

Minister for Health

Statement of Reasons

Pandemic Orders made on 18 March 2022

On 18 March 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. 9)
Pandemic (Quarantine, Isolation and Testing) Order 2022 (No. 6)
Pandemic (Victorian Border Crossing) Order 2022 (No.6)
Pandemic (Visitors to Hospitals and Care Facilities) Order 2022 (No. 4)

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 March 2022, I received advice from the Acting Chief Health Officer. 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 written advice the Chief Health Officer provided on 21 January 2022;
 - 4.9 verbal advice the Chief Health Officer provided on 19 January 2022;
 - 4.10 verbal advice the Chief Health Officer and Deputy Premier provided on 24 January 2022;
 - 4.11 verbal advice the Chief Health Officer provided on 1 February 2022;
 - 4.12 verbal advice the Chief Health Officer provided on 3 February 2022;
 - 4.13 verbal advice the Chief Health Officer provided on 9 February 2022;

- 4.14 verbal advice the Chief Health Officer provided on 15 February 2022;
- 4.15 emailed advice the Chief Health Officer provided on 16 February 2022;
- 4.16 verbal and additional advice the Chief Health Officer provided on 21 February 2022; and
- 4.17 emailed advice the Acting Chief Health Officer provided on 17 March 2022.
- 5 I have also reviewed the epidemiological data available to me on 18 March 2022 to affirm my positions on the orders made to commence on the same day.
- 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.

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

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

Principle of primacy of prevention

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

Principle of accountability

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

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

Principle of collaboration

- 21 The principle of collaboration is that public health and wellbeing, in Victoria and at a national and international level, can be enhanced through collaboration between all levels of Government and industry, business, communities and individuals.
- 22 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.
- 23 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

- 24 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:
 - 24.1 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;
 - 24.2 supports proactive and responsive decision-making for the purposes of preventing and managing the outbreak and spread of pandemics and diseases with pandemic potential;
 - 24.3 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;
 - 24.4 promotes transparency and accountability in relation to decisions made and actions taken under Part 8A; and
 - 24.5 safeguards contact tracing information that is collected when a pandemic declaration is in force.

Human Rights

- 25 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.
- 26 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:

- 26.1 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;
- 26.2 second, seriously turn my mind to the possible impact of the decision on human rights and the implications for affected persons;
- 26.3 third, identify countervailing interests or obligations in a practical and common-sense way; and
- 26.4 fourth, balance competing private and public interests as part of the exercise of ‘justification’.
- 27 This statement of reasons must be read together with the Human Rights Statement.
- 28 I note also that in providing his advice, the Chief Health Officer had regard to the Charter.³

Overview of public health advice

- 29 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.
- 30 I have considered the Acting Chief Health Officers advice of 17 March 2022, in the context of community transmission of COVID-19 throughout Victoria.⁴
- 31 I have also considered the Acting Chief Health Officer’s advice that, as has been reported since November and more widely in recent weeks a sub-lineage of the Omicron variant – BA.2 - has been spreading across Europe. The most recent data we have available from both wastewater testing and, as of yesterday, sequenced clinical isolates is the majority of COVID-19 infections in Victoria as now caused by the BA.2 subvariant.⁵
- 32 While Victoria had been experiencing a downward trend in case numbers over recent weeks, since 15 March case numbers have been rising. While caution should be exercised in interpretation, a couple of days of higher cases numbers coupled with the increasing proportion of COVID-19 representing the more infectious BA.2 subvariant may represent the early signs of an increasing trend of case numbers. The recent trends in NSW, who have had a higher proportion of BA.2 isolates in recent weeks, also suggest this concern may be warranted.⁶

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.

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

⁵ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

⁶ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

- 33 The Acting Chief Health Officer further advised that the changes to the Orders are appropriate despite this possible trend but, as always, the public health team will be closely monitoring the epidemiology over the coming days and weeks to ensure settings remain appropriate and proportionate to the risk.⁷

Current context

- 34 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.⁸ The unknown severity of Omicron in contrast to Delta at the time informed the making of Orders and the need to take swift action to protect sensitive settings such as hospitals and care facilities.
- 35 My priority has been, and continues to be, to reduce morbidity and mortality and limit the impact of the Omicron on Victoria's most vulnerable residents, our health system and other essential services and sectors.
- 36 Victorians have taken the steps needed to help protect our health system by getting vaccinated and prioritising boosters which has allowed us to manage Omicron over recent weeks and allowed easing of most restrictions across settings – including taking safe steps to get more people to return to the office.
- 37 Within this context of declining hospitalisation rates as well as high vaccination coverage in Victoria, the public health advice is that some restrictions, can now be eased.⁹
- 38 When making this pandemic order, I have had regard to the advice provided by the Acting Chief Health Officer dated 17 March 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.

Immediate situation: Continued management of the COVID-19 Pandemic

- 39 As of 17 March 2022, 9,752 new locally acquired cases (3,313 from polymerase chain reaction (PCR) test positive and 6,439 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 March was negative 12.95 per cent.
- 40 As at 17 March 2022, there are currently 44,690 active cases in Victoria. This includes 30,855 probable cases from positive RA tests.
- 41 7 COVID-related deaths were reported in 24 hours preceding 17 March 2022, bringing the total number of COVID-related deaths identified in Victoria to 2,664.

⁷ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 5.

⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

- 42 The Omicron BA.2 subvariant is widely distributed and has overtaken Omicron BA.1 as the predominant variant in more than half of all catchments with sequence results. The Omicron BA.2 subvariant is detected in 31 of 33 (94 per cent) Metro areas and 27 of 33 (82 per cent) Regional areas. These are the most recent VOC result available from wastewater samples retrieved between 19 February and 4 March.
- 43 Within the past seven days to 16 March 2022, there have been 3 industry sites with wastewater detections coinciding with known cases onsite and 2 industry sites with unexpected wastewater detections meeting escalation thresholds.
- 44 According to Critical Hospital Resource Information System (CHRIS) hospitalisation data as of 17 March 2022 the state seven-day hospitalisation due to COVID growth rate is negative 6.49 per cent; and the state seven-day intensive care unit (ICU) admission due to COVID growth is negative 13.33 per cent.

Test results

- 45 Victorians had been tested at a rate of 4480 per 100,000 people over the 14 days to 17 March 2022.

Vaccinations

- 46 As at 17 March 2022:
- 46.0 a total of 6,049,293 doses have been administered through the state's vaccination program, contributing to a total of 14,602,472 doses delivered in Victoria.
 - 46.1 96 per cent of eligible Victorians over the age of 12 have received one dose of a COVID-19 vaccination.
 - 46.2 94 per cent of eligible Victorians over the age of 12 have received two doses of a COVID-19 vaccination.
 - 46.3 62 per cent of eligible Victorians over the age of 16 have received three doses (booster) of a COVID-19 vaccination.
- 47 As at 6 March 2022:
- 47.0 A total of 34,895,720 doses have been administered by Commonwealth facilities, contributing to a total of 55,321,036 delivered nationally.
 - 47.1 93.60 per cent of Australians aged 16 and over have received two doses of a COVID-19 vaccination.¹⁰

¹⁰ Department of Health, Australian Government, Australian Immunisation Register, COVID-19 vaccine rollout updated 15 March 2022.

The current global situation

48 The following situation update and data have been taken from the World Health Organisation, published 15 March 2022.

Statistic	
Global confirmed cumulative cases of COVID-19	Over 455 million
Global cumulative deaths	Over 6 million
Global trend in new weekly cases	Increasing : 8 per cent increase compared to the previous week
The highest numbers of new cases:	Republic of Korea (2,100,171 new cases; 44 per cent increase) Vietnam (1,670,627 new cases; 65 per cent increase) Germany (1,350,362 new cases; 22 per cent increase) Netherlands (475,290 new cases; 42 per cent increase) France (419,632 new cases; 20 per cent increase)

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

Reasons for decision to make pandemic orders

Overview

- 49 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.
- 50 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.
- 51 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.
- 52 In making the decision to issue the pandemic orders, I have had regard to current, detailed health advice. On the basis of that health advice, I believe that it is reasonably necessary for me to make the pandemic orders to protect public health.¹¹ In assessing what is 'reasonably necessary', I have

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

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*”.

53 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.

54 The Chief Health Officer and the Acting Chief Health Officer have relevantly advised that:

54.1 As community transmission continues throughout Victoria, with a stabilising of new active daily cases over the past week, it is necessary to maintain some baseline restrictions, particularly in the context of the Omicron BA.2 sub variant. These measures limit the impacts on the wider community such as provision of essential services and 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.¹²

54.2 Retaining some baseline 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 deliver critical resources to the community.¹³

54.3 These workers also face an elevated level of risk of contracting the virus due to occupational exposure or due to their work with vulnerable persons, 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.¹⁴

54.4 As case numbers have declined, the capacity provided by private hospitals as at 31 January is now in excess of what public hospitals require from private hospitals for pandemic maintenance support. While public hospitals do require support to reduce waiting lists, this will be done via normal commercial contracting means.¹⁵

54.5 Key sensitive settings for which ongoing public health measures are necessary include healthcare and aged care facilities. These settings house vulnerable people for whom an incursion of COVID-19 is likely to have significant impacts on their health and wellbeing and may be at higher risk of viral transmission. These vulnerable population groups include the

¹² Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

¹³ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

¹⁴ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

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

elderly, immunocompromised individuals, Aboriginal and Torres Strait Islander peoples and those with multiple comorbidities.¹⁶

- 54.6 In the context of sustained community transmission, it remains a proportionate response to limit the number of visitors to these sensitive settings, which reduces the number of interactions between a resident or patient and those who may be more mobile in the community. This limits the opportunities for viral transmission.¹⁷
- 54.7 In addition, pre entry testing requirements for visitors to care facilities reduce the risk of viral incursion. Visitors to hospitals must be vaccinated against COVID-19 to be permitted entry, however if they are unvaccinated, they must complete and show evidence of a negative rapid antigen test result on entry and wear an N95 mask (if 18 years and over).¹⁸
- 54.8 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.
- 54.9 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.¹⁹ 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.²⁰
- 54.10 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.²¹
- 54.11 Healthcare workers are more likely to be exposed to infectious cases while delivering care. It is critical to protect the workforce to ensure the care of patients.²² Therefore, I consider the implementation of further measures to safeguard residential aged care facilities (RACF),

¹⁶ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

¹⁷ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

¹⁸ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

¹⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [68].

²⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [69].

²¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 18 [76].

²² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 27 [107-108].

which are highly sensitive settings occupied by individuals 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.²³

- 54.12 In the setting of high vaccination coverage and sustained community transmission of COVID-19, the risk of incursion due to international aircrew is less than the risk posed in the general community. It is proportionate to remove mandatory testing and self-quarantine requirements for fully vaccinated or medically exempt aircrew service workers and replace with a strong recommendation for testing on arrival or if symptoms develop. Industry will continue to support other COVIDSafe measures for aircrew.²⁴
- 54.13 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. Unvaccinated international arrivals present a higher incursion of risk compared to those who are fully vaccinated. 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.²⁵
- 54.14 Testing and quarantine for international passengers remain important proportionate controls as other control measures are relaxed across settings in Victoria. International passenger arrivals present a highly variable level of risk of incursion of COVID-19 into the Victorian community. These individually variable risk factors are challenging to quantify. Legislative and occupational health and safety requirements and overseas aircrew testing measures that apply to aircrew do not apply to passenger arrivals, therefore potentially leaving them at higher risk of COVID-19 infection and onward transmission. Additionally, passenger arrivals may spend more extended periods in the Victorian community than aircrew whose layover periods are often less than 72 hours duration, presenting more opportunities for onward transmission to occur.²⁶
- 54.15 Mandatory requirements to isolate or quarantine remain a proportionate measure to ensure persons who are or may be infected with COVID-19 do not transmit the infection to others once they have been diagnosed as a case or determined to be a close contact. This helps prevent onward transmission and outbreaks controlled more rapidly.²⁷

²³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 19 [81].

²⁴ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

²⁵ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

²⁶ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

²⁷ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

54.16 Diagnosed persons with confirmed COVID-19 should continue to have specific requirements to ensure their risk of onward transmission is minimised. Requiring close contacts to quarantine minimises the chance of a person being infectious in the community.²⁸

54.17 Testing requirements for persons identified as being at increased risk of developing COVID-19 following known exposure is necessary to identify potential cases and inform appropriate public health responses. These testing requirements ensure that any conversion to COVID-19 infection is promptly identified and minimises the chance of a person being infectious in the community.²⁹

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

56 In making the Orders with respect to visitors to hospitals and care facilities I considered the importance of protecting these sensitive settings. A key factor for hospitals is that they are higher risk settings for COVID outbreaks due to heightened exposure risk and a larger potential footprint for an outbreak. This poses a serious risk to patients particularly vulnerable to COVID infection. Care facilities are akin to a residential home, which at the time of making of these Orders have no restrictions on visitors. As such, in making these Orders I considered it reasonably necessary to strike a balance between allowing visitors to places people called home and protecting care facilities.

Risks of no action taken

57 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.³⁰

Schedules

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

²⁸ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

²⁹ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

³⁰ Department of Health, Chief Health Officer Advice to Premier – Advice Relating to the Making of a Pandemic Declaration (8 December 2021), p. 13.

SCHEDULE 1 – REASONS FOR DECISION – PANDEMIC (ADDITIONAL INDUSTRY OBLIGATIONS) ORDER 2022 (NO. 9)

Summary of Order

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

Purpose

- 60 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

- 61 The additional obligations on industries include:
- 61.1 requiring industries to conduct and keep records of surveillance testing unless the worker was a confirmed COVID-19 case in the last 30 days;
 - 61.2 requiring port operators to ensure that workers wear the appropriate level of PPE or in a care facility, a face covering or PPE in accordance with Department requirements;
 - 61.3 requiring workers to provide a written declaration about additional workplaces if working in two or more sites; and
 - 61.4 restrictions on attending work if exposed to a confirmed case in another workplace.
- 62 The following industries must comply with the Order:
- 62.1 poultry processing facilities;
 - 62.2 abattoirs and meat processing facilities;
 - 62.3 seafood processing facilities;
 - 62.4 supermarket work premises and perishable food work premises (located in Metropolitan Melbourne);
 - 62.5 warehousing and distribution centres premises (located in Metropolitan Melbourne);
 - 62.6 commercial cleaning services;
 - 62.7 care facilities;
 - 62.8 ports of entry servicing international arrivals;

- 62.9 hotel quarantine;
 - 62.10 hospitals;
 - 62.11 schools;
 - 62.12 childcare or early childhood services; and
 - 62.13 construction sites.
- 63 An authorised officer or inspector may conduct an inspection of the work premises and audit the records of the employer.
- 64 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.
- 65 The volume of elective surgery activity is to be determined by respective public health services' assessment of their capacity, in consultation with the Department and in line with agreed Hospital Service Provider bed plans, and the following obligations must be met:
- 65.1 COVID-19 demand must be met;
 - 65.2 workforce pressures must be manageable to support the resumption of non-urgent elective surgery;
 - 65.3 patients must be prioritised based on clinical need;
 - 65.4 health services who intend to reduce non-urgent surgery must contact the department as a matter of urgency; and
 - 65.5 for health services to which the above applies, Category 2 and Category 3 surgery should be reduced in the first instance.
- 66 Private hospitals and day procedure centres may only permit elective surgery to be performed if they do not exceed the volume cap prior to the introduction of restrictions. In addition, the following obligations must be met:
- 66.1 patients must be prioritised based on clinical need;
 - 66.2 a minimum capacity for public health services as of 31 January 2022;
 - 66.3 assist aged care facilities with workforce requests related to shortages caused by COVID-19;
 - 66.4 assist public health services operating COVID-19 streaming areas.
- 67 Failure to comply with the Order may result in penalties.

Changes from Pandemic (Additional Industry Obligations) Order 2022 (No. 8)

- 68 Private hospitals and day procedure centres in Metropolitan Melbourne no longer need to maintain minimum capacity provided to public health services, as at 31 January 2022. Instead, they are to provide sufficient capacity where requested by public health services to assist with the COVID-19 response.

Period

- 69 The Order will commence at 11:59:00pm on 18 March 2022 and end at 11:59:00pm on 12 April 2022.

Relevant human rights

Human rights that are limited

- 70 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.
- 71 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 72 The Human Rights Statement also sets out:
- 72.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
- 72.2 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

- 73 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.
- 74 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

- 75 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".
- 76 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer relevantly advised:

- 76.1 Whilst community transmission continues to reduce throughout Victoria, it is necessary to maintain some baseline restrictions to limit the impacts on the wider community such as the provision of essential services and the health system.³¹
- 76.2 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.³²
- 76.3 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.³³
- 76.4 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-19.³⁴
- 76.5 COVID-19 hospitalisations peaked at over 1,200 people in mid-January 2022 and have since begun to stabilize. COVID-19 hospitalisations are projected to further decrease in coming weeks. As such, it is appropriate that restrictions are further eased, to allow more elective surgery to resume.³⁵
- 76.6 Careful and considered lifting of restrictions is necessary to ensure that private hospitals can continue to provide public hospitals with the capacity to assist with the COVID-19 response. In light of sustained community transmission, there is a continuing risk that the system will not have sufficient capacity, including ICU capacity, in public hospitals to treat patients with COVID-19 and other patients with critical care needs.³⁶
- 76.7 To take account of the varying pressures experienced across health services, related to COVID-19 demand and workforce constraints, public health services resume elective surgery, and may determine the volume of activity to be undertaken based on local assessments of capacity and in consultation with the department.³⁷
- 76.8 As case numbers have declined, the capacity provided by private hospitals as at 31 January is now in excess of what public hospitals require from private hospitals for pandemic

³¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

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, 9 February 2022.

³⁵ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

³⁶ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

³⁷ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

maintenance support. While public hospitals do require support to reduce waiting lists, this will be done via normal commercial contracting means.³⁸

76.9 It is expected that streaming sites will continue to focus on supporting patients with COVID-19 and non-streaming sites will support requests by streaming sites to treat Category 1 and Category 2 patients within clinically recommended time. This enables load balancing across the system, meaning that health services share the pressures of COVID-19 demand, mitigating the risk that health services are overwhelmed.³⁹

76.10 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

77 Most recently, I obtained advice from the Chief Health Officer regarding continuing the additional specific obligations on employers and workers in specific industries that are included in this Order. The Chief Health Officer confirmed former advice obtained on 12 February 2021 that some higher risk industries should be required to ensure that workers wear the appropriate level of personal protective equipment (PPE) or a face covering or limit worker movement across different work premises.⁴²

78 I have accepted the advice of the Chief Health Officer.

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

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

80 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.

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

³⁸ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 16 March 2022.

³⁹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 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 Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 11 March 2022.

- 81.1 “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.”⁴³
- 81.2 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.
- 81.3 “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.”⁴⁵ 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.”⁴⁶
- 81.4 The requirements for employers to direct workers to self-isolate under the Order “place significant restrictions on the ability of people to move freely”,⁴⁷ 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”.⁴⁸
- 82 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:
- 82.1 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.

⁴³ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [286].

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) [294].

⁴⁶ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

⁴⁷ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [295].

⁴⁸ Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [297].

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

- 83 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).⁴⁹
- 84 Hospitals are a higher risk setting for COVID outbreaks due to heightened exposure risk and a larger potential footprint for an outbreak, posing a serious risk to vulnerable patients. Projections have shown a risk to the capacity of the public health system and a need to slow the spread of the virus to limit hospital and ICU demand. Though some additional obligations have been removed from hospital settings, it is still important that workers in these settings continue to be subject to certain baseline restrictions to limit the potential for spread of the virus.
- 85 Victoria's international airport and seaports (ports of entry) are the key work premises receiving international arrivals. International arrivals are potentially at elevated risk for COVID-19 due to exposure while in countries where COVID-19 cases are surging, or where novel variants of concern are emerging. International arrivals are also potentially at elevated risk by exposure to infected travellers during transit to Victoria.⁵⁰ Despite mitigation strategies including physical distancing, hand hygiene, restricted workplace access and isolation requirements assisting to reduce the transmission risk of COVID-19, workers at ports of entry are a key interfacing group that require additional protective measures such as additional PPE and surveillance testing.
- 86 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-19.⁵¹
- 87 On the basis of the Chief Health Officer's advice, I considered there to be no other reasonably available means by which to manage the spread of COVID-19 in workplaces that would be less restrictive of freedoms. However, even if there were less restrictive measures, I consider that the restrictions imposed by the Order are in the range of reasonably available options to achieve the purpose.

Conclusion

- 88 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.
- 89 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.

⁴⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-15.

⁵⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 18-19.

⁵¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11.

Schedule 2 – Reasons for Decision – Pandemic (Quarantine, Isolation and Testing) Order 2022 (No.6)

Summary of Order

- 90 This Order requires persons who are diagnosed with COVID-19 or are probable cases of COVID-19 to self-isolate. It also requires persons who are living with or are close contacts of a diagnosed person or probable case to self-quarantine and undertake testing.
- 91 A probable case is someone who has received a positive result on a COVID-19 RA test.
- 92 Additionally, exposed persons, social contacts and symptomatic persons in the community are required to observe testing requirements issued by the Department.
- 93 There are different requirements for self-quarantine and testing depending on the level of exposure to a diagnosed person or probable case.

Purpose

- 94 The objective of this Order is to limit the movement of people who are diagnosed with COVID-19 or are probable cases of COVID-19, those who live with them and their close contacts, and for exposed persons, social contacts or symptomatic persons in the community to observe testing requirements issued by the Department, to limit the spread of COVID-19.

Obligations

- 95 The Order requires diagnosed persons to:
- 95.1 self-isolate at a suitable premises until seven days from the date on which they took a COVID-19 PCR that returned a positive result;
 - 95.2 notify any other person residing at the premises that the diagnosed person has been diagnosed with COVID-19 and has chosen to self-isolate at the premises; and
 - 95.3 notify the Department of the premises chosen to self-isolate and the contact details of any other residents at the premises; and
 - 95.4 notify any close contacts and social contacts, and any education facility where the person attended during the infectious period of their COVID-19 diagnosis.
- 96 The Order defines probable cases as persons who have returned a positive result from a COVID-19 RA test. The Order requires probable cases to:
- 96.1 self-isolate at a suitable premises until the earlier of:
 - 96.1.1 seven days from the date on which they took a COVID-19 RA test that returned a positive result; or

- 96.1.2 the day on which a negative result is received by the probable case from a COVID-19 PCR test that was undertaken within 48 hours after the COVID-19 RA test from which the person became a probable case;
 - 96.2 notify any other person residing at the premises that the probable case has been diagnosed with COVID-19 and has chosen to self-isolate at the premises; and
 - 96.3 notify the Department of the premises chosen to self-isolate and the contact details of any other residents at the premises; and
 - 96.4 notify any education facility where the person attended an indoor space during their infectious period; and
 - 96.5 notify any close or social contacts, to the extent that they are reasonably able to ascertain and notify those contacts.
- 97 The Order requires close contacts to self-quarantine for a period of seven days.
- 98 The Order requires that the seven-day period for close contacts who self-quarantine with a diagnosed person or probable case starts from when:
- 98.1 the diagnosed person undertook their PCR test that confirmed they were a diagnosed person; or
 - 98.2 the probable case undertook their RA test and received a positive COVID-19 result.
- 99 The Order requires close contacts who do not self-quarantine with a diagnosed person or probable case to self-quarantine for seven days from when they last had contact with the diagnosed person or probable case.
- 100 The Order requires the operator of an education facility who is informed of a positive diagnosis by a diagnosed person or probable case to take reasonable steps to notify exposed workers and parents, guardians and carers of the persons enrolled at the education facility during the relevant infectious period of their potential exposure
- 101 The Order requires exposed persons to comply with the relevant requirements set out in the Testing Requirements for Contacts and Exposed Persons document issued by the Department.
- 102 The Order requires social contacts and symptomatic persons in the community to comply with the relevant requirements set out in the Testing Requirements for Contacts and Exposed Persons as issued by the Department.

Changes from Pandemic (Quarantine, Isolation and Testing) Order 2022 (No.5)

- 103 Clarification that diagnosed persons and probable cases must self-isolate until the day that is 7 days from, not after, the date of the positive test.
- 104 Clarification that a recent confirmed case is not to be identified as a close contact.

- 105 Local Public Health Unit (LPHU) Directors and Medical Leads will have an additional power to vary or revoke notice given to a close contact.
- 106 In order to avoid duplicating obligations covered by the Pandemic (Workplace) Order 2022 (No.6) this Order will no longer require education facility operators a to record information on exposed persons.
- 107 The Chief Health Officer, a Deputy Chief Health Officer or LPHU Directors and Medical Leads will have an additional power to vary the period of self-isolation for a diagnosed person or probable case.
- 108 The definition of a recent confirmed case will be amended so that the period a person is considered a recent confirmed case is 8 weeks from time of release from self-isolation (therefore is not considered a case or close contact in that time).

Period

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

Relevant human rights

Human rights that are limited

- 110 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.
- 111 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 112 The Human Rights Statement also sets out:
- 112.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i));
and
- 112.2 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

- 113 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.
- 114 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

- 115 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".
- 116 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer and the Acting Chief Health Officer relevantly advised:
- 116.1 Mandatory requirements to isolate or quarantine remain a proportionate measure to ensure persons who are or may be infected with COVID-19 do not transmit the infection to others once they have been diagnosed as a case or determined to be a close contact, meaning onward transmission can be prevented and outbreaks controlled more rapidly.⁵²
- 116.2 Diagnosed persons with confirmed COVID-19 should continue to have specific requirements to ensure their risk of onward transmission is minimised.⁵³ In line with the national settings announced by the AHPPC and National Cabinet, the self-isolation period for diagnosed persons should be 7 days from the date the person took a COVID-19 PCR test where they were diagnosed with COVID-19⁵⁴
- 116.3 Diagnosed persons and probable cases should continue to have specific requirements to notify their work or education premises if they attended during their infectious period. Under this model, increased accountability is placed on persons who are a confirmed or probable COVID-19 case to inform workplaces and education settings they have attended during their infectious period so that these setting can more promptly instigate public health responses. This measure is also intended for organisations in the community to grow more proficient at appropriately responding to exposures and to become more aware of their responsibilities and capabilities during this evolving stage of the pandemic. Diagnosed persons and probable cases should also continue to be required to notify the department of their place of self-isolation as well as any persons at this location that they have tested positive to COVID-19, to ensure these persons can take precautions to minimise risk of infection.⁵⁵
- 116.4 RA tests show moderate sensitivity and high specificity for the detection of SARS-CoV-2 and are an appropriate asymptomatic screening tool in the setting of high community prevalence.⁵⁶

⁵² Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 24.

⁵³ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 24.

⁵⁴ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

⁵⁵ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 25-26.

⁵⁶ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 12.

- 116.5 Better access to and awareness of RA testing will arm Victorians with a more proactive preventative tool, particularly for those who may experience asymptomatic infection and unwittingly pass this on to their friends and family.⁵⁷
- 117 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.
- 118 As advised by the Acting Chief Health Officer, I am recommending the following positions:
- 118.1 Testing requirements shift away from PCR to RA tests to preserve and reduce pressure on the testing system as repeated RA testing further improves accuracy as a screening modality.⁵⁸
- 118.2 A continued responsibility on individuals testing themselves, and potentially also having cases notify their contacts. This approach reduced delays in contact tracing or implementation of appropriate public health measures, and may be considered low impost as these individuals are oftentimes best placed to directly liaise with their contacts given established relations or known contact details. Similarly, a requirement for operators and employers to notify the Department once outbreak thresholds have been reached helps instigate public health measures while normalising the actions that individuals can take to help protect their contacts or settings, and hence the community.⁵⁹
- 118.3 A close contact as determined by the Department of Health is intended to identify individuals with the greatest risk of developing COVID-19 following exposure to an infectious case.⁶⁰
- 118.4 Interactions that occur in private residences or residential facilities represent a high transmission risk due to the intimate nature of interactions that occur in a prolonged or repeated manner in enclosed spaces. Similarly, outbreaks are high risk settings with established coronavirus transmission representing a heightened risk of infection. Requiring close contacts to quarantine minimises the chance of a person being infectious in the community. Close contacts should also continue to have specific COVID-19 testing requirements during their quarantine period to ensure any conversion to COVID-19 infection is promptly identified.⁶¹
- 118.5 Given the number of COVID-19 cases within the community, requiring exposed persons to provide evidence of a negative COVID-19 test result before returning to an educational facility is likely to be ineffective at disrupting transmission chains, whilst also creating a significant

⁵⁷ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 12.

⁵⁸ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 20.

⁵⁹ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 20.

⁶⁰ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 24.

⁶¹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 24-25.

administrative burden on educational facilities to contact affected students and monitoring COVID-19 test results.⁶²

- 118.6 Vaccine effectiveness for infection and symptomatic infection for two doses against Omicron is likely reduced. Therefore, there is likely minimal differential benefit in applying requirements based on the vaccination status.⁶³
- 118.7 In line with AHPPC and National Cabinet, the self-quarantine period should be 7 days for close contacts, irrespective of whether the close contact is vaccinated or unvaccinated.⁶⁴
- 118.8 The measures recommended by the Chief Health Officer on 23 December for isolation and testing still apply⁶⁵ That is, it is still appropriate that testing requirements shift away from PCR to RA tests to preserve and reduce pressure on the testing system⁶⁶ and that requiring cases to notify their contacts acknowledges a greater responsibility on individuals to manage their COVID risk, and may be considered low impost as these individuals are oftentimes best placed to directly liaise with their contacts given established relations or known contact details.⁶⁷
- 118.9 The use of RA testing as an asymptomatic screening tool in the context of high community prevalence, consistent with previous advice, but with expanded use given the increased risk posed by the Omicron variant.⁶⁸
- 118.10 Symptomatic close contacts should be required to undertake a PCR test on the first day of their self-quarantine. If the result is negative, they should be required to undertake an RA test on the sixth day of self-quarantine.⁶⁹
- 118.11 Asymptomatic close contacts should be required to undertake RA testing on the first day after they are informed that they are a close contact, and on the sixth day of their self-quarantining period.⁷⁰

⁶² Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

⁶³ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 20.

⁶⁴ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

⁶⁵ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 4 January 2022.

⁶⁶ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 20.

⁶⁷ Department of Health, Acting Chief Health Officer Advice to Minister for Health (17 March 2022).

⁶⁸ Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021) p. 13.

⁶⁹ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

⁷⁰ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

- 118.12 Close contacts that cannot access an RA test should be required to undertake a PCR test on the sixth day of self-quarantine and remain in self-quarantine until they receive a negative result.⁷¹
- 118.13 Potential transmission can occur from interactions between infectious cases and other members of the community who do not fulfill the criteria of being a close contact or exposed person. It is important for such persons (termed social contacts) to be made aware of their potential risks and be recommended to seek testing as a precautionary measure to halt potential chains of transmission once notified by the case. This also places a level of responsibility on diagnosed persons to act in a manner that helps protect the health of their close circle of contacts, and thus the overall Victorian community.⁷²
- 118.14 Testing requirements for persons identified as being at increased risk of developing COVID-19 following known exposure is necessary to identify potential cases and inform appropriate public health responses.⁷³ These testing requirements ensure that any conversion to COVID-19 infection is promptly identified and minimises the chance of a person being infectious in the community.⁷⁴
- 118.15 Asymptomatic exposed persons and social contacts should be strongly recommended to undertake an RA test each day for five days. The Minister should consider mandating this recommendation when RA test supply is sufficient to meet demand.⁷⁵
- 118.16 For an asymptomatic person who is not able to access RA tests each day for five days, a lower number of RA tests at a lesser frequency is better than not testing at all, and individuals should monitor for symptoms. The recommendation to undertake the RA tests each day is based on the understanding that increasing the number of tests improves the sensitivity of the testing.⁷⁶
- 118.17 Any reduction in testing access, and any reductions in the effectiveness of contact tracing, isolation and quarantine, will contribute to increasing transmission of COVID-19 in Victoria, and attendant risk of public health consequences including pressure on the health care system.
- 118.18 As LPHUs primarily manage cases and close contact, it is appropriate for the LPHUs to have the ability to vary the isolation period as required for the unique circumstances of individuals.

⁷¹ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

⁷² Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 25.

⁷³ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 24, and re-confirmed in advice provided by the Acting Chief Health Officer to the Minister for Health, (17 March 2022).

⁷⁴ Department of Health, Acting Chief Health Officer Advice to Minister for Health (17 March 2022).

⁷⁵ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

⁷⁶ Text reflects verbal advice provided by the Acting Chief Health Officer to the Minister for Health, 30 December 2021.

This delegation of power will ensure that cases are managed appropriately in a timely manner.⁷⁷

- 118.19 With a shift to operator and community led contact tracing, the record keeping requirement for education facilities is no longer required as these facilities have alternative and robust record keeping measures and systems in place as part of their day-to-day operations, to identify and notify groups of people exposed on site.⁷⁸
- 118.20 Changes to the definition of a recent confirmed case are needed to align with the recent update to reinfection recommendations made by the Communicable Disease Network of Australia (CDNA) whereby confirmed or probable cases who have recovered do not need to be retested or managed as a contact within 8 weeks from their release of isolation, regardless of symptoms.⁷⁹
- 119 I accept this advice. I believe that self-isolation, self-quarantine and testing obligations remain an important safeguard for early detection of diagnosed persons to prevent large scale outbreaks.
- 120 In the making of this pandemic order, I also took due consideration of the following:
- 120.1 The necessity of a suite of measures, including testing and isolation for people who are the ‘known sources’ of potential transmission, to suppress outbreaks and reduce the risk of community transmission rather than address heightened numbers of cases from failures in prevention.
- 120.2 The effect of not taking these public health measures may threaten the viability of the Victorian healthcare system. The risk being avoided is that the health system will be overwhelmed, which would mean that people could lose their lives (due to both COVID and non-COVID related causes) whereas they would normally be successfully treated to recovery in our healthcare system.
- 120.3 High population vaccination coverage rates provide significant protection against severe disease and death and decrease the rates of onward transmission of COVID-19. However, high population vaccination coverage rates do not negate all risk to the community and additional protective measures and safeguards should remain in place. It is necessary to maintain some baseline restrictions, particularly in the context of the Omicron BA.2 sub variant.⁸⁰
- 120.4 Most recently, I obtained advice from the Acting Chief Health Officer regarding continuing to maintain self-isolation and self-quarantine requirements and the testing requirements issued

⁷⁷ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health (17 March 2022).

⁷⁸ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, (17 March 2022).

⁷⁹ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, (17 March 2022).

⁸⁰ Department of Health, Acting Chief Health Officer Advice to Minister for Health (17 March 2022).

by the Department. The Acting Chief Health Officer confirmed that former advice obtained on 10 December 2021 remains relevant in the current circumstances.⁸¹

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

- 121 In making this decision, I considered the possible negative impacts of the Order on the individuals and the community.
- 122 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.
- 123 In addition, I also considered the following additional potential negative impacts:
- 123.1 "Persons who are required to self-isolate or self-quarantine are permitted to leave the premises at which they are isolating/quarantining for limited purposes. They are therefore not able to move freely."⁸²
- 123.2 "Self-isolation or self-quarantine measures can also constitute an incursion into the rights of people of different cultural, religious, racial or linguistic backgrounds to practice their culture, religion, or language to the extent that the short period prevents them from doing so. While there are many ways of enjoying one's culture, religion, or language at home or online, there may be activities which can only be done face-to-face or in a certain location outside the home."⁸³
- 123.3 A person who is diagnosed with COVID-19 required to self-isolate may impact on their social relationships and everyday life, such as going to work or going shopping. Furthermore, some persons may not reside with other diagnosed persons or close contacts who are quarantining, resulting in limited support if they experience mild symptoms.
- 123.4 A person who is a close contact or an exposed person of a diagnosed person is required to self-quarantine which also impacts on their social relationships and everyday life. As such, some persons may not be residing with close contacts who are self-quarantining will have limited support if they experience mild symptoms.
- 123.5 A person who is self-quarantining will also need to undertake COVID-19 testing and wear a face covering, unless an exception applies, when going to get a test. These additional requirements will further affect a person's everyday life.

⁸¹ Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health (11 March 2022).

⁸² Department of Health, Human Rights Statement: Pandemic (Quarantine, Isolation and Testing) Order (30 December 2021) [71].

⁸³ Department of Health, Human Rights Statement: Pandemic (Quarantine, Isolation and Testing) Order (30 December 2021) [73.3].

- 123.6 A person may choose to self-isolate or self-quarantine at a premise of their choice, which may not be their ordinary place of residence, to protect other household members. However, this option may not be viable for some people experiencing financial hardship or persons with limited social connections.
- 124 However, I also recognised that the Order contains the following exceptions or qualifications to minimise the potential negative impacts on individuals and the community:
- 124.1 People who are self-isolating or self-quarantining may go about their day at their place of self-isolation or self-quarantine, largely undisturbed, and are permitted to receive deliveries of the things they need. They can leave self-isolation or self-quarantine in specified circumstances, including to obtain medical care.
- 124.2 This Order does not physically force anyone to undergo medical treatment.
- 124.3 The exemption and exception powers allow Department officers and from 18 March 2022, a Director or Medical Lead of a designated Local Public Health Unit to consider special cases where self-isolation or self-quarantine conditions are especially difficult. Diagnosed persons may choose a place to self-isolate.

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

- 125 The Chief Health Officer's Advice includes reasons why COVID-19 constitutes a serious risk to public health, and recommends measures that are necessary or appropriate to be put in place in the pandemic orders in order to reduce or eliminate the threat. Requirements to test, quarantine and isolate are fundamental to the containment of COVID-19 and I believe that the measures imposed are appropriate to reduce or eliminate the public health risk.
- 126 On the basis of the Chief Health Officer's advice, I consider there to be no other reasonably available means by which to limit the spread of COVID-19 that would be less restrictive of this particular freedom. However, even if there were less restrictive means, I considered that the limitation imposed by this Order is in the range of reasonably available options to reduce the spread of COVID-19.

Conclusion

- 127 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.
- 128 For the same reasons, in my opinion, I formed the opinion that the limits placed on human rights by the Order are demonstrably justified for the purposes of the Charter.

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

Summary of Order

129 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

130 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

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

132 All international arrivals

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

- 132.1.1 to comply with all of the pandemic orders in force;
- 132.1.2 monitor for COVID-19 symptoms;
- 132.1.3 comply with the International Arrivals and Aircrew Testing Requirements (as applicable); and
- 132.1.4 if applicable, obtain a test for COVID-19 as soon as possible after experiencing any COVID-19 symptoms; and

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

- 132.2.1 For international passenger arrivals, the documents required are:
- 132.2.2 an acceptable form of identification;
- 132.2.3 if applicable, evidence of their COVID-19 PCR test results; and
- 132.2.4 international acceptable evidence or international acceptable certification of their vaccination status, or the vaccination status of their parent or guardian.

132.3 For fully vaccinated or medically exempt international aircrew services workers, the documents required are:

- 132.3.1 an acceptable form of identification; and

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

132.4 For Australian-based international aircrew services workers who are not fully vaccinated or medically exempt, the documents required an acceptable form of identification.

133 Australian-based international aircrew services workers who are not fully vaccinated or medically exempt are additionally required to:

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

133.2 self-quarantine, and must travel immediately to their residence in Victoria where they will remain in self-quarantine for 7 days, unless undertaking essential activities.

134 International passenger arrivals who are not fully vaccinated must:

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

134.2 self-quarantine for the prescribed period of time.

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

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

Changes from Pandemic (Victorian Border Crossing) Order 2022 (No. 5)

137 The mandatory testing requirements for fully vaccinated international aircrew services workers have been removed.

138 Fully-vaccinated and medically-exempt international aircrew services workers no longer have testing-related self-quarantine requirements.

139 Pre-departure testing requirements only apply to international aircrew services workers who are not fully vaccinated or medically exempt but are an Australian based international aircrew services worker remaining in Victoria for a period of 48 hours or longer.

Period

140 This Order will commence at 11:59:00 pm on 18 March 2022 and end at 11:59:00pm on 12 April 2022 unless revoked earlier.

Relevant human rights

Human rights that are limited

- 141 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.
- 142 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 143 The Human Rights Statement also sets out:
- 143.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i));
and
- 143.2 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

- 144 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.
- 145 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

- 146 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".
- 147 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer and Acting Chief Health Officer relevantly advised:
- 147.1 Managing 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.⁸⁴
- 147.2 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

⁸⁴ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

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.⁸⁵

- 147.3 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.⁸⁶
- 147.4 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.⁸⁷
- 147.5 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.⁸⁸
- 147.6 The recommendation to allow provisions for the RA test as an alternative testing option to the PCR test remains appropriate. 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.⁸⁹
- 147.7 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.⁹⁰ 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

⁸⁵ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 5.

⁸⁶ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

⁸⁷ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

⁸⁸ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 30.

⁸⁹ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) pp. 5-6.

⁹⁰ Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 31.

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.⁹¹

147.8 The 7-day quarantine duration for Australian-based unvaccinated international aircrew who enter home quarantine 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 also aligns with the requirement for close contacts to complete 7 days of quarantine. 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.

147.9 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. 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. Unvaccinated international arrivals present a higher incursion of risk compared to those who are fully vaccinated.⁹² 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.⁹³

147.10 Unvaccinated international arrivals present a higher incursion of risk compared to those who are fully vaccinated. 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.⁹⁴

147.11 In Victoria, the epidemiological risk profile has shifted. In the setting of high vaccination coverage and sustained community transmission of COVID-19, the risk of incursion due to international aircrew is less than the risk posed in the general community. It is proportionate to remove mandatory testing and self-quarantine requirements for fully vaccinated or medically exempt aircrew service workers and replace with a strong recommendation for testing on arrival or if symptoms develop. Industry will continue to support other COVIDSafe measures for aircrew.⁹⁵

147.12 Testing and quarantine for international passengers remain important proportionate controls as other control measures are relaxed across settings in Victoria. International passenger arrivals present a highly variable level of risk of incursion of COVID-19 into the

⁹¹ Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6.

⁹² Text reflects verbal advice provided by the Chief Health Officer to the Minister of Health, 15 February 2022.

⁹³ Text reflects verbal advice provided by the Chief Health Officer to the Minister of Health, 15 February 2022.

⁹⁴ Text reflects advice provided by the Acting Chief Health Officer to the Minister of Health, 17 March 2022.

⁹⁵ Text reflects advice provided by the Acting Chief Health Officer to the Minister of Health, 17 March 2022.

Victorian community. These individually variable risk factors are challenging to quantify. Legislative and occupational health and safety requirements and overseas aircrew testing measures that apply to aircrew do not apply to passenger arrivals, therefore potentially leaving them at higher risk of COVID-19 infection and onward transmission. Additionally, passenger arrivals may spend more extended periods in the Victorian community than aircrew whose layover periods are often less than 72 hours duration, presenting more opportunities for onward transmission to occur.⁹⁶

148 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

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

150 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.

151 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."⁹⁷

152 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.⁹⁸

153 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.⁹⁹

154 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.

⁹⁶ Text reflects advice provided by the Acting Chief Health Officer to the Minister of Health, 17 March 2022.

⁹⁷ Department of Health, Human Rights Statement: Pandemic (Victorian Border Crossing) Order (11 December 2021) [243.5].

⁹⁸ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 26-27.

⁹⁹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 26-27.

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

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

156 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).¹⁰⁰

157 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-19.¹⁰¹

158 Public education and health promotion can provide community members with an understanding of preventive 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.¹⁰² Education and practicing of ¹⁰³ behaviours is consequently not sufficient in isolation to manage the risk posed by incoming international arrivals.

159 Testing and quarantine for international passengers remain important proportionate controls as other control measures are relaxed across settings in Victoria. International passenger arrivals present a highly variable level of risk of incursion of COVID-19 into the Victorian community. These individually variable risk factors are challenging to quantify. Legislative and occupational health and safety requirements and overseas aircrew testing measures that apply to aircrew do not apply to passenger arrivals, therefore potentially leaving them at higher risk of COVID-19 infection and onward transmission. Additionally, passenger arrivals may spend more extended periods in the Victorian community than aircrew whose layover periods are often less than 72 hours duration, presenting more opportunities for onward transmission to occur.¹⁰⁴

160 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

161 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.

¹⁰⁰ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 14 - 20.

¹⁰¹ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 10-11.

¹⁰² Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 15.

¹⁰³ Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

¹⁰⁴ Text reflects advice provided by the Acting Chief Health Officer to the Minister of Health, 17 March 2022.

162 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 (Visitors to Hospitals and Care Facilities) Order 2022 (No.4)

Summary of Order

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

Purpose

164 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

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

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

165.2 require testing of visitors on entry in certain circumstances;

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

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

165.5 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;

165.6 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;

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

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

166 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 2022 (No. 3)

- 167 The Order enables local public health units (LPHUs) to permit excluded persons to enter or remain at a hospital or care facility. This extends the existing function to LPHU Directors and Medical Leads in addition to the Chief Health Officer or Deputy Chief Health Officer.
- 168 As LPHUs primarily manage cases and close contacts as well as the strategies to control the spread of COVID-19, it is appropriate to extend the power to permit excluded persons to enter or remain at a hospital to LPHU Directors and Medical Leads. This will support more flexible and timely decision making. LPHUs also have a significant role in collaborating with local health networks, which best places them to work with these services on permitting excluding persons.¹⁰⁵

Period

- 169 This Order will commence at 11:59:00pm on 18 March 2022 and end at 11:59:00pm 12 April 2022.

Relevant human rights

Human rights that are limited

- 170 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.
- 171 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 172 The Statement also sets out:
- 172.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i));
and
- 172.2 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

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

¹⁰⁵ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

How the obligations imposed by the Order will protect public health

- 175 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”.
- 176 In relation to the restrictions that will be imposed by this Order, the Chief Health Officer advised:
- 176.1 Whilst Victoria has experienced the peak of the Omicron wave, the state continues to report high levels of COVID-19 community transmission. As there is ongoing community transmission, it is necessary to maintain some baseline restrictions to limit the impacts on the health system.¹⁰⁶
- 176.2 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.
- 176.3 Hospital patients are at increased risk of being exposed to and transmitting COVID-19, and may be particularly vulnerable to the negative impacts of COVID-19 infection including severe disease, further hospitalisation and death. Vulnerable patient cohorts include the elderly, the immunocompromised, and those affected with comorbidities which are known to be associated with adverse outcomes for COVID-19 including cancer, type 2 diabetes, respiratory disease, heart disease, chronic kidney disease, and hypertension.¹⁰⁷
- 176.4 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.¹⁰⁸ 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.¹⁰⁹
- 176.5 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.¹¹⁰

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

¹⁰⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 19 [80].

¹⁰⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [68].

¹⁰⁹ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [69].

¹¹⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 18 [76].

- 176.6 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.¹¹¹
- 177 The 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 often frail, immunocompromised or have significant comorbidities and complex care needs. I note that advice of the Chief Health Officer and have considered how best to protect residential aged care facilities and hospitals. In safeguarding these sensitives, most effective way is preventing the incursion of COVID-19 into such facilities, which is managed by current public health measures in relation to visitors.¹¹²
- 178 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.¹¹³
- 179 I accept the Chief Health Officer’s advice in allowing greater discretion to exempt excluded persons in specific circumstances.
- 180 Given the impact the Omicron variant of concern has had for the duration of this initial declaration period this has also been a factor of consideration in my decision to make this pandemic order.
- 181 I obtained advice from the Chief Health Officer and Acting Chief Health Officer regarding the visitor limits applying to hospitals and care facilities and testing requirements of visitors in certain circumstances. The Chief Health Officer reiterated former advice that key sensitive settings for which ongoing public health measures are necessary include healthcare and aged care facilities.¹¹⁴ These settings house vulnerable people for whom an incursion of COVID-19 is likely to have significant impacts on their health and wellbeing and may be at higher risk of viral transmission. These vulnerable population groups include the elderly, immunocompromised individuals, Aboriginal and Torres Strait Islander peoples and those with multiple comorbidities.¹¹⁵
- 182 In the context of sustained community transmission, the Acting Chief Health Officer advised that it remains a proportionate response to limit the number of visitors to these sensitive settings, which reduces the number of interactions between a resident or patient and those who may be more mobile in the community. This limits the opportunities for viral transmission.¹¹⁶
- 183 In addition, the Chief Health Officer and Acting Chief Health Officer advised that pre-entry testing requirements for visitors to care facilities reduce the risk of viral incursion. Visitors to hospitals must be vaccinated against COVID-19 to be permitted entry, however if they are unvaccinated, they must complete and show evidence of a negative rapid antigen test result on entry and wear an N95 mask

¹¹¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 27 [107-108].

¹¹² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 19 [81].

¹¹³ Text reflects email advice provided by the Chief Health Officer, 16 February 2022.

¹¹⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 18-20 [73]-[82]

¹¹⁵ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

¹¹⁶ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

(if 18 years and over).¹¹⁷ Such screening measures further mitigate risk and enable consideration for greater visitor numbers to balance the social isolation and wellbeing of residents.¹¹⁸

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

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

185 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.

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

186.1 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)."¹¹⁹

186.2 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."¹²⁰

186.3 "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."¹²¹

186.4 "Where children seek to have family contact, limitations on their visitation rights may not be in their best interests in every circumstance."¹²²

186.5 "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."¹²³

¹¹⁷ Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

¹¹⁸ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 18-19 [76].

¹¹⁹ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [53].

¹²⁰ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [54.1].

¹²¹ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [55.3].

¹²² Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [55.4].

¹²³ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [57.1].

- 186.6 “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.”¹²⁴
- 186.7 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.”¹²⁵
- 186.8 Implementing additional measures will likely contribute to community fatigue and distress, which is particularly important given that visitor restrictions in the last 20 months have been associated with negative impacts including by contributing to the social isolation of patients and elderly residents. These additional measures must balance mental and emotional wellbeing of residents, patients, and families with the potential risks of COVID-19 incursions due to visitors.¹²⁶
- 186.9 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.¹²⁷
- 187 However, in considering the potential negative impacts, I also recognised:
- 187.1 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.
- 187.2 “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.”¹²⁸
- 187.3 “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,

¹²⁴ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [57.2].

¹²⁵ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [59.2].

¹²⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [70].

¹²⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [71].

¹²⁸ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [55.1].

not easily replaced, and valued members of their families and community in their own right.”¹²⁹

187.4 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.¹³⁰

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

188 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).¹³¹

189 The Chief Health Officer states that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.¹³²

190 Education, risk communication, and health promotion are recognised as key components of a robust public health response to the COVID-19 pandemic. Education involves ensuring that people are aware of the risks of COVID-19 and how they can protect themselves; health promotion involves tailoring messages to community values, using trusted messengers, using channels different audiences can access, and establishing or linking with peak bodies to support ongoing work. Public education should encourage the uptake of COVID-safe practices such as mask use, hand hygiene, physical distancing, improving ventilation, staying home when unwell and testing when symptomatic, to outline current public health requirements. It should be delivered across multiple platforms and media, and in a variety of community languages.¹³³

191 The Victorian government has undertaken and should continue to undertake a broad range of community engagement, and outreach activities, together with partners in local government, research institutes and local health, community and faith-based organisations and services. This work has been and should continue to be with Aboriginal and Torres Strait Islanders, and culturally and linguistically diverse communities, to develop community specific, locally delivered solutions, including tailored health advice, vaccination information, local led responses and direct engagement activities to support Indigenous, multicultural and multifaith communities through the pandemic. In addition, ongoing guidance has been and should continue to be given to workplaces and specific settings such schools and healthcare facilities on ways to conduct their business and modify their workplaces to reduce risk, even when such measures are no longer mandated. The Victorian

¹²⁹ Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [65].

¹³⁰ Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 [66].

¹³¹ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14 – 20.

¹³² Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11 [34]-[37].

¹³³ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 14-15 [52]-[56].

government's dedicated coronavirus website is heavily utilised, indicating the continued need to provide up to date public health messaging and information.¹³⁴

- 192 Modifying some of the environments within which people live, work and conduct themselves (particularly people who are especially vulnerable to harm from COVID-19) are key measures to lower the likelihood of transmission in a given setting.¹³⁵
- 193 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.¹³⁶
- 194 Furthermore, care facilities are settings that are akin to residential homes. Private homes do not currently have restrictions to visitors. As such, in continuing to limit visitors to care facilities I consider it reasonably necessary to strike a balance between allowing visitors to places people called home and protecting these sensitive settings.
- 195 In supplementary advice, the Chief Health Officer has advised on the importance of ongoing community engagement and public education campaigns in improving the community's understanding of the virus, and empowering all Victorians to protect themselves, their loved ones, and the wider community.¹³⁷
- 196 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.

Conclusion

- 197 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.
- 198 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.

¹³⁴ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 14-15 [52]-[56].

¹³⁵ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 16 [64].

¹³⁶ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 23 [105]-[106], p. 27 [124].

¹³⁷ Department of Health, *Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 16 [63]-[64].