

Minister for Health

Statement of Reasons

Pandemic Orders made on 18 February 2022

On 18 February 2022, I Martin Foley, Minister for Health, made the following pandemic orders under section 165A1 of the *Public Health and Wellbeing Act 2008*:

Pandemic (Additional Industry Obligations) Order 2022 (No. 7)
Pandemic (Open Premises) Order 2022 (No. 5)
Pandemic (Workplace) Order 2022 (No. 5)
Pandemic (Victorian Border Crossing) Order 2022 (No. 5)
Pandemic (Detention) Order 2022 (No. 4)
Pandemic (Visitors to Hospitals and Care Facilities) Order (No. 3)

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

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About the pandemic orders

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

Statutory power to make pandemic orders

- 2 Under section 165AI of the PHW Act, I may, at any time on or after the making of a pandemic declaration by the Premier under s 165AB (or extended under s 165AE(1)), make any order that I believe is reasonably necessary to protect public health. The Premier made a pandemic declaration on 9 December 2021 and then extended the pandemic declaration from 12 January 2022, on the basis that he was satisfied on reasonable grounds that there is a serious risk to public health throughout Victoria arising from the coronavirus (COVID-19) pandemic disease.
- 3 Pursuant to section 165AL(1), before making a pandemic order, I must request the advice of the Chief Health Officer in relation to the serious risk to public health posed by the disease specified in the pandemic declaration, and the public health measures that the Chief Health Officer considers are necessary or appropriate to address this risk.
- 4 On 17 January 2022, the Acting Minister for Health requested advice from the Chief Health Officer in relation to additional measures that could be put in place in response to the Omicron variant of concern. I received the Chief Health Officer's written advice on 21 January 2022. That advice is supplemented by:
 - 4.1 the Chief Health Officer's advice provided on 10 December 2021;
 - 4.2 verbal advice the Chief Health Officer provided on 14 December 2021;
 - 4.3 written advice the Chief Health Officer provided on 23 December 2021;
 - 4.4 verbal advice the Acting Chief Health Officer provided on 29 December 2021;
 - 4.5 verbal advice the Acting Chief Health Officer provided on 30 December 2021;
 - 4.6 verbal advice the Acting Chief Health Officer provided on 4 January 2022;
 - 4.7 written advice the Acting Chief Health Officer provided on 10 January 2022;
 - 4.8 verbal advice the Chief Health Officer provided on 19 January 2022;
 - 4.9 verbal advice the Chief Health Officer and Deputy Premier provided on 24 January 2022;
 - 4.10 verbal advice the Chief Health Officer provided on 1 February 2022;
 - 4.11 verbal advice the Chief Health Officer provided on 3 February 2022; and
 - 4.12 verbal advice the Chief Health Officer provided on 9 February 2022.

- 4.13 verbal advice the Chief Health Officer provided on 15 February 2022; and
- 4.14 email advice the Chief Health Officer provided on 16 February 2022.
- 5 I have also reviewed the epidemiological data available to me on 17 February 2022 to affirm my positions on the orders made to commence on 18 February 2022.
- 6 Under s 165AL(2), in making a pandemic order, I must have regard to the advice of the Chief Health Officer and may have regard to any other matter that I consider relevant including, but not limited to, social and economic matters. I may also consult any other person that I consider appropriate before making a pandemic order.
- 7 On the basis of the material provided to me by the Department of Health and the advice of the Chief Health Officer and Acting Chief Health Officer, I am satisfied that the proposed pandemic orders are reasonably necessary to protect public health. I consider that the limitations on human rights that will be imposed by the proposed pandemic orders are reasonable and justified in a free and democratic society based on human dignity, equality and freedom. I therefore make these pandemic orders under s 165AI of the PHW Act.

Guiding principles

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

Principle of evidence-based decision-making

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

Precautionary principle

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

¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 5.

Principle of primacy of prevention

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

Principle of accountability

- 15 This principle is that persons who are engaged in the administration of this Act should as far as is practicable ensure that decisions are transparent, systematic and appropriate.
- 16 Consistent with this principle, members of the public should be given access to reliable information in appropriate forms to facilitate a good understanding of public health issues, as well as opportunities to participate in policy and program development.
- 17 To promote accountability in the making of pandemic orders, the PHW Act requires that a copy or written record of the Chief Health Officer's advice, a statement of reasons, and a human rights statement (Human Rights Statement) are published in the case of the making, variation or extension of an order.
- 18 All the reasons I have made these orders and the advice that has informed those decisions, as well as the expert assessments of the potential human rights impacts of my decisions, have been published according to this principle.

Principle of proportionality

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

Principle of collaboration

- 21 The principle of collaboration is that public health and wellbeing, in Victoria and at a national and international level, can be enhanced through collaboration between all levels of Government and industry, business, communities and individuals.

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

- 22 Over the past month I have consulted broadly in regard to easing restrictions on elective surgery given the impact of delaying medical services to those in need. I have met with representatives of the Australian Medical Association, Australian Nursing and Midwifery Federation, the Royal Australasian College of Surgeons and representatives of private hospitals. These discussions have assisted in decisions on transitions back to normal operations for public and private hospitals across Victoria.
- 23 On 16 February 2022, I met with Mr Paul Guerra CEO of the Victorian Chamber of Commerce and Industry (VCCI) to outline the arrangements under the Public Health and Wellbeing Act and appropriate settings as the current Omicron wave moves past its peak. I discussed recommendations to remove QR check-in requirements in some settings but retain QR code check-in requirements in vaccinated economy settings (those that are Open Premises for the purposes of the Pandemic (Open Premises) Order. I noted that in consulting with Co-ordinating Ministers of Cabinet colleagues, it was thought that this recommendation (of removing the QR check-in requirement in some lower risk settings while maintaining a requirement for those venues to continue to check vaccination status) may create operational issues for business and be confusing for patrons.
- 24 Mr Guerra noted that some businesses are struggling, particularly in the Melbourne CBD and that any additional burden over and above their normal operating has a cost impost. Mr Guerra also noted that the current QR system enabled the integrated checking of vaccination status without requiring businesses to set up new processes for checking vaccination status without QR code check in. He also said that QR codes are convenient because they're understood.
- 25 Mr Guerra noted that if we can gradually relax different requirements on businesses, including QR codes, this would be welcome. Additionally, Mr Guerra raised the need to signal a timeline for return to offices and removal of the current strong recommendation to work from home.
- 26 The discussion with Mr Guerra, together with input from my Co-ordinating Ministers of Cabinet colleagues, helped to inform my decisions about immediate and future changes to the pandemic orders particularly in terms of supporting business operations and maintaining social licence and the good faith of the Victorian community via easy-to-communicate settings.
- 27 Throughout the pandemic, there has been ongoing consultation between the Deputy Chief Health Officers and the Chief Health Officers of the States and Territories, including through the Australian Health Protection Principal Committee.
- 28 Victoria continues to work with other jurisdictions through National Cabinet to talk through plans for managing COVID-19. Victoria's Roadmap: Delivering the National Plan is aligned with vaccination targets set out in the National Plan to transition Australia's National COVID-19 Response, as agreed by National Cabinet.

Part 8A objectives

- 29 I have also had regard to the objectives of Part 8A in section 165A(1) of the PHW Act, which is to protect public health and wellbeing in Victoria by establishing a regulatory framework that:
- 29.1 prevents and manages the serious risk to life, public health and wellbeing presented by the outbreak and spread of pandemics and diseases with pandemic potential;

- 29.2 supports proactive and responsive decision-making for the purposes of preventing and managing the outbreak and spread of pandemics and diseases with pandemic potential;
- 29.3 ensures that decisions made and actions taken under Part 8A are informed by public health advice and other relevant information including, but not limited to, advice given by the Chief Health Officer;
- 29.4 promotes transparency and accountability in relation to decisions made and actions taken under Part 8A; and
- 29.5 safeguards contact tracing information that is collected when a pandemic declaration is in force.

Human Rights

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

³ Department of Health, Chief Health Officer Advice to Minister for Health (21 January 2022) p. 2; see also Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 4; Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p.3; Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 4.

Overview of public health advice

- 34 Following the Premier making a pandemic declaration on 10 December 2021 I have continued to request the Chief Health Officer and Acting Chief Health Officer’s advice for all Pandemic Orders I have made, including those at hand.
- 35 I have considered the Acting Chief Health Officer’s advice on 9 January 2022, in the context of widespread incidence of Omicron in the community, advised additional public health measures beyond those outlined in the Chief Health Officer’s advice to me on 23 December 2021.⁴

Current context

- 36 Throughout January 2022, Victoria experienced the highest levels of community transmission recorded since the start of the COVID-19 pandemic accounting for nearly three quarters of all cases recorded since the beginning of the pandemic.⁵
- 37 When making this pandemic order, I have had regard to the advice provided by the Chief Health Officer dated 15 February 2022 and 16 February 2022 and the advice identified at paragraph 4 which supplements that advice in the context of all relevant background matters I have identified, including in relation to current outbreak patterns, case numbers, and vaccination rates.
- 38 Most relevantly, the public health advice is that the priority now is to reduce morbidity and mortality and limit the impact of the Omicron variant on Victoria’s most vulnerable residents, our health system and other essential services and sectors through measures aimed at:
- 38.1 reducing the rate at which Victorians become infected (“spreading out the peak”); and
 - 38.2 reducing the number of Victorians who become infected and the number who experience serious illness and require hospitalisation (“lowering the peak”).⁶

Immediate situation: Continued management of the COVID-19 Pandemic according to the Victorian Roadmap to deliver the National Plan

- 39 As of 17 February 2022, 8,501 new locally acquired cases (2,840 from polymerase chain reaction (PCR) test positive and 5,661 from self-reported rapid antigen (RA) test positive) have been reported to the Department of Health within the preceding 24 hours. The state seven-day local case growth rate including RA testing to 17 February was negative 13.01 per cent.
- 40 As at 17 February 2022, there are currently 50,042 active cases in Victoria. This includes 32,638 probable cases from positive RA tests.

⁴ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 13.

⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5.

⁶ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 12-13.

- 41 9 COVID-related deaths were reported in 24 hours preceding 17 February 2022, bringing the total number of COVID-related deaths identified in Victoria to 2,324.
- 42 Within the past seven days to 16 February 2022, there have been 4 industry sites with wastewater detections under active management for outbreak/exposure response and 3 industry sites with unexpected wastewater detections meeting escalation thresholds.
- 43 According to CHRIS hospitalisation data as of 17 February 2022 the state seven-day hospitalisation due to COVID growth rate is negative 27.49 per cent; and the state seven-day intensive care unit (ICU) admission due to COVID growth is negative 33.33 per cent.

Test results

- 44 Victorians had been tested at a rate of 5,685 per 100,000 people over the 14 days to 17 February 2022.

Vaccinations

- 45 As at 17 February 2022:
 - 45.1 a total of 5,877,403 doses have been administered through the state’s vaccination program, contributing to a total of 13,941,180 doses delivered in Victoria.
 - 45.2 93.77per cent of Victorians over the age of 12 have been fully vaccinated (two doses).
 - 45.3 95.27 per cent of eligible Victorians over the age of 12 have received their first dose of a COVID-19 vaccination.
 - 45.4 49.39 per cent of eligible Victorians over the age of 12 have received their third- dose booster of a COVID-19 vaccination.
- 46 As at 16 February 2022:
 - 46.1 A total of 32,896,294 doses have been administered by Commonwealth facilities, contributing to a total of 52,701,104 delivered nationally.
 - 46.2 94.1 per cent of Australians aged 16 and over have been fully vaccinated.

The current global situation

- 47 The following situation update and data have been taken from the World Health Organisation, published 15 February 2022.

Statistic	
Global confirmed cumulative cases of COVID-19	Over 409 million

Global cumulative deaths	Over 5.8 million
Global trend in new weekly cases	Decreasing: 19 per cent decrease compared to the previous week
The highest numbers of new cases:	<p>Russian Federation (1,323,391 new cases; 23 per cent increase)</p> <p>Germany (1,322,071 new cases; similar to the previous week's figures)</p> <p>United States of America (1,237,530 new cases; 43 per cent decrease)</p> <p>Brazil (1,009,678 new cases; 19 per cent decrease)</p> <p>France (979,228 new cases; 43 per cent decrease)</p>

Sources: World Health Organisation published 15 February 2022, WHO COVID-19 Weekly Epidemiology Update

Reasons for decision to make pandemic orders

Overview

- 48 Protecting public health and wellbeing in Victoria from the risks posed by the COVID-19 pandemic is of primary importance when I am deciding whether or not to issue pandemic orders. This is a priority supported by the PHW Act.
- 49 Section 165AL(2)(a) of the Act requires me to have regard to the advice of the Chief Health Officer, and I confirm that I have done so. That advice includes public measures that the Chief Health Officer recommends or considers reasonable.
- 50 Section 165AL(2)(b) permits me to have regard to any other matter I consider relevant, including (but not limited to) social and economic factors. Section 165AL(3) permits me to consult with any other person I consider appropriate before making pandemic orders.
- 51 In making the decision to issue the pandemic orders, I have had regard to current, detailed health advice. On the basis of that health advice, I believe that it is reasonably necessary for me to make the pandemic orders to protect public health.⁷ In assessing what is 'reasonably necessary', I have had regard to Gleeson CJ's observation in *Thomas v Mowbray* (2007) 233 CLR 307 at [22] that "*the [decision-maker] has to consider whether the relevant obligation, prohibition or restriction imposes a greater degree of restraint than the reasonable protection of the public requires*".
- 52 Having had regard to the advice of the Chief Health Officer and the Acting Chief Health Officer, it is my view that making these pandemic orders are reasonably necessary to reduce the risk that COVID-19 poses.

⁷ See Public Health and Wellbeing Act 2008 (Vic) section 3(1) for the definition of 'serious risk to public health'.

53 The Chief Health Officer has relevantly advised that:

- 53.1 Whilst Victoria has experienced the peak of the Omicron wave, the state continues to report high levels of COVID-19 community transmission, with cases currently averaging 7,000 per day. As there is ongoing community transmission, it is necessary to maintain some baseline restrictions to limit the impacts on the health system. Measures such as face mask mandates and vaccine requirements protect individuals, the wider community and the delivery of healthcare services and therefore remain reasonable public health measures imposed to preserve the health and safety of the community.⁸
- 53.2 Vaccination requirements to enter open premises serve to protect the health of all who access these settings, including customers/patrons, workers and visitors, and in particular those who are in a vulnerable population group or unable to be vaccinated.⁹
- 53.3 As the level of community transmission decreases and in the context of continuing vaccination and mask requirements indoors, it is proportionate to relax density quotient requirements in venues. General guidance should continue to support the role of physical distancing, particularly when managing large number of patrons. Existing occupational health and safety requirements will continue to require that risk mitigation measures are in place for both workers and patrons.¹⁰
- 53.4 As with the point above, it is also now proportionate to open dance floors. With removal of the density quotient in venues, people may mix in crowded indoor spaces, where the risk may not differ considerably whether dancing or not. Thus, prohibiting indoor dancefloors may have little impact on reducing COVID-19 transmission, especially among demographics that have much higher natural immunity compared with when these settings were introduced. This change is also more consistent with weddings where dancefloors are currently permitted.¹¹
- 53.5 The Check-in Marshal is recommended to be retained in settings where vaccination and QR-code check-in (as applicable) are required to ensure these obligations are met.¹²
- 53.6 Reducing the quarantine duration for unvaccinated international arrivals who enter hotel quarantine to seven days is an appropriate change. This shift will reflect the current epidemiological risk profile in Victoria, where majority of the population is vaccinated, and there is sustained community transmission due to the Omicron variant. In the setting of high vaccination coverage and widespread transmission, the risk posed by a new incursion of

⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

COVID-19 into the community is minimal compared to the risk of infection from community transmission.¹³

- 53.7 Restrictions on unvaccinated international arrivals entering some sensitive settings, such as hospital and care facilities, may also now be eased given the additional measure in place to keep vulnerable people safe.¹⁴
- 53.8 With borders opening to all international travellers, including tourists, from 22 February 2022, the ongoing use of the permit scheme is no longer appropriate. This aligns with the recent shift in the COVID-19 public health response towards strengthening community engagement and communications to empower individuals to be responsible for testing, contact tracing, and adherence to obligations.¹⁵
- 53.9 In order to better balance COVID-19 transmission risk and potential workforce shortages, hospitals should no longer be required to utilise workforce bubbles. This means implementing workplace bubbles can shift to being at the health service's discretion. Allowing health services to determine whether bubbles are implemented also means this can be based on the risk profile of the service at the time as well as patient demographics and care needs.¹⁶
- 53.10 In the context of sustained community transmission, workforce pressures and operational change to contact tracing, additional record keeping requirements for some workplaces can be removed.¹⁷
- 53.11 The Chief Health Officer further acknowledged the alignment of the fundamental components of his advice, which is to remove QR code requirements in low-risk settings and retain them in high-risk settings, with the changes coming into effect. For the remainder of settings, it would be reasonable for the Minister to take the feedback on operational impacts and social license into account, especially the risk that more complex changes may impede understanding of and compliance with the Orders. The Chief Health Officer also recommend that communications support these changes, including where penalties do and do not apply.¹⁸
- 53.12 Vaccines, once administered, have the additional advantage over situational public health measures that rely on user implementation and practice by producing a more consistent and enduring protection against the harms of COVID-19. No mitigation other than vaccination applies universally in all settings and circumstances.¹⁹

¹³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹⁸ Text reflects email advice provided by the Chief Health Officer, 16 February 2022.

¹⁹ Department of Health, Chief Health Officer Advice to Minister for Health (21 January 2022) pp 11-12.

- 53.13 The current epidemiological situation continues to evolve but it remains necessary to maintain vaccination requirements to enter many premises. These requirements serve to protect the health of all who access these settings, including customers/patrons, workers and in particular those who are in a vulnerable population group or unable to be vaccinated.²⁰
- 53.14 Businesses and public premises continue to be a primary area in which both workers and patrons mingle and interact for extended periods of time. People from different parts of Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community.²¹
- 53.15 Ongoing reviews of vaccination requirements will ensure all measures remain proportionate and necessary to reduce the risk to public health.²²
- 53.16 Retaining some public health measures for essential workforces remains necessary due to the critical nature of the work that these cohorts undertake. These workforces protect vulnerable Victorians, provide essential services and delivery of critical resources to the community. These workers also face an elevated level of risk of contracting the virus due to occupational exposure, therefore warranting additional protective measures to prevent the need for testing and isolating, which not only compromise workforce health and safety, but present significant flow on effects to the community.²³
- 53.17 The mandate of third dose vaccinations of COVID-19 in select higher risk workforces should be maintained. Third doses in select higher risk workforces ensures continued protection both for workers and vulnerable population groups, and to mitigate against the risk of rapidly escalating outbreaks.²⁴ Higher risk workforces warrant specific consideration for mandatory third doses where:²⁵
- 53.17.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
 - 53.17.2 transmission is more likely to lead to severe health consequences for vulnerable individuals with whom the worker may regularly interact during the course of their work (i.e., higher risk for transmission to persons who are medically vulnerable to severe disease and death due to COVID-19 infection);
 - 53.17.3 the workplace setting involves high risk for viral amplification and rapid spread between workers due to factors inherent to the working environment or the nature of the work being undertaken; and

²⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

²¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

²² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

²³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

²⁴ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20.

²⁵ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 21.

53.17.4 the workforces provide essential services to the Victorian community, and the potential impacts from staffing shortfalls due to workers becoming sick with COVID-19 or being required to isolate as a close contact would be significant.²⁶

53.18 Given that hospitals are a high risk setting for COVID-19 outbreaks and that patients are particularly vulnerable to the negative impacts of COVID-19,²⁷ a suite of measures is recommended including proposed third dose vaccination requirements for healthcare workers, and ongoing personal protective equipment (PPE) requirements, would aim to both protect vulnerable groups and the capacity of Victoria's healthcare workforce and system.²⁸

53.19 The Omicron wave placed unprecedented pressure on the health system necessitating temporary postponement of elective surgeries. While this was vital to address workforce and capacity issues, it is now important to increase elective surgeries to minimise the impacts of deferred care on individuals and the system. As COVID-19 hospitalisations begin to decrease and stabilise, easing restrictions on private hospitals to allow a greater proportion of elective surgery to resume will reduce the volume of delayed procedures.²⁹

53.20 The significant impact on broad public health that the restrictions on elective surgery pose is recognised but the system remain under pressure. Continuing the more nuanced approach regarding elective surgery, without compromising the COVID response is appropriate.³⁰

54 I accept the advice of the Chief Health Officer and Acting Chief Health Officer outlined above.

Risks of no action taken

55 Given all the above, if pandemic management measures had not been introduced and maintained in Victoria since early in the pandemic, the likely impact of COVID-19, particularly for older people, people with certain chronic medical conditions and other vulnerable groups would have been far greater. In turn, an even more significant pressure would have been (and still could be) placed on the Victorian health system, to respond at a scale that has little precedent in the modern era. As Taylor and colleagues (2021) note:

If Australia had experienced the same crude case and death rates as three comparable countries - Canada, Sweden and the United Kingdom - there would have been between 680,000 and 2 million cases instead of the 28,500 that did occur [during 2020], and between 15 and 46 times the number of deaths.³¹

²⁶ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 21.

²⁷ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 19.

²⁸ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20.

²⁹ Text reflects verbal advice provided by the Acting Chief Health Officer and Secretary of the Department of Health to the Minister for Health, 3 February 2022.

³⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

³¹ Department of Health, *Chief Health Officer Advice to Premier – Advice Relating to the Making of a Pandemic Declaration* (8 December 2021), p. 13.

Schedules

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

Schedule 1 – Reasons for Decision – Pandemic (Additional Industry Obligations) Order 2022 (No. 7)

Summary of Order

- 57 This Order contains additional specific obligations on employers and workers in specific industries in relation to managing the risk associated with COVID-19.

Purpose

- 58 The purpose of the Order is to establish additional specific obligations on employers and workers in specific industries in relation to managing the risk associated with COVID-19 transmission in the work premises.

Obligations

- 59 The additional obligations on industries include:
- 59.1 requiring industries to conduct and keep records of surveillance testing unless the worker was a confirmed COVID-19 case in the last 30 days;
 - 59.2 requiring industries to ensure that workers wear the appropriate level of PPE or a face covering;
 - 59.3 requiring workers to provide a written declaration about additional workplaces if working in two or more sites;
 - 59.4 worker bubbles;
 - 59.5 not allowing workers to attend work if exposed to a confirmed case in another workplace; and
 - 59.6 placing restrictions on elective surgery unless it is urgent.
- 60 The following industries must comply with the Order:
- 60.1 poultry processing facilities;
 - 60.2 abattoirs and meat processing facilities;
 - 60.3 seafood processing facilities;
 - 60.4 supermarket work premises and perishable food work premises (located in Metropolitan Melbourne);
 - 60.5 warehousing and distribution centres premises (located in Metropolitan Melbourne);
 - 60.6 commercial cleaning services;

- 60.7 care facilities;
 - 60.8 ports of entry servicing international arrivals;
 - 60.9 hotel quarantine;
 - 60.10 hospitals;
 - 60.11 schools;
 - 60.12 childcare or early childhood services; and
 - 60.13 construction sites.
- 61 An authorised officer or inspector may conduct an inspection of the work premises and audit the records of the employer.
- 62 An employer must consult with health and safety representatives, together with workers who are likely to be directly affected in relation to the implementation of the Additional Industry Obligations.
- 63 Elective surgery has restrictions, particularly in relation to public hospitals in metropolitan Melbourne and regional Victoria. Restrictions on elective surgery do not apply to:
- 63.1 Certain private hospitals and day procedure centres in certain regional centres.
 - 63.2 IVF procedures performed at registered facilities or a procedure for the surgical termination of pregnancy.
- 64 Failure to comply with the Order may result in penalties.

Changes from Pandemic (Additional Industry Obligations) Order 2022 (No. 6)

- 65 Removal of worker bubble requirements for hospital work premises.
- 66 Further easing of restrictions on elective surgery in private hospitals in regional areas of Victoria and public hospitals in metropolitan Melbourne.

Period

- 67 The Order will commence at 11:59:00pm on 20 February 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

- 68 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified as limited under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.

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

70 The Human Rights Statement also sets out:

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

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

Human rights that are engaged, but not limited

71 Further, in my opinion, the obligations imposed by the order will engage, but not limit, the human rights identified as engaged, but not limited, under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.

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

How the obligations imposed by the Order will protect public health

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

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

74.1 Whilst Victoria has experienced the peak of the Omicron wave, the state continues to report high levels of COVID-19 community transmission, with cases currently averaging 7000.³²

74.2 Retaining some public health measures for essential workforces remains necessary due to the critical nature of the work that these cohorts undertake. These workforces protect vulnerable Victorians, provide essential services and delivery of critical resources to the community.³³

74.3 These workers also face an elevated level of risk of contracting the virus due to occupational exposure, therefore warranting additional protective measures to prevent the need for testing and isolating, which not only compromise workforce health and safety, but present significant flow on effects to the community.³⁴

74.4 Maintaining the reduction of elective surgery supports the pressure on health systems caused by the Omicron surge and ensures there is capacity in the system to respond to COVID-19

³² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

³³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

³⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

demand.³⁵ Recognising that elective surgery is a real need for many patients who have been waiting since the early months of the pandemic to access non-COVID-19-related surgical care, it is appropriate to recommence surgeries to balance COVID-19 care and non-COVID-19 care, health services capacity, and waiting lists for non-COVID-19 surgical care. Day surgeries take less time and effort to reschedule if necessary and, for the moment, the public health response to COVID-19 is adequate.

- 74.5 The staged resumption of elective surgery is a prudent approach, avoiding impact on the health systems' ability to cope with COVID-19 and a recognition that the private hospitals continue to be able to provide what the public health system needs to offload. This staged resumption plan commenced with the easing of restrictions on elective surgery in the *Pandemic (Additional Industry Obligations) Order 2022 (No. 4)*.
- 74.6 The significant impact on broad public health that the restrictions on elective surgery poses is recognised. Moving to a more nuanced approach regarding elective surgery, without compromising the COVID response, would seem to be a rational response. There are no concerns that it will impact on the public health response to COVID-19.³⁶
- 74.7 As such, restrictions on private hospitals and day procedure centres have again eased together with the easing of restrictions on certain public hospitals. This will allow a proportion of elective surgery to resume, to reduce the volume of elective surgery that has been delayed.
- 74.8 Public health services remain under significant pressure. Maintaining some restrictions on elective surgery enable public health services to focus on treating patients with COVID-19, while other priority patients are referred to private hospitals for their care. They also enable load balancing across the system, meaning that health services share the pressures of COVID-19 demand, mitigating the risk that health services are overwhelmed. These restrictions also support the broader COVID-19 public health response, including releasing staff to support vaccination, testing and COVID Positive Pathways.
- 74.9 Without some restrictions, private hospitals may not provide public hospitals with the capacity to assist with the COVID-19 response. Further, fatigue and workload pressures on staff will be exacerbated, affecting the capacity of the system to respond to COVID-19 and provide critical care, should surgery continue without restriction in private hospitals. It is advised to maintain some restrictions on elective surgery to ensure adequate capacity in the health system and particularly in public hospitals.³⁷
- 74.10 For regional public health services, without restrictions, there is a high risk that there will not be sufficient capacity to treat patients with COVID-19 and other patients with critical care needs within these regions, putting pressure on public health services in Melbourne and Ambulance Victoria and resulting in patients having to travel for care. Surgery settings have

³⁵ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

³⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 9 February 2022.

³⁷ Text reflects verbal advice provided by the Acting Chief Health Officer and Secretary of the Department of Health to the Minister for Health, 3 February 2022.

been reviewed to ensure COVID-19 bed capacity is maintained, and elective surgery may now gradually resume in line with the health advice.³⁸

74.11 I have been advised it is now appropriate to remove the requirement for workplace bubbles in hospital settings. This allows a health service to self-manage COVID-19 risk but also balance this against potential workforce shortages that could result from bubble requirements. Allowing health services to determine whether bubbles are implemented also means this can be based on the risk profile of the service at the time as well as patient demographics and care needs.³⁹

74.12 Surveillance testing of high-risk industries involves the implementation of testing requirements and recommendations for workers, in order to detect cases early. Surveillance testing helps identify asymptomatic but potentially infectious workers, and therefore minimises the impacts of outbreaks on essential industries. Early diagnosis of cases ensures that the infected worker can isolate and take additional measures to reduce the risk of transmission to others. Surveillance testing complements other workplace specific protective measures such as worker vaccine mandates.⁴⁰ Surveillance testing is now occurring in schools, early childhood and childcare industries.⁴¹

75 I have accepted the advice of the Chief Health Officer and Acting Chief Health Officer.

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

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

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

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

78.1 "Freedom of movement of persons in Victoria is limited if diagnosed with COVID-19, living with a diagnosed person, or having been in close contact with a diagnosed person."⁴²

78.2 Workers in certain additional obligation industries are required to wear the appropriate level of personal protective equipment or a face covering. If this "interferes with a person's choice to exercise cultural, religious, or linguistic practices in the workplace, this would constitute an

³⁸ Text reflects verbal advice provided by the Acting Chief Health Officer and Secretary of the Department of Health to the Minister for Health, 9 February 2022.

³⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

⁴⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p 22.

⁴¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

⁴² Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [286].

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.”⁴³

- 78.3 The Order limits a worker’s protection from medical treatment without full, free and informed consent “because persons may be directed by their employer pursuant to the Order to undertake a COVID-19 test”,⁴⁴ assuming that taking a COVID-19 test constitutes medical treatment.
- 78.4 Workers, now including workers at schools, early childhood services and childcare, are required to comply with surveillance testing requirements and declare any additional workplaces if they are working in more than one workplace. “This information would constitute personal and health information and its provision to gain access to the care facility would therefore be an interference with privacy”.⁴⁵ However, this may not have a significant negative impact as “only the details required to establish risk and contact trace are sought.”⁴⁶
- 78.5 “The Order creates an impost on business owners seeking to enjoy their property rights so they can operate their businesses without interference. Sending a worker home to self-quarantine is likely to cause meaningful detriment to a business.”⁴⁷ Furthermore, “the Order might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”⁴⁸
- 78.6 The requirements for employers to direct workers to self-isolate under the Order “place significant restrictions on the ability of people to move freely”,⁴⁹ although exposed workers are only required to self-isolate “for the time the medical evidence suggests is appropriate to make sure that a person is not at risk of transmitting COVID-19”.⁵⁰

⁴³ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [287].

⁴⁴ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [288].

⁴⁵ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [289].

⁴⁶ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [291].

⁴⁷ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

⁴⁸ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

⁴⁹ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [295].

⁵⁰ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [297].

- 78.7 Elective surgery procedures are subject to restrictions, including Category 1 and Category 2A at private hospitals, certain day procedure centres and public hospitals across Victoria. Without ongoing restrictions, there is a high risk that the system will not have sufficient capacity, including ICU capacity. Further, fatigue and workload pressures on staff will be exacerbated, affecting the capacity of the system to respond to COVID-19 and provide critical care.
- 79 In making this pandemic order, I have included limited exceptions to the additional obligations for specified industries to ensure they are less onerous in specific circumstances, including:
- 79.1 Workers in an abattoir, meat processing facility, poultry processing facility or seafood processing facility are required to wear the appropriate level of PPE to carry out the functions of their role. However, this requirement does not apply where it may not be reasonably practicable to wear a face mask in the work premises, or if the nature of a worker's work may mean that wearing a face mask creates a risk to their health and safety. Workers may also be exempted from complying with this requirement where they are subject to an exception to the face covering requirement under the Movement and Gathering Order.
- 79.2 Care facility workers may be subject to a written exemption from the Chief Health Officer in relation to the additional obligations imposed on care facilities where an exemption is necessary to ensure that care facility residents are provided with a reasonable standard of care. Care facility workers may also remove their face covering whilst communicating with a resident where visibility of the mouth is essential to communicate with the resident.

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

- 80 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).⁵¹
- 81 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.⁵²
- 82 On the basis of the Chief Health Officer and Acting Chief Health Officer's advice, I considered there to be no other reasonably available means by which to manage the spread of COVID-19 in workplaces that would be less restrictive of freedoms. However, even if there were less restrictive measures, I consider that the restrictions imposed by the Order are in the range of reasonably available options to achieve the purpose.

⁵¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-15.

⁵² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11.

Conclusion

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

Schedule 2 – Reasons for Decision – Pandemic (Open Premises) Order 2022 (No.5)

Summary of Order

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

Purpose

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

86.1 operators of certain open premises in the State of Victoria; and

86.2 patrons that attend those premises.

Obligations

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

87.1 adult education or higher education premises

87.2 amusement parks

87.3 arcades, escape rooms, bingo centres

87.4 casino

87.5 community premises

87.6 creative arts premises

87.7 drive-in cinemas

87.8 entertainment and function premises

87.9 food and drink premises

87.10 gaming machine premises

87.11 karaoke and nightclubs

87.12 physical recreation premises

87.13 restricted retail premises

- 87.14 sex on premises, brothels and sexually explicit venue
- 87.15 swimming pools, spas, saunas, steam rooms and springs
- 87.16 tours
- 87.17 premises used for tourism services
- 88 Operators of an open premises must (unless an exception applies):
- 88.1 maintain a system which requires all patrons above 18 years of age to show an employee acceptable evidence that the person is fully vaccinated or an excepted person on every occasion a person attends the premises. This system must include a worker placed at each accessible entrance of the premises;
 - 88.2 take reasonable steps to exclude patrons who do not comply with the operator's system, or are not fully vaccinated or exempt;
 - 88.3 not permit any person to work at the premises unless that person is fully vaccinated, or an excepted person. A partially vaccinated worker may work on the premises when no patrons are present at the time. The operator must collect, record and hold vaccination information for all workers;
 - 88.4 not permit the number of patrons to exceed the patron limits as specified in the Order, unless an exception has been permitted under the Order;
- 89 Patrons of an open premises must comply with the operator's system.
- 90 Exceptional circumstances are listed under which an operator is not required to comply with this Order. Otherwise, failure to comply with this Order may result in penalties.

Changes from Pandemic (Open Premises) Order 2022 (No.4)

- 91 Indoor dancefloors may reopen.
- 92 Density quotient limits will no longer apply.

Period

- 93 This Order will commence at 6:00:00pm on 18 February 2022 and end at 11:59:00pm on 12 April 2022 unless revoked earlier.

Relevant human rights

Human rights that are limited

- 94 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified as limited under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.

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

96 The Human Rights Statement also sets out:

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

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

Human rights that are affected, but not limited

97 Further, in my opinion, the obligations imposed by the order will engage, but not limit, the human rights identified as engaged, but not limited, under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.

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

How the obligations imposed by the Order will protect public health

99 I met with the Chief Health Officer on 15 February 2022 and have considered carefully the advice provided at that meeting. Additionally, I have carefully read and considered relevant advice from the Chief Health Officer's and Acting Chief Health Officer's previously provided to me.

100 I have considered the Chief Health Officer's advice that whilst community transmission of COVID-19 continues to reduce throughout Victoria, hospitalisation rates due to COVID-19 decline and third dose vaccination rates increase, the state continues to report high levels of COVID-19 community transmission, with cases currently averaging 7000 per day. As there is ongoing community transmission, it is necessary to maintain some baseline restrictions to limit the impacts on the health system. Measures such as face mask mandates in certain settings and vaccine requirements protect individuals, the wider community and the delivery of healthcare services and therefore remain reasonable public health measures imposed to preserve the health and safety of the community.

101 As the level of community transmission decreases and in the context of continuing vaccination and mask requirements indoors, it is considered proportionate to relax density quotient requirements and to permit dancefloors to reopen.

102 I have considered the following obligations on operators of certain open premises to ensure:

102.1 patrons who are not fully vaccinated or exempt cannot enter the premises;

102.2 systems are in place for patrons over 18 years old to show evidence of their vaccination;

102.3 any patron limits specified in the order are not exceeded;

102.4 persons working at the premises are fully vaccinated or exempt (with partially vaccinated workers able to work on the premises with no patrons present);

- 102.5 vaccination information for all workers is recorded.
- 103 In relation to the measures imposed by this Order the Chief Health Officer has advised as follows:
- 103.1 Vaccination requirements to enter open premises serve to protect the health of all who access these settings, including customers/patrons, workers and in particular those who are in a vulnerable population group or unable to be vaccinated.
- 103.2 Businesses and public premises continue to be a primary area in which both workers and patrons mingle and interact for extended periods of time. People from different parts of Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community.
- 103.3 Current settings are therefore to be maintained and as the current epidemiological situation continues to evolve, an ongoing review of vaccination requirements will ensure all measures remain proportionate and necessary to reduce the risk to public health.⁵³
- 104 Patrons must be prohibited from entering open premises unless fully vaccinated (or medically exempt or ineligible for COVID-19 vaccination), except the following settings:⁵⁴
- 104.1 non-essential retail (excluding hair, beauty and personal care services);
- 104.2 religious services, weddings and funerals; and
- 104.3 real estate inspections and auctions.
- 105 The Chief Health Officer advised that the below settings could be excluded from the open premises requirements:
- 105.1 Non-essential retail is excluded from this vaccine requirement due to the high vaccination rates in the community and the need for people to access goods and services. However, it is reasonable for hair, beauty and personal care services to continue with a vaccine requirement due to the close and prolonged contact that occurs between clients and workers who will not be required to wear face masks due to the nature of the activities.⁵⁵
- 105.2 The interactions that arise from real estate activities are considered lower risk and therefore do not necessitate a vaccine requirement due to the relatively small numbers of patrons, who only attend for a short duration, and spend a portion of the visit in outdoor settings with good ventilation and lower risk of transmission.⁵⁶

⁵³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

⁵⁴ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 31.

⁵⁵ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 31.

⁵⁶ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 31.

- 105.3 Religious gatherings, weddings and funerals, are important for the wellbeing needs of the attendees who are participating in religious and spiritual activities, attending important social milestones.⁵⁷
- 105.4 As the risk from such activities is mitigated by the benefits of natural ventilation in outdoor settings, I do not believe that the Minister needs to consider these restrictions for outdoor spaces or venues.⁵⁸
- 106 Density quotients were re-introduced in higher risk settings as a mitigating measure as the Omicron surge was increasing.
- 107 The Chief Health Officer advised that as the level of community transmission decreases and in the context of continuing vaccination and mask requirements indoors, it is proportionate to relax density quotient requirements in these venues. General guidance should continue to support the role of physical distancing, particularly when managing large number of patrons. Existing occupational health and safety requirements will continue to require that risk mitigation measures are in place for both workers and patrons.⁵⁹
- 108 Dancefloors in entertainment and function premises or a food and drink premises were closed as a mitigating measure as the Omicron surge was increasing.
- 109 The Chief Health Officer advised that as the level of community transmission decreases and in the context of continuing vaccination and mask requirements indoors, it is proportionate to relax density quotient requirements in these venues. General guidance should continue to support the role of physical distancing, particularly when managing large number of patrons. Existing occupational health and safety requirements will continue to require that risk mitigation measures are in place for both workers and patrons.
- 110 I have largely accepted the Chief Health Officer's advices.
- 111 Finally, to assist with internal and national consistency, I have accepted the Acting Chief Health Officer's advice to include participants of COVID-19 vaccination clinical trials in vaccination exemptions, and to include the Sputnik V and Novavax vaccines in the definition of 'two-dose COVID-19 vaccine'. This is for the purpose of aligning policies at a national and interjurisdictional level, which will minimise confusion for the community and industry and therefore assist in compliance.⁶⁰

⁵⁷ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 31.

⁵⁸ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021), p. 16.

⁵⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

⁶⁰ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 14.

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

- 112 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
- 113 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be affected and limited by the Order.
- 114 In addition, I have also considered the following additional potential negative impacts:
- 114.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. "There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds."⁶¹
- 114.2 The "practical effect [of the order] is to require a person to choose between being vaccinated or not being able to attend open premises, which includes a variety of venues including cinemas, restaurants, swimming pools and gyms."⁶²
- 114.3 The order limits freedom of movement "because it prevents a person from attending a particular place — namely, open premises — if they are unvaccinated."⁶³
- 115 In addition, I note that:
- 115.1 The Order does not physically force anyone to receive a COVID-19 vaccine.
- 115.2 The Order contains an exception for people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication.

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

- 116 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).⁶⁴

⁶¹ Department of Health, Human Rights Statement: Pandemic (Open Premises) Order (15 December 2021).

⁶² Department of Health, Human Rights Statement: Pandemic (Open Premises) Order (15 December 2021).

⁶³ Department of Health, Human Rights Statement: Pandemic (Open Premises) Order (15 December 2021).

⁶⁴ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), pp. 14-20.

- 117 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.⁶⁵
- 118 Public education and health promotion can provide community members with an understanding of⁶⁶ behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.⁶⁷ However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.⁶⁸ In addition, it is possible for individuals to be asymptomatic and infectious. Education and practicing of COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 119 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19, the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community. Ensuring high vaccination coverage for workers and patrons reduces the risk of individuals transmitting COVID-19 to others.
- 120 There are a number of challenges that prevent the combination of mask wearing and testing being an equally robust solution to the risks of exposure and transmission compared to vaccines.⁶⁹
- 121 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.⁷⁰ There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 122 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.⁷¹ Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta variant of concern, and increasingly with the Omicron variant of concern.
- 123 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement, fails to provide the same protection for workforces.⁷² Currently, PCR and RA tests are approved for use in Australia.

⁶⁵ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), pp. 10-11.

⁶⁶ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 15.

⁶⁷ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 21, p. 30.

⁶⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 15.

⁶⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

⁷⁰ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

⁷¹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 28, p. 30.

⁷² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

- 124 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases early in January. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 125 RA tests are also subject to potential false negative resulting from the assay itself.⁷³ While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).
- 126 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are.⁷⁴

Other considerations

- 127 The mandatory vaccination requirement for open premises reduces the risk of transmission within those settings and the broader community. This provides greater workforce protection and certainty. Importantly, patrons will have renewed confidence in entering these settings which will assist consumer spending.⁷⁵
- 128 In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirements for open premises to assist with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial behaviour.⁷⁶

Conclusion

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

⁷³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁷⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

⁷⁵ Department of Treasury and Finance, Coronavirus Economic Outlook [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021] – see Appendix 3.

⁷⁶ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 30.

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

Schedule 3 – Reasons for Decision – Pandemic (Workplace) Order 2022 (No.5)

Summary of Order

131 This Order imposes obligations on employers in managing the risk of COVID-19 in the workplace.

Purpose

132 The purpose of the Order is to assist in reducing the frequency and scale of outbreaks of COVID-19 in Victorian workplaces and to establish more specific obligations on employers and workers in relation to managing the risk associated with COVID-19 transmission in the work premises.

Obligations

133 The Order imposes specific obligations on employers to assist in reducing the frequency of outbreaks of COVID-19 in Victorian workplaces.

134 A worker must self-isolate and not attend a work premises if they have been tested for COVID-19 and they are awaiting the result of that test.

135 A worker must not attend a work premises if they have undertaken a COVID-19 PCR test or a COVID-19 RA test and they are awaiting the result of that test except if more than 7 days has passed since the date of the test.

136 An employer must take reasonable steps to:

136.1 ensure all workers carry a face covering at all times and wear a face covering where appropriate; and

136.2 implement a COVIDSafe Plan which addresses health and safety issues arising from COVID-19; and

136.3 where required, keep a record of all persons who attend the work premises, including the person's name, date and time of attendance, contact number and areas of the work premises the person attended; and

136.4 where required, comply with the Victorian Government QR code system and display appropriate signage for the type of work premises as specified by this Order.

137 An employer must advise workers who are symptomatic persons that they are required to comply with any requirements that may be relevant in the document "Testing Requirements for Contacts and Exposed Persons" as amended from time to time, and support a worker to do so.

138 The Order imposes additional work premises specific obligations on employers and specifies the appropriate response of an employer in the circumstance of a suspected or confirmed case of COVID-19 in the work premises.

- 139 A worker who has received a positive result from a COVID-19 PCR test or a COVID-19 RA test must notify the operator of their work premises of their status as a diagnosed person or probable case if they attended an indoor space at the work premises during their Infectious Period.
- 140 After becoming aware of a diagnosed person or a probable case who has attended the work premises in the Infectious Period, the operator must notify all workers who were present at the same indoor space that they may have been exposed to COVID-19 and advise the exposed persons to comply with relevant obligations under the “Testing Requirements for Contacts and Exposed Persons” document as amended from time to time, and support a worker to do so.
- 141 Failure to comply with the Order may result in penalties.

Changes from Pandemic (Workplace) Order 2022 (No.4)

- 142 The records-keeping requirement only applies to employers of work premises in relation to an Open Premises.
- 143 An employer is not required to adhere to the additional records-keeping requirement to demonstrate compliance with the record-keeping requirement.
- 144 An employer is not required to display density quotient signage.

Period

- 145 The Order will commence at 6:00:00pm on 18 February 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

- 146 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified as limited under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.
- 147 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 148 The Human Rights Statement also sets out:
- 148.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i));
and
- 148.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are engaged, but not limited

- 149 Further, in my opinion, the obligations imposed by the order will engage, but not limit, the human rights identified as engaged, but not limited, under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.
- 150 My explanation for why those rights are engaged, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

- 151 I carefully read and considered the Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".
- 152 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
- 152.1 Businesses are and will continue to be a primary area in which both workers and patrons interact. People from different parts of Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community.⁷⁷
- 152.2 Workplaces pose a transmission risk particularly where there are common areas.⁷⁸
- 152.3 All workplaces require some level of obligations to help in both preventing transmission and reduce the risk of outbreaks if a confirmed case of COVID-19 enters a workplace, given the continued levels of transmission within Victoria.⁷⁹
- 152.4 Evidence-based measures such as hand hygiene, physical distancing, use of personal protective equipment, restricted workplace access, contact tracing and isolation and quarantine have been recommended by WHO to mitigate these risks.⁸⁰
- 152.5 A COVIDSafe plan demonstrates that an employer has considered the risk of COVID-19.
- 152.6 Occupational Health and Safety (COVID 19 Incident Notification) Regulations 2021 has been revoked. As a result, employers are no longer required to notify WorkSafe of the attendance of COVID-19 cases at the workplace under this legislation. QR code check supports contract tracing where necessary. Therefore, it is reasonable for the operator of a workplace to only take reasonable steps to notify exposed persons in an employee capacity attending the work premises.⁸¹

⁷⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

⁷⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

⁷⁹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 19.

⁸⁰ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 18-19.

⁸¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

- 152.7 The requirement for operators and employers to notify the department of health once outbreak thresholds should increase to help instigate public health measures while normalising operations.⁸²
- 152.8 The continuation of the QR code check-in system is recommended in higher risk settings (such as hospitality, entertainment, event and function venues, gaming venues, hair and beauty retail premises and physical recreation facilities) to allow rapid identification of high-risk transmission events. This is in the context of returning either to a lower-case prevalence environment, or a high-case prevalence environment due to an emerging variant, in which QR codes may once again support a more centralised model of Testing, Tracing, Isolation and Quarantine (TTIQ) and to anticipate near-term scenarios such as a seasonal winter wave. This also ensures the infrastructure of the system remains in place should it be required to be rapidly reinstated across a setting if required.⁸³
- 152.9 In the context of sustained community transmission, workforce pressures and operational change to contact tracing, additional record keeping requirements for workplaces can be removed. Amending these record-keeping requirements aligns with changes to QR codes and COVID Check-in Marshals. In addition, workplaces have existing record keeping systems in place to draw on.⁸⁴
- 152.10 As the level of community transmission decreases and in the context of continuing vaccination and mask requirements indoors, it is now appropriate to remove the density quotient requirements. The modelling suggests that doing so will not have a significant impact on overall transmission. Existing occupational health and safety requirements and general physical distancing measures will continue to provide risk mitigation measures for both workers and patrons.⁸⁵
- 153 The Chief Health Officer further acknowledged the alignment of the fundamental components of his advice, which is to remove QR code requirements in low-risk settings and retain them in high-risk settings, with the changes coming into effect. For the remainder of settings, it would be reasonable for the Minister to take the feedback on operational impacts and social license into account, especially the risk that more complex changes may impede understanding of and compliance with the Orders. The Chief Health Officer also recommended that communications support these changes, including where penalties do and do not apply.⁸⁶
- 154 I have accepted the advice of the Chief Health Officer and Acting Chief Health Officer. I have also made minor amendments to orders to improve accuracy and clarity.
- 155 Additionally, in relation to the requirement for workplaces to report confirmed cases, I have decided to amend the threshold number of confirmed cases to activate this obligation from one to five in a

⁸² Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 33.

⁸³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

⁸⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

⁸⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

⁸⁶ Text reflects email advice provided by the Chief Health Officer, 16 February 2022.

seven-day period. This is aligned to the general move toward a more community-directed model of case management, in order to prioritise response efforts in line with the objective of suppression and reactive management.

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

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

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

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

158.1 The pandemic orders have differing requirements depending on the size and nature of a workplace. This acknowledges the differing associated risks and broad differences in the operations of businesses across Victoria.

158.2 Employers are no longer required to notify WorkSafe of the attendance of COVID-19 cases at the workplace, and they are only required to inform workers of any COVID-19 exposures, both of which will ease their reporting burden.

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

159 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).⁸⁷

160 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.⁸⁸

161 On the basis of the Acting Chief Health Officer's advice, I considered that that there were no other reasonably available means by which to manage the spread of COVID-19 in workplaces that would be less restrictive of freedoms. However, even if there were to be less restrictive measures, I have considered that the measures imposed by the Order are within the range of reasonably available alternatives to achieve the purpose.

⁸⁷ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 14-15.

⁸⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 10-11.

Conclusion

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

Schedule 4 – Reasons for Decision – Pandemic (Victorian Border Crossing) Order 2022 (No.5)

Summary of Order

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

Purpose

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

Obligations

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

167 All international arrivals:

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

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

167.1.2 monitor for COVID-19 symptoms; and

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

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

167.2.1 for international passenger arrivals and aircrew services workers who are fully vaccinated or medically exempt or less than 12 years and 2 months of age, self-quarantine until receiving a negative result from the COVID-19 test within 24 hours of arrival in Australia or in the case of an international aircrew services worker, until receiving a negative result from a COVID-19 test conducted after their arrival to Victoria, or until their next scheduled international flight (whichever is sooner);

167.2.2 for an international aircrew services worker who is not fully vaccinated nor medically exempt, the prescribed period of time is 7 days;

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

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

167.3.1 For international passenger arrivals, the documents required are:

167.3.2 an acceptable form of identification;

167.3.3 if applicable, evidence of their COVID-19 PCR test results; and

167.3.4 international acceptable evidence or international acceptable certification of their vaccination status, or the vaccination status of their parent or guardian.

167.4 For international aircrew services workers, the documents required are:

167.4.1 an acceptable form of identification; and

167.4.2 international acceptable evidence to show that they are fully vaccinated or international acceptable certification to show they are a medically exempt person.

168 International passenger arrivals must, amongst other things:

168.1 complete prescribed COVID-19 PCR tests or COVID-19 RA tests; and

168.2 self-quarantine for the prescribed period of time.

169 International aircrew arrivals must, amongst other things:

169.1 complete prescribed COVID-19 PCR tests or COVID-19 RA tests; and

169.2 self-quarantine for the prescribed period of time.

170 This Order also sets out the conditions under which a person may be granted an exemption from this Order.

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

Changes from Pandemic (Victorian Border Crossing) Order 2022 (No. 4)

172 The reference period of a person entering Victoria in relation to risk from international arrivals into Victoria, has been adjusted such that restrictions apply to persons who have been in another country in the 7 days prior.

173 The quarantine duration for Australian-based unvaccinated international aircrew services workers, who are not medically exempt, entering self-quarantine is reduced to 7 days.

174 International aircrew workers who are not fully vaccinated nor medically exempt must stay in self-quarantine for 7 days after arrival or until the next scheduled international flight.

- 175 There are no restrictions for international aircrew services workers who are medically exempt or children who are not fully vaccinated and are not medically exempt to attend a residential aged care facility, disability residential service or hospital.
- 176 The requirement for the international arrivals permit scheme has been removed.
- 177 The definitions for ‘childcare and early childhood services’, ‘educational facility’, ‘permit’, ‘personal details’ and ‘hospital’ have been removed.

Period

- 178 This Order will commence at 6:00:00 pm on 18 February 2022 and end at 11:59:00pm on 12 April 2022 unless revoked earlier.

Relevant human rights

Human rights that are limited

- 179 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified as limited under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this Order.
- 180 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 181 The Human Rights Statement also sets out:
- 181.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i));
and
- 181.2 my explanation of the nature and extent of the limitations (as required by section 165AP(2)(iii)).

Human rights that are engaged, but not limited

- 182 Further, in my opinion, the obligations imposed by the order will engage, but not limit, the human rights identified as engaged, but not limited, under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this Order.
- 183 My explanation for why those rights are engaged, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

- 184 I carefully read and considered the Chief Health Officer's advice in the various forms provided to me, as outlined above under “Statutory power to make pandemic orders”.
- 185 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:

- 185.1 A standardised approach to international arrivals assists Victoria to reduce the risk of viral incursion and transmission. A combination of quarantine and testing are required to control for the risks posed by the different cohorts of international arrivals to the Victorian community. These measures become increasingly important in managing the risk of incursion, especially from emerging threats such as the importation of novel variants of concern.⁸⁹
- 185.2 As the global distribution of the Omicron VOC expands, including domestically in Australian jurisdictions, and the local transmission of COVID-19 increases, international border measures become relatively less important in managing incursion risk. Given identification of the Omicron VOC within Australia and ongoing high community transmission within Victoria, it is reasonable for the requirements for international arrivals into Victoria by air to mirror those domestic arrivals from other Australian states and territories, as the risk of incursion from within Australia is no greater than international arrivals.⁹⁰
- 185.3 Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals' interaction and movement for a defined period immediately following their arrival.⁹¹
- 185.4 Testing obligations are designed to detect any imported cases in international arrivals prior to them joining the Victorian community to prevent outbreaks and limit transmission.⁹²
- 185.5 International aircrew service workers staying less than 48 hours were required to remain in self-quarantine with no option to leave self-quarantine. This requirement is now amended to allow aircrew service workers to conduct a COVID-19 test- after their arrival to Victoria and leave self-quarantine once receiving a negative result. This is reasonable as it aligns with the current policy allowing aircrew staying more than 48 hours within Victoria to leave self-quarantine once they receive a negative COVID-19 result.⁹³
- 185.6 The relative risk of SARS-CoV-2 incursion and transmission by international arrivals has substantially diminished relative to the risk from local acquisition in the context of the unprecedented levels of community transmission in Victoria and other Australian jurisdictions due to Omicron variant. Given this shift in the epidemiological risk profile in Victoria, additional testing obligations for this cohort to prevent the introduction of novel threats is no longer an efficient or justifiable use of our valuable testing resources which are already under strain.⁹⁴

⁸⁹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

⁹⁰ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 5.

⁹¹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

⁹² Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

⁹³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022

⁹⁴ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 30.

- 185.7 The recommendation to allow provisions for the RA test as an alternative testing option to the PCR test remains appropriate given the demand for testing in the state with the number of Victorians exposed to the Omicron VOC. RA tests have been found to have moderate sensitivity and high specificity for the detection of SARS-CoV-2 and are an appropriate screening tool for asymptomatic testing, which will be relevant for a large number of international arrivals. RA testing has merit in minimising risk of incursions in sensitive settings when a condition of entry and therefore can be appropriate in this context as we mitigate incursion risk into Victoria. Additionally, it can offset pressure on testing pathology system capacity and free up resources for symptomatic testing to ensure system readiness in Victoria.⁹⁵
- 185.8 While those with medical exemptions from vaccination pose a similar public health risk to those who have foregone vaccination voluntarily, individuals with medical exemptions have temporary or ongoing medical contraindications to vaccination due to circumstances out of their control, and the Minister may consider that ongoing requirements for mandatory in-facility quarantine for these groups is not a proportionate response, particularly as the number of individuals who fall into this group is relatively small and the aggregate public health risk of incursion due to this group is, therefore, also small.⁹⁶ Medically exempt individuals entering Australia should be treated as fully vaccinated for the purposes of determining their post-entry quarantine requirements. These individuals represent a small cohort that have a valid contraindication or acute illness that precludes them from receiving COVID-19 vaccines due to an unacceptable and heightened risk of harm to the individual. This group should not be disadvantaged for circumstances outside of their control through the imposition of quarantine requirements.⁹⁷
- 185.9 Similarly, international arrivals under the age of 12 years should be permitted to quarantine in accordance with the vaccination status of accompanying travel members or as a fully vaccinated individual if unaccompanied minors to prevent separation of travel groups or solitary and unsupervised quarantine of minors. Such an approach would result in unintended harms to the health and wellbeing of young travellers. Further, vaccination is not widely accessible to this age cohort in all countries which raises additional concerns of inequity.⁹⁸
- 185.10 Reducing the quarantine duration for Australian-based unvaccinated international aircrew who enter home quarantine to 7 days is an appropriate change. This shift will reflect the current epidemiological risk profile in Victoria, where majority of the population is vaccinated, and there is sustained community transmission due to the Omicron variant. In the setting of high vaccination coverage and widespread transmission, the risk posed by a new incursion of COVID-19 into the community is minimal compared to the risk of infection from community transmission. This change will also align with the requirement for close contacts to complete 7 days of quarantine in the community. Close contacts are at higher risk of COVID-19 infection due to their known exposure to a confirmed case in a household or

⁹⁵ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) pp. 5-6.

⁹⁶ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 31.

⁹⁷ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6.

⁹⁸ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6

household-like setting. International arrivals generally have a lower risk of COVID-19 infection as they may or may not have been exposed to COVID-19 during their travel. Following the epidemiological risk profile identified, the other post arrival conditions for unvaccinated aircrew service workers and international passengers should also reflect the same period of 7 days as an appropriate measure. Under the same epidemiological risk profile identified, it is appropriate to reduce the period of reference for these international arrivals to 7 days.

- 185.11 Given the high rate of community transmission of COVID-19 in Victoria, and the other risk mitigation strategies being implemented in education facilities across the state (e.g. surveillance testing), it is reasonable to remove all measures that prevent a person, regardless of their vaccination status, who is an international traveller from entering an educational facility. While it is appropriate to retain controls around sensitive settings, it is also appropriate not to prevent international travellers from going to school.⁹⁹
- 185.12 International aircrew services workers are subject to operational requirements of a highly regulated industry, so low-risk aircrew services workers spending less than 48 hours in Victoria and Australian-based fully vaccinated aircrew operating turnaround flights are exempt from some testing requirements.¹⁰⁰
- 185.13 These exemptions from testing requirements are mitigated by other public health measures such as quarantine.
- 185.14 Currently, medically exempt international aircrew services workers are subject to a 14-day restriction on attending sensitive settings, unvaccinated and non-medically exempt children are subject to 7-day sensitive setting restrictions, and there are no restrictions on entering sensitive settings for medically exempt passengers. Removing this restriction for international aircrew services workers and unvaccinated and non-medically exempt children aligns with the Chief Health Officer's advice that international arrivals generally have a lower risk of COVID-19 infection when compared with close contacts as they may or may not have been exposed to COVID-19 during their travel, and that due to the level of local transmission, there is a higher risk of acquiring COVID-19 infection in the general community compared to international travel.¹⁰¹ Further, certain sensitive settings, such as care facilities and hospitals, have additional protective measures in the Visitors to Hospital and Care Facilities Order to reduce the risk of incursion of COVID-19.¹⁰² Most other restrictions on sensitive settings were removed by 4 February 2022, especially as the Visitors to Hospitals and Care Facilities Order contains separate restrictions on unvaccinated visitors such as testing and PPE requirements.¹⁰³
- 185.15 Under the Order, the international arrivals permit scheme is no longer being used to support follow ups as the requirement for arrivals to obtain and carry a permit is no longer

⁹⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

¹⁰⁰ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 27.

¹⁰¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister of Health, 15 February 2022.

¹⁰² Text reflects verbal advice provided by the Chief Health Officer to the Minister of Health, 15 February 2022.

¹⁰³ Text reflects verbal advice provided by the Chief Health Officer to the Minister of Health, 15 February 2022.

appropriate. There is a higher risk of acquiring COVID-19 infection in the general community compared to international travel due to the level of local transmission. Importantly, this will align with the recent shift in the COVID-19 public health response towards strengthening community engagement and communications to empower individuals to be responsible for testing, contact tracing, and adherence to obligations. Further, as Australia will open to all international travellers, including tourists, from 22 February 2022, the ongoing use of the permit scheme is no longer appropriate.¹⁰⁴

185.16 I consider that home quarantine for Australian-based international aircrew services workers and international passenger arrival adolescents who are both not fully vaccinated or medically exempt should continue. My decision is based on the Chief Health Officer's advice that home quarantine requirements remain a vital public health measure that protects the state from incursion of COVID-19 cases and limits the risk of incoming variants of concern, and that unvaccinated international arrivals present a higher incursion of risk compared to those who are fully vaccinated.¹⁰⁵ Further, with large parts of the world still unvaccinated, and major outbreaks persisting internationally, the risk of new variants emerging and entering the country remains.¹⁰⁶

185.17 Maintaining testing requirements, where fully vaccinated or medically exempt international aircrew services workers and international passenger arrivals are required to get a COVID-19 PCR test or COVID-19 RA test within 24 hours of arrival and quarantine until receiving a negative result, will ensure that there is a level of oversight to monitor and detect incoming and outgoing cases of COVID-19 and detect any new variants of concern quickly to limit the spread of any emerging strains of COVID-19.

186 I also note the Acting Chief Health Officer's advice that as a corollary to suggested changes in testing and quarantine requirements for international arrivals, the removal of restrictions on entering sensitive settings is also warranted.¹⁰⁷ The current risk of transmission is greater from locally acquired sources compared to this overseas cohort, the consolidated testing requirement still adequately assesses the COVID-19 status of these international arrivals prior to attending the sensitive settings, and care facilities and hospitals are proposed to have additional protective measures.¹⁰⁸ I have accepted this advice in relation to fully vaccinated aircrew and passengers visiting care facilities and hospitals, as a conditional pre-entry COVID-19 test is not needed separately from the new protective measures for hospitals and care facility visitors. I accept the Acting Chief Health Officer's advice to remove sensitive setting restrictions for all other categories of travellers and will consider the changes for sensitive settings to complement the changes to quarantine following discussion with National Cabinet.

¹⁰⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister of Health, 15 February 2022.

¹⁰⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister of Health, 15 February 2022.

¹⁰⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister of Health, 15 February 2022.

¹⁰⁷ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 31.

¹⁰⁸ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 31.

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

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

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

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

190 In addition, I have also considered the additional potential negative impact where if an exemption is granted under the order, "the recipient must carry evidence of the exemption, any applicable documentary evidence, and a form of identification."¹⁰⁹

191 Further, as noted above, in the Human Rights Statement, I have considered how people's human rights will be engaged and limited by the Order.¹¹⁰

192 In making this Order, I have excluded medically exempt individuals from post-entry quarantine requirements, to ensure those with valid reasons for a medical exemption are not disadvantaged as a consequence of their ineligibility.¹¹¹

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

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

¹⁰⁹ Department of Health, Human Rights Statement: Pandemic (Victorian Border Crossing) Order (11 December 2021) [243.5].

¹¹⁰ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 26-27.

¹¹¹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 26-27.

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

- 195 In his earlier advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).¹¹²
- 196 The Chief Health Officer clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.¹¹³
- 197 Public education and health promotion can provide community members with an understanding of and actions, such as hand hygiene, staying home when unwell and testing when symptomatic. However, international travel carries the risk of importation of novel variants of concern.¹¹⁴ Education and practicing of ¹¹⁵ behaviours is consequently not sufficient in isolation to manage the risk posed by incoming international arrivals.
- 198 I therefore consider that there are no less restrictive means reasonably available to achieve the purpose that the limitations on rights sought to be achieve.

Conclusion

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

¹¹² Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 14 - 20.

¹¹³ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 10-11.

¹¹⁴ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 15.

¹¹⁵ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

Schedule 5 – Reasons for Decision – Pandemic (Detention) Order 2022 (No.4)

Summary of Order

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

Purpose

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

Obligations

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

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

204.1 imposes obligations on specified classes of international arrivals classified as persons of risk. A person of risk is a person who has entered Victoria after having been in another country in the 7 days prior to entry, is not an international transit passenger, and is not eligible to enter Victoria under the Victorian Border Crossing Order. Specifically, this includes:

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

204.1.2 An international passenger arrival if they are older than 18 years of age and not fully vaccinated or medically exempt;

204.1.3 An international passenger arrival if they are over 12 years and two months old and are unvaccinated, not medically exempt, not travelling unaccompanied, and not travelling with at least one parent or guardian who is fully vaccinated or medically exempt.

204.2 imposes an initial period of detention of 7 days.

205 An authorised officer is required to review a person's detention at least once every 24 hours under section 165BG of the Public Health and Wellbeing Act 2008 to determine if the authorised officer is satisfied that the person's continued detention is reasonably necessary to eliminate or reduce a serious risk to public health.

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

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

206.2 there is an emergency situation; or

206.3 the person is required to by law.

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

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

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

Changes from Pandemic (Detention) Order 2022 (No.3)

210 Reduce the period of hotel quarantine for unvaccinated international arrivals from 14 to 7 days to align with the self-quarantine period for close contacts (including unvaccinated close contacts). Consequential amendments to align with this change include:

210.1 the period of reference to consider a person an “international arrival” reduced from 14 to 7 days prior to arrival in Australia or Victoria;

210.2 no longer extending the period of detention by 7 days from an initial period of 7 days.

Period

211 This Order will commence at 06:00:00pm on 18 February 2022 and ends at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

212 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the order will limit the human rights identified as limited under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.

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

214 The Human Rights Statement also sets out:

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

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

Human rights that are engaged, but not limited

- 215 Further, in my opinion, the obligations imposed by the order will engage, but not limit, the human rights identified as engaged, but not limited, under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.
- 216 My explanation for why those rights are engaged, but not limited, by the Order is set out in the Human Rights Statement.

How the obligations imposed by the Order will protect public health

- 217 I carefully read and considered the Chief Health Officer and Acting Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".
- 218 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:
- 218.1 Globally, countries have differing epidemiology, control over COVID-19 outbreaks and protective public health measures. To manage this external risk in a consistent and predictable manner, it is appropriate for Victoria to adopt a nationally standardised approach to international arrivals to reduce the risk of viral incursion and transmission. A combination of quarantine, testing and entry to sensitive setting restrictions are required to control for the risks posed by the different cohorts of international arrivals to the Victorian community. As international travel has now recommenced, these measures become increasingly important in managing the risk of incursion, especially from emerging threats such as the importation of novel variants of concern.¹¹⁶
- 218.2 While evidence for Omicron continues to emerge, TGA-approved and recognised COVID-19 vaccines have been demonstrated to reduce symptomatic disease and severe disease for Omicron, as well as transmission of pre-Omicron variants and the ancestral strain. Thus, unvaccinated travellers pose a higher incursion risk than those who are fully vaccinated. Further, with large parts of the world still unvaccinated, and major COVID-19 outbreaks persisting across the globe, the risk of new variants emerging and arriving at our shores remains.¹¹⁷
- 218.3 Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals' interaction and movement for a defined period.¹¹⁸
- 218.4 Quarantine in a hotel quarantine facility is appropriate for high-risk cohorts such as unvaccinated individuals. Quarantine further mitigates risk of incursion by minimising

¹¹⁶ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

¹¹⁷ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 31

¹¹⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 31.

interactions with general community members while also having in place dedicated operational protocols to reduce risk and access to testing and medical care resources.¹¹⁹

218.5 AHPPC recently reaffirmed its position on the importance of managed quarantine programs for international travellers, releasing a statement on end-to-end best practice arrangements.¹²⁰

218.6 Managed quarantine facilities provide the most stringent safeguards against onward transmission from an infectious person, with robust testing regimens, infection control practices and other public health measures in place to ensure early detection and management of COVID-19 cases and associated close contacts.¹²¹

218.7 Most recently, the Chief Health Officer has advised that hotel quarantine remains a vital public health measure that protects the state from incursion of COVID-19 cases and limits the risk of incoming variants of concern. Unvaccinated international arrivals present a higher incursion of risk compared to those who are fully vaccinated. Government-managed quarantine facilities such as hotel quarantine provide the most oversight and protection against transmission and infection, with robust testing protocols and public health measures in place to ensure early detection and management of cases and contacts.¹²²

218.8 In addition to the above policies, I have considered the additional policies outlined below to further strengthen the Victorian response to the COVID-19 pandemic and ensure alignment with national and jurisdictional policies, specifically for managing maritime arrivals, unvaccinated air arrivals and Victoria's test, trace, isolate and quarantine approach.

218.9 I recommend that international arrivals entering Victoria via Victorian maritime ports, regardless of their vaccination status, continue to be managed in a different way to fully vaccinated air arrivals, because of the unique nature of the industry and associated higher risk profile.¹²³

218.10 International maritime crew continue to represent an increased risk to public health when compared to fully vaccinated international air arrivals due to several factors which include:¹²⁴

218.10.1 International air arrivals are subject to a robust vaccination status verification, whereby status is checked prior to boarding (by the airline) and is also checked again at the airport upon arrival (largely Commonwealth-led), to determine if the person must enter hotel quarantine or is eligible for an international

¹¹⁹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 31.

¹²⁰ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 32

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

¹²² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹²³ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 28.

¹²⁴ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 28.

passenger arrival permit. Currently there is no such Commonwealth process to check vaccination status for international maritime crew.

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

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

219 A person's period of detention will only continue for the whole of the initial period of detention, or the whole of any extension of the initial period of detention if an authorised officer, after conducting a review of the person's detention under section 165BG(2) of the Public Health and Wellbeing Act 2008, determines that the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health.

220 Section 165BG of the Public Health and Wellbeing Amendment (Pandemic Management) Act 2021 provides that:

“(2) Subject to subsection (3), an authorised officer must, at least once every 24 hours during the period that a person is detained, review whether the authorised officer is satisfied that the continued detention of the person is reasonably necessary to eliminate or reduce a serious risk to public health.

(3) If it is not reasonably practicable for a review under subsection (2) to be undertaken within a particular 24 hour period, the review must occur as soon as practicable and without undue delay.¹²⁵”

221 International arrivals who are not fully vaccinated do not have the protective effects provided by COVID-19 vaccines. As this group represents the highest risk of incursion, detention in a hotel quarantine facility where risk mitigating protocols are in place and a quarantine period of seven days is appropriate as it represents the likely incubation period of the SARS-CoV-2 virus.

¹²⁵ Public Health and Wellbeing Amendment (Pandemic Management) Act 2021 (Vic) section 165BG.

- 222 Further to advice from the Chief Health Officer, I have considered that reducing the period of hotel quarantine for unvaccinated international arrivals from 14 to 7 days reflects the current epidemiological risk profile in Victoria, where majority of the population is vaccinated, and there is sustained community transmission due to the Omicron variant. In the setting of high vaccination coverage and widespread transmission, the risk posed by a new incursion of COVID-19 into the community is minimal compared to the risk of infection from community transmission. This change will also align with the requirement for close contacts to complete 7 days of quarantine in the community. Close contacts are at higher risk of COVID-19 infection due to their known exposure to a confirmed case in a household or household-like setting. International arrivals generally have a lower risk of COVID-19 infection as they may or may not have been exposed to COVID-19 during their travel.¹²⁶
- 223 An individual who tests positive for COVID-19 during their detention period is managed as a diagnosed person and will be required to comply with the necessary public health measures of self-isolation to prevent onward transmission. Similarly a person who refuses to get tested during their detention period to confirm that they have not contracted COVID-19. Accordingly, the period of quarantine detention will no longer be extended up to 7 days where a person either tests positive or refuses a test. This change will also align with the requirement for close contacts to complete 7 days of quarantine in the community and unvaccinated international arrivals to complete 7 days of hotel quarantine.
- 224 Furthermore, as the quarantine period is being reduced from 14 to 7 days for unvaccinated international arrivals, it is necessary to similarly reduce the period of reference for international arrivals to 7 days.

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

- 225 In making this decision, I considered the possible negative impacts of the Order on the individuals and the community.
- 226 In particular, as noted above, in the Human Rights Statement, I have considered how people's human rights will be affected and limited by the Order.
- 227 In addition, I have also considered the following additional potential negative impacts¹²⁷:
- 227.1 Separation of families and support networks while people are in detention facilities: If the detained person has family in Victoria, this person is unable to be reunited with family for the period of detention. For detained persons separated from their family, detention can cause disruptions in relationships, economic difficulties, isolation from culture and traditions, and uncertainty and anxiety. I acknowledge this but the high risk of spread of COVID-19 from overseas into and throughout Victoria requires restrictions as specified above.

¹²⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹²⁷ Charter of Human Rights and Responsibilities Act 2006 (Vic).

- 227.2 Detention can also constitute an incursion into the rights of people of different cultural, religious, racial or linguistic backgrounds to practice their culture, religion, or language to the extent that the short period prevents them from doing so. While there are many ways of enjoying one's culture, religion, or language in the place of detention or online, there may be activities which can only be done face-to-face or in a certain location.
- 227.3 A person may be unable to work at their usual place of work for the period of detention, unless they are able to do so remotely. This can have an impact on the economic, social, and psychological wellbeing of the person or/and their family.
- 227.4 Detention places significant restrictions on a person's ability to move freely. This can impact adversely on their mental health and psychosocial wellbeing.
- 228 However, I also recognised that the Order contains the following exceptions or qualifications to minimise the potential negative impacts on individuals and the community:
- 228.1 The Chief Health Officer, the Deputy Chief Health officer or an authorised officer may grant an exemption to a person of risk from the requirements of this Order, if satisfied that the exemption is appropriate by having regard to the need to protect the public and the principles of the Order.
- 228.2 A person may only continue to be detained if an authorised officer, who is required to review the person's detention every 24 hours under s 165BG of the Act, is satisfied that the person's continued detention is reasonably necessary to eliminate or reduce a serious risk to public health.
- 228.3 Section 165BN of the Public Health and Wellbeing Act 2008 provides that "A person is not guilty of an offence against subsection 19(1) if the person had a reasonable excuse for refusing or failing to comply."

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

- 229 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).¹²⁸
- 230 The CHO clearly states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.¹²⁹
- 231 The right to liberty has been described as 'the most elementary and important of all common law rights'. The prohibition is on arbitrary detention and on deprivation of liberty except on grounds, and in accordance with procedures, established by law. This means that the right to liberty may only

¹²⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 14-20.

¹²⁹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 10-11.

be legitimately constrained if the detention is authorised by law and is not arbitrary (in that it is reasonable or proportionate in all the circumstances).

232 I have assessed the suitability of less restrictive alternatives such as shorter periods of detention or home quarantine, and consider that these options are not suitable for a high-risk cohort such as unvaccinated international arrivals because a quarantine period of 7 days represents the likely incubation period of the SARS-CoV-2 virus.

233 I have considered whether home quarantine or a requirement to self-isolate or quarantine at a place of person's choosing is a reasonably available alternative. However, I decided that it was not a reasonably available alternative that would be sufficiently effective to achieve the purpose of the Order, based on the Chief Health Officer's advice that:

233.1 Managed quarantine facilities provide the most stringent safeguards against onward transmission from an infectious person, with robust testing regimens, infection control practices and other public health measures in place to ensure early detection and management of COVID-19 cases and associated close contacts.¹³⁰

233.2 Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals' interaction and movement for a defined period immediately following their arrival.¹³¹

233.3 Quarantine in a hotel quarantine facility is appropriate for high-risk cohorts such as unvaccinated individuals. Quarantine further mitigates risk of incursion by minimising interactions with general community members while also having in place dedicated operational protocols to reduce risk and access to testing and medical care resources.¹³²

234 In relation to changes to reduce hotel quarantine for international arrivals who are unvaccinated from 14 days to 7 days, I note the Chief Health Officer's most recent advice that there is a less restrictive measure available for these individuals, which is home quarantine, but the Chief Health Officer noted the importance of a national approach being taken and our settings and requirements aligning with other states and territories.¹³³

Conclusion

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

¹³⁰ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 30.

¹³¹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

¹³² Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

¹³³ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

- 236 I am also satisfied that the period of detention specified in the Order does not exceed the period that I believe is reasonably necessary to eliminate or reduce a serious risk to public health.
- 237 For the same reasons, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

Schedule 6 – Reasons for Decision – Pandemic (Visitors to Hospitals and Care Facilities) Order 2022 (No.3)

Summary of Order

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

Purpose

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

Obligations

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

240.1 restrict the number of visitors per patient or resident per day;

240.2 require testing of visitors on entry in certain circumstances;

240.3 restrict the number of visitors allowed to enter or remain at the premises;

240.4 restrict the number of visitors with prospective residents of care facilities;

240.5 in certain circumstances, not count a child or dependent accompanying a parent, carer or guardian in the restrictions on the number of visitors per day;

240.6 facilitate telephone, video or other electronic communication with patients and family and support persons to ensure the physical, emotional and social wellbeing of patients and residents;

240.7 ensure that an excluded person does not enter the premises; and

240.8 keep records of all visitor details and times of entry and exit for at least 28 days from the day of entry.

241 Several exceptions from the visitor limits are set out in this Order to ensure parents, carers and guardians are not separated from children unnecessarily. Birth partners are excepted as are those breastfeeding an infant. Other exceptions are for life threatening or end of life support situations. These exceptions allow for the physical and mental wellbeing of children to be protected and for individuals to support family or dependants through key life events.

Changes from Pandemic (Visitors to Hospitals and Care Facilities) Order 2021 (No. 2)

242 Broadening of the reasons for exemption to ordinary visitation exclusions.

Period

243 This Order will commence at 06:00:00pm on 18 February 2022 and end at 11:59:00pm 12 April 2022.

Relevant human rights

Human rights that are limited

244 For the purposes of section 165AP(2)(c), in my opinion, the obligations imposed by the Order will order limit the human rights identified as limited under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.

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

246 The Statement also sets out:

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

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

Human rights that are engaged, but not limited

247 Further, in my opinion, the obligations imposed by the Order will engage, but not limit, the human rights identified as engaged, but not limited, under the heading *Nature and extent of limitations* in the schedule to the Human Rights Statement that relates to this order.

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

How the obligations imposed by the Order will protect public health

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

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

250.1 Whilst Victoria has experienced the peak of the Omicron wave, the state continues to report high levels of COVID-19 community transmission, with cases currently averaging 7000 per day. As there is ongoing community transmission, it is necessary to maintain some baseline restrictions to limit the impacts on the health system.¹³⁴

¹³⁴ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

- 250.2 Retaining some public health measures for essential workforces remains necessary due to the critical nature of the work that these cohorts undertake. These workforces protect vulnerable Victorians, provide essential services and delivery of critical resources to the community.¹³⁵
- 250.3 These workers also face an elevated level of risk of contracting the virus due to occupational exposure, therefore warranting additional protective measures to prevent the need for testing and isolating, which not only compromise workforce health and safety, but present significant flow on effects to the community.¹³⁶
- 250.4 Hospitals and care facilities are sensitive settings requiring additional public health measures to mitigate the risk of negative health impacts on vulnerable residents, patients' visitors and to protect the workforce. Residents within care facilities have several risk factors that increase their risk of severe illness, complications and death from COVID-19, warranting additional protective measures. This includes face masks for workers in resident facing roles when working indoors and staff declarations if working at more than one worksite.¹³⁷
- 250.5 Individuals with known and suspected COVID-19 are more likely to present to health care settings and health care workers are more likely to have prolonged exposure to such individuals during their work. Outbreaks in these settings have continued into 2022.
- 250.6 Incursion of COVID-19 into care facilities has resulted in significant transmission, outbreaks and loss of life. Between 1 August 2021 and 13 December 2021, aged and residential care facilities recorded 309 outbreaks, 1,743 cases and 139 deaths, which comprise some 7.4% of all outbreaks, 1.5% of all cases and 23.2% of deaths during this period. Disability services recorded 202 outbreaks, 609 cases and 1 COVID-19 related death, which comprise 4.9% of all outbreaks, 0.5% of the total number of cases and 0.2% of all deaths during this period.¹³⁸ The outbreaks seen in these sensitive settings throughout 2021 have had significant consequences for staff and patients at health services, and staff and residents at care facilities. For this reason, additional restrictive measures for visitors to both hospitals and care facilities are likely to be appropriate.¹³⁹
- 250.7 Limiting the number of visitors to these sensitive settings (care facilities and hospitals) reduces the number of interactions between a resident or patient and those who may be more mobile in the community, thus reducing opportunities for viral transmission.¹⁴⁰
- 250.8 Hospital patients are at increased risk of being exposed to and transmitting COVID-19, and may be particularly vulnerable to the negative impacts of COVID-19 infection including severe disease, further hospitalisation and death. Vulnerable patient cohorts include the elderly, the immunocompromised, and those affected with comorbidities which are known to be

¹³⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹³⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

¹³⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 18 [76].

¹³⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [68].

¹³⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [69].

¹⁴⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 18 [76].

associated with adverse outcomes for COVID-19 including cancer, type 2 diabetes, respiratory disease, heart disease, chronic kidney disease, and hypertension.¹⁴¹

250.9 Healthcare workers are more likely to be exposed to infectious cases while delivering care. It is critical to protect the workforce to ensure the care of patients.¹⁴²

251 The Acting Chief Health Officer therefore advised that I consider the implementation of further measures to safeguard residential aged care facilities (RACF), which are highly sensitive settings occupied by individuals who are who are often frail, immunocompromised or have significant comorbidities and complex care needs. I consider the implementation of further measures to safeguard residential aged care facilities and hospitals. The most effective way of minimising negative health impacts is by preventing, as far as possible, the incursion of COVID-19 into such facilities.¹⁴³

252 On 16 February 2022, the Chief Health Officer advised me that the current requirements under the Pandemic (Visitors to Hospitals and Care Facilities) Order 2022 (No. 2) that enable a person to be exempted (with approval) from ordinary visitation exclusions is not sufficiently broad. As an example, it does not enable the appropriately qualified delegates (Executive Director of Nursing or equivalent, Deputy Chief Health Officer or Chief Health Officer) to consider exempting a COVID-positive birth partner to be present for the birth of their child. While it is important to maintain a case-by-case approval process by an appropriately qualified person, the discretion available to the decision-maker is currently too narrow.

253 The Chief Health officer recommended I broaden the circumstances that a person may be considered for exemption to align more closely with the circumstances under which ordinary hospital visits are allowed.¹⁴⁴

254 I accept the Chief Health Officer's advice in allowing great discretion to exempt excluded persons in specific circumstances.

255 Given the impact the Omicron variant of concern for the duration of this initial declaration period and this has also been a factor of consideration in my decision to make this pandemic order.

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

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

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

¹⁴¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 19 [80].

¹⁴² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 27 [107-108].

¹⁴³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 19 [81].

¹⁴⁴ Text reflects email advice provided by the Chief Health Officer, 16 February 2022.

- 258 In addition, I have also considered the following additional potential negative impacts:
- 258.1 This order prohibits “visits from diagnosed persons, people with certain COVID-19 Symptoms, and close contacts (except in circumstances which remain limited despite having been eased from previous settings).”¹⁴⁵
- 258.2 Under the order there are “limitations on entry and caps on numbers of visitors to a hospital or a care facility, subject to a set of broader exemptions.”¹⁴⁶
- 258.3 “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.”¹⁴⁷
- 258.4 “Where children seek to have family contact, limitations on their visitation rights may not be in their best interests in every circumstance.”¹⁴⁸
- 258.5 “Given that many people practice their cultural and religious rights with family, friends, and members of the community, restrictions on who can visit them in hospital or a care facility can restrict patients’ or residents’ cultural or religious rights for however short or long a time the stay lasts.”¹⁴⁹
- 258.6 “For Aboriginal persons who have connection with country, restrictions on visitors may have even more of an isolating effect when they are already away from ancestral lands.”¹⁵⁰
- 258.7 Under the order, “visitors to care facilities are required to make a declaration that they are free of COVID-19 symptoms and have not been in contact with a confirmed case or are required to self-isolate or self-quarantine.”¹⁵¹
- 258.8 Implementing additional measures will likely contribute to community fatigue and distress, which is particularly important given that visitor restrictions in the last 20 months have been associated with negative impacts including by contributing to the social isolation of patients and elderly residents. These additional measures must balance mental and emotional

¹⁴⁵ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [53].

¹⁴⁶ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [54.1].

¹⁴⁷ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [55.3].

¹⁴⁸ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [55.4].

¹⁴⁹ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [57.1].

¹⁵⁰ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [57.2].

¹⁵¹ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [59.2].

wellbeing of residents, patients, and families with the potential risks of COVID-19 incursions due to visitors.¹⁵²

258.9 Restrictions on number of visitors to hospitals and care facilities are already very limited and many facilities apply more stringent rules regarding visitation than the Pandemic Orders require. Reducing visitors from five people per day to two people may raise key social factor concerns of individuals loneliness and mental health.¹⁵³

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

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

259.2 “Children or dependents may be visitors to hospitals without being included in a head count (where a cap applies to the number of visitors) if alternative care arrangements are unavailable and the child cannot be left unattended.”¹⁵⁴

259.3 “Persons in care facilities are vulnerable to serious illness or serious physical, mental, or social consequences of illness. Hospitals and care facilities are both high-density and high-contact forms of accommodation involving both residents and staff, and COVID-19 can spread quickly in such settings. COVID-19 has also spread among healthcare workers who are highly trained, not easily replaced, and valued members of their families and community in their own right.”¹⁵⁵

259.4 Individuals who are elderly, immunocompromised or have significant comorbidities and complex care needs are the majority as inpatients at hospitals and residents at care facilities. For this reason, such additional public health measures are necessary as patients and residents at these facilities are particularly vulnerable to the negative impacts of COVID-19 infection, including severe disease and death.¹⁵⁶

¹⁵² Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [70].

¹⁵³ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [71].

¹⁵⁴ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [55.1].

¹⁵⁵ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [65].

¹⁵⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 [66].

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

- 260 In his advice, the Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).¹⁵⁷
- 261 The Chief Health Officer states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.¹⁵⁸
- 262 Hospital patients and care facility residences remain one of the most vulnerable cohorts to COVID-19. While vaccination rates are high, many patients and care facility residents may be unable to be vaccinated due to other medical conditions. These conditions may also be exacerbated by COVID-19 infection. So, while removing all limits on the number of visitors to hospitals and care facilities has been considered, the emergence of variants of concern renders this approach inappropriate at this point.¹⁵⁹
- 263 Options for mandatory vaccination for visitors have been considered in order to remove all limits on the number of visitors to a hospital or care facility. I have deemed this option as currently unviable, given the significant operational burden this would place on hospital and facilities to check vaccination status for all visitations. However, as the role of RA testing becomes more important¹⁶⁰ as accessibility to the¹⁶¹ increases, RA testing by visitors provides a significant safeguard against the risk of incursion of COVID-19 into hospitals and care facilities. Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement for workers in these settings, fails to provide the same protection for workforces. Currently, PCR and Rapid Antigen (RA) tests are approved for use in Australia.
- 264 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta variant of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 265 During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.¹⁶²

¹⁵⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14 – 20.

¹⁵⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11 [34]-[37].

¹⁵⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 23 [105]-[106], p. 27 [124].

¹⁶⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021) p. 19 [101].

¹⁶¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

¹⁶² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

Conclusion

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