

HUMAN RIGHTS STATEMENT

- 1 This Human Rights Statement must be read together with the Statement of Reasons for the Orders made on 18 February 2022.
- 2 This document contains an explanation of the nature of the human rights limited by the Orders (section 165AP(2)(d)(i) of the *Public Health and Wellbeing Act 2008* (Vic) (**PHW Act**)). It does so by reference to the Orders generally.
- 3 Then, by reference to each individual Order, it contains:
 - 3.1 a statement as to whether, in the opinion of the Minister, the Order does or does not limit any human right set out in the Charter of Human Rights and Responsibilities (**the Charter**) (section 165AP(2)(c) of the PHW Act);
 - 3.2 an explanation of:
 - 3.2.1 the importance of the purpose of the limitation (section 165AP(2)(d)(ii) of the PHW Act); and
 - 3.2.2 the nature and extent of the limitation (section 165AP(2)(d)(iii) of the PHW Act); and
 - 3.2.3 the relationship between the limitation and its purpose (section 165AP(2)(d)(iv) of the PHW Act); and
 - 3.2.4 any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve (section 165AP(2)(d)(v) of the PHW Act).

Nature of human rights limited by Orders

- 4 Section 165AP(2)(d)(i) of the PHW Act requires an explanation of the human rights limited by a pandemic order.
- 5 It is important to recognise that a human right may be affected — either positively or negatively — by a particular restriction. This is sometimes referred to as the human right being engaged.
- 6 For example, a human right might be negatively engaged by a restriction. However, some rights are subject to exceptions or qualifications contained within the right itself. If the relevant impact on the right imposed by an Order falls within an internal exception or qualification to that right, it will not "limit" the human right.
- 7 This document considers how human rights might be engaged, in addition to considering how human rights may be limited.
- 8 That goes beyond what is required by section 165AP(2)(d)(i) of the PHW Act. However, for the purposes of giving proper consideration to human rights, it is necessary to consider all relevant human rights. There is conflicting court authority about whether that includes human rights that are both engaged and limited, or just rights that are limited.

- 9 Finally, it is important to note that the “limitation” of a human right by an Order does not mean that the Order is “incompatible” with a human right. An Order will be “incompatible” with a human right if the “limitation” is not a “reasonable” limit that can be “demonstrably justified” under section 7(2) of the Charter.
- 10 Section 7(2) of the Charter states that a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
- 10.1 the nature of the right; and
 - 10.2 the importance of the purpose of the limitation; and
 - 10.3 the nature and extent of the limitation; and
 - 10.4 the relationship between the limitation and its purpose; and
 - 10.5 any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
- 11 These factors are the same factors that must be explained for the purposes of section 165AP(2)(d) of the PHW Act, in circumstances where I have formed the opinion that a human right is limited by an Order.
- 12 Against that background, this section sets out the explanation required by section 165AP(2)(d)(i) of the PHW Act, by reference to the human rights engaged or limited by the Pandemic Orders.

Right to recognition and equality before the law (section 8)

- 13 Section 8(3) of the Charter relevantly provides that every person is entitled to equal protection of the law without discrimination, and everyone has the right to equal and effective protection against discrimination. The purpose of this component of the right to equality is to ensure that all laws and policies are applied equally, and do not have a discriminatory effect. 'Discrimination' under the Charter is defined by reference to the definition in the *Equal Opportunity Act 2010* (Vic) (**EO Act**) on the basis of an attribute in s 6 of that Act. Relevantly, s 6 of the EO Act contains the attributes of age, disability, physical features, religious belief or activity, marital status, and parental or carer status.
- 14 Importantly, the definitions of direct and indirect discrimination incorporated into the Charter “operate according to their own terms to give protection against discrimination on the basis of an attribute within the free-standing legislative framework of the Charter (including s 8(3)) whether or not the discrimination is unlawful within the separate legislative framework of the EO Act”.¹ This may mean that while a particular decision or course of conduct may not meet the formal definition of discrimination under the EO Act, the right to equality may be engaged.
- 15 Direct discrimination occurs where a person treats a person with an attribute unfavourably because of that attribute. Indirect discrimination occurs where there is a requirement, condition or practice imposed that is the same for everyone, but disadvantages a person, or is likely to

¹ *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 at [47] per Bell J.

disadvantage a person, because they have one or more of the protected attributes, and the requirement, condition or practice is not reasonable.

- 16 The EO Act defines disability as including “the presence in the body of organisms causing disease or illness”. A person having COVID-19 therefore has a disability.
- 17 Indirect discrimination occurs where there is a requirement, condition or practice imposed that is the same for everyone but disadvantages a person, or is likely to disadvantage a person, because they have one or more of the protected attributes, and the requirement, condition or practice is not reasonable.²

Right to life (section 9)

- 18 The right to life and the right not to be arbitrarily deprived of life is a fundamental human right and is promoted by the making of the Pandemic Orders. Because the virus is life-threatening, the Pandemic Orders further that right, particularly in relation to vulnerable members of society who are at particular risk from broad and unrestricted transmission of COVID-19.
- 19 In addition, article 12(2)(c) of the International Covenant on Economic, Social and Cultural Rights (to which Australia is a signatory³) requires parties to take steps to achieve the full realisation of the right to the highest attainable standard of health, including by taking measures necessary for the prevention, treatment and control of epidemic diseases. Whilst this right is not directly protected by the Charter, Australia has international obligations to ensure fulfilment of the right and it was identified as relevant to the PHW Act in its Statement of Compatibility.

Right to protection from torture and cruel, inhuman or degrading treatment (section 10)

- 20 The aspects of section 10 that relate to protection against torture and cruel inhuman or degrading treatment are not likely to be relevant to the Pandemic Orders. However, section 10(c) of the Charter states that a person must not be subjected to medical or scientific experimentation or treatment without full, free and informed consent. This section of the Charter largely reflects the requirements of Victorian law which makes it unlawful to render medical treatment without the informed consent of the person concerned, except in limited circumstances, and permits a person who is competent to refuse medical treatment.⁴
- 21 In New Zealand, the taking of a swab to obtain a bodily sample for forensic purposes has been held not to be medical treatment,⁵ however, the taking of a blood sample for the purposes of determining paternity was considered medical treatment.⁶
- 22 The PHW Act envisages that there will be circumstances in which it will be reasonably necessary to require a person to undergo medical testing in order to ascertain whether a person has an infectious disease (pursuant to s 113).

² EO Act s 9.

³ In the Statement of Compatibility for to the *Public Health and Wellbeing Bill 2008*, then Minister for Health (now Premier Andrews) acknowledged this right, being the right of everyone to enjoy the highest attainable standard of health.

⁴ See *PBU & NJE v Mental Health Tribunal* [2018] VSC 564; *Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 233–4; *Re BWV; Ex parte Gardner* (2003) 7 VR 487.

⁵ *Taylor v Attorney-General* HC Auckland CIV-2010-485-226, 9 July 2011, [32] and [36] and the cases considered therein.

⁶ *Cairns v James* [1992] NZFLR 353 (HC), 356.

- 23 During the course of the COVID-19 pandemic, testing has been required in specified circumstances pursuant to the emergency power in s 200(1)(d) of the PHW Act (the power to give any other direction that the authorised officer considers is reasonably necessary to protect public health). High-risk industries have been required to undertake surveillance testing of their workforce (for example, hotel quarantine workers).
- 24 Section 10(c) of the Charter provides that a person must not be subjected to medical treatment without their full, free and informed consent. This section largely reflects the requirements of Victorian legislation, which makes it unlawful to render medical treatment without the informed consent of the person concerned, except in limited circumstances, and which permits a person who is competent to give consent to refuse medical treatment.⁷

Right to freedom of movement (section 12)

- 25 The right to freedom of movement is contained in s 12 of the Charter and protects three separate rights: the right to move freely within Victoria, the right to enter and leave Victoria, and the right to choose where to live in Victoria. Relevantly, it provides that every person lawfully within Victoria has the right to move freely within Victoria. It provides protection from unnecessary restrictions upon a person's freedom of movement and extends, generally, to movement without impediment throughout the State and a right of access to places and services used by members of the public, subject to compliance with regulations legitimately made in the public interest.⁸ The right is directed at restrictions that fall short of physical detention coming within the right to liberty under s 21.⁹ The right to freedom of movement may be limited where it is reasonable under s 7(2) of the Charter, including where it is necessary to protect public health.¹⁰ The right to freedom of movement is one of the most commonly qualified rights.¹¹

Right to privacy and reputation (section 13)

- 26 Section 13(a) of the Charter provides, relevantly, that a person has the right not to have their privacy or family unlawfully or arbitrarily interfered with. Section 13(a) contains internal qualifications; namely, interferences with privacy only limit the right to privacy if they are unlawful or arbitrary. An interference will be lawful if it is permitted by a law which is precise and appropriately circumscribed. An interference, on the other hand, will be arbitrary if it is, for example, capricious, unpredictable, unjust or unreasonable, in the sense of being disproportionate to the legitimate aim sought to be achieved by the limitation.
- 27 "Privacy" is a broad right. The fundamental values which the right to privacy addresses are the physical and psychological integrity, individual and social identity, and autonomy and inherent dignity of the person. In conjunction with other rights in the Charter, including the right to security of person in s 21, the right to privacy gives recognition to "the human right to personal integrity".¹⁰ It protects the individual's interest in the freedom of their personal and social sphere. Relevantly, this encompasses their right to establish and develop meaningful social

⁷ *Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 233–4; *Re BWV; Ex parte Gardner* (2003) 7 VR 487.

⁸ *Gerhardy v Brown* (1985) 159 CLR 70, 102, cited in *DPP v Kaba* (2014) 44 VR 526 at [100] (Bell J).

⁹ *Kracke v Mental Health Review Board* (2009) 29 VAR 1 at [588] (Bell J).

¹⁰ See art 12(3) of the International Covenant on Civil and Political rights, which provides the purposes for which freedom of movement may be restricted. Although not reproduced in the Charter, art 12(3) provides a useful indication of the types of purposes that may be legitimate under s 7(2), including public health.

¹¹ *DPP v Kaba* (2014) 44 VR 526 at [117], citing *Kerr v Attorney-General* (1996) 4 HRNZ 270 at 274.

relations and their right to maintain and develop relationships at work,¹¹ and may also extend to their right to education.

- 28 The "family" aspect of s 13(a) is related to s 17(1) of the Charter, which states that families are entitled to protection by society and the State. While the term "family" is not defined by the Charter, the meaning of this term should not be limited to families formed by formal marriage or co-habitation. This term will likely include at least ties between near relatives, such as between parents and their children, and between grandparents and grandchildren. However, whilst the two rights overlap, they are not co-extensive. Section 13(a) is a negative obligation that only prohibits unlawful or arbitrary interferences with family; whereas s 17(1) is a positive obligation on society and the State.
- 29 The "home" aspect of s 13(a) refers to a person's place of residence, regardless of whether they have a legal interest in that residence.¹² What constitutes an interference with this aspect of the right to privacy has been approached in a practical manner and may cover actions that prevent a person from continuing to live in their home¹³ as well interferences with the home itself.¹⁴

Right to freedom of thought, conscience, religion and belief (section 14)

- 30 Section 14(1) of the Charter provides that every person has the right to freedom of thought, conscience, religion and belief, including the freedom to have or adopt a religion or belief of one's choice (s 14(1)(a)), and to demonstrate one's religion or belief individually or as part of a community, whether in public or private, through worship, observance, practice and teaching (s 14(1)(b)). The concept of 'belief' is not limited to religious or theistic beliefs; it extends to non-religious beliefs as long as they possess a certain level of cogency, seriousness, cohesion and importance.¹⁵ Section 14(2) provides that a person must not be restrained or coerced in a way that limits their freedom to have a belief. Coercion in this context includes both direct and indirect forms of compulsion, such as penal sanctions and restrictions on access to employment.¹⁶

Right to freedom of expression (section 15)

- 31 Section 15(1) of the Charter provides that every person has the right to hold an opinion without interference, while section 15(2) provides that a person has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, through various mediums. Although subject to some limitations, generally speaking, the freedom of expression under s 15(2) will encompass all forms of expression regardless of the content.¹⁷ The right to hold an opinion without interference (section 15(1)) is considered to be an absolute right, and therefore not subject to qualification. However, the right to express that opinion (section 15(2)) may be qualified. Section 15(3) recognises that the right to freedom of expression will often be in conflict with the rights of other people, and with the public good, and so may be subject to clear limits, including lawful restrictions reasonably necessary to protect public health. It is likely that section 15(2) supports an implied right to peaceful protest.

¹² *Director of Housing v Sudi* (2010) 33 VAR 139 at [32].

¹³ *Director of Housing v Sudi* (2011) 33 VR 559; [2011] VSCA 266.

¹⁴ *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 at [61]-[62].

¹⁵ *Campbell v United Kingdom* (1982) 4 EHRR 293, [36]; *Eweida v United Kingdom* (2013) 57 EHRR 8, [81].

¹⁶ UN HRC, General Comment No 22, [5].

¹⁷ See, for example, *Handyside v United Kingdom* (1976) 1 EHRR 737, [49].

- 32 In order to constitute "expression", the speech or conduct in question should be "capable of conveying some kind of meaning".¹⁸ Further, there are limits to what will be considered expression. For example, facial hair,¹⁹ insulting and offensive language and behaviour in a public place,²⁰ acts of violence or criminal damage²¹ (though the act of spraying political graffiti may fit the bill). The protection of the right to freedom of expression is afforded "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'".²² Offensive expression may be justifiably restricted, but it is nevertheless "expression".²³ The freedom extends not only to political discourse, debate and protest but also to artistic, commercial and cultural expression, news and information.

Right to peaceful assembly and freedom of association (section 16)

- 33 Section 16(1) of the Charter provides that every person has the right to peaceful assembly. This provision reflects the right of persons to gather as a means of participating in public affairs and to pursue common interests or further common purposes. This includes gathering for the purpose of protest or political demonstration; however, to fall within the scope of section 16(1), an assembly must be peaceful, and the right will not protect violent protest, riots, and affrays. It is recognised that it may be necessary to take action to prevent an imminent breach of the peace, which may place restrictions on the rights of peaceful demonstrators.²⁴ While a gathering need not be for a particular purpose to attract the protection of this right, there is no guarantee to a right to assemble for purely social or recreational purposes.²⁵ However, like most other rights, the right can be limited where reasonably justifiable in accordance with s 7(2) of the Charter.
- 34 Similarly, s 16(2) of the Charter relevantly provides that every person has the right to freedom of association with others. This right is concerned with allowing people to pursue common interests in formal groups, such as political parties, professional or sporting clubs, non-governmental organisations, trade unions, and corporations.²⁶

Right to protection of families and children (section 17)

- 35 Section 17(1) of the Charter recognises that families are the fundamental group unit of society and entitles families to protection by the society and the State. Section 17(1) is related to the s 13(a) right and an act or decision that unlawfully or arbitrarily interferes with a family is also likely to limit that family's entitlement to protection under section 17(1).
- 36 The Charter does not define the term 'family'; however, extrinsic materials and judicial consideration confirm that it is to be given a broad interpretation. As discussed above, it at least includes ties between near relatives and regard to other indicia of familial relationships including

¹⁸ *Magee v Delaney* (2012) 39 VR 50.

¹⁹ *Kuyken v Lay* [2013] VCAT 1972 at [205]–[210].

²⁰ *Ferguson v Walkley* [2008] VSC 7 at [27].

²¹ *Magee v Delaney* (2012) 39 VR 50.

²² *Handyside v United Kingdom* [1976] ECHR 5 at [49].

²³ See, for example, *DPP v Collins* [2006] UKHL 40 at [14]; *Monis v The Queen* (2013) 249 CLR 92.

²⁴ See, for example, *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105; [2006] UKHL 55.

²⁵ See for example *R (Countryside Alliance) v Attorney General* [2008] AC 719; [2007] UKHL 52 at [58].

²⁶ Joseph and Castan, *The International Covenant on Civil and Political Rights* (3rd ed, Oxford University Press, 2013), [19.13].

cohabitation, economic ties, and a regular and intense relationship. Cultural traditions may be relevant when considering whether a group of persons constitute a ‘family’ in a given case. In this respect, the cultural right in s 19(2)(c) of the Charter, which states that Aboriginal people must not be denied the right to maintain their kinship ties, is also relevant. As discussed above in relation to cultural rights, the concept of ‘kinship’ within Aboriginal culture is broader than that used in non-Aboriginal culture.

- 37 Section 17(2) recognises the particular vulnerability of children due to their age, and confers additional rights on them. Its scope is informed by the United Nations Convention on the Rights of the Child, which requires that in all actions concerning children, the best interests of the child shall be the primary consideration. However, it is worth noting that courts in the United Kingdom construe the best interests of the child as “a” primary consideration rather than “the” primary consideration.²⁷
- 38 Section 17 is closely related to section 13, to the extent that section 13 protects the rights of individuals not to have their family and home unlawfully or arbitrarily interfered with.

Right to take part in public life (section 18)

- 39 Section 18(1) of the Charter provides that every person in Victoria has the right, and is to have the opportunity, without discrimination, to take part in public affairs, directly or through freely chosen representatives. The rights to vote and to have access to the public service and public office in s 18(2)(a) and (b) may be regarded as specific aspects of the general right to direct participation in public affairs. This contemplates direct and indirect involvement in public affairs. Direct involvement may take various forms including the right to vote, and to participate in public debate. Every person must have the right to vote (s 18(2)(a)) and the opportunity to participate directly in public affairs, subject to reasonable limits (such as appropriate qualifications to be suitable for public office).

Cultural rights (section 19)

- 40 Section 19 of the Charter protects the right of all persons with a particular cultural, religious, racial or linguistic background to enjoy their culture, to declare and practise their religion and to use their language, in community with other persons of that background.
- 41 Section 19(2) bestows particular rights on Aboriginal people. Section 19(2)(c) of the Charter provides that Aboriginal people must not be denied the right to maintain their kinship ties. The concept of ‘kinship’ within Aboriginal culture differs from that used in non-Aboriginal culture; Aboriginal kinship networks are generally understood to extend broadly into the community, beyond a person’s immediate family. The Pandemic Orders will operate to restrict the ability of Aboriginal people to maintain their kinship ties (with people other than those with whom they reside) in a physically proximate way given the strict limitations on both travel and gatherings. Funerals and mourning in particular are important communal activities in Aboriginal culture, with community members having a cultural obligation to attend in order to fulfil their cultural duties. Section 19(d) protects the rights of Aboriginal people to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

²⁷ See *ZH (Tanzania) v Home Secretary* [2011] UKSC 4 at [25]–[26]; *Zoumbas v Secretary of State for Home Department* [2013] UKSC 74 at [10]; *R (MG) v Secretary of State for Home Department* [2018] EWHC Admin 31 at [87].

Property rights (section 20)

- 42 The right to property under section 20 of the Charter will be limited when all three of the following criteria are met: the interest interfered with must be “property”, the interference must amount to a “deprivation” of property, and the deprivation must not be “in accordance with law”. In *PJB v Melbourne Health (Patrick's Case)*²⁸ Bell J observed that in the Charter, “neither ‘property’ nor ‘deprived’ is defined. On first principles, these terms would be interpreted liberally and beneficially to encompass economic interests and deprivation in a broad sense. ‘In accordance with law’ has a particular meaning in this context.”

Right to liberty and security of persons (section 21)

- 43 Section 21 of the Charter protects the right to liberty. The liberty right in s 21 reflects aspects of the common law right to personal liberty, which has been described as 'the most elementary and important of all common law rights'.²⁹ In particular, s 21(2) prohibits a person from being subjected to *arbitrary* detention, whilst s 21(3) prohibits a person from being deprived of their liberty *except on grounds, and in accordance with procedures, established by law*. Together, the effect of ss 21(2) and (3) is that the right to liberty may legitimately be constrained only in circumstances where the deprivation of liberty by detention is both lawful, in that it is specifically authorised by law, and not arbitrary, in that it is reasonable or proportionate in all the circumstances.
- 44 The scope of the right in s 21 extends to detention to prevent the spread of infectious diseases. Whether a particular restriction amounts to a 'deprivation of liberty' for the purpose of the right in s 21 is a question of degree or intensity.³⁰ Detention or deprivation of liberty does not necessarily require physical restraint; however, the right to liberty is concerned with the physical detention of the individual, and not mere restrictions on freedom of movement.³¹
- 45 Where some Pandemic Orders may deprive a person of liberty by way of detention, any deprivation of liberty should not extend beyond the time during which the restraint is necessary on the basis of medical evidence. This approach is supported by a significant body of international jurisprudence, which accepts that detention can be justifiable if demonstrably necessary to prevent the spread of a serious infectious disease, where there are no other effective measures that are less restrictive of human rights.³²

Right to humane treatment when deprived of liberty (section 22)

- 46 Section 22 of the Charter imposes certain standards in respect of the treatment of people who are detained in Victoria. It requires that any person detained must be treated with dignity and humanity. This applies to people detained in the criminal justice system and in non-punitive or protective forms of detention such as the compulsory detention of persons with a mental illness, or for a public health purpose. Section 22 contains additional requirements to ensure differential treatment of accused persons detained who have not been convicted of any offence: s 22(2) and (3).

²⁸ [2011] VSC 327 at [87].

²⁹ *R v Foster* (1993) 113 ALR 1, 8 quoting Fullager J in *Trobridge v Hardy* (1955) 94 CLR 147, 152.

³⁰ *Kracke v Mental Health Review Board* (2009) 29 VAR 1 at [664].

³¹ *Ibid.*

³² *Ibid.*; General Comment No 35 at [5].

Rights of children in the criminal process (section 23), Right to a fair hearing (section 24), Rights in criminal proceedings (section 25)

- 47 Section 23 of the Charter stipulates additional requirements to those in section 22 for the humane treatment of children in detention in recognition that children are particularly vulnerable to harm in criminal detention and to discriminatory exclusion in the operation of the criminal law, and that governments and courts are therefore obliged to take all necessary measures to protect them from such harm and to ensure their participation in those processes.³³ Section 23 applies only with respect to the treatment of children in the criminal process and not to children in other forms of detention. The requirement that a child be brought to trial as “quickly as possible” recognises the widely accepted principle in international law that children should be detained for only the shortest appropriate time. Section 24(1) confers on a person charged with a criminal offence or a party to a civil proceeding the right to a “fair and public hearing” by a “competent, independent and impartial court or tribunal”. The requirement in section 24(1) that proceedings be “public” is a reflection of the common law principles of open justice.³⁴
- 48 Section 25 protects a number of rights in the criminal justice system, including the right to be presumed innocent until proven guilty, the right of an accused person to adequate time and facilities to communicate with their lawyer contemplates that the accused should have the opportunity to do so in a confidential setting, the right to be tried in person and the right to be tried without unreasonable delay. An unreasonable delay for the purposes of section 25(2)(c) of the Charter is one which is “excessive, inordinate or unacceptable”.³⁵ The assessment of whether delay is “unreasonable” will depend upon all the circumstances

³³ Pound & Evans, *Annotated Victorian Charter of Rights*, LawBook Co 2019 at [CHR.24.320] *DPP v SL* [2016] VSC 714 at [7]; *DPP v SE* [2017] VSC 13 at [11].

³⁴ *Russell v Russell* (1976) 134 CLR 495 at 520; *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4 at [20]–[21]; *PQR v Secretary, Department of Justice and Regulation* (2017) 53 VR 45; [2017] VSC 513 at [34]–[42].

³⁵ *Baker (a pseudonym) v DPP (Vic)* [2017] VSCA 58 at [67], [87].

SCHEDULE 1 – PANDEMIC (ADDITIONAL INDUSTRY OBLIGATIONS) ORDER 2022 (NO. 7)

Nature and extent of limitations

49 As noted in the Statement of Reasons for the Order, in my opinion, the obligations imposed by the Order will **limit** the following human rights:

49.1 Freedom of movement

49.2 Cultural rights

49.3 Freedom from torture, cruel inhuman and degrading treatment (including protection from medical treatment without full, free and informed consent)

50 Further, in my opinion, the obligations imposed by the Order will **engage**, but not limit, the following human rights:

50.1 Privacy and reputation

50.2 Freedom of thought, conscience, religion and belief

50.3 Freedom of expression

50.4 Property rights

50.5 Right to liberty and security of persons

50.6 Right to humane treatment when deprived of liberty

50.7 Right to life

51 Each of the rights limited or otherwise engaged is discussed below.

Freedom of movement

52 In my opinion, the Order **limits** this right because:

52.1 An employer must direct a worker to undertake a COVID-19 PCR test as soon as possible, and self-isolate until a negative COVID-19 PCR test result is received, if during surveillance testing a worker is found to have a positive COVID-19 rapid antigen test result or two successive invalid COVID-19 rapid antigen test results.

52.2 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.

Cultural rights

53 In my opinion, the Order **limits** this right because:

- 53.1 Depending on the industry, the additional obligation industries must ensure that workers wear the appropriate level of personal protective equipment or wear a face covering.
- 53.2 If wearing personal protective equipment or a face covering 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.

Freedom from torture, cruel or inhuman treatment (including protection from medical treatment without full, free and informed consent)

- 54 In my opinion, the Order **limits** this right because persons may be directed by their employer pursuant to the Order to undertake a COVID-19 test and may otherwise prevent a person from having an elective surgery procedure completed during the period of the order. I have assumed that taking a test for COVID-19 constitutes medical treatment: see *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647; [2016] VSC 111 at [159]. In New Zealand, the taking of a swab to obtain a bodily sample for forensic purposes has been held not to be medical treatment,³⁶ however, the taking of a blood sample for the purposes of determining paternity was considered medical treatment.³⁷
- 55 On the other hand, the continued increases in elective surgery across the State prevent people from being subject to cruel or inhuman treatment where the delay in receiving surgery results in the condition requiring surgery becoming medically or psychologically unbearable.

Privacy and reputation

- 56 In my opinion, the Order **engages** this right because:
- 56.1 The additional obligation industries must conduct surveillance testing and keep records of surveillance testing, unless the worker was a confirmed case of COVID-19 within the last 30 days.
- 56.2 Depending on the industry, the additional obligation industries must ensure that workers provide a written declaration about additional workplaces if working in two or more. This is no longer the case for healthcare facilities workers.
- 56.3 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.
- 57 However, although the Order engages the right to privacy, in my opinion, it is not limited by the Order. That is because the right to privacy is not limited by a restriction unless the restriction is unlawful or arbitrary. Here, the restriction is authorised by the PHW Act and is therefore lawful.
- 58 Further:

³⁶ *Taylor v Attorney-General* HC Auckland CIV-2010-485-226, 9 July 2011, [32] and [36] and the cases considered therein.

³⁷ *Cairns v James* [1992] NZFLR 353 (HC), 356.

- 58.1 The collection of information is subject to existing privacy legislation and principles.
- 58.2 Details sought are limited to those necessary to establish risk of COVID-19 or to contact trace if anyone involved in the visit tests positive to COVID-19. While an incursion on privacy, it should not be an arbitrary incursion because only the details required to establish risk and contact trace are sought.
- 59 Moreover, the increase in elective surgery as COVID-19 hospitalisations decrease permits healthcare workers to maintain their right to a private life as it pertains to attending, forming relationships at, and developing their identity at the workplace. Worker bubbles have also been removed for hospital work premises, permitting those premises to make their own arrangements according to local conditions for managing COVID-19 risk, balancing workforce capacity, and meeting patients' demographic and care needs.
- 60 Having regard to those matters, and the other matters set out in the Statement of Reasons, the restrictions imposed by the Order are not arbitrary.

Freedom of thought, conscience, religion and belief, and freedom of expression

- 61 In my opinion, these rights are **engaged** in the following ways:
- 61.1 Depending on the industry, additional obligation industries must ensure that workers wear the appropriate level of personal protective equipment or wear a face covering.
- 61.2 Wearing personal protective equipment or a face covering does not of itself take away a worker's right to hold an opinion and express them. A worker may wear personal protective equipment or a face covering and still express a belief that such equipment is unnecessary or oppressive.

Property rights

- 62 In my opinion, the Order **engages** this right because:
- 62.1 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.
- 62.2 This Order may have the effect of interfering with the rights of property owners and other persons with property rights, whose use or enjoyment of the property (real or personal) will be engaged by the operation of the Order. The Order might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property. If the business and its assets are owned by an individual, and that reduction in capacity continues for a lengthy period of time, it may over time become a substantial restriction on the use of a person's property.
- 62.3 The Order does not currently create a deprivation of property merely by impacting some workforce capacity and limiting some elective surgery through the private system, although it is an impediment to business. Nonetheless, even if the Orders impose measures that constitute a deprivation of property, it will occur in accordance with law. Lawful and non-arbitrary interference with property will engage, but not limit, property rights.

62.4 Here, the restriction is authorised by the PHW Act and is therefore lawful. Further, having regard to the public health advice given by the CHO and the matters discussed in my Statement of Reasons, the restrictions imposed by the Order are not arbitrary.

Right to liberty and security of persons, and humane treatment when deprived of liberty

63 In my opinion, these rights are **engaged** in the following ways:

63.1 An employer who has become aware of a suspected case must advise the worker to self-isolate immediately by either directing the worker to travel home immediately or to self-isolate and socially distance at the work premises, and must advise the worker to be tested for COVID-19 as soon as possible.

63.2 Requirements of self-isolation place significant restrictions on the ability of people to move freely.

63.3 If the worker takes a COVID-19 test, the period of self-isolation is only until a negative COVID-19 test result is received and the worker may go about their day at their place of self-quarantine, largely undisturbed.

64 However, the right to liberty and security is not limited by a restriction unless the restriction is unlawful or arbitrary. Here, the restriction is authorised by the PHW Act and is therefore lawful.

65 Further, the Order requires exposed persons to self-isolate only for the time the medical evidence suggests is appropriate to make sure that a person is not at risk of transmitting COVID-19.

66 Having regard to those matters, and the other matters set out in the Statement of Reasons, the restrictions imposed by the Order are not arbitrary.

67 Accordingly, in my opinion, although the Order engages the right to liberty and security, in my opinion, it is not limited by the Order.

68 Because the right to liberty and security is not limited, no issue arises about humane treatment when deprived of liberty (because the threshold is not met). Therefore, in my opinion, it is not limited.

Right to life

69 The right to life may be positively **engaged** by the Order, particularly where some elective surgeries are now permitted. However, in my opinion, it is not limited by the Order.

Importance of purpose of limitations

70 The purpose of the Order, and thus of the limitations, is set out under the heading *Purpose* in the schedule to the Statement of Reasons that relates to this Order.

71 That is an important purpose.

Relationship between limitations and purpose

- 72 There is a rational connection between the limits imposed on human rights and the purpose identified in the Statement of Reasons.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

- 73 This issue is considered under the heading *Whether there are any less restrictive alternatives that are reasonably available to protect public health* in the schedule to the Statement of Reasons that relates to this Order.

SCHEDULE 2 – PANDEMIC (OPEN PREMISES) ORDER 2022 (NO. 5)

Nature and extent of limitations

- 74 As noted in the Statement of Reasons for the Order, in my opinion, the obligations imposed by the order will **limit** the following human rights:
- 74.1 Freedom from being subject to medical or scientific experimentation or treatment without his or her full, free and informed consent
 - 74.2 Freedom of movement
- 75 Further, in my opinion, the obligations imposed by the order will **engage**, but not limit, the following human rights:
- 75.1 Right to equality
 - 75.2 Privacy and reputation
 - 75.3 Freedom of expression
 - 75.4 Freedom of thought, conscience, religion and belief
 - 75.5 Cultural rights
 - 75.6 Right to life
- 76 Each of the rights engaged or limited is discussed below.

Protection from medical treatment without full, free and informed consent

- 77 In my opinion, the Order **limits** this right because its practical effect is to require a person to choose between being vaccinated or to not attend open premises such as cinemas, restaurants, swimming pools and gyms.
- 78 I note that this position is consistent with adopted by the New Zealand Government in recent litigation in which mandatory vaccination orders were challenged and which an equivalent right was considered. The New Zealand High Court has accepted the correctness of that position on three occasions: *GF v Minister of COVID-19 Response* [2021] NZHC 2526 at [70]; *Four Aviation Security Service Employees v Minister of Covid-19 Response* [2021] NZHC 3012 at [28]; and *Four Midwives v Minister for COVID-19 Response* at [38].

Freedom of movement

- 79 The right to freedom of movement will be limited where a person is prevented from moving to, or from a particular place.
- 80 In my opinion, the Order **limits** this right because it prevents a person from attending a particular place — namely, open premises — if they are unvaccinated.
- 81 This position is consistent with that adopted by the New South Wales Supreme Court in *Kassam v Hazzard* [2021] NSWSC 1320 at [70], recognising that the Court was there concerned with the

common law right to movement (not the Charter right). An appeal from that decision was dismissed: see *Kassam v Hazzard* [2021] NSWCA 299 at [111], [175].

Right to equality

82 This right is **engaged** in the following ways:

82.1 To the extent that the Order treats persons who are not vaccinated unfavourably on the basis of that status that may engage the right to equality because it could amount to indirect discrimination where the effect of the Order is to discriminate against a cohort of persons with a protected attribute.

82.2 A requirement to be vaccinated in order to access certain goods or services at an open premises may disadvantage people who object to taking the relevant vaccines for a variety of reasons, including those based on religious, cultural and personal health views and other belief systems. Whilst the latter are unlikely to involve attributes protected by the EO Act, religion and race are protected attributes, as is disability.

82.3 An exception to the requirement is provided 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. The requirement will therefore not be imposed on people with disabilities that preclude them being vaccinated.

82.4 A vaccination condition may disadvantage some people with protected attributes, including in relation to age, on the basis of that attribute. It is however noted that such a limitation will not constitute indirect discrimination if it is reasonable.

83 For those reasons, I consider that the Order engages the right. However in my opinion, the right is not limited by the Order because unreasonableness is a precondition to a finding of indirect discrimination. I consider the Order to be reasonable having regard to the matters set out in the Statement of Reasons.

Privacy and reputation

84 In my opinion, the Order engages the right to privacy because it operates to maintain a system which requires all patrons above the age of 18 years to show acceptable evidence that a person is fully vaccinated or an excepted person. Patrons of an open premises are required to comply with the operator's system. This obligation effectively requires those people required to provide this information to have taken steps to receive a vaccination or be subject to certain restrictions, including exclusion from that specified business or from a specified venue.

85 Further, the right to privacy includes a right to respect for bodily integrity. However, the Order does not force anyone to receive a COVID-19 vaccine. I therefore do not consider that the Order engages this aspect of the right.

86 Although the Order engages the right to privacy, in my opinion, it is not limited by the Order. That is because the right to privacy is not limited by a restriction unless the restriction is unlawful or arbitrary. Here, the restriction is authorised by the PHW Act and is therefore lawful.

87 Taking into account the matters set out in the Statement of Reasons and this Statement, my opinion is that the restrictions imposed by the order on privacy are not arbitrary.

Freedom of thought, conscience, religion and belief, freedom of expression and cultural rights

88 These rights are **engaged** in the following ways:

88.1 The requirement to show evidence of being vaccinated might be taken by some as a limit on those persons' rights to hold an opinion about vaccination without interference or that this would constitute an interference with their cultural or religious rights.

88.2 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.

88.3 However, the Order does not have the effect of altering or limiting a person's beliefs about vaccinations or restrict people from engaging in their cultural or religious practices in other ways, although they may require people to act inconsistently with those beliefs if they wish to be able to receive services from those specified businesses subject to the Orders.

89 For the above reasons, although this right is engaged, my opinion is that it is not limited by the Order.

Right to life

90 I consider the differential treatment of workers and patrons at open premises based on vaccination status assists in protecting vulnerable cohorts' right to life.

91 For that reason, the right to life may be **positively engaged** by the Order. However, in my opinion, it is not limited by the Order.

Importance of purpose of limitations

92 The purpose of the Order, and thus of the limitations, is set out under the heading *Purpose* in the schedule to the Statement of Reasons that relates to this order.

93 That is an important purpose.

Relationship between limitations and purpose

94 There is a rational connection between the limits imposed on human rights and the purpose identified in the Statement of Reasons.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

95 This issue is considered under the heading *Whether there are any less restrictive alternatives that are reasonably available to protect public health* in the schedule to the Statement of Reasons that relates to this order.

SCHEDULE 3 – PANDEMIC (WORKPLACE) ORDER 2022 (NO. 5)

Nature and extent of limitations

- 96 As noted in the Statement of Reasons for the Order, in my opinion, the obligations imposed by the order will **limit** the following human rights:
- 96.1 Right to equality
 - 96.2 Freedom of movement
 - 96.3 Peaceful assembly and freedom of association
 - 96.4 Protection of families and children
 - 96.5 Cultural rights
- 97 Further, in my opinion, the obligations imposed by the order will **engage**, but not limit, the following human rights:
- 97.1 Privacy and reputation
 - 97.2 Freedom of thought, conscience, religion and belief
 - 97.3 Freedom of expression
 - 97.4 Property rights
 - 97.5 Right to liberty and security of persons
 - 97.6 Right to humane treatment when deprived of liberty
 - 97.7 Right to life
- 98 Each of the rights limited or otherwise engaged is discussed below.

Right to equality

- 99 In my opinion, the Order **limits** this right because:
- 99.1 A worker must not attend a work premises if they have been tested for COVID-19 because they are symptomatic and they are awaiting the result of that test.
 - 99.2 An employer must not require a worker to perform work if the worker is displaying one or more COVID-19 symptoms. An employer who has become aware of a suspected case must advise the worker to self-isolate immediately by either directing the worker to travel home immediately or to self-isolate and socially distance at the work premises, and must advise the worker to be tested for COVID-19 as soon as possible. A worker who receives a positive test result for COVID-19 must notify the operator of their work premises if the worker attended an indoor space at the work premises during their infectious period.

- 99.3 These restrictions can amount to unfavourable treatment on the basis of disability by requiring workers symptomatic with COVID-19 to return home or to self-isolate and socially distance at the work premises, and to take a COVID-19 test if the worker has not already done so.

Freedom of movement

100 In my opinion, the Order **limits** this right because:

- 100.1 A worker must not attend a work premises if they have been tested for COVID-19 because they are symptomatic and they are awaiting the result of that test.
- 100.2 An employer who has become aware of a suspected case or probable case must advise the worker to self-isolate immediately by either directing the worker to travel home immediately or to self-isolate and socially distance at the work premises, and must advise the worker to be tested for COVID-19 as soon as possible.
- 100.3 Freedom of movement of persons in Victoria who are going to work is therefore limited if the worker is symptomatic for COVID-19 or otherwise is a suspected case or probable case and the Order prevents the person from going to work.

Peaceful assembly and freedom of association

101 In my opinion, the Order **limits** this right because:

- 101.1 A worker must not attend a work premises if they have been tested for COVID-19 because they are symptomatic and they are awaiting the result of that test.
- 101.2 An employer must not require a worker to perform work if the worker is displaying one or more COVID-19 symptoms. An employer who has become aware of a suspected case must advise the worker to self-isolate immediately by either directing the worker to travel home immediately or to self-isolate and socially distance at the work premises, and must advise the worker to be tested for COVID-19 as soon as possible.
- 101.3 The Order limits this right because persons who are self-quarantining/isolating cannot freely gather with others, including to peacefully to pursue common interests or further common purposes (including for a demonstration).

Protection of families and children, and cultural rights

102 In my opinion, the Order **limits** these rights because:

- 102.1 An employer who has become aware of a suspected case or probable case must advise the worker to self-isolate immediately by either directing the worker to travel home immediately or to self-isolate and socially distance at the work premises, and must advise the worker to be tested for COVID-19 as soon as possible.
- 102.2 A worker who has been notified that they may have been exposed to COVID-19 must self-quarantine immediately; must take a COVID-19 test within 24 hours; must remain in self-quarantine until they receive a negative test result; and must notify the operator of the work premises of their test result.

102.3 For workers who must self-quarantine under the Order and choose to self-quarantine away from their family, this can cause disruptions in relationships, economic difficulties, isolation from culture and traditions, and uncertainty and anxiety. Self-isolation and self-quarantine measures can therefore be characterised as an incursion into the right to protection of families and children.

102.4 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.

Privacy and reputation

103 In my opinion, the Order **engages** the right to privacy because:

103.1 An employer must keep a record of all persons who attend the work premises, must use the Victorian Government QR code system and must provide an alternative record-keeping system for people who cannot use the QR code system, with some exceptions.

103.2 A worker who receives a positive test result for COVID-19 must notify the operator of their work premises if the worker attended an indoor space at the work premises during their infectious period.

103.3 As soon as an employer becomes aware that a diagnosed person has attended the work premises during the person's infectious period, the operator must notify the Department and the health and safety representative at the work premises; must advise all workers to be tested for COVID-19 and self-quarantine if they become symptomatic; and must put in place appropriate control and/or risk management measures to reduce the risk of spreading COVID-19.

103.4 A worker who has been notified that they may have been exposed to COVID-19 must self-quarantine immediately; must take a COVID-19 test within 24 hours; must remain in self-quarantine until they receive a negative test result; and must notify the operator of the work premises of their test result.

103.5 This information would constitute personal and health information and its provision would therefore be an interference with privacy. They are subject to existing privacy legislation and principles, as referred to in the Order. Details sought are limited to those necessary to contact trace if necessary.

104 However, although the Order engages the right to privacy, in my opinion, it is not limited by the Order. That is because the right to privacy is not limited by a restriction unless the restriction is unlawful or arbitrary. Here, the restriction is authorised by the PHW Act and is therefore lawful.

105 Further:

105.1 An employer must not collect personal information unless it is necessary under the Order, and must use reasonable endeavours to protect the personal information from use or disclosure. The personal information is intended to be destroyed 28 days after collection except where permitted or required to be retained. Recordkeeping

obligations have been relaxed so that less information is required to be collected, and the collected information is required to be shared with fewer entities.

105.2 While an incursion on privacy, the Order is not an arbitrary incursion because only the details required to establish risk and contact trace are sought.

106 Having regard to those matters, and the other matters set out in the Statement of Reasons, the restrictions imposed by the Order are not arbitrary.

Freedom of thought, conscience, religion and belief, and freedom of expression

107 In my opinion, this right is **engaged** because:

107.1 The Order creates a significant impost on business owners, employers, property owners, and workers to comply with public health policy measures that are frequently updated to adapt to a fluid disease. The Order creates responsibilities to collect information, to self-quarantine if symptomatic, to send workers home if symptomatic or a probable case, and to use the Victorian Government QR code system, among others.

107.2 Those who are firmly opposed to restrictions on their daily activities may argue that the requirements the Order creates limits their rights to hold an opinion about the pandemic or its management without interference. The Order does not preclude a person from holding an opinion or belief either for, or against, the Order, management of the pandemic response, or the pandemic. The Order penalises non-compliance but does not have the effect of altering or limiting a person's beliefs and does not fully inhibit those beliefs from being expressed or shared while complying with the Order, such as through online engagement.

107.3 For those reasons, although the Order engages the right, in my opinion, it is not limited by the Order.

Property rights

108 In my opinion, this right is **engaged** in the following ways:

108.1 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.

108.2 This Order may have the effect of interfering with the rights of property owners and other persons with property rights, whose use or enjoyment of the property (real or personal) will be affected by the operation of the Order. The Order might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property. If the business and its assets are owned by an individual, and that reduction in capacity continues for a lengthy period of time, it may over time become a substantial restriction on the use of a person's property.

108.3 The Order does not currently create a deprivation of property merely by impacting some workforce capacity and imposing some relaxed administrative requirements such as recordkeeping (noting that QR codes are no longer required for lower-risk premises and density quotients have now been removed), although it is an impediment to business. Nonetheless, even if the Orders impose measures that constitute a deprivation of

property, it will occur in accordance with law. Lawful and non-arbitrary interference with property will engage, but not limit, property rights.

108.4 Here, the restriction is authorised by the PHW Act and is therefore lawful. Further, having regard to the public health advice given by the Chief Health Officer and the matters discussed in my Statement of Reasons, the restrictions imposed by the Order are not arbitrary.

108.5 For those reasons, although the Order engages the right, in my opinion, it is not limited by the Order.

Right to liberty and security of persons, and humane treatment when deprived of liberty

109 In my opinion, these rights are **engaged** because:

109.1 An employer who has become aware of a suspected case or probable case must advise the worker to self-isolate immediately by either directing the worker to travel home immediately or to self-isolate and socially distance at the work premises, and must advise the worker to be tested for COVID-19 as soon as possible.

109.2 A worker who has been notified that they may have been exposed to COVID-19 must self-quarantine immediately; must take a COVID-19 test within 24 hours; must remain in self-quarantine until they receive a negative test result; and must notify the operator of the work premises of their test result.

109.3 Requirements of self-isolation and self-quarantine place significant restrictions on the ability of people to move freely.

110 However, the right to liberty and security is not limited by a restriction unless the restriction is unlawful or arbitrary. Here, the restriction is authorised by the PHW Act and is therefore lawful.

111 Further, the Order requires exposed persons to self-quarantine only for the time the medical evidence suggests is appropriate to make sure that a person is not at risk of transmitting COVID-19.

112 Having regard to those matters, and the other matters set out in the Statement of Reasons, the restrictions imposed by the Order are not arbitrary.

113 Accordingly, in my opinion, although the Order engages the right to liberty and security, in my opinion, it is not limited by the Order.

114 Because the right to liberty and security is not limited, no issue arises about humane treatment when deprived of liberty (because the threshold is not met). Therefore, in my opinion, it is not limited.

Right to life

115 The right to life may be positively **engaged** by the Order. However, in my opinion, it is not limited by the Order.

Importance of purpose of limitations

116 The purpose of the Order, and thus of the limitations, is set out under the heading *Purpose* in the schedule to the Statement of Reasons that relates to this order.

117 That is an important purpose.

Relationship between limitations and purpose

118 There is a rational connection between the limits imposed on human rights and the purpose identified in the Statement of Reasons.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

119 This issue is considered under the heading *Whether there are any less restrictive alternatives that are reasonably available to protect public health* in the schedule to the Statement of Reasons that relates to this order.

SCHEDULE 4 – PANDEMIC (VICTORIAN BORDER CROSSING) ORDER 2022 (NO. 5)

Nature and extent of limitations

120 As noted in the Statement of Reasons for the Order, in my opinion, the obligations imposed by the order will **limit** the following human rights:

120.1 Right to equality;

120.2 Protection from medical treatment without full, free and informed consent;

120.3 Freedom of movement;

120.4 Protection of families and children; and

120.5 Cultural rights.

121 Further, in my opinion, the obligations imposed by the order will **engage**, but not limit, the following human rights:

121.1 Privacy and reputation;

121.2 Freedom of thought, conscience, religion and belief;

121.3 Freedom of expression;

121.4 Right to liberty and security of persons;

121.5 Humane treatment when deprived of liberty; and

121.6 Right to life.

122 Each of the rights limited or otherwise engaged is discussed below.

Right to equality

123 In my opinion, this right is **limited** in the following ways:

123.1 This Order imposes self-quarantine (for some), testing, and permit requirements (including the disclosure of some personal and medical information) on international aircrew services workers and international passenger arrivals which are more onerous than the settings for people in Victoria who have not visited another country in the past 7 days.

123.2 These restrictions can amount to unfavourable treatment on the basis of disability, or association with a person with a disability, by requiring people imputed to have higher risk of infection with COVID-19 to self-quarantine. It may also amount to unfavourable treatment on the basis of employment activity for international aircrew services workers who must be tested frequently or must self-quarantine.

123.3 The definition of international passenger arrival now excludes international maritime arrivals, who receive detention notices from CQV and will be covered by those notices.

Freedom of movement

124 Relevantly, the right to freedom of movement will be limited where a person is prevented from moving to, or from a particular place.

125 In my opinion, this right is **limited** because:

125.1 An international aircrew services worker who is not fully vaccinated or medically exempt must self-quarantine for 7 days after arrival unless undertaking essential activities.

125.2 Adolescents who are not fully vaccinated and are not medically exempt must self-quarantine until the eighth day after arrival in Australia, unless undertaking essential activities. If the person arrived in Victoria after the end of the self-quarantine period, the person is not required to self-quarantine. While in self-quarantine, the person must not share spaces or facilities at the self-quarantine premises. There is a broad exemption power to any part of the Order held by senior officials in the Department. If an exemption is granted, the recipient must carry evidence of the exemption, any applicable documentary evidence, and a form of identification.

Protection of families and children, and cultural rights

126 In my opinion, these rights are **limited** in the following ways:

126.1 International aircrew services workers are required to self-quarantine depending on their vaccination status and time of arrival.

126.2 An international passenger arrival in self-quarantine must not share spaces or facilities at the premises while self-quarantining.

126.3 There is a broad exemption power to any part of the Order held by senior officials in the Department. If an exemption is granted, the recipient must carry evidence of the exemption, any applicable documentary evidence, and a form of identification.

126.4 Given that children under 5 years 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 disruptions in relationships, economic difficulties, isolation from culture and traditions, and uncertainty and anxiety. Quarantine measures can be characterised as an incursion into the right of protection of families and children where international passenger arrivals or international aircrew services workers persons may have family events (such as school concerns or hospital admissions) and are prevented from being together, or children are not supported by their families on important occasions.

126.5 Self-isolation or self-quarantine measures 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. Where such events are time sensitive, such as a burial or other cultural or religious event, the requirement to remain in isolation or quarantine may be particularly onerous.

Protection from medical treatment without full, free and informed consent

127 In my opinion, the Order **limits** this right because:

127.1 The Order imposes obligations on persons to be tested for COVID-19. A worker who remains in Victoria for 48 hours or longer must have completed a pre-departure COVID-19 test unless the worker is operating turnaround flights and all the workers on that flight remain airside. A worker who is fully vaccinated or medically exempt and who remains in Victoria for 48 hours must complete a COVID-19 test within 24 hours of arrival in Victoria. A worker who is not fully vaccinated and not medically exempt must complete a COVID-19 test within 24 hours of arrival in Victoria.

127.2 An international passenger arrival must take a COVID-19 test within 24 hours of arrival into Australia (if within 24 hours of arrival the person is in Victoria).

127.3 COVID-19 tests will either be PCR or rapid antigen tests as set out in the Departmental document titled “International arrivals and aircrew testing requirements”.

127.4 I have assumed that taking a test for COVID-19 constitutes a medical treatment, although I note this is a cautious interpretation: see *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] VSC 111 at [159]-[160]. In New Zealand, the taking of a swab to obtain a bodily sample for forensic purposes has been held not to be medical treatment,³⁸ however, the taking of a blood sample for the purposes of determining paternity was considered medical treatment.³⁹

Privacy and reputation

128 In my opinion, the Order **engages** the right to privacy because:

128.1 A person must provide information, including if applicable evidence of any COVID-19 PCR test results and international acceptable evidence or certification to show that they are fully vaccinated or medically exempt. The information required to be disclosed and carried by these Orders is intended to be limited to that necessary to identifying which people are at risk of becoming infected with COVID-19, and which of those people arriving from outside Australia are known to the Department (so that their risk of transmission of COVID-19 is also known).

129 The right to privacy will not be limited by being restricted, as long as those restrictions are not unlawful or arbitrary. Here, the restriction is authorised by the PHW Act and is therefore lawful.

130 The restrictions on privacy are not arbitrary because the information sought is not capricious and is based on the identifiable criterion of information necessary to identify people who are at

³⁸ *Taylor v Attorney-General* HC Auckland CIV-2010-485-226, 9 July 2011, [32] and [36] and the cases considered therein.

³⁹ *Cairns v James* [1992] NZFLR 353 (HC), 356.

risk of becoming infected with COVID-19. Having regard to those matters, and the other matters set out in the Statement of Reasons, the restrictions imposed by the Order are not arbitrary.

131 For those reasons, although the Order **engages** the right to privacy, in my opinion, it is not limited by the Order.

Freedom of thought, conscience, religion and belief, and freedom of expression

132 In my opinion, these rights are **engaged** but not limited because:

132.1 Those who are firmly opposed to restrictions on their daily activities may argue that the requirements the Order creates limits their rights to hold an opinion about the pandemic or its management without interference.

132.2 However, the Order does not preclude a person from holding an opinion or belief either for, or against, the Order, management of the pandemic response, or the pandemic. The Order penalises non-compliance but do not have the effect of altering or limiting a person's beliefs and do not fully inhibit those beliefs from being expressed or shared while complying with the Order, such as through online engagement.

132.3 For those reasons, although the Order **engages** the rights to freedom of thought, conscience, religion and belief, and freedom of expression, in my opinion, they are not limited by the Order.

Right to liberty and security of persons, and humane treatment when deprived of liberty

133 In my opinion, these rights are **engaged** but not limited because:

133.1 An international aircrew services worker who is not fully vaccinated or medically exempt must travel directly into self-quarantine and may only leave the vehicle for certain specified purposes. The worker must self-quarantine for 7 days after arrival unless undertaking essential activities.

133.2 An adolescent international passenger arrival who is not fully vaccinated and not medically exempt must travel directly into self-quarantine and may only leave the vehicle for certain specified purposes and must remain in self-quarantine until the 8th day after arrival unless undertaking essential activities. While in self-quarantine, the person must not share spaces or facilities at the self-quarantine premises.

133.3 The requirements of self-isolation and self-quarantine place significant restrictions on the ability of people to move freely. The right to liberty has been described as 'the most elementary and important of all common law rights' in *R v Foster* (1993) 113 ALR 1, 8.

133.4 However, the right to liberty and security is not limited by a restriction unless the restriction is unlawful or arbitrary. Here, the restriction is authorised by the PHW Act and is therefore lawful.

133.5 The Order deprives people of liberty only for the time the medical evidence suggests is appropriate to make sure that a person is not at risk of transmitting COVID-19, depending on whether a person is fully vaccinated or not and medically exempt or not, keeping in mind that variants of COVID-19 outside of Australia are different and not as

well known by local science. The right to liberty is not limited because the period of self-quarantine is made under law is necessary to address the epidemiological risk, making the period of detention not arbitrary.

134 For those reasons, although the Order engages the right, in my opinion, it is not limited by the Order.

135 Because the right to liberty and security is not limited, no issue arises about humane treatment when deprived of liberty (because the threshold is not met). Therefore, in my opinion, it is not limited.

Right to life

136 The right to life may be **engaged** in that it is promoted by the Order. In my opinion, it is not limited by the Order.

Importance of purpose of limitations

137 The purpose of the Order, and thus of the limitations, 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.

138 That is an important purpose.

Relationship between limitations and purpose

139 There is a rational connection between the limits imposed on human rights and the purpose identified in the Statement of Reasons.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

140 This issue is considered under the heading *Whether there are any less restrictive alternatives that are reasonably available to protect public health* in the schedule to the Statement of Reasons that relates to this order.

SCHEDULE 5 – PANDEMIC (DETENTION) ORDER 2022 (NO. 4)

Nature and extent of limitations

141 As noted in the Statement of Reasons for the Order, in my opinion, the obligations imposed by the order will **limit** the following human rights:

141.1 Right to equality;

141.2 Protection from medical treatment without full, free and informed consent;

141.3 Freedom of movement;

141.4 Protection of families and children; and

141.5 Cultural rights.

142 Further, in my opinion, the obligations imposed by the order will **engage**, but not limit, the following human rights:

142.1 Privacy and reputation;

142.2 Freedom of thought, conscience, religion and belief;

142.3 Freedom of expression;

142.4 Right to liberty and security of persons;

142.5 Humane treatment when deprived of liberty; and

142.6 Right to life.

143 Each of the rights limited or otherwise engaged is discussed below.

Right to equality

144 In my opinion, the Order **limits** the right because:

144.1 A person who arrives in Victoria from outside of Australia who is not fully vaccinated or a medically exempted person (subject to other conditions) may be detained at a place specified by the authorised officer for a period specified in Schedule 2 of the Order or earlier until tested. The imposition has now decreased because the length of hotel quarantine has been halved from 14 to 7 days, but the limitation to the right does remain for that shorter period.

144.2 A detained person may only leave the place of detention for specified purposes and may not permit any other person from entering the place of detention unless that other person is lawfully authorised to do so, is detained at the same place, or ordinarily resides with the person under detention.

144.3 A person may stay with a detained person who is a minor or who has a disability or medical condition which requires support or treatment, if the person submits to the same conditions of detention.

144.4 These restrictions can amount to unfavourable treatment on the basis of disability, or association with a person with a disability (otherwise characterisable as a person imputed to have a disability), by requiring people with the imputed disability of possible infection with COVID-19 to be detained, and requiring people seeking to care for certain persons with that imputed disability to stay at the place of detention under the same conditions.

Freedom of movement

145 Relevantly, the right to freedom of movement will be limited where a person is prevented from moving to, or from a particular place.

146 In my opinion, the Order **limits** this right because it requires the detention – a severe restriction on freedom of movement - of 'persons of risk' for the period specified in the Order.

Protection of families and children, and cultural rights

147 In my opinion, the Order **limits** these rights because:

147.1 If the detained person has family in Victoria, this person is unable to be reunited with family for the period of detention.

147.2 A detained person may permit a person to enter the place of detention if the person ordinarily resides with the person under detention. A person may stay with a detained person who is a minor or who has a disability or medical condition which requires support or treatment, if the person submits to the same conditions of detention. Other members of the detained person's family cannot enter or join them in detention.

147.3 For detained persons separated from their family, the detention can cause disruptions in relationships, economic difficulties, isolation from culture and traditions, and uncertainty and anxiety. Detention can therefore be characterised as an incursion into the right to protection of families and children.

147.4 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.

Protection from medical treatment without full, free and informed consent

148 In my opinion, the Order **limits** this right because:

148.1 Although the Order does not impose an obligation to be tested, persons may be requested to be tested while they are detained.

Privacy and reputation

149 In my opinion, the Order **engages** the right to privacy because:

- 149.1 A detained person may only leave the place of detention for specified purposes and may not permit any other person from entering the place of detention unless that other person is lawfully authorised to do so, is detained at the same place, or ordinarily resides with the person under detention. To demonstrate that leaving or a visit is for a purpose permitted under the Order, a detained person necessarily needs to disclose information, some of which will be personal and some of which will be medical. Being monitored will also erode a person's privacy while they are being detained. This may include being asked questions about where the person is and what they are doing, or a view into the person's place of detention which may show personal items and activities.
- 149.2 A person may stay with a detained person who is a minor or who has a disability or medical condition which requires support or treatment, if the person submits to the same conditions of detention. Again, to arrange these conditions would require a disclosure of personal and/or medical information.
- 149.3 The degree of information required to be disclosed by this Order is intended to be limited to that necessary to identifying the level of risk in relation to a proposed activity measured as against the purposes permitted by the Order.
- 150 However, although the Order engages the right to privacy, in my opinion, it is not limited by the Order. That is because the right to privacy is not limited by a restriction unless the restriction is unlawful or arbitrary. Here, the restriction is authorised by the PHW Act and is therefore lawful.
- 151 Further:
- 151.1 The information sought is not so much that the incursion into privacy is disproportionate to the purpose and is therefore arbitrary; and
- 151.2 A person is only detained for a period considered epidemiologically necessary to address the risk that a person coming into Victoria from outside of Australia is capable of transmitting COVID-19 to those in the community.
- 152 Having regard to that matter, and the other matters set out in the Statement of Reasons, the restrictions imposed by the Order are not arbitrary.

Freedom of thought, conscience, religion and belief, and freedom of expression

- 153 In my opinion, the Order **engages** these rights because:
- 153.1 Those who are firmly opposed to restrictions on their daily activities may argue that the requirements the Order creates limits their rights to hold an opinion about the pandemic or its management without interference. The Order does not preclude a person from holding an opinion or belief either for, or against, the Order, management of the pandemic response, or the pandemic. The Order does not preclude a person from expressing those beliefs and, indeed, expressions of opinion can occur while detained and fully complying with the Order. The Order penalises non-compliance but does not have the effect of altering or limiting a person's beliefs and does not fully inhibit those beliefs from being expressed or shared while complying with the Order, such as through online engagement or complaint.
- 153.2 Online engagement is also available for those wishing to practice their religious or cultural beliefs, and many such activities can be performed alone. The mere fact of a limited

period of detention does not prevent a person from believing in their religion or expressing their cultural values, even if detained in one location and unable to meet face-to-face with other adherents except in very limited circumstances.

Right to liberty and security of persons, and humane treatment when deprived of liberty

- 154 In my opinion, the Order **engages** these rights because detention places significant restrictions on a person's ability to move freely.
- 155 However, the right to liberty and security is not limited by a restriction unless the restriction is unlawful or arbitrary. Here, the restriction is authorised by the PHW Act and is therefore lawful.
- 156 Further, people are detained only for the time the medical evidence suggests is reasonably necessary to make sure that a person is not at risk of transmitting COVID-19. That period has been shortened from 14 to 7 days to align with the self-quarantine period for local close contacts.
- 157 Having regard to those matters, and the other matters set out in the Statement of Reasons, the restrictions imposed by the Order are not arbitrary.
- 158 Accordingly, in my opinion, although the Order engages the right to liberty and security, in my opinion, it is not limited by the Order.
- 159 Because the right to liberty and security is not limited, no issue arises about humane treatment when deprived of liberty (because the threshold is not met). Therefore, in my opinion, it is not limited.

Right to life

- 160 The right to life may be positively engaged by the Order. In my opinion, it is not limited by the Order.

Importance of purpose of limitations

- 161 The purpose of the Order, and thus of the limitations, is set out under the heading *Purpose* in the schedule to the Statement of Reasons that relates to this Order.
- 162 That is an important purpose.

Relationship between limitations and purpose

- 163 There is a rational connection between the limits imposed on human rights and the purpose identified in the Statement of Reasons.

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

- 164 This issue is considered under the heading *Whether there are any less restrictive alternatives that are reasonably available to protect public health* in the schedule to the Statement of Reasons that relates to this Order.

SCHEDULE 6 – PANDEMIC (VISITORS TO HOSPITALS AND CARE FACILITIES) ORDER 2022 (NO. 3)

Nature and extent of limitations

165 As noted in the Statement of Reasons for the Order, in my opinion, the obligations imposed by the order will **limit** the following human rights:

165.1 Right to equality;

165.2 Freedom of movement;

165.3 Protection of families and children; and

165.4 Cultural rights.

166 Further, in my opinion, the obligations imposed by the order will **engage**, but not limit, the following human rights:

166.1 Right to life; and

166.2 Privacy and reputation.

167 Each of the rights limited or otherwise engaged is discussed below.

Right to equality

168 In my opinion, the Order **limits** this right because:

168.1 A person must not enter or remain at a hospital or a care facility unless a patient or resident, a worker, a visitor who is not prohibited under the Order, a prospective resident of the care facility, or permitted under an exception in the Order such as breastfeeding, end-of-life support, or immediate family members for patients whose medical condition is life threatening.

168.2 A person permitted to enter must provide evidence of full vaccination or a negative test result for a COVID-19 rapid antigen test or PCR test. Visitors providing end-of-life support to a hospital patient or care facility resident are capped.

168.3 Greater discretion can now be exercised to permit exemptions from ordinary visitation exclusions, but the case-by-case approval process by a decision-maker remains in place.

168.4 These restrictions can amount to unfavourable treatment on the basis of disability, or association with a person with a disability (otherwise characterisable as a person imputed to have a disability), by prohibiting 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).

Freedom of movement

169 In my opinion, the Order **limits** this right because:

169.1 The Order imposes limitations on entry and caps on numbers of visitors to a hospital or a care facility, subject to a set of broader exemptions. Limitations and caps are imposed where the risk of COVID-19 transmission is higher or unknown. That higher or unknown risk may be temporary (such as in the case of a close contact), or some hospital or care facility stays are temporary (such as minor inpatient procedures).

169.2 Freedom of movement of persons in Victoria in visiting hospitals and care facilities is therefore limited because it does not allow a person to travel without impediment through places used by the public. However, this limitation is only temporary given that no person is wholesale excluded.

Protection of families and children

170 In my opinion, the Order **limits** this right because:

170.1 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.

170.2 The Order also imposes restrictions on family members visiting patients or residents.

170.3 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.

170.4 Where children seek to have family contact, limitations on their in-person visitation rights may not be in their best interests in every circumstance.

170.5 There is therefore an incursion into the protection of families and children when they cannot meet face-to-face in a time when a relative, who is a patient or a resident, would appreciate the comfort and connection.

171 However, the Order does not inhibit non-physical means of communication. Care facilities must take all reasonable steps to ensure that alternative forms of contact are facilitated for residents.

Cultural rights

172 In my opinion, the Order **limits** this right because:

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

172.2 For Aboriginal persons who have connection with country, restrictions on visitors may have even more of an isolating effect when patients, residents, or visitors are already away from ancestral lands.

172.3 There is therefore an incursion on the right of persons with a particular cultural, religious, racial or linguistic background to practise their culture, religion, or language to the extent that this can be done by face-to-face visits.

172.4 On the other hand, many people enjoy their culture, religion, or language through many dimensions beyond face-to-face engagement. These alternative avenues are available to family and friends seeking to exercise cultural, religious, racial or linguistic practices if they fall within the population of persons temporarily limited from visiting a person in a hospital or care facility, either because of visitor caps or COVID-19 symptoms.

Right to life

173 The right to life may be positively engaged by the Order, as it will reduce the risk of transmission of COVID-19 in aged care and hospital settings where there are particularly vulnerable populations. However, in my opinion, it is not limited by the Order.

Privacy and reputation

174 In my opinion, the Order engages the right to privacy because:

174.1 Hospitals are required to keep records of the contact details of people who visit, and their dates and times of entry and exit.

174.2 Visitors to care facilities are required to make a declaration that they are free of COVID-19 symptoms, have not been in contact with a confirmed case or are required to self-isolate or self-quarantine, and show proof of a negative COVID-19 rapid antigen test if relevant.

174.3 Case-by-case approval processes for exemptions to permit visitors to hospitals requires the disclosure of personal information to demonstrate why the exemption is justified.

174.4 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.

175 However, although the Order engages the right to privacy, in my opinion, it is not limited by the Order. That is because the right to privacy is not limited by a restriction unless the restriction is unlawful or arbitrary. Here, the restriction is authorised by the PHW Act and is therefore lawful.

176 Further:

176.1 Records are subject to existing privacy legislation and principles in settings where there are already protocols and culture requiring maintenance of patient or resident confidentiality.

176.2 Details sought are limited to those necessary to establish risk of COVID-19 or to contact trace if anyone involved in the visit tests positive to COVID-19. Only the details required to establish risk and contact trace are sought.

177 Having regard to those matters, and the other matters set out in the Statement of Reasons, the restrictions imposed by the Order are not arbitrary.

Importance of purpose of limitations

178 The purpose of the Order, and thus of the limitations, is set out under the heading *Purpose* in the schedule to the Statement of Reasons that relates to this Order.

Relationship between limitations and purpose

179 There is a rational connection between the limits imposed on human rights and the purpose identified in the Statement of Reasons.

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

Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

181 This issue is considered under the heading *Whether there are any less restrictive alternatives that are reasonably available to protect public health* in the schedule to the Statement of Reasons that relates to this Order.