transmission is more likely to lead to severe health consequences for vulnerable individuals with whom the worker may regularly interact during the course of their work (i.e., higher risk for transmission to persons who are medically vulnerable to severe disease and death due to COVID-19 infection);

175.1.3 the workplace setting involves high risk for viral amplification and rapid spread between workers due to factors inherent to the working environment or the nature of the work being undertaken; and

175.1.4 the workforces provide essential services to the Victorian community, and the potential impacts from staffing shortfalls due to workers becoming sick with COVID-19 or being required to isolate as a close contact would be significant.

175.2 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to vaccination mandates at this time is not recommended beyond the higher risk workforces identified. Additional mandates in relation to booster vaccination doses could be considered appropriate in the future if evidence of certain groups falling behind in coverage or facing increased risk of transmission or adverse outcomes becomes apparent.

175.3 Given that hospitals are a high risk setting for COVID-19 outbreaks and that patients are particularly vulnerable to the negative impacts of COVID-19 a suite of measures is recommended including proposed third dose vaccination requirements for healthcare workers, and ongoing PPE requirements, would aim to both protect vulnerable groups and the capacity of Victoria's healthcare workforce and system.

175.4 COVID-19 case rates in Victoria remain elevated despite significant population coverage in Victoria of greater than 90 per cent full vaccination in those aged 12 years and above.

175.5 Vaccination remains the best way to develop immunity and prevent COVID-19 disease and reduce the risk of severe outcomes such as hospitalisation, ICU admission, need for ventilatory support and death. This has been reflected in the available Victorian surveillance data for the period of 4 December 2021 to 3 January 2022 which demonstrates a significantly greater rate of cases, hospitalisations, ICU admissions and deaths recorded in those who have not been fully vaccinated (0 or 1 dose) compared to

those who have been fully vaccinated (2 or 3 doses). Although this information applies to people infected with Delta as well as with Omicron, early evidence of reduced vaccine effectiveness with Omicron suggests that these differences will only worsen or at least remain maintained.

- 175.6 Early estimates of vaccine effectiveness (VE) against symptomatic infection find a significantly lower VE against Omicron infection compared to Delta infection and emerging evidence suggest two doses of vaccination with Pfizer or AstraZeneca are insufficient to give adequate levels of protection against infection and mild disease with the Omicron variant . Part of this is because the immunity that vaccines provide wanes over time. , This is why even countries with high levels of previous infection or vaccination are seeing rapidly surging case numbers of Omicron,¹³ and it seems plausible that the numbers are due to a combination of waning immunity, Omicron being able to evade previously established immunity (from infection or vaccination) or and its increased transmissibility.
- 175.7 However, protection against transmission is partially recovered by a third mRNA booster dose (third dose) and protection against severe disease has been shown to remain high. In particular, third dose vaccines appear to reduce the likelihood of severe illness. A UK study estimated that vaccine effectiveness against symptomatic illness from Omicron is 75.5% (95%CI: 56.1 to 86.3%) two weeks after a Pfizer vaccine third dose in those who received a primary course of the Pfizer vaccine and 71.4% (95%CI: 41.8 to 86.0%) in those who received a primary course of the AstraZeneca vaccine.
- 175.8 Although these findings are not yet definitive, they provide promising evidence on the effective use of third doses of existing COVID-19 vaccines in providing further immunity against Omicron. Further studies and publications are awaited on the impact of Omicron on vaccine effectiveness.¹¹⁵
- 175.9 I further advise that the Minister consider mandating third doses of COVID-19 vaccination in select higher risk workforces, to ensure continued protection both for workers and vulnerable population groups, and to mitigate against the risk of rapidly escalating outbreaks.
- 175.10 Third dose vaccinations would involve a further dose of COVID-19 vaccine within the recommended period (currently greater than 3 - 4 months) after the primary course of vaccination has been completed. This should be distinguished from the current ATAGI recommendation for a third dose of COVID-19 vaccination to be given in severely immunocompromised populations, to address the risk of suboptimal or non-response to the standard 2-dose schedule that has been recognised in this group.
- 175.11 For these individuals (i.e., people aged 18 years and over who are severely immunocompromised who have already received 3 doses of a COVID-19 vaccine), ATAGI now recommends a booster (i.e., 4th dose) at 4 months, in line with the timing for the general population. This is expected to improve protection against asymptomatic infection, serious illness or death from COVID-19 caused by Omicron.

¹¹⁵ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) pp. 9-10 [38]-[41].

- 175.12 The workforces set out below warrant specific consideration for mandatory third doses, not only because they were some of the earliest workers to receive the COVID-19 vaccine, but also because the workforces themselves are higher risk:
- 175.12.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk), such as healthcare workers;
 - 175.12.2 transmission is more likely to lead to severe health consequences for vulnerable individuals with whom the worker may regularly interact during the course of their work (i.e., higher risk for transmission to persons who are medically vulnerable to severe disease and death due to COVID-19 infection);
 - 175.12.3 the workplace setting involves high risk for viral amplification and rapid spread between workers due to factors inherent to the working environment or the nature of the work being undertaken, such as meat processing workers, as outlined in paragraph 85; and
 - 175.12.4 the workforces provide essential services to the Victorian community, and the potential impacts from staffing shortfalls due to workers becoming sick with COVID-19 or being required to isolate as a close contact would be significant.¹¹⁶
- 175.13 The presence of the Omicron variant of concern has been confirmed in Victoria¹¹⁷ and the variant “is not yet fully understood and will be the topic of continued interest internationally”.¹¹⁸
- 175.14 Individual vaccination coverage reduces the risk to others in the same setting, who may not be eligible to be vaccinated.¹¹⁹
- 175.15 Maintaining a baseline vaccine mandate will protect workers from the increasing incursion and transmission risk represented by the return to onsite work, easing of restrictions in the Victorian community, and easing of domestic and international border restrictions, particularly in the face of the emerging threat posed by the Omicron Variant of concern.¹²⁰
- 175.16 Many workers are already required to be fully vaccinated (or exempt) to attend work and thus, continuing vaccination requirements for workforces that are already subject to a mandate would not be expected to result in significant disruption to affected industries or sectors, or an imposition on workers.¹²¹
- 175.17 There are a series of workplaces that involve clearly higher risk and therefore it is important to ensure that workers and vulnerable populations within those settings are protected in a way that goes beyond what might be achieved by relying on the population vaccination coverage. For example, in settings where infection risk is greater due to vaccination

¹¹⁶ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) pp. 20-21 [85]-[87].

¹¹⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 8 at [30].

¹¹⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 12 at [43].

¹¹⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 at [137].

¹²⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 28-29 at [137].

¹²¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29 at [137].

ineligibility (e.g., education settings), the presence of vulnerable cohorts (e.g., residential aged care) or other transmission related factors are at play (e.g., meat processing).¹²²

- 175.18 Workforce shortages resulting from the need to isolate or furlough infected staff and their contacts are a material threat to maintaining workplace operations. High workforce vaccination coverage, supported by vaccine mandates, can diminish these disruptions by reducing outbreaks in these settings.¹²³
- 175.19 Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.¹²⁴
- 175.20 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus.¹²⁵
- 175.21 COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates.¹²⁶
- 175.22 COVID-19 vaccines reduce the individual risk of experiencing more serious health outcomes from infection.¹²⁷

176 I accepted that advice.

177 Importantly, I noted that that the Chief Health Officer says the following at paragraph 146 of his Advice:

*It would therefore be appropriate, and my recommendation, that the Minister uses discretion in deciding how public confidence in the administration of public health (and the improvements in compliance and prosocial behaviour that such confidence brings) would be best served. This may be by retaining a general vaccine mandate or by removing it, noting the possibility of having to reinstate it later.*¹²⁸

178 The Chief Health Officer's Advice to me also:

- 178.1 notes that the "Omicron variant is not yet fully understood and will be the topic of continued interest internationally",¹²⁹ and the challenge that reinstating any mandatory vaccination requirements would bring in terms of consistency of public policy settings, compliance and general community understanding and acceptance of these requirements; and

¹²² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29 [138].

¹²³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29 [137].

¹²⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 31 [148].

¹²⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 [137].

¹²⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29 [137].

¹²⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 [137].

¹²⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 [146].

¹²⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 12 [43].

178.2 advises that “people need certainty to plan their lives: sweeping changes to impose or ease restrictions should be made carefully”.¹³⁰

179 Based on the global uncertainty regarding the impact of the Omicron variant of concern, the speed at which it is spreading¹³¹ and the knowledge these orders will be maintained for a maximum of 28 days, I have decided to retain a general vaccine mandate (which is partially implemented by this Order), rather than removing it. I have decided to take a precautionary approach and maintain mandatory vaccination requirements for workers in the settings previously mandated by the Chief Health Officer.

180 I also consider it is necessary and proportionate to maintain the mandatory vaccination settings for workers and many discretionary activities – such as hospitality and entertainment.

181 I am opting for minimal changes to mandatory vaccination measures previously issued by the Chief Health Officer.

Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community

182 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.

183 In particular, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.

184 In addition, I have also considered the following additional potential negative impacts:

184.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. “There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds.”¹³²

184.2 The order “may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”¹³³

184.3 The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.

¹³⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 12 at [43].

¹³¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 9 at [29].

¹³² Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [110.2].

¹³³ Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [119].

184.4 As the order “prevent[s] a person from working out of home if they are not vaccinated... they may require people to act inconsistently with [their] beliefs if they wish to be able to attend work at their workplace.”¹³⁴

185 However, in considering the potential negative impacts, I also recognised:

185.1 The Order does not physically force anyone to receive a COVID-19 vaccine.

185.2 The Order does not prohibit the employment of any unvaccinated person. It only operates to prevent attendance at workplaces. It therefore allows unvaccinated people to remain employed if an employer could continue to employ them working from home.

185.3 The Order contains an exception for people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication.

185.4 In making this order I have included limited exceptions to the mandatory vaccination requirement for specified workers to ensure it is less onerous in specific circumstances including:

185.4.1 to ensure workers can perform work or duties that is necessary to provide for urgent specialist clinical or medical care due to an emergency situation or a critical unforeseen circumstance; or

185.4.2 a worker is required to fill a vacancy to provide urgent care, to maintain quality of care and/or to continue essential operations due to an emergency situation or a critical unforeseen circumstance; or

185.4.3 a worker is required to respond to an emergency; or

185.4.4 a worker is required to perform urgent and essential work to protect the health and safety of workers or members of the public, or to protect assets and infrastructure. Whether there are any less restrictive alternatives that are reasonably available to protect public health.

Whether there are any less restrictive alternatives that are reasonably available to protect public health

186 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).¹³⁵

187 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.¹³⁶

¹³⁴ Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [110.3].

¹³⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 14 – 20.

¹³⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 10-11 at [34]-[36].

- 188 Public education and health promotion can provide community members with an understanding of ¹³⁷ behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.¹³⁸ However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.¹³⁹ COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health. behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 189 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19,¹⁴⁰ the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community.¹⁴¹ Ensuring high vaccination coverage for specified workers reduces the risk of individuals transmitting COVID-19 to others.¹⁴²
- 190 There are a number of challenges that prevent the combination of mask wearing and testing being an equally robust solution to the risks of exposure and transmission compared to vaccines.¹⁴³
- 191 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.¹⁴⁴ There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 192 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.¹⁴⁵ Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta variant of concern, and increasingly with the Omicron variant of concern.
- 193 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,¹⁴⁶ however surveillance testing as an alternative to mandatory vaccination requirements for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.

¹³⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15 at [52-53].

¹³⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 21 at [91]; p. 30 at [142]-[143].

¹³⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15 at [62].

¹⁴⁰ World Health Organisation, *Contact Tracing in the context of COVID-19: Interim guidance* [Online, 2021] Available at: https://apps.who.int/iris/bitstream/handle/10665/339128/WHO-2019-nCoVContact_Tracing-2021.1-eng.pdf?sequence=24&isAllowed=y [Accessed 5 December 2021].

¹⁴¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 8 at [26].

¹⁴² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 at [137].

¹⁴³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

¹⁴⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

¹⁴⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 28 at [132]; p. 30 at [147].

¹⁴⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 22 at [97].

- 194 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement for Specified Workers, fails to provide the same protection for workforces.¹⁴⁷ Currently, PCR and RA tests are approved for use in Australia.
- 195 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta variant of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 196 During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.¹⁴⁸
- 197 Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to¹⁴⁹ on-site RA tests and have allowed individuals to provide proof of a RA test. People would have to take a RA test every day and there are real challenges in overseeing compliance with the result.¹⁵⁰
- 198 RA Tests are also subject to potential false negative resulting from the assay itself.¹⁵¹ While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2per cent (95per cent confidence interval: 29.5-79.8per cent).
- 199 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are organised.¹⁵²
- 200 In making this order, I considered the Chief Health Officer’s Advice where advised me that “it would seem appropriate, given the interaction with vulnerable population groups that consideration be given to mandatory third dose booster vaccinations for healthcare workers, aged and disability care workers in the first instance.”¹⁵³ This was due to the workforces “interaction with vulnerable population groups” and a concern of “waning immunity [that] is associated with an increased incidence in breakthrough infections.”¹⁵⁴ As there has not been national agreement or ATAGI advice issued for mandating booster vaccines for healthcare, aged care and disability workers, I have decided not to make orders mandating booster vaccine doses for healthcare, aged cared and disability workers.

¹⁴⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁴⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁴⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁵⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁵¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁵² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁵³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 at [147].

¹⁵⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 at [147].

Other considerations

- 201 The mandatory vaccination requirement for specified workers reduces the risk of transmission within Specified Workers and the broader community. This provides greater workforce protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.¹⁵⁵
- 202 In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirement for Specified Workers assists with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial.¹⁵⁶

Conclusion

- 203 Considering all of the above factors (including those contained in the Human Rights Statement), Chief Health Officer and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
- 204 For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

¹⁵⁵ Department of Treasury and Finance, *Coronavirus Economic Outlook* [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

¹⁵⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 at [146].

Schedule 4 – Reasons for Decision – Pandemic (Visitors to Hospitals and Care Facilities) Order 2022 (No.2)

Summary of Order

205 This Order requires operators to restrict visitor access to hospitals and care facilities to limit the spread of COVID-19 within vulnerable populations.

Purpose

206 The objective of this Order is to impose obligations on the operators of hospitals and care facilities to limit non-essential visits and access to hospitals and care facilities, in order to limit the spread of COVID-19 within those particularly vulnerable populations.

Obligations

207 This order requires the operators of hospitals and care facilities to:

- 207.1 restrict the number of visitors per patient or resident per day;
- 207.2 require testing of visitors on entry in certain circumstances;
- 207.3 restrict the number of visitors allowed to enter or remain at the premises;
- 207.4 restrict the number of visitors with prospective residents of care facilities;
- 207.5 in certain circumstances, not count a child or dependent accompanying a parent, carer or guardian in the restrictions on the number of visitors per day;
- 207.6 facilitate telephone, video or other electronic communication with patients and family and support persons to ensure the physical, emotional and social wellbeing of patients and residents;
- 207.7 ensure that an excluded person does not enter the premises; and
- 207.8 keep records of all visitor details and times of entry and exit for at least 28 days from the day of entry.
- 207.9 Several exceptions from the visitor limits are set out in this Order to ensure parents, carers and guardians are not separated from children unnecessarily. Birth partners are excepted as are those breastfeeding an infant. Other exceptions are for life threatening or end of life support situations. These exceptions allow for the physical and mental wellbeing of children to be protected and for individuals to support family or dependants through key life events.

Changes from Pandemic (Visitors to Hospitals and Care Facilities) Order 2021 (No. 1)

208 The Operator of a hospital must ensure visitors over 18 years of age are fully vaccinated.

- 208.1 If visitors are not fully vaccinated, they must present a negative RA test result from the day of their visit and wear an N95 face covering for the duration of their visit.
- 209 Visitors under 18 years must be fully vaccinated or able present a negative RA test result from the day of their visit and wear a standard face mask.
- 210 The Operator of a Care Facility must ensure visitors present a negative RA test before entering a facility.
- 211 If RA tests are not available, the Operator must limit visitors to two per person per day.
- 212 Exclusion for persons who have been in another country in the past 14 days, unless specifically they are permitted to attend a hospital in line with the Pandemic (Victoria Border Crossing) Order, is removed as a consequential change from changes to Pandemic (Victoria Border Crossing) Order.

Period

- 213 This Order will commence at 11:59:00pm 12 January 2022 and end at 11:59:00pm 12 April 2022.

Relevant human rights

Human rights that are limited

- 214 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the Order will limit the human rights identified in paragraph 220 of the Human Rights Statement.
- 215 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 216 The Statement also sets out:
- 216.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
- 216.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are affected, but not limited

- 217 Further, in my opinion, the obligations imposed by the order will affect, but not limit, the following human rights set out in paragraph 221 of the Human Rights Statement.

218

My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

219 I carefully read and considered the Chief Health Officer and Acting Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".

220 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer advised:

220.1 COVID-19 case rates in Victoria remain elevated despite significant population coverage in Victoria of greater than 90 per cent full vaccination in those aged 12 years and above.¹⁵⁷

220.2 Based on preliminary modelling by the Burnet Institute in late December 2021 on the impact of Omicron in Victoria, the most plausible simulations saw case numbers and resulting hospital admissions rise significantly higher if additional public health and social measures were not implemented.¹⁵⁸

220.3 The severity of Omicron relative to Delta is not yet clearly defined, although evidence increasingly reports a substantially reduced severity for Omicron. However, due to the profound rise in cases, the reduced severity does not prevent the modelled¹⁵⁹¹⁶⁰

220.4 The Omicron concern is highlighted in the¹⁶¹ hospitalisation rates has also been reported in Denmark where the proportion of Omicron cases are rising (cautious interpretation of the upward trend in Denmark is required as this trend was being observed since early October and likely attributable in part to Delta). In the UK, COVID-19 hospitalisations have remained elevated with fluctuations since late July with a 2.2% increase rate reported in the week preceding 17 December 2021.⁸ It is important to acknowledge that the Victorian health system was already under burden from ongoing Delta outbreaks due to hospitalisations and staff furloughs, and now Omicron is generating even greater health service demand and operational disruption.¹⁶²

220.5 Hospitals and care facilities are sensitive settings requiring additional public health measures to mitigate the risk of negative health impacts on vulnerable residents, patients visitors and to protect the workforce. Residents within care facilities have several risk factors that increase their risk of severe illness, complications and death from COVID-19, warranting additional protective measures. This includes face masks for workers in resident facing roles when working indoors and staff declarations if working at more than one worksite.¹⁶³

¹⁵⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 28 [136].

¹⁵⁸ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 January 2022) p. 9 [37].

¹⁶⁰ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 January 2022) p. 9 [38].

¹⁶² Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 January 2022) p. 7-8 [30].

¹⁶³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 18 [76].

- 220.6 Individuals with known and suspected COVID19 are more likely to present to health care settings and health care workers are more likely to have prolonged exposure to such individuals during their work. Outbreaks in these settings have continued throughout 2021. From 1 August until 21 December 2021, a total of 555 outbreaks were linked to acute hospital settings, resulting in 2,115 confirmed cases and 76 deaths, which comprise some 13.0% of all outbreaks, 1.6% of all cases and 11.7% of all deaths during this period.¹⁶⁴
- 220.7 Incursion of COVID-19 into care facilities has resulted in significant transmission, outbreaks and loss of life. Between 1 August 2021 and 13 December 2021, aged and residential care facilities recorded 309 outbreaks, 1,743 cases and 139 deaths, which comprise some 7.4% of all outbreaks, 1.5% of all cases and 23.2% of deaths during this period. Disability services recorded 202 outbreaks, 609 cases and 1 COVID-19 related death, which comprise 4.9% of all outbreaks, 0.5% of the total number of cases and 0.2% of all deaths during this period.¹⁶⁵ The outbreaks seen in these sensitive settings throughout 2021 have had significant consequences for staff and patients at health services, and staff and residents at care facilities. For this reason, additional restrictive measures for visitors to both hospitals and care facilities are likely to be appropriate.¹⁶⁶
- 220.8 The consequences of an outbreak in care facilities and hospitals include requirements for COVID-19 infected and exposed staff to self-isolate or quarantine, and therefore not attending work for a period of time potentially creating workforce pressures that may compromise patient and resident care.¹⁶⁷
- 220.9 Limiting the number of visitors to these sensitive settings (care facilities and hospitals) reduces the number of interactions between a resident or patient and those who may be more mobile in the community, thus reducing opportunities for viral transmission.¹⁶⁸
- 220.10 Hospital patients are at increased risk of being exposed to and transmitting COVID-19, and may be particularly vulnerable to the negative impacts of COVID-19 infection including severe disease, further hospitalisation and death. Vulnerable patient cohorts include the elderly, the immunocompromised, and those affected with comorbidities which are known to be associated with adverse outcomes for COVID-19 including cancer, type 2 diabetes, respiratory disease, heart disease, chronic kidney disease, and hypertension.¹⁶⁹
- 220.11 Healthcare workers are more likely to be exposed to infectious cases while delivering care. It is critical to protect the workforce to ensure the care of patients.¹⁷⁰
- 221 The Acting Chief Health Officer therefore advised that I consider the implementation of further measures to safeguard residential aged care facilities (RACF), which are highly sensitive settings occupied by individuals who are who are often frail, immunocompromised or have significant comorbidities and complex care needs. I consider the implementation of further measures to safeguard residential aged care facilities and hospitals. The most effective way of minimising

¹⁶⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [67].

¹⁶⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [68].

¹⁶⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [69].

¹⁶⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 25 [97].

¹⁶⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 18 [76].

¹⁶⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 19 [80].

¹⁷⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 27 [107-108].

negative health impacts is by preventing, as far as possible, the incursion of COVID-19 into such facilities.¹⁷¹

222 I accept the Chief Health Officer and Acting Chief Health Officer's advice in relation to restrictions on visitors of residents. I have also made minor amendments to orders to improve accuracy and clarity.

223 Given the emerging risk of the Omicron variant of concern, the global uncertainty regarding its impact and the speed at which it is spreading,¹⁷² the increasing trend in COVID-19 case load may continue for the duration of this initial declaration period and this has also been a factor of consideration in my decision to make this pandemic order.

Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community

224 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.

225 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be affected and limited by the Order.

226 In addition, I have also considered the following additional potential negative impacts:

226.1 This order prohibits "visits from diagnosed persons, people with certain COVID-19 Symptoms, and close contacts (except in circumstances which remain limited despite having been eased from previous settings)".¹⁷³

226.2 Under the order there are "limitations on entry and caps on numbers of visitors to a hospital or a care facility."¹⁷⁴

226.3 "If a family member of a patient or resident is not permitted to visit, it would limit the rights of those visitors, patients, and residents to enjoy time with their family in what is likely to be a time of heightened stress."¹⁷⁵

226.4 "Where children seek to have family contact, limitations on their visitation rights may not be in their best interests in every circumstance."¹⁷⁶

226.5 "Given that many people practice their cultural and religious rights with family, friends, and members of the community, restrictions on who can visit them in hospital or a care facility

¹⁷¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 19 [81].

¹⁷² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 8 [34].

¹⁷³ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [53].

¹⁷⁴ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [54.1].

¹⁷⁵ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [55.3].

¹⁷⁶ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [55.4].

can restrict patients' or residents' cultural or religious rights for however short or long a time the stay lasts."¹⁷⁷

226.6 "For Aboriginal persons who have connection with country, restrictions on visitors may have even more of an isolating effect when they are already away from ancestral lands."¹⁷⁸

226.7 Under the order, "visitors to care facilities are required to make a declaration that they are free of COVID-19 symptoms and have not been in contact with a confirmed case or are required to self-isolate or self-quarantine."¹⁷⁹

226.8 Implementing additional measures will likely contribute to community fatigue and distress, which is particularly important given that visitor restrictions in the last 20 months have been associated with negative impacts including by contributing to the social isolation of patients and elderly residents. These additional measures must balance mental and emotional wellbeing of residents, patients, and families with the potential risks of COVID-19 incursions due to visitors.¹⁸⁰

226.9 Restrictions on number of visitors to hospitals and care facilities are already very limited and many facilities apply more stringent rules regarding visitation than the Pandemic Orders require. Reducing visitors from five people per day to two people may raise key social factor concerns of individuals loneliness and mental health.¹⁸¹

227 However, in considering the potential negative impacts, I also recognised:

227.1 Operators of care facilities and hospitals must take all reasonable steps to facilitate telephone, video or other means of electronic communication with the parents, guardians, partners, carers, support persons and family members of residents to support the physical, emotional and social wellbeing (including mental health) of residents and patients.

227.2 "Children or dependents may be visitors to hospitals without being included in a head count (where a cap applies to the number of visitors) if alternative care arrangements are unavailable and the child cannot be left unattended."¹⁸²

227.3 "Persons in care facilities are vulnerable to serious illness or serious physical, mental, or social consequences of illness. Hospitals and care facilities are both high-density and high-contact forms of accommodation involving both residents and staff, and COVID-19 can spread quickly in such settings. COVID-19 has also spread among healthcare workers who are highly

¹⁷⁷ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [57.1].

¹⁷⁸ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [57.2].

¹⁷⁹ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [59.2].

¹⁸⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [70].

¹⁸¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [71].

¹⁸² Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [55.1].

trained, not easily replaced, and valued members of their families and community in their own right.”¹⁸³

227.4 Individuals who are elderly, immunocompromised or have significant comorbidities and complex care needs are the majority as inpatients at hospitals and residents at care facilities. For this reason, such additional public health measures are necessary as patients and residents at these facilities are particularly vulnerable to the negative impacts of COVID-19 infection, including severe disease and death.¹⁸⁴

Whether there are any less restrictive alternatives that are reasonably available to protect public health

228 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).¹⁸⁵

229 The Chief Health Officer states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.¹⁸⁶

230 Hospital patients and care facility residences remain one of the most vulnerable cohorts to COVID-19. While vaccination rates are high, many patients and care facility residents may be unable to be vaccinated due to other medical conditions. These conditions may also be exacerbated by COVID-19 infection. So, while removing all limits on the number of visitors to hospitals and care facilities has been considered, the emergence of variants of concern renders this approach inappropriate at this point.¹⁸⁷

231 Options for mandatory vaccination for visitors have been considered in order to remove all limits on the number of visitors to a hospital or care facility. I have deemed this option as currently unviable, given the significant operational burden this would place on hospital and facilities to check vaccination status for all visitations. However, as the role of RA testing becomes more important¹⁸⁸ as accessibility to the¹⁸⁹ increases, RA testing by visitors provides a significant safeguard against the risk of incursion of COVID-19 into hospitals and care facilities. Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement for workers in these settings, fails to provide the same protection for workforces. Currently, PCR and Rapid Antigen (RA) tests are approved for use in Australia.

232 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta variant of concern. Increased use would increase the burden on

¹⁸³ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [65].

¹⁸⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 [66].

¹⁸⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14 – 20.

¹⁸⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11 [34]-[37].

¹⁸⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 23 [105]-[106], p. 27 [124].

¹⁸⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 19 [101].

¹⁸⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.

233 During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.¹⁹⁰

234 In making this order, I considered the Chief Health Officer's advice who advised me that "it would seem appropriate, given the interaction with vulnerable population groups that consideration be given to mandatory third dose booster vaccinations for healthcare workers, aged and disability care workers in the first instance."¹⁹¹ This was due to the workforces "interaction with vulnerable population groups" and a concern of "waning immunity [that] is associated with an increased incidence in breakthrough infections." As there has not been national agreement or ATAGI advice issued for mandating booster vaccines for healthcare, aged care and disability workers, I have decided not to make orders mandating booster vaccine doses for healthcare, aged care and disability workers.

Conclusion

235 Considering all of the above factors (including those contained in the Human Rights Statement), Chief Health Officer and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.

236 For the same reasons, in my opinion, the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

¹⁹⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁹¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 30 at [147].

Schedule 5 – Reasons for Decision – Pandemic (Movement and Gathering) Order 2022 (No. 3)

Summary of Order

238 This Order requires individuals to carry and wear face coverings in certain settings; requires organisers of ceremonies not to permit individuals who are unvaccinated to perform work at the ceremony space, subject to some exceptions; and requires workers not to perform work outside of their ordinary place of residence where they are not permitted to do so by their employer under:

- 238.1 the Open Premises Order; or
- 238.2 the COVID-19 Mandatory Vaccination (Specified Workers) Order; or
- 238.3 the COVID-19 Mandatory Vaccination (Specified Facilities) Order; or
- 238.4 the COVID-19 Mandatory Vaccination (General Workers) Order.

Purpose

239 The objective of this Order is to reduce the spread of COVID-19 in Victoria in indoor settings; and to impose obligations upon organisers of ceremonies in relation to the vaccination of workers at ceremony spaces; and to impose obligations on workers to be vaccinated to perform work outside of their home, in order to limit the spread of COVID-19 within the population of those workers.

Obligations

240 This Order requires individuals to take certain actions to reduce the risk of harm caused by COVID-19 by:

- 240.1 carrying a face covering at all times (unless an exception applies)
- 240.2 wearing a face covering in the following settings (unless an exception applies):
 - 240.3 while in an indoor space;
 - 240.4 while attending an event with 30,000 or more patrons in attendance, unless the person is seated outdoors at the event;
 - 240.5 when visiting a hospital;
 - 240.6 when visiting a care facility;
 - 240.7 on public transport or in a commercial passenger vehicle or licensed tourism operator vehicle;
 - 240.8 if a diagnosed person or close contact and leaving the premises;

- 240.9 after being tested for COVID-19 and awaiting results, other than as part of surveillance testing; and
- 240.10 wherever required to do so in accordance with any other pandemic orders in force.
- 240.11 The Chief Health Officer recommended the following exceptions to the requirement that a person wear a face mask in the settings enumerated above:¹⁹²
- 240.11.1 the person is an infant or a child under the age of 8 years except if they are a student in Year 3 to 6 and they are in an indoor space at a primary school
 - 240.11.2 the person is attending a private residence, unless that person is attending an inspection of real estate for the purposes of a prospective sale or rental of the property or attending an auction;
 - 240.11.3 the person is a prisoner in a prison
 - 240.11.4 the person is detained in a remand centre, youth residential centre or youth justice centre
 - 240.11.5 the person has a physical or mental health illness or condition, or disability, which makes wearing a face covering unsuitable
 - 240.11.6 it is not practicable for the person because the person is escaping harm or the risk of harm, including harm relating to family violence or violence of another person
 - 240.11.7 the person is communicating with a person who is deaf or hard of hearing and visibility of the mouth is essential for communication
 - 240.11.8 the nature of a person's work or education means that wearing a face covering creates a risk to their health and safety
 - 240.11.9 the nature of a person's work or education means that clear enunciation or visibility of the mouth is essential
 - 240.11.10 the person is working by themselves in an enclosed indoor space (unless and until another person enters that indoor space)
 - 240.11.11 the person is one of two persons being married, during their wedding ceremony, or while being photographed at the wedding
 - 240.11.12 the person is a professional sports person when training or competing
 - 240.11.13 the person is engaged in any strenuous physical exercise
 - 240.11.14 the person is riding a bicycle or a motorcycle

¹⁹² Department of Health, *Chief Health Officer Advice to Minister for Health* (11 December 2021), pp. 17-18 at [71].

- 240.11.15 the person is consuming medicine, food or drink
 - 240.11.16 the person is smoking or vaping (including e-cigarettes) while stationary
 - 240.11.17 the person is undergoing dental or medical care or treatment to the extent that such care or treatment requires that no face covering be worn
 - 240.11.18 the person is receiving a service and it is not reasonably practicable to receive that service wearing a face covering
 - 240.11.19 the person is providing a service and it is not reasonably practicable to provide that service wearing a face covering
 - 240.11.20 the person is an accused person in a criminal case in any court located in the State of Victoria and the person is in the dock either alone or with a co-accused, provided that any co-accused also present in the dock is at least 1.5 metres away from the person
 - 240.11.21 the person is asked to remove the face covering to ascertain identity
 - 240.11.22 for emergency purposes
 - 240.11.23 when required or authorised by law
 - 240.11.24 when doing so is not safe in all the circumstances.
- 241 Face masks are required to be carried at all times by individuals aged 8 years and over, with limited exceptions, as these individuals must be prepared to wear masks in settings where the use of masks is required.
- 242 The Order requires workers not to perform work outside their ordinary place of residence if their employer is not permitted to allow them to do so under:
- 242.1 the Open Premises Order; or
 - 242.2 the COVID-19 Mandatory Vaccination (Specified Workers) Order; or
 - 242.3 the COVID-19 Mandatory Vaccination (Specified Facilities) Order; or
 - 242.4 the COVID-19 Mandatory Vaccination (General Workers) Order.
- 243 The Order requires organisers of a ceremony to:
- 243.1 collect, record and hold vaccination information of workers at the ceremonial space; and
 - 243.2 not permit a person to work at the ceremonial space unless they are:
 - 243.2.1 fully vaccinated,
 - 243.2.2 an excepted person, or

243.2.3 a person who conducts services of public worship and acknowledgments of faith, performs marriages, funerals and special memorial services according to tradition and ecclesiastical and civil law, or provides end of life faith visits to members of the community in their homes hospitals and other institutions.

244 Failure to comply with this Order may result in penalties.

Period

245 This Order will commence at 11:59:00pm 12 January 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

246 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified in paragraph 258 of the Human Rights Statement.

247 My explanation for why those rights are limited by the Order is set out in the Human Rights Statement.

248 The Human Rights Statement also sets out:

248.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and

248.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are affected, but not limited

249 Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights identified in paragraph 259 of the Human Rights Statement.

250 My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

251 I carefully read and considered the Chief Health Officer's and Acting Chief Health Officer's advice.

252 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer and Acting Chief Health Officer has relevantly advised:

252.1 A mandate rather than a recommendation to work from home is an appropriate measure to reduce transmission of COVID-19.

252.2 That in the context of the rapidly escalating case numbers due to Omicron that I consider the following public health and social measures:

- 252.2.1 a requirement that individuals work or study from home wherever possible (except Early Childhood Education and Care services (ECEC) and schools).
- 252.3 COVID-19 case rates in Victoria remain elevated despite significant population coverage in Victoria of greater than 90 per cent full vaccination in those aged 12 years and above.¹⁹³
- 252.4 Omicron is expected to compound the ongoing issue of elevated case numbers driven by the currently predominant Delta Variant of Concern (**Delta**). Elevated case numbers already constitute a significant burden on Victoria's testing capacity and the Victorian health system. Without additional public health interventions, there is a clear and realistic possibility of widespread infection and serious illness, an unsustainable burden on the health system and substantial disruption to economic and social activities throughout the community.¹⁹⁴
- 252.4.1 Face coverings are a low impost measure that simultaneously reduces a person's capacity to spread exhaled particles into the surrounding environment and the risk of uninfected people inhaling infectious particles.¹⁹⁵
- ~~252.5~~ With community transmission persisting in Victoria, face coverings are needed in high-risk settings, such as hospitals and residential aged care facilities, where vulnerable population groups, such as the elderly and immunocompromised, may be exposed.¹⁹⁶
- 252.6 The transmission risks in indoor and confined spaces with poor ventilation (and particularly when physical distancing is difficult to maintain) is much higher when compared to outdoor spaces.¹⁹⁷
- 252.7 With high ongoing rates of community transmission of Delta in Victoria, as well as increasing local cases of Omicron, the re-introduction of face masks in all non-residential indoor settings is an appropriate intervention that will reduce the risk of widespread transmission.¹⁹⁷
- 252.8 The Minister should also consider requiring face masks for all staff and all patrons aged 8 years and above for indoor public events and some specific outdoor public events where high numbers of patrons are attending and crowding is expected. Existing exceptions to face mask use, including for when people are eating or drinking, will continue to be in place.¹⁹⁸
- 252.9 In indoor settings, mandatory seated service should also be considered for reinstatement at hospitality and entertainment venues to reduce the aggregate movement and mixing of people in enclosed spaces. Given that we remove our face masks for eating and drinking, seated service requirements will assist to reduce the risk of transmission across various groups because physical distancing occurs due to spacing between tables. In addition, the contacts most at risk will be those seated next to a later identified case. They will generally be known to

¹⁹³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 at [136].

¹⁹⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 2 at [5].

¹⁹⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 16 at [65 – 66].

¹⁹⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 16 at [67].

¹⁹⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 13 at [61].

¹⁹⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 17 at [91].

the case and can be more readily contacted and advised to test and isolate, rather than requiring all patrons to do so.¹⁹⁹

- 252.10 Children below the age of 12 years are not currently able to access vaccination and outbreaks in education settings comprise a substantial proportion of cases in Victoria's Delta VOC outbreak. Face masks limit the risk of transmission in this cohort and the potential consequences of exposure and infection. Further, while severe disease and death due to COVID-19 are rare in children, the long-term potential consequences of infection, including of 'long COVID' are not well understood. Face mask requirements in children in Years 3-6 should continue to be part of a suite of measures to reduce transmission in schools.²⁰⁰
- 252.11 While face masks have been previously mandated for those aged 12 years and over in Victoria, recent outbreaks in education settings have involved children of all ages. As at 22 December 2021, there have been a total of 31,093 cases and 2,561 active cases in the 0-9 years age cohort. In children aged 10-19 years, there have been 22,652 total cases and 1,975 active cases. Face masks limit the risk of disease transmission in this cohort and the potential consequences of exposure and infection.²⁰¹ Furthermore, while severe disease and death due to COVID-19 may be rare in children, the long-term potential consequences of infection, including 'long COVID' in this cohort are not well understood. This age group also continues to play a major role in disease transmission. Of note, the vast majority of Victorian population aged between 8 to 12 years of age is not currently vaccinated against COVID-19, leaving this group more vulnerable to the disease than older children who are eligible for vaccination.²⁰¹
- 252.12 Introducing a face mask requirement for those aged 8 and over in all indoor settings in Victoria at this time could play a significant role in preventing the potential exponential rise in case numbers that is being observed overseas.²⁰²
- 252.13 Lowering the age from which masks should be mandated in the general community to 8 years old would align with face mask requirements currently in place for students in Years 3-6 when they are at school, where there have been no significant issues with using them in school settings.²⁰³
- 252.14 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus.²⁰⁴
- 252.15 COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates.²⁰⁵
- 252.16 COVID-19 vaccines reduce the individual risk of experiencing more serious health outcomes from infection.²⁰⁶

¹⁹⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 16 at [86].

²⁰⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 16 at [68].

²⁰¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 13 at [63].

²⁰² Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 13 at [63].

²⁰³ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 13 at [64].

²⁰⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 at [137].

²⁰⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29 at [137].

²⁰⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 at [137].

- 252.17 There is no vaccine requirement for religious gatherings, weddings and funerals, in consideration of the health and wellbeing needs of the attendees who are participating in religious and spiritual activities, attending important social milestones.²⁰⁷
- 252.18 Between 1 August 2021 and 21 December 2021, there were 77 outbreaks associated with hospitality and entertainment venues that resulted in some 565 cases.²⁴ Other than schools, more outbreaks have occurred in hospitality venues than any other public venue regulated by the Open Premises Orders.²⁰⁸
- 252.19 While, at this stage, it remains uncertain whether the protection afforded by vaccines against infection and severe illness has been significantly eroded by Omicron, preliminary results of studies collated by the WHO suggests that:
- 252.19.1 vaccines appear to have a reduced effectiveness against symptomatic infection and (to a lesser extent) hospitalisation for Omicron when compared to other variants,²⁰⁹ and
- 252.19.2 vaccine effectiveness appears to improve in those who have received a booster dose of COVID-19 vaccines. In particular, booster vaccines appear to reduce the likelihood of severe illness. The same UK study¹⁸, outlined in paragraph 36 goes on to estimate that vaccine effectiveness against symptomatic illness from Omicron is 75.5% (95%CI: 56.1 to 86.3%) two weeks after a Pfizer vaccine booster dose in those who received a primary course of the Pfizer vaccine and 71.4% (95%CI: 41.8 to 86.0%) in those who received a primary course of the AstraZeneca vaccine.²¹⁰
- 252.20 Importantly, even countries with high levels of previous infection or vaccination are seeing rapidly surging case numbers of the Omicron VOC. It is not yet known the extent to which these trends reflect the variant being able to evade previously established immunity (from infection or vaccination) or just its increased transmissibility.²¹¹

253 I accept this advice.

254 Given the emerging risk of the Omicron variant of concern, the global uncertainty regarding its impact and the speed at which it is spreading,²¹² the increasing trend in COVID-19 case load may continue for the duration of this initial declaration period and this has also been a factor of consideration in my decision to make this pandemic order.

Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community

255 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.

²⁰⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 31 at [154].

²⁰⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 15 at [75].

²⁰⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 8 at [34]-[35].

²¹⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 9 at [37].

²¹¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 9 at [38].

²¹² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 9 at [29].

256 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be affected and limited by the Order.

257 In addition, I have also considered the following additional potential negative impacts:

257.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. "There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds."²¹³

257.2 The order "may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property."²¹⁴

257.3 The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.

258 However, in considering the potential negative impacts, I have included exceptions to the requirement to wear a face covering for a range of circumstances including where:

258.1 a person has a physical or mental health illness or condition, or disability, which makes wearing a face covering unsuitable; or

258.2 a person is communicating with a person who is deaf or hard of hearing and visibility of the mouth is essential for communication; or

258.3 where wearing a face covering is not safe.

Whether there are any less restrictive alternatives that are reasonably available to protect public health

259 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).²¹⁵

260 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.²¹⁶

261 Public education and health promotion can provide community members with an understanding of²¹⁷ behaviours and actions, such as hand hygiene, staying home when unwell and testing when

²¹³ Department of Health, *Human Rights Statement: Pandemic (Movement and Gathering)* (10 December 2021), at [136.2].

²¹⁴ Department of Health, *Human Rights Statement: Pandemic (Movement and Gathering)* (10 December 2021), at [66], [93], [119].

²¹⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 14 – 20.

²¹⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 10-11 [34]-[36].

²¹⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15 at [52] – [53].

symptomatic.²¹⁸ However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.²¹⁹ COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health. behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.

- 262 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19,²²⁰ the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community.²²¹ Ensuring high vaccination coverage for specified workers reduces the risk of individuals transmitting COVID-19 to others.²²²
- 263 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,²²³ however surveillance testing as an alternative to mandatory vaccination requirements for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.²²⁴
- 264 There are a number of challenges that prevent the combination of mask wearing and testing being an equally robust solution to the risks of exposure and transmission compared to vaccines.²²⁵ Mask wearing is appropriate in many higher risk settings, and these settings often required an N95 face mask, other PPE, training in PPE use, and a buddy system in place for donning and offing. Even though these settings reported generally high levels of compliance, compliance clearly fluctuated across time and depended on participants' (variable) motivation to comply.
- 265 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.²²⁶ There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 266 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.²²⁷ Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta VOC, and increasingly with the Omicron VOC.

²¹⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 21 at [91]; p. 30 at [142] – [143].

²¹⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 15 at [62].

²²⁰ World Health Organisation, *Contact Tracing in the context of COVID-19: Interim guidance* [Online, 2021] Available at: https://apps.who.int/iris/bitstream/handle/10665/339128/WHO-2019-nCoVContact_Tracing-2021.1-eng.pdf?sequence=24&isAllowed=y [Accessed 5 December 2021].

²²¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 8 at [26].

²²² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 at [137].

²²³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 22 at [97].

²²⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 22 at [99-100].

²²⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

²²⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

²²⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 28 at [132]; p. 30 at [147].

- 267 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement for Specified Workers, fails to provide the same protection for workforces.²²⁸ A negative point in time test result may provide a delayed and therefore inaccurate indication of an individual's actual COVID-19 status. In the past few weeks, positive COVID-19 cases in the community have steadily increased due to a heightened transmission risk represented by the return to onsite work and easing of restrictions in the Victorian community.
- 268 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta Variant of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 269 Generally, there is a minimum turnaround time of 6-24 hours between a test being administered and a result being received. During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.²²⁹
- 270 Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to ²³⁰ on-site RA tests and have allowed individuals to provide proof of a RA test. People would have to take a RA test every day and there are real challenges in overseeing compliance with the result.²³¹
- 271 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are ²³²
- 272 Since the start of November 2021, the proportion of tests returning a positive result in Victoria has been between 1.5-2 per cent. This is a significantly higher proportion positive than New South Wales, which has stabilised to below 0.5 per cent for many weeks. With this elevated risk, I considered high workforce vaccination coverage, supported by vaccinated mandates, reasonably necessary to diminish these disruptions and reduce outbreaks for specified workers.
- 273 In making this order, I considered the Chief Health Officer's Advice where advised me that "it would seem appropriate, given the interaction with vulnerable population groups that consideration be given to mandatory third dose booster vaccinations for healthcare workers, aged and disability care workers in the first instance."²³³ This was due to the workforces "interaction with vulnerable population groups" and a concern of "waning immunity [that] is associated with an increased incidence in breakthrough infections."²³⁴ As there has not been national agreement or ATAGI advice issued for mandating booster vaccines for healthcare, aged care and disability workers, I have

²²⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

²²⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

²³⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

²³¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

²³² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

²³³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 at [147].

²³⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30 at [147].

decided not to make orders mandating booster vaccine doses for healthcare, aged care and disability workers.

Other considerations

274 The mandatory vaccination requirement for Specified Workers, General Workers, Specified Facilities and Open Premises reduces the risk of transmission within the broader community. This provides greater community protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.²³⁵

275 In making this order, I consider it reasonably necessary to maintain the mandatory vaccination requirements for Specified Workers, General Workers, Specified Facilities and Open Premises, as these requirements²³⁶, such as self-isolation when symptomatic, wearing a face covering in certain settings and maintaining social distancing²³⁷

Conclusion

276 Taking into account all of the above factors (including those contained in the Human Rights Statement) and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believe it was reasonably necessary to make the Order to protect public health.

277 For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

²³⁵ Department of Treasury and Finance, *Coronavirus Economic Outlook* [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

²³⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (11 December 2021), p. 30 at [146].

Schedule 6 – Reasons for Decision – Pandemic (Victorian Border Crossing) Order 2022 (No.3)

Summary of Order

278 I have made a pandemic order containing obligations for persons entering Australia as international passengers or international aircrew services workers because I believe doing so is reasonably necessary to protect public health.

Purpose

279 The objective of this Order is to provide a scheme for persons arriving in Australia as an international passenger arrival or international aircrew services worker, to limit the spread of COVID-19.

Obligations

280 This Order provides for persons entering Australia as international passengers or as international aircrew services workers to limit the spread of COVID-19.

281 All international arrivals:

281.1 must comply with the general post-entry conditions, which are:

281.1.1 to comply with all of the pandemic orders in force;

281.1.2 monitor for COVID-19 symptoms; and

281.1.3 obtain a test for COVID-19 as soon as possible after experiencing any COVID-19 symptoms; and

281.2 If required to self-quarantine, must travel immediately to the residence in Victoria where they will remain in self-quarantine for a prescribed period of time, unless undertaking essential activities:

281.2.1 for international passenger arrivals and aircrew services workers who are fully vaccinated or medically exempt or less than 12 years and 2 months of age, self-quarantine until receiving a negative result from the COVID19 test within 24 hours of arrival in Australia;

281.2.2 for an international aircrew services worker who is not fully vaccinated nor medically exempt, the prescribed period of time is 14 days;

281.2.3 for an international passenger arrival who is at least 12 years and 2 months of age and less than 18 years of age and is not fully vaccinated nor medically exempt, the prescribed period of time is 7 days; and

281.3 must carry and present specific documents on the request of an authorised officer:

281.3.1 For international passenger arrivals, the documents required are:

- 281.3.2 their valid international passenger arrival permit (unless they are a child under 12 years and 2 months of age and travelling with a person who holds a valid permit);
 - 281.3.3 an acceptable form of identification;
 - 281.3.4 if applicable, evidence of their COVID-19 PCR test results; and
 - 281.3.5 international acceptable evidence or international acceptable certification of their vaccination status, or the vaccination status of their parent or guardian.
- 281.4 For international aircrew services workers, the documents required are:
- 281.4.1 an acceptable form of identification; and
 - 281.4.2 international acceptable evidence to show that they are fully vaccinated or international acceptable certification to show they are a medically exempt person.
- 282 International passenger arrivals must, amongst other things:
- 282.1 obtain a valid international passenger arrival permit;
 - 282.2 complete prescribed COVID-19 PCR tests or COVID-19 RA tests; and
 - 282.3 self-quarantine for the prescribed period of time.
- 283 International aircrew arrivals must, amongst other things:
- 283.1 complete prescribed COVID-19 PCR tests or COVID-19 RA tests; and
 - 283.2 self-quarantine for the prescribed period of time.
- 284 This Order also sets out the process for permit applications and the conditions under which a person may be granted an exemption from this Order.
- 285 Failure to comply with this Order may result in penalties.

Changes from Pandemic (Victorian Border Crossing) Order 2021 (No. 2)

- 286 International aircrew services workers and international passenger arrivals are not required to obtain a test following the first test within 24 hours of arrival in Victoria.
- 287 International aircrew services workers and international passenger arrivals are not restricted from entering specific facilities (an educational facility, childcare or early childhood services, residential aged care facility, disability residential service or hospital) for a period of time after entering Victoria.
- 288 An international aircrew services worker who is not fully vaccinated nor medically exempt must self-quarantine for seven days instead of 14 days.

Period

289 This Order will commence at 11:59:00pm on 12 January 2021 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

290 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified in paragraph 237 of the Human Rights Statement.

291 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.

292 The Human Rights Statement also sets out:

292.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and

292.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are affected, but not limited

293 Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights set out in paragraph 238 of the Human Rights Statement.

294 My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

295 I carefully read and considered the Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".

296 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:

296.1 A standardised approach to international arrivals assists Victoria to reduce the risk of viral incursion and transmission. A combination of quarantine and testing are required to control for the risks posed by the different cohorts of international arrivals to the Victorian community. These measures become increasingly important in managing the risk of incursion, especially from emerging threats such as the importation of novel variants of concern.²³⁸

296.2 As the global distribution of the Omicron VOC expands, including domestically in Australian jurisdictions, and the local transmission of COVID-19 increases, international border measures become relatively less important in managing incursion risk. Given identification of

²³⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 26 [119].

the Omicron VOC within Australia and ongoing high community transmission within Victoria, it is reasonable for the requirements for international arrivals into Victoria by air to mirror those domestic arrivals from other Australian states and territories, as the risk of incursion from within Australia is no greater than international arrivals.²³⁹

296.3 Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals' interaction and movement for a defined period immediately following their arrival.²⁴⁰

296.4 Testing obligations are designed to detect any imported cases in international arrivals prior to them joining the Victorian community to prevent outbreaks and limit transmission.²⁴¹ Retaining testing requirements for international passengers remains critical so that testing within 24 hours of arrival is undertaken. This ensures that any detection of COVID-19 continues to be a core part of risk mitigation for international arrivals. Furthermore, persons arriving from overseas are required to have completed a PCR test or RA test and comply with the COVID-19 RA test procedure prior to their scheduled flight departure whereas for interstate arrivals this is not required for entry into Victoria.

296.5 The relative risk of SARS-CoV-2 incursion and transmission international arrivals has substantially diminished relative to the risk from local acquisition in the context of the unprecedented levels of community transmission in Victoria and other Australian jurisdictions due to Omicron variant. Given this shift in the epidemiological risk profile in Victoria, additional testing obligations for this cohort, following this initial test within 24 hours of arrival, to prevent the introduction of novel threats is no longer an impactful use of our valuable testing resources which are already under strain.²⁴²

296.6 Maintaining the COVID-19 testing requirement within 24 hours of arrival for international arrivals, alongside the pre-departure testing requirement for passengers set by the Commonwealth and aircrew set by the Victorian state, remain necessary to determine the COVID-19 status of incoming arrivals given the risk of exposure during transit, however there is a diminishing need for subsequent testing in this cohort. Such changes to consolidate testing requirements for international arrivals aligns with the National Cabinet announcement made on 5 January 2022 and is anticipated to be adopted across most jurisdictions for consistency.²⁴³

296.7 A recommendation to allow provisions for the RA test as an alternative testing option to the PCR test was appropriate given the increase in demand for testing in the state as the numbers of Victorians exposed to the Omicron VOC. RA tests have been found to have moderate sensitivity and high specificity for the detection of SARS-CoV-2 and are an appropriate screening tool for asymptomatic testing, which will be relevant for a large number of international arrivals. RA testing has merit in minimising risk of incursions in sensitive settings when a condition of entry and therefore can be appropriate in this context as we mitigate incursion risk into Victoria. Additionally, it can offset pressure on testing pathology

²³⁹ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 5[29-30].

²⁴⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 26 [121].

²⁴¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 26 [122].

²⁴² Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 30 [119].

²⁴³ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 30-31 [120].

system capacity and free up resources for symptomatic testing to ensure system readiness in Victoria.²⁴⁴

~~296.8~~ While those with medical exemptions from vaccination pose a similar public health risk to those who have foregone vaccination voluntarily, individuals with medical exemptions have temporary or ongoing medical contraindications to vaccination due to circumstances out of their control, and the Minister may consider that placing perpetual requirements for mandatory in-facility quarantine for these groups is not a proportionate response, particularly as the number of individuals who fall into this group is relatively small and the aggregate public health risk of incursion due to this group is, therefore, also small.²⁴⁵ Medically exempt individuals entering Australia should be treated as fully vaccinated for the purposes of determining their post-entry quarantine requirements. These individuals represent a small cohort that have a valid contraindication or acute illness that precludes them from receiving COVID-19 vaccines due to an unacceptable and heightened risk of harm to the individual. This group should be not be disadvantaged for circumstances outside of their volitional control through the imposition of quarantine requirements.²⁴⁶

296.9 Similarly, international arrivals under the age of 12 years should be permitted to quarantine in accordance with the vaccination status of accompanying travel members or as a fully vaccinated individual if unaccompanied minors to prevent separation of travel groups or solitary and unsupervised quarantine of minors. Such an approach would result in unintended harms to the health and wellbeing of young travellers. Further, vaccination is not widely accessible to this age cohort in all countries which raises additional concerns of inequity.²⁴⁷

296.10 However, for medically exempt and international arrivals under the age of 12 years counterbalancing risk mitigation measures of testing requirements and restrictions on entry to high-risk settings should remain to monitor for cases and prevent unintended transmission to vulnerable groups.²⁴⁸

296.11 Restrictions on entry to sensitive settings with vulnerable populations are important to protect those Victorians at an increased risk of harm from COVID-19 outbreaks and reduce the incursion of emerging threats such as novel VOC that may potentially be more transmissible, virulent or treatment resistive.²⁴⁹

296.12 No change to the quarantine or additional public health requirements are proposed for international arrivals who are unvaccinated. This cohort Unvaccinated international arrivals do not have a valid medical exemption and have volitionally not received their COVID-19 vaccines despite being eligible. They do not have the protective effects of COVID-19 vaccination and thus represent the highest risk cohort of international arrivals.²⁵⁰

²⁴⁴ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) pp. 5-6 [32].

²⁴⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 31 [123].

²⁴⁶ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6 [35].

²⁴⁷ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6 [36].

²⁴⁸ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6 [37].

²⁴⁹ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6 [34].

²⁵⁰ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6 [39].

- 296.13 Similarly, public health requirements for unvaccinated aircrew services workers should remain as they represent the highest risk cohort of international arrivals.²⁵¹
- 296.14 International aircrew services workers are subject to operational requirements of a highly regulated industry, so low-risk aircrew services workers spending less than 48 hours in Victoria and Australian-based fully vaccinated aircrew operating turnaround flights are exempt from some testing requirements.²⁵²
- 296.15 These exemptions from testing requirements are mitigated by other public health measures of quarantine and restrictions to sensitive settings minimising transmission and incursion risk.²⁵³
- 296.16 As a corollary to the changes in testing and quarantine requirements for international arrivals, the removal of restrictions on entering sensitive settings following arrival to Victoria and the conditional obligation of pre-entry COVID-19 testing are also warranted. Currently, the risk of transmission is greater from locally acquired sources compared to this overseas cohort and the consolidated testing requirement still adequately assesses the COVID-19 status of these international arrivals prior to attending the sensitive settings. Further, certain sensitive settings with the most vulnerable populations such as RACFs and hospitals are proposed to have additional protective measures which helps circumvent risk of incursion.²⁵⁴
- 297 I note the Acting Chief Health Officer's advice that given that close contacts in the community are now required to undertake 7 days of quarantine, the quarantine duration for unvaccinated international arrivals who enter hotel quarantine could also be updated to 7 days in order to maintain a consistent approach.²⁵⁵ I also note the Acting Chief Health Officer's recommendation that this change for unvaccinated international arrivals be considered pending further discussions at the national level to seek a consensus approach to this issue.²⁵⁶ I accept the Acting Chief Health Officer's advice and will consider changes to the period for quarantine following discussion of this issue with National Cabinet.
- 298 I also note Acting Chief Health Officer's advice that as a corollary to suggested changes in testing and quarantine requirements for international arrivals, the removal of restrictions on entering sensitive settings is also warranted.²⁵⁷ The current risk of transmission is greater from locally acquired sources compared to this overseas cohort, the consolidated testing requirement still adequately assesses the COVID-19 status of these international arrivals prior to attending the sensitive settings, and care facilities and hospitals are proposed to have additional protective measures.²⁵⁸ I have accepted this advice in relation to fully vaccinated aircrew and passengers visiting care facilities and hospitals, as a conditional pre-entry COVID-19 test is not needed separately from the new protective measures for hospitals and care facility visitors. I accept the Acting Chief Health Officer's advice to remove sensitive setting restrictions for all other categories

²⁵¹ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6 [41]

²⁵² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 27 [125]-[127].

²⁵³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 27 [126].

²⁵⁴ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 31 [122].

²⁵⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 30 [116].

²⁵⁶ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 30 [118].

²⁵⁷ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 31 [122].

²⁵⁸ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 31 [122].

of travellers and will consider the changes for sensitive settings to complement the changes to quarantine following discussion with National Cabinet.

299 I have accepted the advice of the Chief Health Officer and Acting Chief Health Officer, subject to the matters addressed in these reasons. I have also made minor amendments to orders to improve accuracy and clarity.

Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community

300 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.

301 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be affected and limited by the Order.

302 In addition, I have also considered the following additional potential negative impacts:

302.1 Under the order, international aircrew services workers "must be tested frequently, must self-quarantine and be excluded from vulnerable settings if not in possession of negative test results".²⁵⁹

302.2 The order requires "people imputed to have higher risk of infection with COVID-19 to self-quarantine and to be excluded from certain vulnerable settings for a period of 7 or 14 days".²⁶⁰ "Exclusion from vulnerable settings where international passenger arrivals or international aircrew services workers may have family events (such as school concerns or hospital admissions) prevents families from being together, and children from being supported by their families on important occasions."²⁶¹

302.3 If an exemption is granted under the order, "the recipient must carry evidence of the exemption, any applicable documentary evidence, and a form of identification."²⁶²

302.4 Under the order, "international passenger arrivals must obtain a valid international passenger arrival permit including personal details and an attestation, and a QR code. The arrival must carry and present on request identification and the permit."²⁶³

302.5 The order requires that "an international passenger arrival may not attend an educational facility in Victoria until ... the 8th day after (if not fully vaccinated and not medically exempt) arrival in Australia and until after receiving a negative day 5 to 7 ... test result."²⁶⁴

302.6 As children under 12 years of age "remain ineligible for vaccination, many people required to self-quarantine choose to do so away from their family and children. The Order requires that a person self-quarantining cannot even use shared facilities in the premise. This can cause

²⁵⁹ Department of Health, *Human Rights Statement: Pandemic (Victorian Border Crossing) Order* (11 December 2021) [241].

²⁶⁰ Department of Health, *Human Rights Statement: Pandemic (Victorian Border Crossing) Order* (11 December 2021) [241].

²⁶¹ Department of Health, *Human Rights Statement: Pandemic (Victorian Border Crossing) Order* (11 December 2021) [31.5].

²⁶² Department of Health, *Human Rights Statement: Pandemic (Victorian Border Crossing) Order* (11 December 2021) [243.5].

²⁶³ Department of Health, *Human Rights Statement: Pandemic (Victorian Border Crossing) Order* (11 December 2021) [243.4].

²⁶⁴ Department of Health, *Human Rights Statement: Pandemic (Victorian Border Crossing) Order* (11 December 2021) [243.4].

disruptions in relationships, economic difficulties, isolation from culture and traditions, and uncertainty and anxiety.”²⁶⁵

303 Further, as noted above, in the Human Rights Statement, I have considered how people’s human rights will be affected and limited by the Order.²⁶⁶

304 In making this pandemic order, I have excluded medically exempt individuals from post-entry quarantine requirements, to ensure those with valid reasons for a medical exemption are not disadvantaged as a consequence of their ineligibility.²⁶⁷

305 I have included a provision for a broad exemption power, which provides an avenue for individual requests for an exemption to be considered by senior officials in the Department. This allows for an exemption to be granted to any of the requirements in this order if required, ensuring exceptional circumstances can be considered on a case-by-case basis and that the application of the order is not overly rigid in such circumstances.

306 In this order I have ensured that a person in self-quarantine is permitted to leave self-quarantine for essential reasons. These essential reasons include to obtain medical care, respond to an emergency or to leave the State of Victoria.

Whether there are any less restrictive alternatives that are reasonably available to protect public health

307 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).²⁶⁸

308 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.²⁶⁹

309 Public education and health promotion can provide community members with an understanding of²⁷⁰ and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.²⁷¹ However, international travel carries the risk of importation of novel variants of concern.²⁷² Education and practicing of²⁷³ behaviours is consequently not sufficient in isolation to manage the

²⁶⁵ Department of Health, *Human Rights Statement: Pandemic (Victorian Border Crossing) Order* (11 December 2021) [244.5].

²⁶⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 26-27 [123].

²⁶⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 26-27 [123].

²⁶⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14 - 20.

²⁶⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11 [34]-[36].

²⁷² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 15 [52]-[53].

²⁷³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 26 [119].

risk posed by incoming international arrivals. behaviours is consequently not sufficient in isolation to manage the risk posed by incoming international arrivals.

310 I therefore consider that there are no less restrictive means reasonably available to achieve the purpose that the limitations on rights sought to be achieve.

Conclusion

311 Taking into account all of the above factors (including those contained in the Human Rights Statement), and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.

312 For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

Schedule 7 – Reasons for Decision – Pandemic (Detention) Order 2022 (No.3)

Summary of Order

313 This Order contains requirements to detain 'persons of risk' for specified periods.

Purpose

314 The objective of this Order is to limit the transmission of COVID-19 by requiring persons of risk to be detained for specified periods.

Obligations

315 This Order specifies circumstances and conditions in which a person is to be detained in Victoria to limit the transmission of COVID-19 and the period of, and requirements for, that detention.

316 To limit the risk of transmission of COVID-19, by requiring persons of risk to be detained for specified periods of time, this Order:

316.1 imposes obligations on specified classes of international arrivals classified as persons of risk. A person of risk is a person who has entered Victoria after having been in another country in the 14 days prior to entry, is not an international transit passenger, and is not eligible to enter Victoria under the Victorian Border Crossing Order. Specifically, this includes:

316.1.1 A person who is an international aircrew services worker who is not fully vaccinated or medically exempt and is not an Australian-based international aircrew services worker;

316.1.2 An international passenger arrival if:

316.1.2.1 they are older than 18 years of age and not fully vaccinated or medically exempt; and

316.1.2.2 over 12 years and two months old and are unvaccinated, not medically exempt, not travelling unaccompanied, and not travelling with at least one parent or guardian who is fully vaccinated or medically exempt.

316.2 imposes an initial period of detention of ~~seven~~ 14 days; and

316.3 if the detained person is awaiting the result of their latest COVID-19 test at the end of the initial period of detention, provides for an extension of the period of detention until the end of a further period of ~~seven~~ 14 or until the date on which the result is communicated to the person, whichever is earlier.

317 An authorised officer is required to review a person's detention at least once every 24 hours under section 165BG of the Public Health and Wellbeing Act 2008 to determine if the authorised officer is

satisfied that the person's continued detention is reasonably necessary to eliminate or reduce a serious risk to public health.

318 A detained person must not leave the person's place of detention unless:

318.1 the person has been granted permission by an authorised officer for the purpose of obtaining medical care, or getting a COVID-19 test, or to reduce a serious risk to the person's mental health, or to visit a patient in hospital if permitted to do so, or to leave Victoria; or

318.2 there is an emergency situation; or

318.3 the person is required to by law.

319 A person must not enter a place of detention of another person unless that person is lawfully authorised to enter that place for a specific reason (for example, providing food or medical care) or is detained in the same place of detention for the same, or substantially the same, period of time, or ordinarily resides with the detained person at the place of detention.

320 The Chief Health Officer, the Deputy Chief Health officer or an authorised officer may grant an exemption to a person of risk from the requirements of this Order, if satisfied that the exemption is appropriate by having regard to the need to protect the public and the principles of the Order.

321 Failure to comply with this Order may result in penalties.

Period

322 This Order will commence at 11:59:00pm on 12 January 2022 and ends at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

323 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights specified in paragraph 282 of the Human Rights Statement.

324 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.

325 The Human Rights Statement also sets out:

325.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and

325.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are affected, but not limited

326 Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights specified in paragraph 283 of the Human Rights Statement.

327 My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

328 I carefully read and considered the Chief Health Officer and Acting Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".

329 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:

329.1 Globally, countries have differing epidemiology, control over COVID-19 outbreaks and protective public health measures. To manage this external risk in a consistent and predictable manner, it is appropriate for Victoria to adopt a nationally standardised approach to international arrivals to reduce the risk of viral incursion and transmission. A combination of quarantine, testing and entry to sensitive setting restrictions are required to control for the risks posed by the different cohorts of international arrivals to the Victorian community. As international travel has now recommenced, these measures become increasingly important in managing the risk of incursion, especially from emerging threats such as the importation of novel variants of concern.²⁷⁴

329.2 While evidence for Omicron continues to emerge, TGA-approved and recognised COVID-19 vaccines have been demonstrated to reduce symptomatic disease and severe disease for Omicron, as well as transmission of pre-Omicron variants and the ancestral strain. Thus, unvaccinated travellers pose a higher incursion risk than those who are fully vaccinated. Further, with large parts of the world still unvaccinated, and major COVID-19 outbreaks persisting across the globe, the risk of new variants emerging and arriving at our shores remains.²⁷⁵

329.3 Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals' interaction and movement for a defined period.²⁷⁶

329.4 Quarantine in a hotel quarantine facility is appropriate for high-risk cohorts such as unvaccinated individuals. Quarantine further mitigates risk of incursion by minimising interactions with general community members while also having in place dedicated operational protocols to reduce risk and access to testing and medical care resources.²⁷⁷

²⁷⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 26 [119].

²⁷⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 31 [121].

²⁷⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 31 [121].

²⁷⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 31 [121].

- 329.5 AHPPC recently reaffirmed its position on the importance of managed quarantine programs for international travellers, releasing a statement on end-to-end best practice arrangements.²⁷⁸
- 329.6 Managed quarantine facilities provide the most stringent safeguards against onward transmission from an infectious person, with robust testing regimens, infection control practices and other public health measures in place to ensure early detection and management of COVID-19 cases and associated close contacts.²⁷⁹
- 329.7 Testing obligations are designed to detect any imported cases in international arrivals prior to them joining the Victorian community to prevent outbreaks and limit transmission.²⁸⁰
- 329.8 Medically exempt international arrivals should be treated as fully vaccinated for the purposes of determining post-entry quarantine requirements to avoid prejudicial treatment due to their ineligibility. Furthermore, the aggregate risk attributable to this cohort is estimated to be low due to the low anticipated number of international arrivals with valid vaccination exemptions, given that valid reasons for exemptions are very limited in number. Management of the risk posed by this group should be via additional restrictions before entry into high-risk settings.²⁸¹
- 329.9 In addition to the above policies, the Minister may consider the additional policies outlined below to further strengthen the Victorian response to the COVID-19 pandemic and ensure alignment with national and jurisdictional policies, specifically for managing maritime arrivals, unvaccinated air arrivals and Victoria's test, trace, isolate and quarantine approach.
- 329.10 I recommend that international arrivals entering Victoria via Victorian maritime ports, regardless of their vaccination status, continue to be managed in a different way to fully vaccinated air arrivals, because of the unique nature of the industry and associated higher risk profile.²⁸²
- 329.11 International maritime crew continue to represent an increased risk to public health when compared to fully vaccinated international air arrivals due to several factors which include:²⁸³
- 329.11.1 International air arrivals are subject to a robust vaccination status verification, whereby status is checked prior to boarding (by the airline) and is also checked again at the airport upon arrival (largely Commonwealth-led), to determine if the person must enter hotel quarantine or is eligible for an international passenger arrival permit. Currently there is no such Commonwealth process to check vaccination status for international maritime crew.
- 329.11.2 International air passengers are required to adhere to Commonwealth pre arrival conditions, which includes having a negative COVID-19 PCR test result taken within 3

²⁷⁸ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 32 [126]

²⁷⁹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 31 [124]

²⁸⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 26 [122].

²⁸¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 26-27 [123].

²⁸² Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 28 [113].

²⁸³ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 28 [114].

days of their departure to Australia. International aircrew must have evidence of a negative PCR test result within 3 days of departure or a negative RA test result within 24 hours of departure. Pre departure tests provide some level of reduction in the risk that arrivals will have COVID-19 in transit or on arrival. Currently, a pre-departure test is not required by the Commonwealth for international maritime crew as, given the nature and duration of international maritime voyages, it would be impractical to implement.

329.11.3 The combined effect of the lack of either of the above controls for international maritime crew is that such crew continue to represent an increased risk to public health when compared to fully vaccinated international air arrivals with negative COVID-19 pre departure test results. Until such time as a robust vaccination verification and testing process can be established for this group, having a policy where vaccination status determines arrival requirements in Victoria is not operationally feasible.

330 I note the Acting Chief Health Officer's advice that given that close contacts in the community are now required to undertake 7 days of quarantine, the quarantine duration for unvaccinated international arrivals who enter hotel quarantine could also be updated to 7 days in order to maintain a consistent approach.²⁸⁴ I also note the Acting Chief Health Officer's recommendation that this change for unvaccinated international arrivals be considered pending further discussions at the national level to seek a consensus approach to this issue.²⁸⁵ I accept the Acting Chief Health Officer's advice and will consider changes to the period for detention following discussion of this issue with National Cabinet.

331 I generally accepted the Chief Health Officer and Acting Chief Health Officer's advice, subject to the matters addressed in these reasons. I have also made minor amendments to orders to improve accuracy and clarity.

332 I note that the Chief Health Officer advised that the policy should require a review of relevant individual factors that can be easily evidenced and thus operationally supported, such as:²⁸⁶

332.1 travel history, which reflects the individual's potential exposure to COVID-19 and epidemiological risk;

332.2 vaccination status, which informs the individual's degree of protection against infection and reduced risk of onward transmission; and

332.3 age and (for aircrew workers) country of residence, which influence the feasibility and appropriateness of implementing public health measures. Minors should not be unduly separated from their travel group as a consequence of the international border policy, as such separation can lead to increased and unnecessary distress, and potentially impact on well-being and mental health within families.

²⁸⁴ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 30 [116].

²⁸⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 30 [118].

²⁸⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 26 [120].

- 333 A person's period of detention will only continue for the whole of the initial period of detention, or the whole of any extension of the initial period of detention if an authorised officer, after conducting a review of the person's detention under section 165BG(2) of the Public Health and Wellbeing Act 2008, determines that the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health.
- 334 Section 165BG of the Public Health and Wellbeing Amendment (Pandemic Management) Act 2021 provides that:
- 334.1 “(2) Subject to subsection (3), an authorised officer must, at least once every 24 hours during the period that a person is detained, review whether the authorised officer is satisfied that the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health.
- 334.2 (3) If it is not reasonably practicable for a review under subsection (2) to be undertaken within a particular 24 hour period, the review must occur as soon as practicable and without undue delay.²⁸⁷”
- 335 International arrivals who are not fully vaccinated do not have the protective effects provided by COVID-19 vaccines. As this group represents the highest risk of incursion, detention in a hotel quarantine facility where risk mitigating protocols are in place and a quarantine period of seven days is appropriate as it represents the likely incubation period of the SARS-CoV-2 virus.
- 336 An individual who tests positive for COVID-19 during their detention period is managed as a diagnosed person and will be required to comply with the necessary public health measures of self-isolation to prevent onward.
- 337 A person with an increased risk of COVID-19 but who refused to comply with testing requirements during their detention period must have their detention period extended up to seven days, not exceeding seven days. The extension can be revoked should a person decide to complete their testing obligations and test negative thus confirming that they have not contracted COVID-19 and thus do not pose a risk of infection to others.

Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community

- 338 In making this decision, I considered the possible negative impacts of the Order on the individuals and the community.
- 339 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be affected and limited by the Order.
- 340 In addition, I have also considered the following additional potential negative impacts²⁸⁸:
- 340.1 Separation of families and support networks while people are in detention facilities: If the detained person has family in Victoria, this person is unable to be reunited with family for the

²⁸⁷ *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021 (Vic)* section 165BG.

²⁸⁸ *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

period of detention. For detained persons separated from their family, detention can cause disruptions in relationships, economic difficulties, isolation from culture and traditions, and uncertainty and anxiety. I acknowledge this but the high risk of spread of COVID-19 from overseas into and throughout Victoria requires restrictions as specified above.

340.2 Detention can also constitute an incursion into the rights of people of different cultural, religious, racial or linguistic backgrounds to practice their culture, religion, or language to the extent that the short period prevents them from doing so. While there are many ways of enjoying one's culture, religion, or language in the place of detention or online, there may be activities which can only be done face-to-face or in a certain location.

340.3 A person may be unable to work at their usual place of work for the period of detention, unless they are able to do so remotely. This can have an impact on the economic, social, and psychological wellbeing of the person or/and their family.

340.4 Detention places significant restrictions on a person's ability to move freely. This can impact adversely on their mental health and psychosocial wellbeing.

341 However, I also recognised that the Order contains the following exceptions or qualifications to minimise the potential negative impacts on individuals and the community:

341.1 The Chief Health Officer, the Deputy Chief Health officer or an authorised officer may grant an exemption to a person of risk from the requirements of this Order, if satisfied that the exemption is appropriate by having regard to the need to protect the public and the principles of the Order.

341.2 A person may only continue to be detained if an authorised officer, who is required to review the person's detention every 24 hours under s 165BG of the Act, is satisfied that the person's continued detention is reasonably necessary to eliminate or reduce a serious risk to public health.

1.1. Section 165BN of the Public Health and Wellbeing Act 2008 provides that "A person is not guilty of an offence against subsection 19(1) if the person had a reasonable excuse for refusing or failing to comply."

Whether there are any less restrictive alternatives that are reasonably available to protect public health

342 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).²⁸⁹

343 The CHO clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.²⁹⁰

²⁸⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-20.

²⁹⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11 [34]-[36].

- 344 The right to liberty has been described as 'the most elementary and important of all common law rights'. The prohibition is on arbitrary detention and on deprivation of liberty except on grounds, and in accordance with procedures, established by law. This means that the right to liberty may only be legitimately constrained if the detention is authorised by law and is not arbitrary (in that it is reasonable or proportionate in all the circumstances).
- 345 I have assessed the suitability of less restrictive alternatives such as shorter periods of detention or home quarantine, and consider that these options are not suitable for a high-risk cohort such as unvaccinated international arrivals because a quarantine period of 14 days represents the likely incubation period of the SARS-CoV-2 virus.
- 346 I have considered whether home quarantine or a requirement to self-isolate or quarantine at a place of person's choosing is a reasonably available alternative. However, I decided that it was not a reasonably available alternative that would be sufficiently effective to achieve the purpose of the Order, based on the Chief Health Officer's advice that:
- 346.1 Managed quarantine facilities provide the most stringent safeguards against onward transmission from an infectious person, with robust testing regimens, infection control practices and other public health measures in place to ensure early detection and management of COVID-19 cases and associated close contacts.²⁹¹
- 346.2 Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals' interaction and movement for a defined period immediately following their arrival.²⁹²
- 346.3 Quarantine in a hotel quarantine facility is appropriate for high-risk cohorts such as unvaccinated individuals. Quarantine further mitigates risk of incursion by minimising interactions with general community members while also having in place dedicated operational protocols to reduce risk and access to testing and medical care resources.²⁹³

Conclusion

- 347 Taking into account all of the above factors (including those contained in the Human Rights Statement), and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
- 348 I am also satisfied that the period of detention specified in the Order does not exceed the period that I believe is reasonably necessary to eliminate or reduce a serious risk to public health.
- 349 For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

²⁹¹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 30 [124].

²⁹² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 26 [121].

²⁹³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 26 [121].

Schedule 8 – Reasons for Decision – Pandemic (Open Premises) Order 2022 (No.3)

Summary of Order

350 This Order imposes obligations upon operators of certain open premises in Victoria and their patrons in relation to vaccination against COVID-19 and other requirements, in order to address the serious public health risk posed to Victoria by COVID-19.

Purpose

351 The objective of this Order is to impose obligations in relation to vaccination against COVID-19 and other requirements, in order to address the serious public health risk posed to Victoria by COVID-19 upon:

- 351.1 operators of certain open premises in the State of Victoria; and
- 351.2 patrons that attend those premises.

Obligations

352 The premises to which this order applies ('open premises') are:

- 352.1 adult education or higher education premises
- 352.2 arcades, escape rooms, bingo centres
- 352.3 casino
- 352.4 community premises
- 352.5 creative arts premises
- 352.6 drive-in cinemas
- 352.7 food and drink premises
- 352.8 gaming machine premises
- 352.9 karaoke and nightclubs
- 352.10 physical recreation premises
- 352.11 restricted retail premises
- 352.12 sex on premises, brothels and sexually explicit venue
- 352.13 swimming pools, spas, saunas, steam rooms and springs
- 352.14 tours

352.15 premises used for tourism services

353 Operators of an open premises must (unless an exception applies):

353.1 maintain a system which requires all patrons above 18 years of age to show an employee acceptable evidence that the person is fully vaccinated or an excepted person on every occasion a person attends the premises. This system must include a worker placed at each accessible entrance of the premises;

353.2 take reasonable steps to exclude patrons who do not comply with the operator's system, or are not fully vaccinated or exempt;

353.3 not permit any person to work at the premises unless that person is fully vaccinated, or an excepted person. A partially vaccinated worker may work on the premises when no patrons are present at the time. The operator must collect, record and hold vaccination information for all workers;

353.4 not permit the number of patrons to exceed the patron limits as specified in the Order, unless an exception has been permitted under the Order;

354 Operators of food, drink and high-risk entertainment premises must apply a density quotient of 1 person per 2 square metres in indoor areas.

355 Patrons of an open premises must comply with the operator's system.

356 Exceptional circumstances are listed under which an operator is not required to comply with this Order. Otherwise, failure to comply with this Order may result in penalties.

Changes from Pandemic (Open Premises) Order 2021 (No. 2)

357 Food and drink premises and entertainment and function premises are not permitted to use any indoor space as a dancefloor except where a wedding is being held at the premises.

358 Where an operator of an entertainment and function premises operates a space within an entertainment and function premises as a food and drink premises then relevant patron limit applying to food and drink premises of 1 person per 2 square meters applies to that premises.

359 Defining a medical contraindication to include an individual who is in the process of completing a Federal Department of Health approved COVID-19 vaccine trial.

Period

360 This Order will commence at 11:59:00pm on 12 January 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

361 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified in paragraph 49 of the Human Rights Statement.

362 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.

363 The Human Rights Statement also sets out:

363.1 My explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and

363.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are affected, but not limited

364 Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights identified in paragraph 50 of the Human Rights Statement.

365 My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

366 I carefully read and considered the Chief Health Officer's and Acting Chief Health Officer's advice.

366.1 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer and Acting Chief Health Officer relevantly advised:

366.2 I have previously commended to the Minister a range of PHSMs intended to reduce the risks of transmission in social settings. These include:

- i. introducing a density quotient of 1 person per 4 square metres (DQ4) in all indoor hospitality and entertainment settings (including amusement parks, cinemas and seated theatres),
- ii. closing indoor dancefloors; and
- iii. mandating seated service requirement in indoor hospitality settings.

366.3 I have considered whether it is possible to achieve this reduction in risk through less restrictive measures, and for this reason I repeat and agree with the Chief Health Officer's advice that there can be an exemption for weddings, and that these restrictions not apply to outdoor settings. The reason why there can be an exemption for weddings is that weddings are a single group of people who generally know each other, who start and stay at the same venue without other people arriving and leaving over the course of the night. Weddings

therefore differ from the ordinary commercial operations of hospitality venues. I have also considered and agree with the Chief Health Officer's advice that it is appropriate to acknowledge the burden that these health measures place on the community and to lighten that burden in respect of once-in-a-lifetime events.²⁹⁴

366.4 The Chief Health Officer has previously advised on the risks associated with mass gatherings such as public events. I consider applying capacity limits to events to be a proportionate response to these risks. However, if these capacity limits on events are not viewed as proportionate due to social and economic impacts, I advise the Minister to consider alternative mitigation strategies. One such strategy involves requiring masks to be worn at all times unless eating and drinking, rather than allowing attendees to remove their masks when seated outdoors.²⁹⁵

366.5 Another such strategy involves requiring RA tests prior to attendance, which would allow a more targeted approach to risk management by removing from attendance those people who are likely to be infectious at the time of (or at least the day of) attendance at the event. There are, however, operational and supply constraints that limit Victoria's ability for implementation. In addition, as a matter of real-world applicability, there are real challenges in overseeing compliance with the result and making sure that participants have performed an RA test and received a negative result on the day of the event.²⁹⁶

366.6 Whilst noting these operational considerations, a measured approach to self-delivered surveillance prior to attendance at such events will become an important initiative in mitigating the risk of super spreader events that may arise from such settings. RA continue to present a significant opportunity that can be harnessed to reduce the risk of COVID-19 incursion and transmission in a range of contexts including major events. They are not, however, a 'silver bullet' that are by themselves sufficient to prevent infection, and they should be utilised alongside other measures such as masks, increased ventilation, and density limits in the hospitality areas that accompany events.²⁹⁷

366.7 That in the context of the rapidly escalating case numbers due to Omicron that I consider the following public health and social measures:

366.7.1 a requirement that individuals work or study from home wherever possible (except Early Childhood Education and Care services (ECEC) and schools).²⁹⁸

366.7.2 Businesses are and will continue to be a primary area in which both workers and patrons interact. People from different parts of Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community.²⁹⁹

²⁹⁴ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p.17 [67]-[68].

²⁹⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 17 [69].

²⁹⁶ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) pp. 17-18 [70].

²⁹⁷ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 18 [71].

²⁹⁸ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 13 [56].

²⁹⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 19 [77].

- 366.7.3 Vaccination requirements to enter open premises serve to protect the health of all who access these settings, including customers/patrons, workers and visitors, and in particular those who are in a vulnerable population group.³⁰⁰
- 366.7.4 Despite Victoria achieving the 90 per cent double dose vaccination threshold in people aged 12 years and over, it would be necessary and appropriate that patron vaccination mandates should remain in place for all open premises in the context of ongoing elevated rates of community transmission.³⁰¹
- 366.7.5 Venues should have a system in place to enable patrons or visitors to check in using either the Services Victoria QR code or manual record keeping process. This information is necessary to facilitate contact tracing.³⁰²
- 366.7.6 The requirement for an operator to ensure a system is in place to be able to collect vaccination information for patrons aged 18 years and over each time they enter these settings should therefore also be retained in accordance with the vaccination requirement before entry.³⁰³
- 366.7.7 Imposing density quotients and requiring seated service in indoor areas of food, drink, and high-risk entertainment premises reduces the number of patrons potentially exposed in a venue, allows for individuals and operators to practice physical distancing, and reduce the risk of transmission across various groups.³⁰⁴
- 366.7.8 Reintroducing density quotients for specified indoor settings also reflects the need to allow economic activity to continue, balanced against the public health evidence that outdoor environments are fundamentally lower risk than indoor environments.³⁰⁵
- 366.7.9 To align with Commonwealth policy, individuals on an approved COVID-19 vaccination clinical trial should be permitted to have a temporary exemption from receiving a COVID-19 vaccination.³⁰⁶
- 367 Patrons must be prohibited from entering open premises unless fully vaccinated (or medically exempt or ineligible for COVID-19 vaccination), except the following settings:³⁰⁷
- 367.1 non-essential retail (excluding hair, beauty and personal care services);
 - 367.2 religious services, weddings and funerals; and
 - 367.3 real estate inspections and auctions.

³⁰⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 [149].

³⁰¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 32 [156].

³⁰² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 19 [81].

³⁰³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 32 [157].

³⁰⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 16 [83], [86].

³⁰⁵ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

³⁰⁶ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 32 [128].

³⁰⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 31 [152]-[154].

368 The Chief Health Officer advised that the below settings could be excluded from the open premises requirements:

368.1 Non-essential retail is excluded from this vaccine requirement due to the high vaccination rates in the community and the need for people to access goods and services. However, it is reasonable for hair, beauty and personal care services to continue with a vaccine requirement due to the close and prolonged contact that occurs between clients and workers who will not be required to wear face masks due to the nature of the activities.³⁰⁸

368.2 The interactions that arise from real estate activities are to be considered lower risk and therefore not necessitate a vaccine requirement due to the relatively small numbers of patrons, who only attend for a short duration, and spend a portion of the visit in outdoor settings with good ventilation and lower risk of transmission.³⁰⁹

368.3 Religious gatherings, weddings and funerals, are important for the wellbeing needs of the attendees who are participating in religious and spiritual activities, attending important social milestones.³¹⁰

368.4 As the risk from such activities is mitigated by the benefits of natural ventilation in outdoor settings, I do not believe that the Minister needs to consider these restrictions for outdoor spaces or venues.³¹¹

369 I have largely accepted the Chief Health Officer and Acting Chief Health Officer's advices.

370 I acknowledge the Chief Health Officer and Acting Chief Health Officer's advice regarding density quotients in hospitality and high-risk entertainment indoor venues. However, I believe a density requirement of 1 person per 2 square metres for indoor areas of food and drink premises and high-risk entertainment venues such as arcades, nightclub, karaoke, gaming, casino and sex on premises venues is a proportionate measure to mitigate transmission at this stage in considering both the public health advice and the broader social and economic factors.

371 I also acknowledge the Chief Health Officer's advice on the risks associated with mass gatherings such as public events and the and Acting Chief Health Officer's consideration that applying capacity limits to events to be a proportionate response to these risks. Noting the extensive work underway between the Department of Health and the Department of Jobs, Precincts and Regions (DJPR) and industry sectors to deal with events in a safe manner, I have decided to hold all recommendations from the Acting Chief Health Officer and maintain current settings. I want to be clear that all events are under active consideration based on their risk profile and the rapidly changing position on alternative measures that could be landed to ensure safer events – RA tests prior to entry, other measures to make social distancing, distancing, masks, ticketing safer.

372 I note the recommendation of the Acting Chief Health Officer to reduce event capacity to 50 per cent and extend the density requirement to other premises, and will review as soon as possible in coming days in the light of other factor such as the scalability and the role of measures in the wider

³⁰⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 31 [152].

³⁰⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 31 [153].

³¹⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 31 [154].

³¹¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 16 [81].



public health measures in the current environment. This extends beyond the Australian Open to the wider events calendar and the current Public Events Framework (PEF). The Tracing, Testing, Isolation and Quarantine (TTIQ) and social public health measures options as devised, the view of the VECCI Chief Executive Officer as to the importance of events to employment and recovery and the advice from the Acting Chief Health Officer on both the 6 January 2021 and 7 January 2021 prospects are all factors I have taken into account for the goal of safer events and compliance measures being achieved. In holding off acting on these recommendations presently, there are processes under way with public health's central role to offer me what I hope is an alternative to achieve public health goals in a less restrictive manner. The matter will need consistent reviewing.

373 I have also made the following changes for clarification and to align with policy intention:

373.1 Allowing facilities being used exclusively for community sport facilities to permit patrons who are attending for swimming lessons at the same time.

373.2 Adding shared physical recreation facilities within residential complexes as an exemption to the COVID Marshal Check-In requirements

373.3 Removing the cleaning requirement for shared equipment for tours and transport

374 Finally, to assist with internal and national consistency, I have accepted the Acting Chief Health Officer's advice to include participants of COVID-19 vaccination clinical trials in vaccination exemptions. This is for the purpose of aligning policies at a national and interjurisdictional level, which will minimise confusion for the community and industry and therefore assist in compliance.³¹²

Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community

375 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.

376 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be affected and limited by the Order.

377 In addition, I have also considered the following additional potential negative impacts:

377.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. "There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds."³¹³

³¹² Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 14 [58].

³¹³ Department of Health, *Human Rights Statement: Pandemic (Open Premises) Order* (15 December 2021), at [166.2].

377.2 The “practical effect [of the order] is to require a person to choose between being vaccinated or not being able to attend open premises, which includes a variety of venues including cinemas, restaurants, swimming pools and gyms.”³¹⁴

377.3 The order limits freedom of movement “because it prevents a person from attending a particular place — namely, open premises — if they are unvaccinated.”³¹⁵

378 In addition, as advised by the Acting Chief Health Officer I will be recommending the following positions for operators of open premises:

378.1 The Order does not physically force anyone to receive a COVID-19 vaccine.

378.2 The Order contains an exception for people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication.

Whether there are any less restrictive alternatives that are reasonably available to protect public health

379 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).³¹⁶

380 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.³¹⁷

381 Public education and health promotion can provide community members with an understanding of³¹⁸ behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.³¹⁹ However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.³²⁰ In addition, it is possible for individuals to be asymptomatic and infectious. Education and practicing of COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.

382 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19, the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community. Ensuring high vaccination coverage for workers and patrons reduces the risk of individuals transmitting COVID-19 to others.

³¹⁴ Department of Health, *Human Rights Statement: Pandemic (Open Premises) Order* (15 December 2021), at [155].

³¹⁵ Department of Health, *Human Rights Statement: Pandemic (Open Premises) Order* (15 December 2021), at [158].

³¹⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 14-20.

³¹⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 10-11 [34]-[36].

³¹⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15 [52]-[53].

³¹⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 21 [91], p. 30 [142]-[143].

³²⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15 [62].

- 383 There are a number of challenges that prevent the combination of mask wearing and testing being an equally robust solution to the risks of exposure and transmission compared to vaccines.³²¹
- 384 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.³²² There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 385 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.³²³ Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta variant of concern, and increasingly with the Omicron variant of concern.
- 386 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,³²⁴ however surveillance testing as an alternative to mandatory vaccination requirements for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.³²⁵
- 387 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement, fails to provide the same protection for workforces.³²⁶ Currently, -(PCR) and RA tests are approved for use in Australia.
- 388 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta Variant of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 389 Generally, there is a minimum turnaround time of 6-24 hours between a test being administered and a result being received. During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.³²⁷ Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to³²⁸ on-site RA tests and have allowed individuals to provide proof of a RA test. People would have to take a RA test every day and there are real challenges in overseeing compliance with the result. Further, proof of a negative test result as a point-in-time indicator is not a perfect indicator of infectiveness.³²⁹

³²¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

³²² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

³²³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28 [132], p. 30 [147].

³²⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 22 [97].

³²⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 22 [99]-[100].

³²⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

³²⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

³²⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

³²⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

- 390 RA tests are also subject to potential false negative resulting from the assay itself.³³⁰ While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).
- 391 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are.³³¹

Other considerations

- 392 The mandatory vaccination requirement for open premises reduces the risk of transmission within those settings and the broader community. This provides greater workforce protection and certainty. Importantly, patrons will have renewed confidence in entering these settings which will assist consumer spending during its typical peak period, which will assist the state's economic recovery from the unprecedented impact of the pandemic.³³²
- 393 In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirements for open premises to assist with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial behaviour.³³³
- 394 Applying a density quotient to outdoor entertainment, if adopted, could have severe immediate and long-term economic impact on Victoria's economic recovery and the economic wellbeing of Victorians. Outdoor environments are fundamentally lower risk than indoor environments, and therefore is important to encourage outdoor activities, rather than in higher risk environment of transmission such as private residences and indoor spaces.³³⁴

Conclusion

- 395 Taking into account all of the above factors (including those contained in the Human Rights Statement) and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.
- 396 For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

³³⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

³³¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

³³² Department of Treasury and Finance, *Coronavirus Economic Outlook* [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021] – see Appendix 3.

³³³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 30 [146].

³³⁴ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

Schedule 9 – Reasons for Decision – Pandemic (Workplace) Order 2022 (No.3)

Summary of Order

397 This Order imposes restrictions on the number of Victorians attending work premises and imposes obligations on employers in managing the risk of COVID-19 in the workplace.

Purpose

398 The purpose of the Order is to limit the number of Victorians attending work premises to assist in reducing the frequency and scale of outbreaks of COVID-19 in Victorian workplaces and to establish more specific obligations on employers and workers in relation to managing the risk associated with COVID-19 transmission in the work premises.

Obligations

399 The Order restricts the number of Victorians attending work premises and imposes specific obligations on employers to assist in reducing the frequency of outbreaks of COVID-19 in Victorian workplaces.

400 A worker must self-isolate and not attend a work premises if they have been tested for COVID-19 and they are awaiting the result of that test.

401 A worker must not attend a work premises if they have undertaken a COVID-19 PCR test or a COVID-19 RA test and they are awaiting the result of that test except if more than 7 days has passed since the date of the test.

401.1 within their seven days of self-isolation or quarantine period, whichever is earliest.

402 An employer must take reasonable steps to:

402.1 ensure all workers carry a face covering at all times and wear a face covering where appropriate; and

402.2 implement a COVIDSafe Plan which addresses health and safety issues arising from COVID-19; and

402.3 keep a record of all persons who attend the work premises, including the person's name, date and time of attendance, contact number and areas of the work premises the person attended; and

402.4 comply with the Victorian Government QR code system and display appropriate signage for the type of work premises as specified by this Order.

403 An employer must advise workers who are symptomatic persons that they are required to comply with any requirements that may be relevant in the document "Testing Requirements for Contacts and Exposed Persons" as amended from time to time, and support a worker to do so.

404 The Order imposes additional work premises specific obligations on employers determined by the type of Premises and specifies the appropriate response of an employer in the circumstance of a suspected or confirmed case of COVID-19 in the work premises.

405 A worker who has received a positive result from a COVID-19 PCR test or a COVID-19 RA test must notify the operator of their work premises of their status as a diagnosed person or probable case if they attended an indoor space at the work premises during their Infectious Period.

406 After becoming aware of a diagnosed person or a probable case who has attended the work premises in the Infectious Period, the operator must notify all workers who were present at the same indoor space that they may have been exposed to COVID-19 and advise the exposed persons to comply with relevant obligations under the “Testing Requirements for Contacts and Exposed Persons” as amended from time to time, and support a worker to do so.

407 Failure to comply with the Order may result in penalties.

Period

408 The Order will commence at 11:59:00pm on 12 January 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

409 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights specified in paragraph 71 of the Human Rights Statement.

410 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.

411 The Human Rights Statement also sets out:

411.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and

411.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are affected, but not limited

412 Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights specified in paragraph 72 of the Human Rights Statement.

413 My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

414 I carefully read and considered the Chief Health Officer's advice in the various forms provided to me, as outlined above under “Statutory power to make pandemic orders”.

415 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:

415.1 Businesses are and will continue to be a primary area in which both workers and patrons interact. People from different parts of Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community.³³⁵

415.2 Workplaces pose a transmission risk particularly where there are common areas, inadequate ventilation, and close contact between people. Evidence-based measures such as hand hygiene, physical distancing, use of personal protective equipment, restricted workplace access, contact tracing and isolation and quarantine have been recommended by WHO to mitigate these risks.

415.3 All workplaces require some level of obligations to help in both preventing transmission and reduce the risk of outbreaks if a confirmed case of COVID-19 enters a workplace, given the continued levels of transmission within Victoria.³³⁶

415.4 Evidence-based measures such as hand hygiene, physical distancing, use of personal protective equipment, restricted workplace access, contact tracing and isolation and quarantine have been recommended by WHO to mitigate these risks.³³⁷

415.5 Mitigation strategies including COVIDSafe Plans, QR check-in requirements and COVID Check-in Marshals, are required to minimise spreading COVID-19 into workplaces and sensitive settings, to protect vulnerable population groups and to ensure case numbers do not overwhelm our health system.³³⁸

415.6 A COVIDSafe plan demonstrates that an employer has considered the risk of COVID-19.³³⁹

415.7 The requirement for workplaces to have a system which checks-in patrons or visitors is necessary to support our contact tracing efforts. In addition, having COVID Check-in Marshals ensures patron compliance, to allow contact tracing efforts to be useful in the event of an outbreak and ensure vaccination requirements for entry are met.³⁴⁰

415.8 Requirements on employers and workers in response to suspected and confirmed cases of COVID-19, allow workers and students at risk to be notified of their exposure and allow them to take appropriate public health measures such as testing and quarantining.³⁴¹

³³⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 18 [77].

³³⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 19 [79].

³³⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 18-19 [78].

³³⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 19 [79].

³³⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 19 [80].

³⁴⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 19 [79].

³⁴¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 20 [84].

415.10 The use of RA testing as an asymptomatic screening tool in the context of high community prevalence is consistent with previous advice, but their use should be expanded now given the increased risk posed by the Omicron variant. Testing requirements need to shift away from PCR to RA tests to preserve capacity in the COVID-19 PCR testing system and promote timely diagnosis and linkage to care.³⁴²

415.11 The requirement for operators and employers to notify the department of health once outbreak thresholds should increase to help instigate public health measures while normalising operations.³⁴³

416 I have accepted the advice of the Chief Health Officer and Acting Chief Health Officer. I have also made minor amendments to orders to improve accuracy and clarity.

417 Additionally, in relation to the requirement for workplaces to report confirmed cases, I have decided to amend the threshold number of confirmed cases to activate this obligation from one to five in a seven-day period. This is aligned to the general move toward a more community-directed model of case management, in order to prioritise response efforts in line with the objective of suppression and reactive management.

Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community

418 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.

419 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be affected and limited by the Order.

420 However, I also recognised that the Order contains the following exceptions or qualifications to minimise the potential negative impacts on individuals and the community:

420.1 The pandemic orders have differing requirements depending on the size and nature of a workplace. This acknowledges the differing associated risks and broad differences in the operations of businesses across Victoria.

Whether there are any less restrictive alternatives that are reasonably available to protect public health

421 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).³⁴⁴

³⁴² Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 3 [8].

³⁴³ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 33 [134].

³⁴⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-15.

422 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.³⁴⁵

423 On the basis of the Acting Chief Health Officer's advice, I considered that that there were no other reasonably available means by which to manage the spread of COVID-19 in workplaces that would be less restrictive of freedoms. However, even if there were to be less restrictive measures, I have considered that the measures imposed by the Order are within the range of reasonably available alternatives to achieve the purpose.

Conclusion

424 Taking into account all of the above factors (including those contained in the Human Rights Statement), and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.

425 For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

³⁴⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11 [34]-[36].

Schedule 10 – Reasons for Decision – Pandemic (Additional Industry Obligations) Order 2022 (No.3)

Summary of Order

426 This Order contains additional specific obligations on employers and workers in specific industries in relation to managing the risk associated with COVID-19.

Purpose

427 The purpose of the Order is to establish additional specific obligations on employers and workers in specific industries in relation to managing the risk associated with COVID-19 transmission in the work premises.

Obligations

428 The additional obligations on industries include requiring industries to conduct and keep records of surveillance testing unless the worker was a confirmed COVID-19 case in the last 30 days, requiring industries to ensure that workers wear the appropriate level of personal protective equipment or a face covering, requiring workers to provide a written declaration about additional workplaces if working in two or more, bubble workers, not allowing workers to attend work if exposed to a confirmed case in another workplace, and ceasing elective surgery unless it is urgent, including Category 1 and Category 2A admissions. The following industries must comply with the Order:

- 428.1 poultry processing facilities;
- 428.2 abattoirs and meat processing facilities;
- 428.3 seafood processing facilities;
- 428.4 supermarket work premises and perishable food work premises;
- 428.5 warehousing and distribution centres;
- 428.6 commercial cleaning services;
- 428.7 care facilities;
- 428.8 ports of entry servicing international arrivals;
- 428.9 hotel quarantine;
- 428.10 hospitals;
- 428.11 construction sites.

429 An authorised officer or inspector may conduct an inspection of the work premises and audit the records of the employer.

430 An employer must consult with health and safety representatives, together with workers who are likely to be directly affected in relation to the implementation of the Additional Industry Obligations.

431 Elective surgery is restricted to Category 1 and 2A elective surgery procedures and non-urgent elective surgery is temporarily postponed in private hospitals, day procedure centres and public hospitals in metropolitan Melbourne and regional Victoria.

432 Failure to comply with the Order may result in penalties.

Period

433 The Order will commence at 11:59:00pm on 12 January 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

434 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights specified in paragraph 118 of the Human Rights Statement.

435 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.

436 The Human Rights Statement also sets out:

436.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and

436.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are affected, but not limited

437 Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights specified in paragraph 119 of the Human Rights Statement.

438 My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

439 I carefully read and considered the Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".

440 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer and Acting Chief Health Officer relevantly advised:

441 COVID-19 case rates in Victoria remain elevated despite significant population coverage in Victoria of greater than 90 per cent full vaccination in those aged 12 years and above.³⁴⁶

441.1 The presence of the Omicron variant of concern has been confirmed in Victoria³⁴⁷ and Omicron cases appear to be increasing at a faster rate when compared to the Delta, which is consistent with a greater degree of infectivity.³⁴⁸

441.2 Victoria's international airport and seaports (ports of entry) are the key work premises receiving international arrivals. International arrivals are potentially at elevated risk for COVID-19 due to exposure while in countries where COVID-19 cases are surging, or where novel variants of concern are emerging. International arrivals are also potentially at elevated risk by exposure to infected travellers during transit to Victoria. Workers at ports of entry are a key interfacing group that require ongoing protective measures in the context of a global pandemic. Additional PPE is a required measure to reduce the risk of exposure of and onward transmission from these workers into the community and to prevent incursion of new variants of concern. Additional surveillance testing for this workforce is also necessary and appropriate.³⁴⁹

441.3 Government-operated quarantine facilities remain of significance as part of the essential management of international arrivals including those who are subsequently confirmed to have COVID-19. Although the consequential risk of hotel quarantine workers acquiring infection from this setting has lessened relative to the current high rates of community transmission in Victoria, ongoing protective measures remain important in mitigating incursion risk, particularly given the recent emergence of the Omicron Variant of concern. These measures include mandatory vaccination requirements, use of appropriate PPE COVIDSafe training and surveillance testing.³⁵⁰

441.4 Abattoirs, meat, poultry and seafood processing facilities are cold environments with high humidity, involving exertive work which increases aerosol production, and where physical distancing is often impractical. This can result in favourable conditions for COVID-19 transmission and a high risk of amplification and uncontained outbreaks. These outbreaks also have downstream consequences for essential food supply. Large uncontained outbreaks occurred in these settings in Victoria's second wave, which spread into different parts of Victoria. These industries are essential to the food supply chain locally and nationally, which can be compromised when outbreaks occur. Retaining face coverings is a low impost protective public health measure which mitigates the risk of transmission amongst workers in this industry. Abattoirs, meat, poultry and seafood processing facilities were identified as being higher risk in the early stages of the pandemic and continue to be represented in outbreak data in Victoria, contributing to 1.5 per cent of outbreaks between August and December of 2021.³⁵¹

441.5 Care facilities are sensitive settings that require additional public health measures to mitigate the risk to vulnerable residents and to protect the workforce. Residents within care

³⁴⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 28 [136].

³⁴⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 8 [30]

³⁴⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 6-7 [26]

³⁴⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 20 [89].

³⁵⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21 [90].

³⁵¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21 [91].

facilities have several risk factors that increase their risk of severe illness, complications and death from COVID-19, warranting additional protective measures. This includes face masks for workers in resident facing roles when working indoors and staff declarations if working at more than one worksite. Incursion of COVID-19 into care facilities in the second wave in Victoria, resulted in large case numbers, many uncontained outbreaks, major workforce shortages and significant loss of life. Despite high vaccination coverage, this vulnerable population need additional protection, to avoid the severe consequences of transmission and in order to reduce the number of deaths in Victoria as far as practicable.³⁵²

441.6 Hospitals are also sensitive settings where patients are at increased risk of being exposed to and transmitting COVID-19. Furthermore, hospital patients may be particularly vulnerable to the negative impacts of COVID-19 infection including severe disease, further hospitalisation and death. Vulnerable patient cohorts include the elderly, the immunocompromised, and those affected with comorbidities which are known to be associated with adverse outcomes for COVID-19 including cancer, type 2 diabetes, respiratory disease, heart disease, chronic kidney disease, and hypertension³⁵³.

441.7 Ceasing elective surgery will support the pressure on health systems cause by the Omicron surge and ensure there is capacity in the system to respond to COVID-19 demand. This includes the addition of private hospitals in the Rural City of Wangaratta to private hospitals prohibited from undertaking non-urgent elective surgery. There are substantial pressures on the testing system and hospitalisations moved from 398 inpatients and falling, to 516 inpatients and going up. Twelve Victorian health services have indicated that they were already using extended-team workforce models to deliver care under specialist supervision, and some health services had indicated that they were no longer able to meet nurse to patient ratios. These workforce challenges would only increase as more healthcare workers became infected.³⁵⁴

441.8 Healthcare workers are more likely to be exposed to infectious cases while delivering care. Recommended obligations related to protecting this workforce include multisite worker restrictions and declarations, worker bubbles and compliance and consultation. It is critical to protect the workforce in order to minimise exposure of other workers to infection, mitigate the need for isolation of workers who become cases and reduce the impacts of furloughing workers who are close contacts, all of which have the potential to negatively impact worker health and wellbeing and the delivery of patient care. All obligations currently in place under the section 200 Directions should be retained, in addition to healthcare worker mandatory vaccination obligations, as Victoria continues to have a large volume of active cases, including a high number who are hospitalised.³⁵⁵

441.9 Surveillance testing of high-risk industries involves the implementation of testing requirements and recommendations for workers, in order to detect cases early. Surveillance testing helps identify asymptomatic but potentially infectious workers, and therefore minimises the impacts of outbreaks on essential industries. Early diagnosis of cases ensures that the infected worker can isolate and take additional measures to reduce the risk of

³⁵² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21 [92].

³⁵³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 21 [93].

³⁵⁴ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

³⁵⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 21-22 [94].

transmission to others. Surveillance testing complements other workplace specific protective measures such as worker vaccine mandates.³⁵⁶

442 I have accepted the advice of the Chief Health Officer and Acting Chief Health Officer. I have also made minor amendments to orders to improve accuracy and clarity.

443 Given the emerging risk of the Omicron Variant of concern , global uncertainty regarding its impact and the speed at which it is spreading,³⁵⁷ the increasing trend in COVID-19 case load may continue for the duration of this initial declaration period and this has also been a factor of consideration in my decision to make this pandemic order.

444 In addition, the period that an employer is not required to carry out surveillance testing for COVID-19 in relation to a worker who is a confirmed case, has been reduced from 90 days to 30 days. This change reflects the updated Series of National Guidelines, which includes a change to a re-exposure in a recovered case of COVID-19 from 90 days to 30 days.

Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community

445 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.

446 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be affected and limited by the Order.

447 In addition, I have also considered the following additional potential negative impacts:

447.1 "Freedom of movement of persons in Victoria is limited if diagnosed with COVID-19, living with a diagnosed person, or having been in close contact with a diagnosed person."³⁵⁸

447.2 Workers in certain additional obligation industries are required to wear the appropriate level of personal protective equipment or a face covering. If this "interferes with a person's choice to exercise cultural, religious, or linguistic practices in the workplace, this would constitute an incursion into that person's cultural, religious, racial, or linguistic rights to the extent that those rights are not already limited by attending work with occupational safety or uniform requirements."³⁵⁹

447.3 The Order limits a worker's protection from medical treatment without full, free and informed consent "because persons may be directed by their employer pursuant to the Order

³⁵⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22 [97].

³⁵⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 9 [29].

³⁵⁸ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [286].

³⁵⁹ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [287].

to undertake a COVID-19 test”,³⁶⁰ assuming that taking a COVID-19 test constitutes medical treatment.

447.4 Workers are required to comply with surveillance testing requirements and declare any additional workplaces if they are working in more than one workplace. “This information would constitute personal and health information and its provision to gain access to the care facility would therefore be an interference with privacy”.³⁶¹ However, this may not have a significant negative impact as “only the details required to establish risk and contact trace are sought.”³⁶²

447.5 “The Order creates an impost on business owners seeking to enjoy their property rights so they can operate their businesses without interference. Sending a worker home to self-quarantine is likely to cause meaningful detriment to a business.”³⁶³ Furthermore, “the Order might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”³⁶⁴

447.6 The requirements for workers to self-isolate under the Order “place significant restrictions on the ability of people to move freely”,³⁶⁵ although exposed workers are only required to self-isolate “for the time the medical evidence suggests is appropriate to make sure that a person is not at risk of transmitting COVID-19.”³⁶⁶

447.7 Elective surgery procedures are restricted to urgent procedures only, including Category 1 and Category 2A at private hospitals, day procedure centres and public hospitals across Victoria. Without restrictions, there is a high risk that the system will not have sufficient capacity, including ICU capacity. Further, fatigue and workload pressures on staff will be exacerbated, affecting the capacity of the system to respond to COVID-19 and provide critical care.

448 In making this pandemic order, I have included limited exceptions to the additional obligations for specified industries to ensure they are less onerous in specific circumstances, including:

448.1 Workers in an abattoir, meat processing facility, poultry processing facility or seafood processing facility are required to wear the appropriate level of PPE to carry out the functions of their role. However, this requirement does not apply where it may not be reasonably practicable to wear a face mask in the work premises, or if the nature of a worker’s work may mean that wearing a face mask creates a risk to their health and safety. Workers may also be

³⁶⁰ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [288].

³⁶¹ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [289].

³⁶² Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [291].

³⁶³ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

³⁶⁴ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

³⁶⁵ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [295].

³⁶⁶ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [297].

exempted from complying with this requirement where they are subject to an exception to the face covering requirement under the Movement and Gathering Order.

448.2 Care facility workers may be subject to a written exemption from the Chief Health Officer in relation to the additional obligations imposed on care facilities where an exemption is necessary to ensure that care facility residents are provided with a reasonable standard of care. Care facility workers may also remove their face covering whilst communicating with a resident where visibility of the mouth is essential to communicate with the resident.

448.3 Certain requirements are only applicable to the extent that they are reasonably practicable. This includes making arrangements for high-risk hospital work premises workers to work consistently with the same group of workers where reasonably practicable. Ensuring this is only where reasonably practicable is less onerous than mandating this requirement in all circumstances.

Whether there are any less restrictive alternatives that are reasonably available to protect public health

449 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).³⁶⁷

450 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.³⁶⁸

451 On the basis of the Chief Health Officer and Acting Chief Health Officer's advice, I considered there to be no other reasonably available means by which to manage the spread of COVID-19 in workplaces that would be less restrictive of freedoms. However, even if there were less restrictive measures, I consider that the restrictions imposed by the Order are in the range of reasonably available options to achieve the purpose.

Conclusion

452 Taking into account all of the above factors (including those contained in the Human Rights Statement) and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.

453 For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

³⁶⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14 – 15.

³⁶⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11 [34]-[36].

Schedule 11 – Reasons for Decision – Pandemic (Quarantine, Isolation and Testing) Order

Summary of Order

454 This Order requires persons who are diagnosed with COVID-19 or are probable cases of COVID-19 to self-isolate. It also requires persons who are living with or are close contacts of a diagnosed person or probable case to self-quarantine and undertake testing.

455 A probable case is someone who has received a positive result on a COVID-19 RA test.

456 Additionally, exposed persons, social contacts and symptomatic persons in the community are required to observe testing requirements issued by the Department.

457 There are different requirements for self-quarantine and testing depending on the level of exposure to a diagnosed person or probable case.

Purpose

458 The objective of this Order is to limit the movement of people who are diagnosed with COVID-19, those who live with them and their close contacts, and for exposed persons, social contacts or symptomatic persons in the community to observe testing requirements issued by the Department, to limit the spread of COVID-19.

Obligations

459 The Order requires diagnosed persons to:

- 459.1 self-isolate at a suitable premises until seven days after the date on which they took a COVID-19 PCR test that returned a positive result;
- 459.2 notify any other person residing at the premises that the diagnosed person has been diagnosed with COVID-19 and has chosen to self-isolate at the premises; and
- 459.3 notify the Department of the premises chosen to self-isolate and the contact details of any other residents at the premises; and
- 459.4 notify any close contacts, social contacts, work premises where the diagnosed person usually works, and any education facility where the person attended during the infectious period of their COVID-19 diagnosis.

460 The Order defines probable cases as persons who have returned a positive result from a COVID-19 RA test. The Order requires probable cases to:

461 self-isolate at a suitable premises until the earlier of:

- 461.1 seven days after the date on which they took a COVID-19 RA test that returned a positive result; or



- 461.2 the day on which a negative result is received by the probable case from a COVID-19 PCR test that was undertaken after the COVID-19 RA test from which the person became a probable case;
- 461.3 notify any other person residing at the premises that the probable case has been diagnosed with COVID-19 and has chosen to self-isolate at the premises; and
- 461.4 notify the Department of the premises chosen to self-isolate and the contact details of any other residents at the premises; and
- 461.5 notify any education facility where the person attended an indoor space during their infectious period; and
- 461.6 notify any close or social contacts, to the extent that they are reasonably able to ascertain and notify those contacts.
- 462 The Order requires close contacts who self-quarantine with a diagnosed person or probable case for a period of seven days, which starts from when:
- 462.1 the diagnosed person undertook their PCR test that confirmed they were a diagnosed person; or
- 462.2 the probable case undertook their RA test and received a positive COVID-19 result.
- 463 The Order requires close contacts who do not self-quarantine with a diagnosed person or probable case to self-quarantine for seven days from when they last had contact with the diagnosed person or probable case.
- 464 The Order requires the operator of an education facility who is informed of a positive diagnosis by a diagnosed person or probable case to take reasonable steps to notify exposed persons of their potential exposure. Those notified must provide to the operator of an education facility acceptable evidence of a negative result from any test they are required to complete before returning to the education facility. The operator must record a list of exposed persons and any results of tests for COVID-19 they complete including acceptable evidence of a negative test.
- 465 The Order requires exposed persons to comply with the relevant requirements set out in the Testing Requirements for Contacts and Exposed Persons document issued by the Department. If an exposed person was notified by the operator of an education facility that they are an exposed person, they are required to provide acceptable evidence of any negative COVID-19 test they are required to complete within 24 hours of receiving the result and before returning to the education facility.
- 466 The Order requires social contacts and symptomatic persons in the community to comply with the relevant requirements set out in the Testing Requirements for Contacts and Exposed Persons as issued by the Department.

Period

- 467 This Order will commence at 11:59:00pm on 12 January 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

468 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified in paragraph 95 of the Human Rights Statement.

469 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.

470 The Human Rights Statement also sets out:

470.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and

470.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are affected, but not limited

471 Further, in my opinion, the obligations imposed by the order will affect, but not limit, the human rights identified in paragraph 96 of the Human Rights Statement.

472 My explanation for why those rights are affected, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

473 I carefully read and considered the Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".

474 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer and the Acting Chief Health Officer relevantly advised:

474.1 Mandatory requirements to isolate or quarantine remain a proportionate measure to ensure persons who are or may be infected with COVID-19 do not transmit the infection to others once they have been diagnosed as a case or determined to be a close contact, meaning onward transmission can be prevented and outbreaks controlled more rapidly.³⁶⁹

474.2 Diagnosed persons with confirmed COVID-19 should continue to have specific requirements to ensure their risk of onward transmission is minimised.³⁷⁰ In line with the national settings announced by the AHPPC and National Cabinet, the self-isolation period for

³⁶⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 24 [108].

³⁷⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 24 [109].

diagnosed persons should be 7 days from the date the person took a COVID-19 PCR test where they were diagnosed with COVID-19³⁷¹³⁷²

- 474.3 Diagnosed persons and probable cases should continue to have specific requirements to notify their work or education premises if they attended during their infectious period. Under this model, increased accountability is placed on persons who are a confirmed or probable COVID-19 case to inform workplaces and education settings they have attended during their infectious period so that these setting can more promptly instigate public health responses. This measure is also intended for organisations in the community to grow more proficient at appropriately responding to exposures and to become more aware of their responsibilities and capabilities during this evolving stage of the pandemic. Diagnosed persons and probable cases should also continue to be required to notify the department of their place of self-isolation as well as any persons at this location that they have tested positive to COVID-19, to ensure these persons can take precautions to minimise risk of infection.³⁷³
- 474.4 In the context of ongoing community transmission of the Delta variant, and the likely increase in transmission of Omicron, it is advisable that the role of RA testing be urgently expanded in Victoria. RA tests show moderate sensitivity and high specificity for the detection of SARS-CoV-2 and are an appropriate asymptomatic screening tool in the setting of high community prevalence.³⁷⁴
- 474.5 Better access to and awareness of RA testing will arm Victorians with a more proactive preventative tool, particularly for those who may experience asymptomatic infection and unwittingly pass this on to their friends and family.³⁷⁵
- 474.6 The use of RA testing as an asymptomatic screening tool in the context of high community prevalence is consistent with previous advice, but their use should be expanded now given the increased risk posed by the Omicron variant.³⁷⁶
- 474.7 The measures recommended by the Chief Health Officer on 23 December for isolation and testing are still applicable.³⁷⁷ Testing requirements need to shift away from PCR to RA tests to preserve and reduce pressure on the testing system. In order to facilitate this shift, some changes need to be made to case definitions in the Orders.³⁷⁸ Repeated RA testing further improves accuracy as a screening modality.³⁷⁹

³⁷² Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

³⁷³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 25-26 [117].

³⁷⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 12 [54].

³⁷⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 12 [55].

³⁷⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 13 [58].

³⁷⁷ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

³⁷⁸ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

³⁷⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 20 [108] [i].

475 Depending on the availability of RA testing, aspects of the test, trace, isolate and quarantine approach should be revised to better support the case, contact and outbreak management strategy from the likely impacts of Omicron on capacity and resourcing.³⁸⁰

476 I have accepted the advice of the Chief Health Officer and Acting Chief Health Officer. I have also made minor amendments to orders to improve accuracy and clarity.

477 As advised by the Acting Chief Health Officer, I am recommending the following positions:

477.1 Testing requirements need to shift away from PCR to RA tests to preserve and reduce pressure on the testing system. In order to facilitate this shift, some changes need to be made to case definitions in the Orders.³⁸¹ Repeated RA testing further improves accuracy as a screening modality.³⁸²

477.2 Acknowledging a greater responsibility on individuals to test the infectiousness themselves, and potentially also having cases notify their contacts. This approach may become increasingly important once Response teams reach capacity, resulting in delays in contact tracing or implementation of appropriate public health measures, and may be considered low impost as these individuals are oftentimes best placed to directly liaise with their contacts given established relations or known contact details. Similarly, a requirement for operators and employers to notify the Department once outbreak thresholds have been reached help instigate public health measures while normalising the actions that individuals can take to help protect their contacts or settings, and hence the community.³⁸³

477.3 A close contact as determined by the Department of Health is intended to identify individuals with the greatest risk of developing COVID-19 following exposure to an infectious case.³⁸⁴

477.4 Interactions that occur in private residences or residential facilities represent a high transmission risk due to the intimate nature of interactions that occur in a prolonged or repeated manner in enclosed spaces. Similarly, outbreaks are high risk settings with established coronavirus transmission representing a heightened risk of infection. Requiring close contacts to quarantine minimises the chance of a person being infectious in the community. Close contacts should also continue to have specific COVID-19 testing requirements during their quarantine period to ensure any conversion to COVID-19 infection is promptly identified.³⁸⁵

477.5 Vaccine effectiveness for infection and symptomatic infection for two doses against Omicron is likely reduced. Therefore, there is likely minimal differential benefit in applying requirements based on the vaccination status.³⁸⁶

³⁸⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 20 [108].

³⁸¹ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

³⁸² Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 20 [108] [i].

³⁸³ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 20 [108] [ii].

³⁸⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 24 [110].

³⁸⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 24-25 [111].

³⁸⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 20 [109].

- 477.6 In line with AHPPC and National Cabinet, the self-quarantine period should be 7 days for close contacts, irrespective of whether the close contact is vaccinated or unvaccinated.³⁸⁷
- 477.7 The measures recommended by the Chief Health Officer on 23 December for isolation and testing are still applicable.³⁸⁸
- 477.8 The use of RA testing as an asymptomatic screening tool in the context of high community prevalence is consistent with previous advice, but their use should be expanded now given the increased risk posed by the Omicron variant.³⁸⁹
- 477.9 Symptomatic close contacts should be required to undertake a PCR test on the first day of their self-quarantine. If the result is negative, they should be required to undertake an RA test on the sixth day of self-quarantine.³⁹⁰
- 477.10 Asymptomatic close contacts should be required to undertake RA testing on the first day after they are informed that they are a close contact, and on the sixth day of their self-quarantining period.³⁹¹
- 477.11 Close contacts that cannot access an RA test should be required to undertake a PCR test on the sixth day of self-quarantine and remain in self-quarantine until they receive a negative result.³⁹²
- 477.12 Individuals who have been potentially exposed to an infectious case at a workplace or education facility can be designated as an exposed person by the employer or provider of these settings. This measure is important to maintain occupational safety in the context of a return to social and economic activities in the midst of an ongoing pandemic. This also places a level of responsibility on diagnosed persons and employers/providers to act in a manner that helps protect the health of their workers and enrolled persons, and thus the overall Victorian community. Requirements for exposed persons are less than those for close contacts, as there is a lower risk of infection. However, controls are still necessary to ensure potential chains of transmission are halted where possible.³⁹³
- 477.13 Potential transmission can occur from interactions between infectious cases and other members of the community who do not fulfill the criteria of being a close contact or exposed person. It is important for such persons (termed social contacts) to be made aware of their potential risks and be recommended to seek testing as a precautionary measure to halt potential chains of transmission once notified by the case. This also places a level of responsibility on diagnosed persons to act in a manner that helps protect the health of their close circle of contacts, and thus the overall Victorian community.³⁹⁴

³⁸⁷ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

³⁸⁸ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

³⁸⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 13 [58].

³⁹⁰ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

³⁹¹ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

³⁹² Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

³⁹³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 25 [113]-[115].

³⁹⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 25 [116].

- 477.14 Testing requirements for persons identified as being at increased risk of developing COVID-19 following known exposure is necessary to identify potential cases and inform appropriate public health responses.³⁹⁵
- 477.15 Symptomatic exposed persons and social contacts should be required to undertake a PCR test.³⁹⁶
- 477.16 Asymptomatic exposed persons and social contacts should be strongly recommended to undertake an RA test each day for five days. The Minister should consider mandating this recommendation when RA test supply is sufficient to meet demand.³⁹⁷
- 477.17 It is no longer reasonable that a person be required to self-isolate for 10 days should they not undertake a required PCR test. The current infringement system is appropriate for managing those individuals.³⁹⁸
- 477.18 For an asymptomatic person who is not able to access RA tests each day for five days, a lower number of RA tests at a lesser frequency is better than not testing at all, and individuals should monitor for symptoms. The recommendation to undertake the RA tests each day is based on the understanding that increasing the number of tests improves the sensitivity of the testing.³⁹⁹
- 477.19 There is significant pressure being experienced by the testing system and there is a need to protect capacity for testing those in whom the value of testing is highest on both public health and clinical care grounds. However, any reduction in testing access, and any reductions in the effectiveness of contact tracing, isolation and quarantine, will contribute to increasing transmission of COVID-19 in Victoria, and attendant risk of public health consequences including pressure on the health care system. Therefore, in the near future, it is recommended that review of the impact of the proposed changes, including consideration of reinforcing further testing and contact tracing measures beyond those agreed at National Cabinet on 30 December 2021, be strongly considered.⁴⁰⁰
- 478 I accept this advice. I believe that self-isolation, self-quarantine and testing obligations remain an important safeguard for early detection of diagnosed persons to prevent large scale outbreaks.
- 479 In the making of this pandemic order, I also took due consideration of the following:
- 480 The necessity of a suite of measures, including testing and isolation for people who are the 'known sources' of potential transmission, to suppress outbreaks and reduce the risk of community transmission rather than address heightened numbers of cases from failures in prevention.
- 481 The effect of not taking these public health measures may threaten the viability of the Victorian healthcare system. The risk being avoided is that the health system will be overwhelmed, which

³⁹⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 24 [107].

³⁹⁶ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

³⁹⁷ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

³⁹⁸ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

³⁹⁹ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

⁴⁰⁰ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

would mean that people could lose their lives (due to both COVID and non-COVID related causes) whereas they would normally be successfully treated to recovery in our healthcare system.

482 High population vaccination coverage rates provide significant protection against severe disease and death and decrease the rates of onward transmission of COVID-19. However, high population vaccination coverage rates do not negate all risk to the community and additional protective measures and safeguards should remain in place, particularly when the Omicron variant of concern is known to be within the Victorian community while its risk profile is not yet well understood.

Countervailing possible impacts that the obligations imposed by the Order may have on individuals and the community

483 In making this decision, I considered the possible negative impacts of the Order on the individuals and the community.

484 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be affected and limited by the Order.

485 In addition, I also considered the following additional potential negative impacts:

485.1 "Persons who are required to self-isolate or self-quarantine are permitted to leave the premises at which they are isolating/quarantining for limited purposes. They are therefore not able to move freely."⁴⁰¹

485.2 "Given that children under 12 years remain ineligible for vaccination, many people required to self-isolate or self-quarantine have been young children and their families. Even where children are older or a family is constituted only of adults, many people choose to self-isolate or self-quarantine away from their family. This can cause disruptions in relationships, economic difficulties, isolation from culture and traditions, and uncertainty and anxiety."⁴⁰²

485.3 "Self-isolation or self-quarantine measures can also constitute an incursion into the rights of people of different cultural, religious, racial or linguistic backgrounds to practice their culture, religion, or language to the extent that the short period prevents them from doing so. While there are many ways of enjoying one's culture, religion, or language at home or online, there may be activities which can only be done face-to-face or in a certain location outside the home."⁴⁰³

485.4 A person who is diagnosed with COVID-19 required to self-isolate may impact on their social relationships and everyday life, such as going to work or going shopping. Furthermore, some persons may not reside with other diagnosed persons or close contacts who are quarantining, resulting in limited support if they experience mild symptoms.

⁴⁰¹ Department of Health, *Human Rights Statement: Pandemic (Quarantine, Isolation and Testing) Order* (30 December 2021) [71].

⁴⁰² Department of Health, *Human Rights Statement: Pandemic (Quarantine, Isolation and Testing) Order* (30 December 2021) [73.2].

⁴⁰³ Department of Health, *Human Rights Statement: Pandemic (Quarantine, Isolation and Testing) Order* (30 December 2021) [73.3]

- 485.5 A person who is a close contact or an exposed person of a diagnosed person is required to self-quarantine which also impacts on their social relationships and everyday life. As such, some persons may not be residing with close contacts who are self-quarantining will have limited support if they experience mild symptoms.
- 485.6 A person who is self-quarantining will also need to undertake COVID-19 testing and wear a face covering, unless an exception applies, when going to get a test. These additional requirements will further affect a person's everyday life.
- 485.7 A person may choose to self-isolate or self-quarantine at a premise of their choice, which may not be their ordinary place of residence, to protect other household members. However, this option may not be viable for some people experiencing financial hardship or persons with limited social connections.
- 486 However, I also recognised that the Order contains the following exceptions or qualifications to minimise the potential negative impacts on individuals and the community:
- 486.1 People who are self-isolating or self-quarantining may go about their day at their place of self-isolation or self-quarantine, largely undisturbed, and are permitted to receive deliveries of the things they need. They can leave self-isolation or self-quarantine in specified circumstances, including to obtain medical care.
- 486.2 This Order does not physically force anyone to undergo medical treatment.
- 486.3 The exemption and exception powers allow Department officers to consider special cases where self-isolation or self-quarantine conditions are especially difficult. Diagnosed persons may choose a place to self-isolate.

Whether there are any less restrictive alternatives that are reasonably available to protect public health

- 487 The Chief Health Officer's Advice includes reasons why COVID-19 constitutes a serious risk to public health, and recommends measures that are necessary or appropriate to be put in place in the pandemic orders in order to reduce or eliminate the threat. Requirements to test, quarantine and isolate are fundamental to the containment of COVID-19 and I believe that the measures imposed are appropriate to reduce or eliminate the public health risk.
- 488 On the basis of the Chief Health Officer's advice, I consider there to be no other reasonably available means by which to limit the spread of COVID-19 that would be less restrictive of this particular right than in the quarantine, isolation and testing measures contained in this Order. However, even if there were less restrictive means, I considered that the limitation imposed by this Order is in the range of reasonably available options to reduce the spread of COVID-19.

Conclusion

- 489 Taking into account all of the above factors (including those contained in the Human Rights Statement), and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believed it was reasonably necessary to make the Order to protect public health.

490 For the same reasons, in my opinion, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.