

# Minister for Health

## Statement of Reasons

### Pandemic Orders made on 12 April 2022

On 12 April 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. 10)
Pandemic COVID-19 Mandatory Vaccination (General Workers) Order 2022 (No.4)
Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2022 (No. 7)
Pandemic COVID-19 Mandatory Vaccination (Specified Workers) Order 2022 (No. 6)
Pandemic (Detention) Order 2022 (No. 5)
Pandemic (Movement and Gathering) Order 2022 (No.5)
Pandemic (Open Premises) Order 2022 (No. 6)
Pandemic (Quarantine, Isolation and Testing) Order 2022 (No.7)
Pandemic (Victoria Border Crossing) Order 2022 (No. 7)
Pandemic (Visitors to Hospitals and Care Facilities) Order 2022 (No.5)
Pandemic (Workplace) Order 2022 (No. 7)

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 the initial pandemic declaration on 9 December 2021, extended the pandemic declaration from 12 January 2022 and again on 6 April 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 7 April 2022, I received advice from the Acting Chief Health Officer.
- 5 I have previously received the following advice:
  - 5.1 the Chief Health Officer's advice provided on 10 December 2021;
  - 5.2 verbal advice the Chief Health Officer provided on 14 December 2021;
  - 5.3 written advice the Chief Health Officer provided on 23 December 2021;
  - 5.4 verbal advice the Acting Chief Health Officer provided on 29 December 2021;
  - 5.5 verbal advice the Acting Chief Health Officer provided on 30 December 2021;
  - 5.6 verbal advice the Acting Chief Health Officer provided on 4 January 2022;
  - 5.7 written advice the Acting Chief Health Officer provided on 10 January 2022;
  - 5.8 written advice the Chief Health Officer provided on 21 January 2022;
  - 5.9 verbal advice the Chief Health Officer provided on 19 January 2022;
  - 5.10 verbal advice the Chief Health Officer and Deputy Premier provided on 24 January 2022;
  - 5.11 verbal advice the Chief Health Officer provided on 1 February 2022;
  - 5.12 verbal advice the Chief Health Officer provided on 3 February 2022;
  - 5.13 verbal advice the Chief Health Officer provided on 9 February 2022;

- 5.14 verbal advice the Chief Health Officer provided on 15 February 2022;
- 5.15 emailed advice the Chief Health Officer provided on 16 February 2022;
- 5.16 verbal and additional advice the Chief Health Officer provided on 21 February 2022; and
- 5.17 emailed advice the Acting Chief Health Officer provided on 17 March 2022.
- 6 I have also reviewed the epidemiological data available to me on 7 April 2022 to affirm my positions on the orders made to commence on the same day.
- 7 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.
- 8 I have taken into consideration where relevant the work of the Australian Health Protection Principal Committee (AHPPC). I note in particular the recommendation of AHPPC on 31 March 2022, to maintain some public health measures to reduce the risk of transmission as the appropriate time for any changes should be in the weeks following the anticipated peak and plateau of the current BA.2 variant of concern surge due over April 2022. Making changes, including changes to quarantine settings, that will result in increased transmission in the community at a time when cases are already increasing or are at their peak, may result in further disruption to the health system. The resulting escalation in case numbers is likely to increase, rather than decrease, any disruptions to broader societal functioning.<sup>1</sup>
- 9 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

- 10 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.

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<sup>1</sup> Department of Health, Australian Government, AHPPC Statement on winter season preparedness, 31 March 2022.

### *Principle of evidence-based decision-making*

- 11 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.<sup>2</sup>
- 12 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*

- 13 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.
- 14 Although Victoria has achieved high vaccination coverage, and a substantial proportion of the population with a level of natural immunity from recent surging Omicron infections, the potential impacts of Omicron and the BA.2 sub-lineage discussed above mean that public health and safety measures continue to play a vital role by reducing the amount of contact between people and the risk of transmission during interactions, limiting further spread of COVID-19 and the potential impact on the health system

### *Principle of primacy of prevention*

- 15 This principle is that the prevention of disease, illness, injury, disability or premature death is preferable to remedial measures.
- 16 Despite high vaccination coverage across Victoria, many situations involve a higher level of risk. Given the continuing risk of increasing 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.<sup>3</sup>

### *Principle of accountability*

- 17 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.
- 18 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.
- 19 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

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<sup>2</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 5.

<sup>3</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 14.

statement (Human Rights Statement) are published in the case of the making, variation or extension of an order.

- 20 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*

- 21 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.
- 22 In deciding to make a pandemic order, I am required to be satisfied that the order is 'reasonably necessary' to protect public health, which requires consideration of the proportionality of those measures to the risk to public health.

#### *Principle of collaboration*

- 23 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.
- 24 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.
- 25 On my behalf, the Department of Health has engaged broadly across the Victorian Government to verify appropriate public health measures into the future. This is a continuing process to ensure public health measures continue to protect all Victorians.
- 26 Victoria continues to work with other jurisdictions through National Cabinet to talk through plans for managing COVID-19.
- 27 It has been important throughout the pandemic for states and territories to cooperate wherever possible in the alignment of public health measures to ensure national consistency where appropriate. In the current absence of any national leadership or opportunity for such, the need to cooperate with states on pandemic orders and health measures has been particularly important in framing consideration of these orders.

#### *Part 8A objectives*

- 28 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:
  - 28.1 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;

- 28.2 supports proactive and responsive decision-making for the purposes of preventing and managing the outbreak and spread of pandemics and diseases with pandemic potential;
- 28.3 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;
- 28.4 promotes transparency and accountability in relation to decisions made and actions taken under Part 8A; and
- 28.5 safeguards contact tracing information that is collected when a pandemic declaration is in force.

## Human Rights

- 29 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.
- 30 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:
  - 30.1 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;
  - 30.2 second, seriously turn my mind to the possible impact of the decision on human rights and the implications for affected persons;
  - 30.3 third, identify countervailing interests or obligations in a practical and common-sense way; and
  - 30.4 fourth, balance competing private and public interests as part of the exercise of ‘justification’.
- 31 This statement of reasons must be read together with the Human Rights Statement.
- 32 I note also that in providing his advice, the Acting Chief Health Officer had regard to the Charter.<sup>4</sup>

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

## Overview of public health advice

- 33 Following the Premier extending the pandemic declaration on 6 April 2020, I requested the Chief Health Officer's advice under this section. 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.
- 34 The advice provided by the Acting Chief Health Officer is in consideration of the increasing prevalence of the BA.2 Omicron sub-lineage in the Victorian community, which appears to be even more transmissible than the original Omicron variant of concern (**VOC**) (BA.1), the forthcoming winter season and the greater movement and mixing of individuals locally and internationally. This advice also considers the likelihood of waning immunity to COVID-19 over time, both in those who have become infected and those who are vaccinated.<sup>5</sup>

## Current context

- 35 A key opening remark from the Chief Health Officer in the Advice to the Premier provides an overview of advice given Victoria's current position in the pandemic:

*"As I have advised in my Advice to the Premier to extend the Pandemic Declaration, I have considered the increased risk of incursion and viral propagation due to community fatigue with public health measures and the pandemic more broadly. I have also considered the possibility of increasing cases of COVID-19 as winter approaches and there is a resultant change in community behaviour such as gathering indoors more frequently and for prolonged periods. As I have advised in my Advice to the Premier to extend the Pandemic Declaration, these factors, alongside poorer indoor ventilation, typically increase transmission and the spread of respiratory diseases, not only from severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), but seasonal respiratory viruses, such as influenza, which compound the overall risk to population health. The current situation in Victoria necessitates continuation of and changes to some public health measures as outlined below to address the threat posed by COVID-19. It also warrants removal of some measures currently included in Orders"*<sup>6</sup>

- 36 The Chief Health Officer in the Advice to the Premier to extend the Pandemic Declaration, has considered the increased risk of incursion and viral propagation due to community fatigue with public health measures and the pandemic more broadly. The Chief Health Officer also considered the possibility of increasing cases of COVID-19 as winter approaches and there is a resultant change in community behaviour such as gathering indoors more frequently and for prolonged periods. As stated in the Advice to the Premier to extend the Pandemic Declaration, these factors, alongside poorer indoor ventilation, typically increase transmission and the spread of respiratory diseases, not only from severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), but seasonal

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<sup>5</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p.3

<sup>6</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 3



respiratory viruses, such as influenza, which compound the overall risk to population health. The current situation in Victoria necessitates continuation of and changes to some public health measures as outlined below to address the threat posed by COVID-19. It also warrants removal of some measures currently included in Orders.<sup>7</sup>

- 37 The priority for the COVID-19 response remains reducing morbidity and mortality and limiting the impact of COVID-19 on Victorians who are most at risk of serious illness, controlling chains of transmission, and reducing the strain on our health system, while maintaining the continued operation of essential services and sectors. It is therefore necessary and appropriate to continue some public health and social measures (**PHSMs**) to protect those most at risk and our health system.<sup>8</sup>
- 38 When making these pandemic orders, I have had regard to previous advice provided by both the Acting and Chief Health Officers. I have also noted the advice provided by the Acting Chief Health officer on the 7 April 2022, that full implementation of the advice should be based on epidemiological data.
- 39 As noted above, the AHPPC recommended on 31 March 2022, that measures to reduce transmission remain in place until after the current Omicron BA.2 wave has passed.<sup>9</sup>
- 40 I have considered the timing for implementing the all the measures in the Acting Chief Health Officer's advice. I have chosen to draw on earlier advice or external information (for example, AHPPC statements) regarding current measures contained in the Orders as the epidemiology evolves. With the steady increase in cases and the public health modelling that forecast a peak and plateauing of cases in mid-April, I am holding changes until this forecasted projection to support our health systems as we they prepare for the upcoming flu season.

### Immediate situation: Continued management of the COVID-19 Pandemic

- 41 As of 8 April, 11,192 new locally acquired cases (4,029 from polymerase chain reaction (PCR) test positive and 7,163 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 rolling average was 10,267 cases.
- 42 As at 8 April 2022, there are currently 63,985 active cases in Victoria, with 335 people hospitalised, 6 of which are in ICU. 4 COVID-related deaths were reported in 24 hours preceding 8 April 2022, bringing the total number of COVID-related deaths identified in Victoria to 2,774.

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<sup>7</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 3

<sup>8</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 4

<sup>9</sup> Department of Health, Australian Government, AHPPC Statement on winter season preparedness, 31 March 2022.

- 43 Within the past seven days to 7 April 2022, there have been 7 industry sites with wastewater detections under active management for outbreak/exposure response and 4 industry sites with unexpected wastewater detections meeting escalation thresholds.

#### *Test results*

- 44 According to data from the week ending 5 April 2022, the proportion of PCR tests returning a positive result in Victoria is estimated at 18.5 per cent

#### *Vaccinations*

- 45 As at 8 April 2022:
- 45.1 a total of 1,469,303 doses have been administered through the state’s vaccination program, contributing to a total of 14,965,238 doses delivered in Victoria.
  - 45.2 95.8 per cent of eligible Victorians over the age of 12 have received one dose of a COVID-19 vaccination.
  - 45.3 94.4 per cent of eligible Victorians over the age of 12 have received two doses of a COVID-19 vaccination.
  - 45.4 70.1 per cent of eligible Victorians over the age of 16 have received three doses (booster) of a COVID-19 vaccination.
- 46 As at 8 April 2022:
- 46.1 A total of 35,957,616 doses have been administered by Commonwealth facilities, contributing to a total of 56,773,871 delivered nationally.
  - 46.2 Over 95 per cent of Australians aged 16 and over have received two doses of a COVID-19 vaccination.<sup>10</sup>

### The current global situation

- 47 The following situation update and data have been taken from the World Health Organisation, published 5 April 2022.

<b>Statistic</b>	
Global confirmed cumulative cases of COVID-19	Over 489 million
Global cumulative deaths	Over 6 million

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<sup>10</sup> Department of Health, Australian Government, Australian Immunisation Register, COVID-19 vaccine rollout updated 7 April 2022.

Global trend in new weekly cases	Decreasing: 16 per decrease compared to the previous week
The highest numbers of new cases:	<p>Republic of Korea (2,058,375 new cases; 16 per cent decrease)</p> <p>Germany (1,137,270 new cases; 13 per cent decrease)</p> <p>France (959,084 new cases; 13 per cent increase)</p> <p>Vietnam (796,725 new cases; 29 per cent decrease)</p> <p>Italy (486,695 new cases; 3 per cent decrease)</p>

Sources: World Health Organisation published 5 April 2022, WHO COVID-19 Weekly Epidemiology Update

### Reasons for decision to make pandemic orders

#### Overview

- 48 Protecting public health and wellbeing in Victoria from the risks posed by the COVID-19 pandemic is of primary importance when I am deciding whether or not to issue pandemic orders. This is a priority supported by the PHW Act.
- 49 Section 165AL(2)(a) of the Act requires me to have regard to the advice of the Chief Health Officer, and I confirm that I have done so. That advice includes public measures that the Chief Health Officer recommends or considers reasonable.
- 50 Section 165AL(2)(b) permits me to have regard to any other matter I consider relevant, including (but not limited to) social and economic factors. Section 165AL(3) permits me to consult with any other person I consider appropriate before making pandemic orders.
- 51 In making the decision to issue the pandemic orders, I have had regard to current, detailed health advice. On the basis of that health advice, I believe that it is reasonably necessary for me to make the pandemic orders to protect public health.<sup>11</sup> In assessing what is 'reasonably necessary', I have had regard to Gleeson CJ's observation in *Thomas v Mowbray* (2007) 233 CLR 307 at [22] that “*the [decision-maker] has to consider whether the relevant obligation, prohibition or restriction imposes a greater degree of restraint than the reasonable protection of the public requires*”.
- 52 Having had regard to the advice of the Acting Chief Health Officer. I have also had regard relevant advice previously provided by both the Chief Health Officer and Acting Chief Health Officer. It is my view that making these pandemic orders are reasonably necessary to reduce the risk that COVID-19 poses.
- 53 The Acting Chief Health Officer and Chief Health Officer have relevantly advised that:

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<sup>11</sup> See Public Health and Wellbeing Act 2008 (Vic) section 3(1) for the definition of ‘serious risk to public health’.

- 53.1 Currently, Omicron is the dominant variant of COVID-19 circulating across the world. The Omicron variant has multiple sub-lineages, including BA.1.1, BA.1, BA.2 and BA.3. The predominant sub-lineage globally is BA.1., however, the proportion of BA.2 cases is increasing globally, with evidence indicating that in New South Wales and Victoria (BA.2 is now the dominant sub-lineage).<sup>12</sup>
- 53.2 Evidence about the Omicron sub-lineage BA.2 and the potential implications for individuals, the population and the health system is building. Initial evidence demonstrates that BA.2 has a moderate growth advantage over BA.1. The growth advantage of BA.2 over other variants and sub-lineages translates to greater transmission, posing a significant risk due to the potential for a steep rise in infections and hospitalisations over the coming weeks, from a baseline of sustained community transmission.<sup>13</sup>
- 53.3 From 9 January 2022, Victoria had been experiencing a downward trend in case numbers from a peak of 51,356 new cases on 8 January 2022. However, since 15 March 2022 case numbers have been steadily rising again. A similar trend is occurring in New South Wales, with 24,115 positive cases recorded on the 23 March 2022, following a previous peak of 91,928 daily infections on 12 January 2022. Similarly, all other jurisdictions that experienced an Omicron wave in January are seeing a resurgence in case numbers. While caution should be exercised in interpreting changing case numbers, the increased proportion of cases identified as the more infectious BA.2 sub-lineage coupled with increasing case numbers represent a trend towards a national BA.2 wave.<sup>14</sup>
- 53.4 Evidence regarding the disease severity of BA.2 is still emerging; however, preliminary data suggests that infection with BA.2 does not result in a higher risk of hospitalisation than BA.1. Even if less severe disease continues to be a feature of BA.2, it may still have a significant impact on our hospital system given the sheer number of cases that could result from a more transmissible variant, and particularly going into winter.<sup>15</sup>
- 53.5 Studies investigating the impact of COVID-19 vaccines against transmission and disease severity due to Omicron continue to emerge. Evidence to date indicates that vaccine effectiveness (VE) against infection, symptomatic disease and severe disease following the primary course of COVID 19 vaccines is lower for Omicron than other VOCs (World Health Organization (a), 2022).<sup>16</sup>

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<sup>12</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 10

<sup>13</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 10

<sup>14</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 10

<sup>15</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 10

<sup>16</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 10

- 53.6 Despite this, multiple studies on VE against Omicron demonstrate that protection against severe disease is preserved following a primary vaccine course compared to protection against infection and symptomatic disease (World Health Organization (a), 2022).<sup>17</sup>
- 53.7 Data on the impact of COVID-19 vaccines in protecting against transmission of Omicron remains limited. However, as people who are vaccinated are less likely to acquire infection, COVID-19 vaccines may prevent some onward transmission, including due to Omicron. Preliminary evidence from a study among households in Denmark, indicates that a third dose (booster) may curb onward transmission of both BA.1 and BA.2.<sup>18</sup>
- 53.8 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.<sup>19</sup>
- 53.9 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.<sup>20</sup>
- 53.10 The Victorian healthcare system faced additional and extraordinary pressure due to the Omicron outbreak. Hospital admissions surged and there were severe workforce shortages across the system including acute care, community care, aged care, and ambulance services. High demand and declining resource availability contributed to the Department of Health issuing a coordinated 'Pandemic Code Brown' triggering public hospitals to activate Code Brown plans on 19 January 2022 (Victorian Department of Health (f), 2022). The Pandemic Code Brown was stood down on 14 February 2022.<sup>21</sup>
- 53.11 Recent modelling by the Burnet Institute suggests that there may be an increase in COVID-19 infections and hospitalisations during April and May 2022. The early adoption of measures by individuals and employers - such as wearing face masks indoors at locations other than private residences and working from home where possible - may improve outcomes with fewer infections and less pressure placed on the health system. Conversely, reducing certain public health measures, including isolation and quarantine requirements, may adversely and significantly impact the trajectory and outcomes with a greater number of infections and strain on the health system.<sup>22</sup>

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<sup>17</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 10

<sup>18</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 11

<sup>19</sup> Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

<sup>20</sup> Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

<sup>21</sup> Department of Health, Acting *Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 8

<sup>22</sup> Department of Health, Acting *Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 12

53.12 The direct and indirect impacts of COVID-19 continue to pressure the health system, with workforce availability a significant factor influencing capacity. While hospitalisations and ICU admissions related to COVID-19 had been gradually declining since 28 January 2022, hospitalisations and unplanned workforce absences have recently started to rise again.<sup>23</sup>

53.13 The health system is very likely to encounter additional strain as the winter months approach due to a number of factors. This includes an increase of influenza infections and influenza-related hospital admissions, increases in respiratory syncytial virus and other seasonal respiratory viruses that can increase hospitalisations in the winter months; other cold weather-related increases in cardiovascular and respiratory illness, alongside parallel demand due to BA.2 or another VOC that may emerge.<sup>24</sup>

53.14 The AHPPC has recently expressed concern about the upcoming winter season and the additional challenges that the health system may encounter due to the likely co-circulation of influenza and COVID-19 (Australian Health Protection Principal Committee (a), 2022). The AHPPC statement highlights that these challenges may be offset by increasing population level immunity from vaccination and natural infection and the availability of treatments which may mitigate against high hospital demand. AHPPC reinforced that the least restrictive PHSMs should be employed to support the health system to function<sup>25</sup>.

53.15 The AHPPC made specific recommendations for a nationally consistent, risk-based transition to the removal of requirements for close contacts of COVID-19 to quarantine:

53.15.1 where quarantine is required, 7 days remains appropriate at this time;  
and

53.15.2 following the peak impact of the BA.2 wave, quarantine will be replaced by other measures, which may include:

- (1) requirements for frequent rapid antigen testing;
- (2) wearing of masks when leaving the house;
- (3) work from home, where this is feasible;
- (4) limiting access of close contacts to high-risk settings; and
- (5) monitoring of symptoms (and isolating if symptomatic).<sup>26</sup>

53.16 Epidemiological data will be consistently reviewed over the period of the school holidays. If appropriate, changes to a range of measures may be made to coincide with the return of

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<sup>23</sup> Department of Health, Acting *Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 8

<sup>24</sup> Department of Health, Acting *Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 8-9

<sup>25</sup> Department of Health, Acting *Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 9

<sup>26</sup> Department of Health, Australian Government, AHPPC Statement on winter season preparedness, 31 March 2022.

children to school. I will specifically be reviewing face mask requirements for primary school students in years 3 to 6 and if data suggests it appropriate, these measures may be removed.

- 53.17 Care facilities are a diverse group of facilities of differing sizes, resources, governance structures, and level of care provided to residents, and with significant diversity in their ability to implement infection control measures. For these reasons the chief Health Officer advised that at this time visitor requirements for care facilities continue to be a requirement in Pandemic Orders, to ensure the upmost level of protection continues to be provided to residents, particularly as we approach winter, and noting significant COVID-19 mortality in care facilities in Victoria.<sup>27</sup>
- 53.18 Face masks remain an important public health measure even in the context of high population vaccination rates in Victoria. Face masks have a protective effect and can both protect healthy individuals and reduce the risk of disease transmission from infected individuals. Moreover, masks are a cost-effective and cost-saving measure, especially considering increasing transmissibility of Omicron variants, decreased vaccine effectiveness due to waning immunity or escape variants and increased social interactions, particularly indoors, which will likely increase in the cooler months.<sup>28</sup>
- 53.19 It is necessary to require employers and educational facilities to provide a general notification to individuals (or parents, guardians and carers) that they may have been exposed to a positive case. This measure supports the recent shift in the pandemic response towards empowering and educating the general public and businesses to manage outbreaks and protect staff, students and the community.<sup>29</sup>
- 53.20 I have been advised by the Acting Chief Health Officer that early and consistent implementation of all these measures is the best strategy to limit further impacts from Omicron, including BA.2 and any new variants that emerge. These measures, if implemented as a suite, will help to limit the impacts to Victorian residents who are most at risk of serious illness, reduce effects on the health system and support the continuity of critical services. The Acting Chief Health Officer further advised several measures be retained in Orders. Other measures that remain strongly recommended, should be implemented via alternative mechanisms wherever possible such as through strong engagement or via another legal instrument if deemed necessary. This is part of a gradual shift to empower individuals, communities, and industry to play a greater role in the ongoing pandemic response.<sup>30</sup>
- 54 I broadly accept the advice of the Acting Chief Health Officer outlined above.
- 55 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

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<sup>27</sup> Department of Health, Acting *Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 25

<sup>28</sup> Department of Health, Acting *Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 14

<sup>29</sup> Department of Health, Acting *Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 18

<sup>30</sup> Department of Health, Acting *Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 5

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

- 56 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.<sup>31</sup>*

## Schedules

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

## **SCHEDULE 1 – REASONS FOR DECISION – PANDEMIC (ADDITIONAL INDUSTRY OBLIGATIONS) ORDER 2022 (NO. 10)**

### Summary of Order

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

#### *Purpose*

- 59 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*

- 60 The additional obligations on industries include:

60.1 requiring industries to conduct and keep records of surveillance testing unless the worker was a confirmed COVID-19 case in the last 30 days;

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



- 60.2 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;
  - 60.3 requiring workers to provide a written declaration about additional workplaces if working in two or more sites; and
  - 60.4 restrictions on attending work if exposed to a confirmed case in another workplace.
- 61 The following industries must comply with the Order:
- 61.1 poultry processing facilities;
  - 61.2 abattoirs and meat processing facilities;
  - 61.3 seafood processing facilities;
  - 61.4 supermarket work premises and perishable food work premises (located in Metropolitan Melbourne);
  - 61.5 warehousing and distribution centres premises (located in Metropolitan Melbourne);
  - 61.6 commercial cleaning services;
  - 61.7 care facilities;
  - 61.8 ports of entry servicing international arrivals;
  - 61.9 hotel quarantine;
  - 61.10 hospitals;
  - 61.11 schools;
  - 61.12 childcare or early childhood services; and
  - 61.13 construction sites.
- 62 An authorised officer or inspector may conduct an inspection of the work premises and audit the records of the employer.
- 63 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.
- 64 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:
- 64.1 COVID-19 demand must be met;

- 64.2 workforce pressures must be manageable to support the resumption of non-urgent elective surgery;
  - 64.3 patients must be prioritised based on clinical need;
  - 64.4 health services who intend to reduce non-urgent surgery must contact the department as a matter of urgency; and
  - 64.5 for health services to which the above applies, Category 2 and Category 3 surgery should be reduced in the first instance.
- 65 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:
- 65.1 patients must be prioritised based on clinical need;
  - 65.2 a minimum capacity for public health services as of 31 January 2022;
  - 65.3 assist public health services operating COVID-19 streaming areas.
- 66 Failure to comply with the Order may result in penalties.

*Changes from Pandemic (Additional Industry Obligations) Order 2022 (No. 9)*

- 67 There have been no changes to the obligations imposed by this order.

*Period*

- 68 The Order will commence at 11:59:00pm on 12 April 2022 and end at 11:59:00pm on 12 July 2022.

## Relevant human rights

*Human rights that are limited*

- 69 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.
- 70 My explanation for why those rights are limited by the order is set out in the Human Rights Statement.
- 71 The Human Rights Statement also sets out:
- 71.1 my explanation of the nature of the human rights limited (as required by section 165AP(2)(i)); and
  - 71.2 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*

- 72 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.
- 73 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

- 74 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".
- 75 In relation to the restrictions that will be imposed by this Order, I have drawn from previous advice provided by the Chief Health Officer and Acting Chief Health Officer, who relevantly advised:
- 75.1 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.<sup>32</sup>
- 75.2 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.<sup>33</sup>
- 75.3 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.<sup>34</sup>
- 75.4 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.<sup>35</sup>
- 75.5 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

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

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

<sup>34</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 9 February 2022.

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

may determine the volume of activity to be undertaken based on local assessments of capacity and in consultation with the department.<sup>36</sup>

75.6 The health system is likely to encounter additional strain as the winter months approach due to a number of factors. This includes an increase of influenza infections and influenza-related hospital admissions, increases in respiratory syncytial virus and other seasonal respiratory viruses that can increase hospitalisations in the winter months; other cold weather-related increases in cardiovascular and respiratory illness, alongside parallel demand due to BA.2 or another VOC that may emerge.<sup>37</sup>

75.7 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.<sup>38</sup>

75.8 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.<sup>39</sup> Surveillance testing is now occurring in schools, early childhood and childcare industries.<sup>40</sup>

76 Most recently, I obtained advice from the Acting Chief Health Officer regarding continuing the additional specific obligations on employers and workers in specific industries that are included in this Order.

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

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

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

79 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.

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

<sup>37</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 April 2022), p.8.

<sup>38</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

<sup>39</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p 22.

<sup>40</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.

- 80 In addition, I have also considered the following additional potential negative impacts:
- 80.1 “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.”<sup>41</sup>
  - 80.2 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”,<sup>42</sup> assuming that taking a COVID-19 test constitutes medical treatment.
  - 80.3 “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.”<sup>43</sup> 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.”<sup>44</sup>
  - 80.4 The requirements for employers to direct workers to self-isolate under the Order “place significant restrictions on the ability of people to move freely”,<sup>45</sup> 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”.<sup>46</sup>
- 81 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:
- 81.1 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.

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<sup>41</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [286].

<sup>42</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [288].

<sup>43</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

<sup>44</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [294].

<sup>45</sup> Department of Health, *Human Rights Statement: Pandemic (Additional Industry Obligations) Order* (11 December 2021) [295].

<sup>46</sup> 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

- 82 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).<sup>47</sup>
- 83 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.
- 84 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.<sup>48</sup> 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.
- 85 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.<sup>49</sup>
- 86 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

- 87 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.
- 88 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.

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<sup>47</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-15.

<sup>48</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 18-19.

<sup>49</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11.

## Schedule 2 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (General Workers) Order 2022 (No. 4)

### Summary of Order

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

#### *Purpose*

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

91 This Order requires:

91.1 an employer to not permit a general worker to work outside of the general worker's ordinary place of residence unless they are fully vaccinated or exempt; and

91.2 an employer of a general worker to collect, record and hold the general worker's vaccination status when they work outside their ordinary place of residence; and

91.3 an employer to disclose a general worker's vaccination information to an authorised officer upon request.

92 A general worker is defined as a person who does work but is **not**:

92.1 a person under 12 years and two months of age

92.2 a person who is a worker within the meaning of the COVID-19 Mandatory Vaccination (Specified Workers) Order;

92.3 a person who is a worker in relation to a specified facility within the meaning of the COVID-19 Mandatory Vaccination (Specified Facilities) Order;

92.4 a person who is a worker within the meaning of the Open Premises Order;

92.5 a Commonwealth employee;

92.6 a judge or judicial registrar;

92.7 a person who works in connection with proceedings in a court, where that work cannot be done from the person's ordinary place of residence;

92.8 a person who is a member of the staff of Court Services Victoria within the meaning of the Court Services Victoria Act 2014;

92.9 a person employed or engaged by the Chief Executive Officer of the Victorian Civil and Administrative Tribunal;

92.10 a member of State Parliament;

92.11 the Clerk of the Legislative Assembly;

92.12 the Clerk of the Legislative Council;

92.13 an electorate officer within the meaning of the Parliamentary Administration Act 2004;

92.14 a parliamentary officer within the meaning of the Parliamentary Administration Act 2004;

92.15 a person who works at or in connection with a place of worship and:

92.15.1 conducts services of public worship and acknowledgments of faith;

92.15.2 performs marriages, funerals and special memorial services according to tradition and ecclesiastical and civil law;

92.15.3 visits members of the community in their homes, hospitals and other institutions to provide advice and religious comfort for the purpose of end of life faith reasons;

92.16 a person identified in Article 1 of the Vienna Convention on Diplomatic Relations, as set out in the Schedule to the Diplomatic Privileges and Immunities Act 1967 of the Commonwealth;

92.17 a person identified in Article 1 of the Vienna Convention on Consular Relations, as set out in the Schedule to the Consular Privileges and Immunities Act 1972 of the Commonwealth;

92.18 the Governor and the Lieutenant Governor.

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

#### *Changes from Pandemic (Additional Industry Obligations) Order 2022 (No. 9)*

94 There have been no changes to the obligations imposed by this order.

#### *Period*

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

### Relevant human rights

#### *Human rights that are limited*

96 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.



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

98 The Human Rights Statement also sets out:

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

98.2 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*

99 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.

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

*How the obligations imposed by the Order will protect public health*

101 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".

102 The Acting Chief Health Officer noted that vaccination has been shown to reduce the risk of severe COVID-19 related outcomes such as hospitalisation and death (World Health Organization (a), 2022) (United Kingdom Health Security Agency (c), 2022).<sup>50</sup>

103 In providing advice on worker vaccination requirements, the Acting Chief Health Officer considered the current epidemiology of COVID-19 in Victoria, vaccination coverage and uptake of third dose (booster) vaccination, and population susceptibility of COVID-19 in the context of natural immunity and community transmission. In addition, consideration was had to the shift in Victoria's pandemic response to individual and industry-led action, and the ongoing focus on protecting those most at risk of serious outcomes from COVID-19 and our healthcare system. In addition, the Chief Health Officer considered the settings and environments, including workplaces, where an outbreak may be particularly detrimental, and the ongoing role of mandatory vaccination of workers.<sup>51</sup>

104 I have considered the Acting Chief Health Officer's advice that there has been an increase in the COVID-19 cases observed in the recent weeks, which is likely due to a number of factors including the circulation of the more transmissible BA.2 sub-lineage and waning population level protection afforded from both COVID-19 vaccination and previous COVID-19 infection. This trend aligns with the experience reported internationally. The Acting Chief Health Officer also noted the forecasting

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<sup>50</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p.21.

<sup>51</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 21.

which suggests Victoria is entering a period of rising case numbers which is likely to peak around mid-April, with hospitalisations peaking shortly thereafter.<sup>52</sup>

105 I have also considered the AHPPC has recently expressed concern about the upcoming winter season and the additional challenges that the health system may encounter due to the likely co-circulation of influenza and COVID-19.<sup>53</sup>

106 In relation to the measures imposed by this Order, the Acting Chief Health Officer has advised as follows:

106.1 It is open to the Minister to consider the continuation of the current requirement for all workers that leave their home for work to have at least received their primary course of vaccination (two doses), or a valid medical exemption to attend work onsite.<sup>54</sup>

106.2 Data on the impact of COVID-19 vaccines in protecting against transmission of Omicron remains limited. However, as people who are vaccinated are less likely to acquire infection, COVID-19 vaccines may prevent some onward transmission, including due to Omicron. Preliminary evidence from a study among households in Denmark, indicates that a third dose (booster) may curb onward transmission of both BA.1 and BA.2.

106.3 A third dose (booster) requirement should be retained in the workforces where they currently apply. Evidence suggests that a third dose (booster) limits onward transmission of Omicron and provides greater protection to workers from symptomatic illness, hospitalisation and death.

106.4 Healthcare, disability and residential aged care workers provide care to individuals who are at greater risk of exposure to COVID-19 and severe adverse outcomes. These workforces provide essential care that may be in close physical proximity, with periods of repeated or prolonged exposure, increasing the risk of transmission to individuals most at risk. This also confers an occupational exposure risk to workers and this requirement will provide direct protection to staff.

106.5 Third dose (booster) requirements should be retained for education facility staff as this workforce mostly works in indoor settings alongside children with various abilities to physically distance or wear a mask and with relatively lower vaccination coverage in the children. As maintaining mask requirements among younger children can be varied, exemptions currently apply for children under eight years of age or in grade two or below. There are also mask requirement exceptions for individuals, such as education workers, where clear enunciation or visibility of their mouth is essential. Thus, staff who work in these environments are at an increased risk of exposure, especially considering the disproportionate number of new infections occurring in education settings. This measure will confer direct protection to education workers, reducing the risk of severe outcomes associated with their heightened risk of exposure to COVID-19 relative to other workforces

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<sup>52</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 4.

<sup>53</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 9.

<sup>54</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 22.

and will also support the continuity of education and learning for their students. It may also limit onward transmission, particularly, as some children are unvaccinated or partially vaccinated.

106.6 These groups of workers have been included in the third dose (booster) mandate to date because they are those involved in the care of at-risk populations, are at higher occupational risk of COVID-19, are critical to maintaining emergency services or food supply chains, or are at higher risk of being involved in large workplace outbreaks because of the nature of their work environment.<sup>55</sup>

106.7 This worker vaccination requirement continues to be a proportionate measure as the potential benefits outweigh the potential harms. There is already strong industry support to protect Victorians at risk of serious outcomes and ensure that workforces at highest risk of incursion and amplification of COVID-19 infection have the opportunity to maximise the protection of their employees.<sup>56</sup> This requirement also aligns with updated ATAGI advice on what should be considered 'up-to-date' vaccination against COVID-19 (Australian Technical Advisory Group on Immunisation, 2022), will minimise the risk of incursion and help to protect individual workers who may be particularly susceptible to the negative impacts of COVID-19 infection, including severe illness and death.<sup>57</sup>

107 In relation to the measures imposed by this Order, I have drawn on previous advice that the Chief Health Officer and Acting Chief Health Officer has provided:

107.1 Worker vaccine mandates should be maintained as part of the Victorian response to the COVID-19 response for several reasons:

107.1.1 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus and experiencing more serious health outcomes from infection – as well as reducing the risk to others in the same setting, who may not be eligible to receive vaccination.

107.1.2 Maintaining a vaccine mandate as a baseline will protect workers from the increasing incursion and transmission risk represented by the return to onsite work, easing of restrictions in the Victorian community, and easing of domestic and international border restrictions, particularly in the face of the emerging threat posed by the Omicron variant of concern.

107.1.3 COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates. Many workers are already required to be fully vaccinated (or exempt) to attend work and thus, continuing vaccination requirements for workforces that are

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<sup>55</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) pp. 23-24.

<sup>56</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 24.

<sup>57</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 24.

already subject to a mandate would not be expected to result in significant disruption to affected industries or sectors, or an imposition on workers.

107.1.4 Workforce shortages resulting from the need to isolate or furlough infected staff and their contacts are a material threat to maintaining workplace operations. High workforce vaccination coverage, supported by vaccine mandates, can diminish these disruptions by reducing outbreaks in these settings.<sup>58</sup>

107.2 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to booster vaccination mandates at this time is not recommended beyond the higher risk workforces.

108 I accepted that advice.

109 Based on the increase in COVID cases observed in recent weeks, the forecasting suggesting a likely peak around mid-April and AHPCC concern regarding the upcoming winter season and additional challenges that the health system may encounter,<sup>59</sup> I have decided to retain the general vaccination mandate (which is partially implemented by this Order). In addition, I have decided to maintain booster vaccination requirements for workers in residential aged care facilities and healthcare facilities and introduce a booster vaccination requirement for workers in education facilities.

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

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

111 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.

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

112.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. "There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds."<sup>60</sup>

112.2 "Exclusion from a physical workplace based on vaccination status may be particularly onerous for single parents, for parents of younger children, and for parents of multiple children (who

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<sup>58</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 28-29.

<sup>59</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) pp. 4, 9.

<sup>60</sup> Department of Health, *Human Rights Statement: Pandemic (General Workers) Order* (11 December 2021), at [57.2].

may find it impossible to work effectively at home). This may... disproportionately affect women who typically bear more of the child-minding or caring responsibilities in the home.”<sup>61</sup>

- 112.3 The order “requires workers to provide evidence of their COVID-19 vaccination status to their employers by certain dates”.
  - 112.4 The order “may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”<sup>19</sup>
  - 112.5 The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.
  - 112.6 As the order “prevents a person from working out of home if they are not vaccinated... they may require people to act inconsistently with [their] beliefs if they wish to be able to attend work at their workplace.”<sup>62</sup>
- 113 However, in considering the potential negative impacts, I also recognised:
- 113.1 The Order does not physically force anyone to receive a COVID-19 vaccine.
  - 113.2 The Order does not prohibit the employment of any unvaccinated person. It only operates to prevent attendance at workplaces. It therefore allows unvaccinated people to remain employed if an employer could continue to employ them working from home.
  - 113.3 The Order contains an exception for people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication or an acute medical illness.
  - 113.4 Additionally, general workers who are not fully vaccinated or exempt may continue to work at their usual place of work if it is not reasonably practicable for the person to work at their ordinary place of residence (subject to any other vaccination requirements on workers contained in other orders).

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<sup>61</sup> Department of Health, Human Rights Statement: Pandemic (General Workers) Order (11 December 2021), at [58.5].

<sup>62</sup> Department of Health, Human Rights Statement: Pandemic (General Workers) Order (11 December 2021), at [57.3].

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

- 114 In his advice, the Acting 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).<sup>63</sup>
- 115 The Acting Chief Health Officer advises that even if measures which were less restrictive were implemented, residual risks would remain where using more restrictive measures would be necessary and proportionate as a response.<sup>64</sup>
- 116 Public education and health promotion can provide community members with an understanding of COVIDSafe behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic. However, onsite work, particularly at specified facilities, typically involves a significant amount of workforce interaction and movement. In addition, it is possible for individuals to be asymptomatic and infectious. Education and practicing of COVIDSafe behaviours is consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 117 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19, the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community. Ensuring high vaccination coverage in specified facilities reduces the risk of individuals transmitting COVID-19 to others.
- 118 There are a number of challenges that prevent the combination of mask wearing and testing being an equally robust solution to the risks of exposure and transmission compared to vaccines.<sup>65</sup>
- 119 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.<sup>66</sup> There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 120 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.<sup>67</sup> Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta Variant of concern, and increasingly with the Omicron Variant of concern.

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<sup>63</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 April 2022), pp. 13-14.

<sup>64</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 April 2022), p. 12.

<sup>65</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>66</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>67</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 28; p. 30.

- 121 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,<sup>68</sup> however surveillance testing as an alternative to mandatory vaccination requirements for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.<sup>69</sup>
- 122 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement for Specified Workers, fails to provide the same protection for workforces.<sup>70</sup> Currently, (PCR) and (RA) are approved for use in Australia.
- 123 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta variant of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 124 Generally, there is a minimum turnaround time of 6-24 hours between a test being administered and a result being received. During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.<sup>71</sup>
- 125 Due to the operational issues (essentially, delays and bottlenecks) associated with performing a RA test, settings and workplaces have been unable or unwilling to<sup>72</sup> on-site RA tests and have allowed individuals to provide proof of a RA test. People would have to take a RA test every day and there are real challenges in overseeing compliance with the result.<sup>73</sup>
- 126 RA tests are also subject to potential false negative resulting from the assay itself.<sup>74</sup> While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).

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<sup>68</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 22.

<sup>69</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 22.

<sup>70</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>71</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

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

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

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

127 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings can be organised along such lines.<sup>75</sup>

### Other considerations

128 The mandatory vaccination requirement for workers generally reduces the risk of transmission across workforces and the broader community. This provides greater workforce protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.<sup>76</sup>

129 In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirements for general workers assists with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial behaviours.<sup>77</sup>

### Conclusion

130 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.

131 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.

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<sup>75</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>76</sup> Department of Treasury and Finance, Coronavirus Economic Outlook [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

<sup>77</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 30.



## Schedule 3 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2022 (No. 7)

### Summary of Order

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

### *Purpose*

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

### *Obligations*

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

134.1 residential aged care facilities;

134.2 construction sites;

134.3 healthcare facilities; and

134.4 education facilities.

135 This Order requires operators of specified facilities to:

135.1 collect, record and hold vaccination information of workers;

135.2 take reasonable steps to prevent entry of unvaccinated, partially vaccinated, or not fully vaccinated (boosted) or workers to the specified facility for the purposes of working; and

135.3 if a booster deadline is specified in relation to a worker and the worker is aged 18 years or over, take reasonable steps to prevent entry of workers, unless the worker is fully vaccinated (boosted) or an excepted person; and

135.4 notify current and new workers that the operator is obliged to collect, record and hold vaccination information about the worker and to take reasonable steps to prevent a worker who is unvaccinated, partially vaccinated or not fully vaccinated (boosted) from entering or remaining on the premises of a specified facility for the purposes of work as applicable.

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

## *Changes from Pandemic COVID-19 Mandatory Vaccination (Specified Facilities) Order 2022 (No. 6)*

137 A clarification has been added to the definition of education worker to note that it does not cover a third party using an educational facility outside of normal operating hours, for example if used as a polling site.

### *Period*

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

## Relevant human rights

### *Human rights that are limited*

139 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.

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

141 The Statement also sets out:

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

141.2 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*

142 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.

143 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

144 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".

- 145 The Acting Chief Health Officer noted that vaccination has been shown to reduce the risk of severe COVID-19 related outcomes such as hospitalisation and death (World Health Organization (a), 2022) (United Kingdom Health Security Agency (c), 2022).<sup>78</sup>
- 146 I have considered the Acting Chief Health Officer's advice that there has been an increase in the COVID-19 cases observed in the recent weeks, which is likely due to a number of factors including the circulation of the more transmissible BA.2 sub-lineage and waning population level protection afforded from both COVID-19 vaccination and previous COVID-19 infection. This trend aligns with the experience reported internationally. The Acting Chief Health Officer also noted the forecasting which suggests Victoria is entering a period of rising case numbers which is likely to peak around mid-April, with hospitalisations peaking shortly thereafter.<sup>79</sup>
- 147 I have also considered the AHPPC has recently expressed concern about the upcoming winter season and the additional challenges that the health system may encounter due to the likely co-circulation of influenza and COVID-19.<sup>80</sup>
- 148 The Acting Chief Health Officer noted that the health system is likely to encounter additional strain as the winter months approach due to a number of factors. This includes an increase of influenza infections and influenza-related hospital admissions, increases in respiratory syncytial virus and other seasonal respiratory viruses that can increase hospitalisations in the winter months; other cold weather-related increases in cardiovascular and respiratory illness, alongside parallel demand due to BA.2 or another VOC that may emerge.<sup>81</sup>
- 149 In relation to the measures imposed by this Order, the Acting Chief Health Officer has advised as follows:
- 149.1 It is open to the Minister to consider the continuation of the current requirement for all workers that leave their home for work to have at least received their primary course of vaccination (two doses), or a valid medical exemption to attend work onsite.<sup>82</sup>
- 149.2 Data on the impact of COVID-19 vaccines in protecting against transmission of Omicron remains limited. However, as people who are vaccinated are less likely to acquire infection, COVID-19 vaccines may prevent some onward transmission, including due to Omicron. Preliminary evidence from a study among households in Denmark, indicates that a third dose (booster) may curb onward transmission of both BA.1 and BA.2.
- 149.3 A third dose (booster) requirement should be retained in the workforces where they currently apply. Evidence suggests that a third dose (booster) limits onward transmission of Omicron

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<sup>78</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p.21

<sup>79</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 4.

<sup>80</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 9.

<sup>81</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) pp. 8,9.

<sup>82</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 22.

and provides greater protection to workers from symptomatic illness, hospitalisation and death.

- 149.4 Healthcare, disability and residential aged care workers provide care to individuals who are at greater risk of exposure to COVID-19 and severe adverse outcomes. These workforces provide essential care that may be in close physical proximity, with periods of repeated or prolonged exposure, increasing the risk of transmission to individuals most at risk. This also confers an occupational exposure risk to workers and this requirement will provide direct protection to staff.
- 149.5 Third dose (booster) requirements should be retained for education facility staff as this workforce mostly works in indoor settings alongside children with various abilities to physically distance or wear a mask and with relatively lower vaccination coverage in the children. As maintaining mask requirements among younger children can be varied, exemptions currently apply for children under eight years of age or in grade two or below. There are also mask requirement exceptions for individuals, such as education workers, where clear enunciation or visibility of their mouth is essential. Thus, staff who work in these environments are at an increased risk of exposure, especially considering the disproportionate number of new infections occurring in education settings. This measure will confer direct protection to education workers, reducing the risk of severe outcomes associated with their heightened risk of exposure to COVID-19 relative to other workforces and will also support the continuity of education and learning for their students. It may also limit onward transmission, particularly, as some children are unvaccinated or partially vaccinated.
- 149.6 These groups of workers have been included in the third dose (booster) mandate to date because they are those involved in the care of at-risk populations, are at higher occupational risk of COVID-19, are critical to maintaining emergency services or food supply chains, or are at higher risk of being involved in large workplace outbreaks because of the nature of their work environment.<sup>83</sup>
- 150 In relation to the measures that will be imposed by this Order, I have drawn on previous advice that the Chief Health Officer and Acting Chief Health Officer has provided:
- 150.1 Worker vaccine mandates should be maintained as part of the Victorian response to the COVID-19 response for several reasons:
- 150.1.1 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus and experiencing more serious health outcomes from infection – as well as reducing the risk to others in the same setting, who may not be eligible to receive vaccination.
- 150.1.2 Maintaining a vaccine mandate as a baseline will protect workers from the increasing incursion and transmission risk represented by the return to onsite work, easing of restrictions in the Victorian community, and easing of domestic

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<sup>83</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) pp. 23-24.

and international border restrictions, particularly in the face of the emerging threat posed by the Omicron variant of concern.

150.1.3 COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates. Many workers are already required to be fully vaccinated (or exempt) to attend work and thus, continuing vaccination requirements for workforces that are already subject to a mandate would not be expected to result in significant disruption to affected industries or sectors, or an imposition on workers.

150.1.4 Workforce shortages resulting from the need to isolate or furlough infected staff and their contacts are a material threat to maintaining workplace operations. High workforce vaccination coverage, supported by vaccine mandates, can diminish these disruptions by reducing outbreaks in these settings.<sup>84</sup>

150.2 Having regard to the wide-spread increase in booster vaccinations administered, a one-size-fits-all approach to booster vaccination mandates at this time is not recommended beyond the higher risk workforces.<sup>85</sup>

150.3 The booster vaccination mandate should only apply to workers aged 18 years and over.

150.4 Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.<sup>86</sup>

151 I have broadly accepted that advice.

152 Based on the increase in COVID cases observed in recent weeks, the forecasting suggesting a likely peak around mid-April and AHPCC concern regarding the upcoming winter season and additional challenges that the health system may encounter,<sup>87</sup> I have decided to retain the general vaccination mandate (which is partially implemented by this Order). In addition, I have decided to maintain booster vaccination requirements for workers in residential aged care facilities and healthcare facilities and introduce a booster vaccination requirement for workers in education facilities.

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

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

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<sup>84</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 28-29.

<sup>85</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), pp. 23-24.

<sup>86</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 31.

<sup>87</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) pp. 4, 9.

154 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.

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

155.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. "There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds."<sup>88</sup>

155.2 The order "may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property."<sup>89</sup>

155.3 The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.<sup>90</sup>

155.4 As the order "prevent[s] a person from working out of home if they are not vaccinated... they may require people to act inconsistently with [their] beliefs if they wish to be able to attend work at their workplace."<sup>91</sup>

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

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

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

156.3 The Order contains exceptions for:

156.3.1 people who have certification from a medical practitioner that they are unable to receive a dose or a further dose of a relevant vaccine due to a medical contraindication;

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<sup>88</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [84.2].

<sup>89</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [93].

<sup>90</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [79]

<sup>91</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Facilities) Order* (11 December 2021), at [84.3].

- 156.3.2 people who are fully vaccinated and not yet eligible to receive their booster dose;
  - 156.3.3 people who are fully vaccinated recent international arrivals;
  - 156.3.4 people who have a temporary medical exemption that has recently expired; and
  - 156.3.5 close contacts and diagnosed persons who have been in self-quarantine or self-isolation.
- 156.4 In making this order I have included limited exceptions to the mandatory vaccination requirement for specified facilities to ensure it is less onerous in specific circumstances including:
- 156.4.1 to ensure workers can perform work or duties that is necessary to provide for urgent specialist clinical or medical care due to an emergency situation or a critical unforeseen circumstance;
  - 156.4.2 a worker is required to fill a vacancy to provide urgent care, to maintain quality of care and/or to continue essential operations due to an emergency situation or a critical unforeseen circumstance;
  - 156.4.3 a worker is exempted because they are excluded from ATAGI advice on receiving a booster dose of a COVID-19 vaccine;
  - 156.4.4 a worker is required to respond to an emergency; or
  - 156.4.5 a worker is required to perform urgent and essential work to protect the health and safety of workers or members of the public, or to protect assets and infrastructure.

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

- 157 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).<sup>92</sup>
- 158 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.<sup>93</sup>
- 159 Public education and health promotion can provide community members with an understanding of COVIDSafe behaviours and actions, such as hand hygiene, staying home when unwell and testing

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<sup>92</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 14-20.

<sup>93</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 10-11.

when symptomatic.<sup>94</sup> However, onsite work, particularly at specified facilities, typically involves a significant amount of workforce interaction and movement.<sup>95</sup> In addition, it is possible for individuals to be asymptomatic and infectious.<sup>96</sup> Education and practicing of COVIDSafe behaviours is consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.

- 160 Alternative measures to a vaccine mandate that are available facilitate a take-up of booster vaccines for workers in education facilities include promoting booster dose vaccinations in communications with education facilities, encouraging participation in a Vaccine Champions Program, providing paid time off to attend vaccination appointments, and implementing school-based vaccine pop-up clinics.<sup>97</sup> A vaccine mandate provides sufficient and direct protection to workers and their contacts while communicating the importance and urgency of vaccination.<sup>98</sup> Extensive consultation has taken place within the education sector, and responses of peak stakeholder bodies have been predominantly supportive of this measure.<sup>99</sup>
- 161 In addition to the specific and direct protection that vaccine mandates provide to workers (and their contacts both in their workplace, their homes, and in the broader community), mandates drive support for public health measures by communicating the importance and urgency of vaccination. Given that the deadline of a proposed vaccine mandate will most likely not take effect until after modelled peak of the Omicron surge, reinforced communication and engagement regarding vaccination through the issuing of a vaccine mandate is itself of public health importance.<sup>100</sup>
- 162 Wearing face masks and possibly even other forms of PPE is not regarded as an acceptable alternative to mandatory vaccination of workers due to a number of reasons. Training is required to ensure that users are aware of the correct level of PPE and know how to don and doff the PPE effectively.<sup>101</sup> Studies show that auditing and additional training are required in healthcare settings to improve general compliance and PPE practice in front-line health workers, even those who face immediate threat of exposure to COVID-19. Inconsistent practices will increase the risk of transmission in various settings as protection is only afforded if correctly worn.
- 163 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.<sup>102</sup> There would be significant problems with providing sufficient resources to

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<sup>94</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 15.

<sup>95</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 21, p. 30.

<sup>96</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 15.

<sup>97</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 12.

<sup>98</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 23.

<sup>99</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 12.

<sup>100</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 21

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

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



upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.

- 164 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.<sup>103</sup> Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta variant of concern.
- 165 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,<sup>104</sup> however surveillance testing as an alternative to mandatory vaccination requirements for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.<sup>105</sup>
- 166 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement, fails to provide the same protection for workforces.<sup>106</sup> PCR and RA tests are approved for use in Australia.
- 167 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta and Omicron variants of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 168 RA tests are also subject to potential false negative resulting from the assay itself.<sup>107</sup> While the sensitivity and specificity of RA testing varies by the test being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).
- 169 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are organised, outdoors or highly ventilated.<sup>108</sup>
- 170 In making this order, I considered the Chief Health Officer’s Advice that it is open for me to mandate third doses of COVID-19 vaccination for school and ECEC workers “to ensure continued protection

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<sup>103</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 28; p. 30.

<sup>104</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22.

<sup>105</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 22.

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

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

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

for this workforce, most notably individuals with significant underlying health conditions.”<sup>109</sup> The Chief Health Officer advised that this conclusion would be particularly available if I “was of the view that less restrictive public health measures [...] had already been adopted and given the opportunity to take full effect.”<sup>110</sup> I believe it is reasonably necessary in the context of escalating case numbers to mandate this third dose for school and ECEC workers to protect these workforces and protect these settings from further disruption ahead of the commencement of the academic year.

## Other considerations

- 171 The mandatory vaccination requirement for specified facilities reduces the risk of transmission within those settings and the broader community. This provides greater workforce protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.<sup>111</sup>
- 172 In making this order, I consider it reasonably necessary to retain and extend the mandatory vaccination requirements for specified facilities to protect public health and that it assists with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial behaviours such as self-isolation when symptomatic, wearing a face covering in certain settings and maintaining social distancing.

## Conclusion

- 173 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.
- 174 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.

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<sup>109</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 13.

<sup>110</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 13.

<sup>111</sup> Department of Treasury and Finance, *Coronavirus Economic Outlook* [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

## Schedule 4 – Reasons for Decision – Pandemic COVID-19 Mandatory Vaccination (Specified Workers) Order 2022 (No.6)

### Summary of Order

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

### *Purpose*

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

### *Obligations*

177 This Order requires employers of specified workers to:

177.1 collect, record and hold vaccination information of workers;

177.2 not permit specific unvaccinated or partially vaccinated or previously vaccinated workers from working outside the worker's ordinary place of residence; and

177.3 if a booster deadline is specified in relation to a worker and the worker is aged 18 years or over, the employer must not, after that date, permit the worker to work outside their ordinary place of residence unless the worker is fully vaccinated (boosted) or an excepted person; and

177.4 notify current and new workers that the employer is obliged to collect, record and hold vaccination information about the worker and to not permit the worker who is unvaccinated or partially vaccinated or not fully vaccinated (boosted) from working outside the worker's ordinary place of residence.

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

- |   |  |
|---|--|
| 178.1 accommodation worker                  | 178.7 community worker                   |
| 178.2 agricultural and forestry worker      | 178.8 creative arts worker               |
| 178.3 airport worker                        | 178.9 custodial worker                   |
| 178.4 ancillary, support and welfare worker | 178.10 disability worker                 |
| 178.5 authorised officer                    | 178.11 emergency service worker          |
| 178.6 care worker                           | 178.12 entertainment and function worker |

- 178.13 food distribution worker
- 178.14 funeral worker
- 178.15 higher education worker
- 178.16 justice worker
- 178.17 manufacturing worker
- 178.18 marriage celebrant
- 178.19 meat and seafood processing worker
- 178.20 media and film production worker
- 178.21 mining worker
- 178.22 physical recreation worker
- 178.23 port or freight worker
- 178.24 professional sports, high-performance sports or racing person
- 178.25 professional services worker
- 178.26 public sector worker
- 178.27 quarantine accommodation worker
- 178.28 real estate worker
- 178.29 religious worker
- 178.30 repair and maintenance worker
- 178.31 retail worker
- 178.32 science and technology worker
- 178.33 social and community service worker
- 178.34 transport worker
- 178.35 utility and urban worker
- 178.36 veterinary and pet/animal care worker

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

#### *Changes from Pandemic (Visitors to Hospitals and Care Facilities) Order 2022 (No. 4)*

180 This order has been changed to remove certain references to booster deadlines that have passed.

#### *Period*

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

### Relevant human rights

#### *Human rights that are limited*

182 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.

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

184 The Statement also sets out:

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

184.2 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*

185 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.

186 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

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

- 188 The Acting Chief Health Officer noted that vaccination has been shown to reduce the risk of severe COVID-19 related outcomes such as hospitalisation and death (World Health Organization (a), 2022) (United Kingdom Health Security Agency (c), 2022).<sup>112</sup>
- 189 I have considered the Acting Chief Health Officer’s advice that there has been an increase in the COVID-19 cases observed in the recent weeks, which is likely due to a number of factors including the circulation of the more transmissible BA.2 sub-lineage and waning population level protection afforded from both COVID-19 vaccination and previous COVID-19 infection. This trend aligns with the experience reported internationally. The Acting Chief Health Officer also noted the forecasting which suggests Victoria is entering a period of rising case numbers which is likely to peak around mid-April, with hospitalisations peaking shortly thereafter.<sup>113</sup>
- 190 I have also considered the AHPPC has recently expressed concern about the upcoming winter season and the additional challenges that the health system may encounter due to the likely co-circulation of influenza and COVID-19.<sup>114</sup>
- 191 The Acting Chief Health Officer noted that the health system is likely to encounter additional strain as the winter months approach due to a number of factors. This includes an increase of influenza infections and influenza-related hospital admissions, increases in respiratory syncytial virus and other seasonal respiratory viruses that can increase hospitalisations in the winter months; other cold weather-related increases in cardiovascular and respiratory illness, alongside parallel demand due to BA.2 or another VOC that may emerge.<sup>115</sup>
- 192 In relation to the restrictions that will be imposed by this Order, the Acting Chief Health Officer relevantly advised:
- 192.1 Worker vaccine mandates should be maintained as part of the Victorian response to the COVID-19 response for several reasons:
- 192.1.1 COVID-19 vaccines are safe and effective interventions that reduce the individual risk of contracting and transmitting coronavirus and experiencing more serious health outcomes from infection – as well as reducing the risk to others in the same setting, who may not be eligible to receive vaccination.
- 192.1.2 Maintaining a vaccine mandate as a baseline will protect workers from the increasing incursion and transmission risk represented by the return to onsite work, easing of restrictions in the Victorian community, and easing of domestic and international border restrictions, particularly in the face of the emerging threat posed by the Omicron variant of concern.

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<sup>112</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p.21

<sup>113</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 4.

<sup>114</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 9.

<sup>115</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) pp. 8,9.

- 192.1.3 COVID-19 vaccines are readily available in Victoria and workforces have had adequate time to meet the deadlines stipulated in current vaccine mandates. Many workers are already required to be fully vaccinated (or exempt) to attend work and thus, continuing vaccination requirements for workforces that are already subject to a mandate would not be expected to result in significant disruption to affected industries or sectors, or an imposition on workers.
- 192.1.4 Workforce shortages resulting from the need to isolate or furlough infected staff and their contacts are a material threat to maintaining workplace operations. High workforce vaccination coverage, supported by vaccine mandates, can diminish these disruptions by reducing outbreaks in these settings.<sup>116</sup>
- 192.1.5 It is open to the Minister to consider the continuation of the current requirement for all workers that leave their home for work to have at least received their primary course of vaccination (two doses), or a valid medical exemption to attend work onsite.<sup>117</sup>
- 192.1.6 Data on the impact of COVID-19 vaccines in protecting against transmission of Omicron remains limited. However, as people who are vaccinated are less likely to acquire infection, COVID-19 vaccines may prevent some onward transmission, including due to Omicron. Preliminary evidence from a study among households in Denmark, indicates that a third dose (booster) may curb onward transmission of both BA.1 and BA.2.
- 192.1.7 A third dose (booster) requirement should be retained in the workforces where they currently apply. Evidence suggests that a third dose (booster) limits onward transmission of Omicron and provides greater protection to workers from symptomatic illness, hospitalisation and death.
- 192.2 There are a series of workplaces that involve clearly higher risk and therefore it is important to ensure that workers and vulnerable populations within those settings are protected in a way that goes beyond what might be achieved by relying on the population vaccination coverage. For example, in settings where infection risk is greater due to vaccination ineligibility (e.g., education settings), the presence of vulnerable cohorts (e.g., residential aged care) or other transmission related factors are at play (e.g., meat processing).<sup>118</sup>
- 192.3 Mandating third doses of COVID-19 vaccination in select higher risk workforces, to ensure continued protection both for workers and vulnerable population groups, and to mitigate against the risk of rapidly escalating outbreaks.<sup>119</sup> In relation to these higher risk workforces:

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<sup>116</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 28-29.

<sup>117</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 22.

<sup>118</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 29.

<sup>119</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 20.

- 192.3.1 there is an increased risk of exposure to COVID-19 for the individual worker (i.e., higher occupational exposure risk);
  - 192.3.2 transmission is more likely to lead to severe health consequences for vulnerable individuals with whom the worker may regularly interact during the course of their work (i.e., higher risk for transmission to persons who are medically vulnerable to severe disease and death due to COVID-19 infection);
  - 192.3.3 the workplace setting involves high risk for viral amplification and rapid spread between workers due to factors inherent to the working environment or the nature of the work being undertaken; and
  - 192.3.4 the workforces provide essential services to the Victorian community, and the potential impacts from staffing shortfalls due to workers becoming sick with COVID-19 or being required to isolate as a close contact would be significant.<sup>120</sup>
- 192.4 Close contacts who have been in self-quarantine should be allowed a 14-day exception to receive a booster. Diagnosed persons who have been in self-isolation should be allowed a four-month exception to receive a booster. From 4 February 2021, probable cases may access this exception provided that they receive a positive PCR test result to confirm their diagnosis. A PCR test is reasonable and appropriate as it is the gold standard, and the gold standard should apply in these small number of cases for people seeking exemption from a booster dose in workforces in which a mandate applies.<sup>121</sup>
- 192.5 The exceptions to the booster mandate are considered proportionate in consideration of:
- 192.5.1 high population vaccination coverage rates, in combination with other mitigation strategies, providing significant protection to other workers and vulnerable cohorts these excepted workers have contact with.
  - 192.5.2 risk mitigation strategies already in place, such as mask requirements, additional PPE for healthcare settings and recommended surveillance testing for specific cohorts.
  - 192.5.3 completion of a primary course of vaccination, although having challenges related to waning immunity, offering some protection.
  - 192.5.4 the defined periods for third dose requirements for these cohorts providing certainty to employers and workers while maintaining strong messaging that vaccination as soon as eligible is required.
  - 192.5.5 enabling a return to work of workers who have not yet received their third dose, will support critical industries to maintain staffing levels, while continuing

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<sup>120</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022), p. 21.

<sup>121</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 1 February 2022.



additional mitigation measures will act to moderate the risk workers without a third dose pose to the workforce and the people they serve.

192.5.6 providing recently arrived international workers with a period from the day of arrival to complete a third dose allows for a proportionate approach as they navigate a new healthcare system, and noting primary course vaccination mandates would still apply to these workers for onsite work, meaning that would have some protection from having had completed a primary vaccination course.<sup>122</sup>

192.6 Operator obligations to collect, record and hold worker information should be retained to facilitate contact tracing.<sup>123</sup>

193 I accepted that advice.

194 Importantly, I note that that the Chief Health Officer has advised:

*It would therefore be appropriate, and my recommendation, that the Minister uses discretion in deciding how public confidence in the administration of public health (and the improvements in compliance and prosocial behaviour that such confidence brings) would be best served. This may be by retaining a general vaccine mandate or by removing it, noting the possibility of having to reinstate it later.*<sup>124</sup>

195 Additionally:

*“The impact of Omicron on individuals and the population is becoming clearer, and available evidence suggests that Omicron is more transmissible, associated with higher rates of reinfection, and demonstrates greater immune evasiveness compared to previous variants of concern (VOC). Although there is potentially a lower risk of severe illness and mortality, the very large number of cases have had a detrimental impact across various industries and sectors, even in settings where restrictive public health measures remain in place.”*<sup>125</sup>

196 and:

*“people need certainty to plan their lives: sweeping changes to impose or ease restrictions should be made carefully”.*<sup>126</sup>

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<sup>122</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

<sup>123</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 31.

<sup>124</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

<sup>125</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (21 January 2022) p. 3.

<sup>126</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 12.

- 197 Based on the increase in COVID cases observed in recent weeks, the forecasting suggesting a likely peak around mid-April and AHPCC concern regarding the upcoming winter season and additional challenges that the health system may encounter,<sup>127</sup> I have decided to retain a general vaccine mandate (which is partially implemented by this Order), rather than removing it. I have decided to take a precautionary approach and maintain mandatory vaccination requirements for workers in the settings previously mandated by the Chief Health Officer.
- 198 I also consider it is necessary and proportionate to maintain the mandatory vaccination settings for workers and many discretionary activities – such as hospitality and entertainment.

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

- 199 In making this decision, I have seriously considered the possible negative impacts of the Order on the individuals and the community.
- 200 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.
- 201 In addition, I have also considered the following additional potential negative impacts:
- 201.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. “There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds.”<sup>128</sup>
- 201.2 The order “may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”<sup>129</sup>
- 201.3 The order may result in people losing their employment, or unable to obtain employment if they are unwilling to be vaccinated and unable to perform their duties from home.

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<sup>127</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) pp. 4,9.

<sup>128</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [110.2].

<sup>129</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [119].

201.4 As the order “prevent[s] a person from working out of home if they are not vaccinated... they may require people to act inconsistently with [their] beliefs if they wish to be able to attend work at their workplace.”<sup>130</sup>

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

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

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

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

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

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

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

202.4.3 a worker is exempted because they are excluded from ATAGI advice on receiving a booster dose of a COVID-19 vaccine;

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

202.4.5 a worker is required to perform urgent and essential work to protect the health and safety of workers or members of the public, or to protect assets and infrastructure.

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

203 In his advice, the Chief Health Officer set out a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).<sup>131</sup>

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<sup>130</sup> Department of Health, *Human Rights Statement: Pandemic (Specified Workers) Order* (11 December 2021), at [110.3].

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

- 204 The Chief Health Officer clearly stated that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.<sup>132</sup>
- 205 Public education and health promotion can provide community members with an understanding of <sup>133</sup> behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.<sup>134</sup> However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.<sup>135</sup> COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health. behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 206 There are a number of challenges that prevent the combination of mask wearing and testing being an equally robust solution to the risks of exposure and transmission compared to vaccines.<sup>136</sup>
- 207 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.<sup>137</sup> There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 208 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.<sup>138</sup> Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta variant of concern, the Omicron variant of concern.
- 209 Surveillance testing is used in certain high-risk industries to increase the likelihood of early detection of cases,<sup>139</sup> however surveillance testing as an alternative to mandatory vaccination requirements for specified workers has operational challenges and resource constraints and is therefore not suited as a replacement to protect the community from COVID-19.
- 210 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement for Specified Workers, fails to provide the same protection for workforces.<sup>140</sup> Currently, PCR and RA tests are approved for use in Australia.

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<sup>132</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 10-11.

<sup>133</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15.

<sup>134</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 21; p. 30.

<sup>135</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 15.

<sup>136</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

<sup>137</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

<sup>138</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), pp. 28; p. 30.

<sup>139</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 22.

<sup>140</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

- 211 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases driven by the Delta variant of concern. Increased use would increase the burden on the system and contribute to increased waiting times at pathology testing sites and turnaround times for results for the entire community.
- 212 During this period between the test being undertaken and received and then attendance at the venue, further infectious exposures could occur.<sup>141</sup>
- 213 RA Tests are also subject to potential false negative resulting from the assay itself.<sup>142</sup> While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2per cent (95per cent confidence interval: 29.5-79.8per cent).
- 214 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are organised.<sup>143</sup>
- 215 In making this order, I considered the Chief Health Officer’s Advice that advised me that “it would seem appropriate, given the interaction with vulnerable population groups that consideration be given to mandatory third dose booster vaccinations for healthcare workers, aged and disability care workers in the first instance.”<sup>144</sup> This was due to the workforces’ “interaction with vulnerable population groups” and a concern of “waning immunity [that] is associated with an increased incidence in breakthrough infections.”<sup>145</sup>

## Other considerations

- 216 The mandatory vaccination requirement for specified workers reduces the risk of transmission within Specified Workers and the broader community. This provides greater workforce protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.<sup>146</sup>

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<sup>141</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>142</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>143</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>144</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

<sup>145</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

<sup>146</sup> Department of Treasury and Finance, *Coronavirus Economic Outlook* [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

217 In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirement for Specified Workers assists with public confidence in the overall administration of public health and results in overall improvements in community compliance.<sup>147</sup>

## Conclusion

218 Considering all of the above factors (including those contained in the Human Rights Statement), Chief Health Officer advice 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.

219 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.

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<sup>147</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021), p. 30.

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

### Summary of Order

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

#### *Purpose*

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

#### *Obligations*

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

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

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

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

223.1.2 A person who is an international maritime services worker who is not fully vaccinated or medically exempt;

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

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

223.2 imposes an initial period of detention of 7 days.

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

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

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

225.2 there is an emergency situation; or

225.3 the person is required to by law.

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

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

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

#### *Changes from Pandemic (Detention) Order 2022 (No.4)*

229 The following definitions in the Order have been amended:

229.1 maritime person of risk, to exclude a person who is eligible to enter Victoria under the Victorian Border Crossing Order.

229.2 international maritime arrival, to now mean a person who is arriving from another country and disembarking a maritime vessel at a Victorian maritime port.

#### *Period*

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

### Relevant human rights

#### *Human rights that are limited*

231 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.

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

233 The Human Rights Statement also sets out:

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



233.2 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*

234 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.

235 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

236 I carefully read and considered the Acting Chief Health Officer's advice. To the extent that they are relevant to my decision, I have also had regard to previous advice from the Acting Chief Health Officer and the Chief Health Officer's advice in the various forms provided to me, as outlined above under "Statutory power to make pandemic orders".

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

237.1 Globally, countries have differing epidemiology, control over COVID-19 outbreaks and protective public health measures. To manage this external risk in a consistent and predictable manner, it is appropriate for Victoria to adopt a nationally standardised approach to international arrivals to reduce the risk of viral incursion and transmission. A combination of quarantine, testing and entry to sensitive setting restrictions are required to control for the risks posed by the different cohorts of international arrivals to the Victorian community. As international travel has now recommenced, these measures become increasingly important in managing the risk of incursion, especially from emerging threats such as the importation of novel variants of concern.<sup>148</sup>

237.2 International arrivals via air and sea should continue to be subject to specific quarantine and testing requirements, as there is an ongoing risk of incursion of COVID-19 and emerging VOCs due to international travel.

237.3 In Victoria, despite high vaccination coverage there continues to be widespread community transmission of COVID-19, thus the relative risk posed by international arrivals is much less compared to earlier stages of the pandemic. However, given inequitable access to COVID-19 vaccines internationally leading to varied vaccination coverage across the world, there are many countries that remain largely unvaccinated and high levels of transmission continue to occur across the world. Consequently, there is an ongoing risk that new variants may emerge

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<sup>148</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

that are more virulent or better able to evade host immune responses and spread via international travel.<sup>149</sup>

237.4 International arrivals via air and sea should be managed according to their vaccination status due to the different level of public health risk posed.<sup>150</sup>

237.5 Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals' interaction and movement for a defined period.<sup>151</sup>

237.6 Quarantine in a hotel quarantine facility is appropriate for high-risk cohorts such as unvaccinated individuals. Quarantine further mitigates risk of incursion by minimising interactions with general community members while also having in place dedicated operational protocols to reduce risk and access to testing and medical care resources.<sup>152</sup>

237.7 AHPPC recently reaffirmed its position on the importance of managed quarantine programs for international travellers, releasing a statement on end-to-end best practice arrangements.<sup>153</sup>

237.8 Managed quarantine facilities provide the most stringent safeguards against onward transmission from an infectious person, with robust testing regimens, infection control practices and other public health measures in place to ensure early detection and management of COVID-19 cases and associated close contacts.<sup>154</sup>

237.9 Most recently, the Chief Health Officer has advised that hotel quarantine remains a vital public health measure that protects the state from incursion of COVID-19 cases and limits the risk of incoming variants of concern. Unvaccinated international arrivals present a higher incursion of risk compared to those who are fully vaccinated. Government-managed quarantine facilities such as hotel quarantine provide the most oversight and protection against transmission and infection, with robust testing protocols and public health measures in place to ensure early detection and management of cases and contacts.<sup>155</sup>

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

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<sup>149</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) pp. 18-19.

<sup>150</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p. 19.

<sup>151</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 31.

<sup>152</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 31.

<sup>153</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 32

<sup>154</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 31

<sup>155</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

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

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

*(3) If it is not reasonably practicable for a review under subsection (2) to be undertaken within a particular 24 hour period, the review must occur as soon as practicable and without undue delay.<sup>156</sup>”*

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

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

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

242 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.

243 In addition, I have also considered the following additional potential negative impacts<sup>157</sup>:

243.1 Separation of families and support networks while people are in detention facilities: If the detained person has family in Victoria, this person is unable to be reunited with family for the period of detention. For detained persons separated from their family, detention can cause disruptions in relationships, economic difficulties, isolation from culture and traditions, and uncertainty and anxiety. I acknowledge this but the high risk of spread of COVID-19 from overseas into and throughout Victoria requires restrictions as specified above.

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

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<sup>156</sup> Public Health and Wellbeing Amendment (Pandemic Management) Act 2021 (Vic) section 165BG.

<sup>157</sup> Charter of Human Rights and Responsibilities Act 2006 (Vic).

- 243.3 A person may be unable to work at their usual place of work for the period of detention, unless they are able to do so remotely. This can have an impact on the economic, social, and psychological wellbeing of the person or/and their family.
- 243.4 Detention places significant restrictions on a person's ability to move freely. This can impact adversely on their mental health and psychosocial wellbeing.
- 244 However, I also recognised that the Order contains the following exceptions or qualifications to minimise the potential negative impacts on individuals and the community:
- 244.1 The Chief Health Officer, the Deputy Chief Health officer or an authorised officer may grant an exemption to a person of risk from the requirements of this Order, if satisfied that the exemption is appropriate by having regard to the need to protect the public and the principles of the Order.
- 244.2 A person may only continue to be detained if an authorised officer, who is required to review the person's detention every 24 hours under s 165BG of the Act, is satisfied that the person's continued detention is reasonably necessary to eliminate or reduce a serious risk to public health.
- 244.3 Section 165BN of the Public Health and Wellbeing Act 2008 provides that "A person is not guilty of an offence against subsection 19(1) if the person had a reasonable excuse for refusing or failing to comply."

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

- 245 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<sup>158</sup>, education,<sup>159</sup> epidemiology and monitoring).<sup>160</sup>
- 246 The CHO has clearly stated that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.<sup>161</sup>
- 247 The right to liberty has been described as 'the most elementary and important of all common law rights'. The prohibition is on arbitrary detention and on deprivation of liberty except on grounds, and in accordance with procedures, established by law. This means that the right to liberty may only be legitimately constrained if the detention is authorised by law and is not arbitrary (in that it is reasonable or proportionate in all the circumstances).

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<sup>158</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 14-15.

<sup>159</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 14-15

<sup>160</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 14-20.

<sup>161</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 10-11.

- 248 I have assessed the suitability of less restrictive alternatives such as shorter periods of detention or home quarantine, and consider that these options are not suitable for a high-risk cohort such as unvaccinated international arrivals because a quarantine period of 7 days represents the likely incubation period of the SARS-CoV-2 virus.
- 249 I have considered whether home quarantine or a requirement to self-isolate or quarantine at a place of person's choosing is a reasonably available alternative. However, I decided that it was not a reasonably available alternative that would be sufficiently effective to achieve the purpose of the Order, based on the Chief Health Officer's advice that:
- 249.1 Managed quarantine facilities provide the most stringent safeguards against onward transmission from an infectious person, with robust testing regimens, infection control practices and other public health measures in place to ensure early detection and management of COVID-19 cases and associated close contacts.<sup>162</sup>
- 249.2 Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals' interaction and movement for a defined period immediately following their arrival.<sup>163</sup>
- 249.3 Quarantine in a hotel quarantine facility is appropriate for high-risk cohorts such as unvaccinated individuals. Quarantine further mitigates risk of incursion by minimising interactions with general community members while also having in place dedicated operational protocols to reduce risk and access to testing and medical care resources.<sup>164</sup>

## Conclusion

- 250 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.
- 251 I am also satisfied that the period of detention specified in the Order does not exceed the period that I believe is reasonably necessary to eliminate or reduce a serious risk to public health.
- 252 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.

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<sup>162</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 30.

<sup>163</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

<sup>164</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

## Schedule 6 – Reasons for Decision – Pandemic (Movement and Gathering) Order 2022 (No. 5)

### Summary of Order

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

253.1 the Open Premises Order; or

253.2 the COVID-19 Mandatory Vaccination (Specified Workers) Order; or

253.3 the COVID-19 Mandatory Vaccination (Specified Facilities) Order; or

253.4 the COVID-19 Mandatory Vaccination (General Workers) Order.

### *Purpose*

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

### *Obligations*

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

255.1 carrying a face covering at all times (unless an exception applies);

255.2 wearing a face covering in the following settings:

255.2.1 while in an indoor space at an education premises that is a primary school (including an outside school hours service at a primary school) if:

(1) the person is worker;

(2) the person is a student in Year 3 or above, up to and including Year 6; or

(3) the person is a visitor at the education premises (and aged 8 years or above);

255.2.2 while working at or visiting an indoor space at a premises at which a childcare or early childhood service is being provided;

255.2.3 while working in an indoor space at a prison, remand centre, youth residential centre, youth justice centre or post-sentence facility;

- 255.2.4 while in an indoor space that is a publicly accessible area of a healthcare premises;
  - 255.2.5 while working in an indoor space that is a publicly accessible area of:
    - (1) a retail premises or a food and drink premises (including a food court); or
    - (2) an event with more than 30,000 patrons in attendance;
    - (3) a court or justice centre, including when not interacting with members of the public;
  - 255.2.6 while visiting a hospital;
  - 255.2.7 while visiting a care facility or working in a resident-facing role in an indoor space at a care facility, including when not interacting with residents;
  - 255.2.8 while in an aircraft or in an indoor space at an airport;
  - 255.2.9 while on public transport or in a commercial passenger vehicle or in a vehicle being operated by a licensed tourism operator;
  - 255.2.10 if the person is a diagnosed person, close contact or a probable case and is leaving the premises in accordance with the Quarantine, Isolation and Testing Order;
  - 255.2.11 if the person has been tested for COVID-19 and is awaiting the results of that test, except where that test was taken as part of a surveillance or other asymptomatic testing program; and
  - 255.2.12 where required to do so in accordance with any other pandemic orders in force.
- 255.3 The Chief Health Officer recommended the following exceptions to the requirement that a person wear a face mask in the settings enumerated above:<sup>165</sup>
- 255.3.1 the person is an infant or a child under the age of 8 years except if they are a student in Year 3 to 6 and they are in an indoor space at a primary school;
  - 255.3.2 the person is a prisoner in a prison;
  - 255.3.3 the person is detained in a remand centre, youth residential centre or youth justice centre;
  - 255.3.4 the person has a physical or mental health illness or condition, or disability, which makes wearing a face covering unsuitable;

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<sup>165</sup> Department of Health, Chief Health Officer Advice to Minister for Health (11 December 2021), pp. 17-18 at [71].

- 255.3.5 it is not practicable for the person because the person is escaping harm or the risk of harm, including harm relating to family violence or violence of another person;
- 255.3.6 the person is communicating with a person who is deaf or hard of hearing and visibility of the mouth is essential for communication;
- 255.3.7 the nature of a person's work or education means that wearing a face covering creates a risk to their health and safety;
- 255.3.8 the nature of a person's work or education means that clear enunciation or visibility of the mouth is essential;
- 255.3.9 the person is working by themselves in an enclosed indoor space (unless and until another person enters that indoor space);
- 255.3.10 the person is a professional sportsperson when training or competing;
- 255.3.11 the person is engaged in any strenuous physical exercise;
- 255.3.12 the person is riding a bicycle or a motorcycle;
- 255.3.13 the person is consuming medicine, food or drink;
- 255.3.14 the person is smoking or vaping (including e-cigarettes) while stationary;
- 255.3.15 the person is undergoing dental or medical care or treatment to the extent that such care or treatment requires that no face covering be worn;
- 255.3.16 the person is receiving a service and it is not reasonably practicable to receive that service wearing a face covering;
- 255.3.17 the person is providing a service and it is not reasonably practicable to provide that service wearing a face covering;
- 255.3.18 the person is asked to remove the face covering to ascertain identity;
- 255.3.19 for emergency purposes;
- 255.3.20 when required or authorised by law;
- 255.3.21 when doing so is not safe in all the circumstances.

256 Face masks are required to be carried at all times by individuals aged 8 years and over, with limited exceptions, as these individuals must be prepared to wear masks in settings where the use of masks is required.

257 The recommendation to work and study from home if possible is no longer in place.



258 The Order requires workers not to perform work outside their ordinary place of residence if their employer is not permitted to allow them to do so under:

258.1 the Open Premises Order; or

258.2 the COVID-19 Mandatory Vaccination (Specified Workers) Order; or

258.3 the COVID-19 Mandatory Vaccination (Specified Facilities) Order; or

258.4 the COVID-19 Mandatory Vaccination (General Workers) Order.

259 The Order requires organisers of a ceremony to:

259.1 collect, record and hold vaccination information of workers at the ceremonial space; and

259.2 not permit a person to work at the ceremonial space unless they are:

259.2.1 fully vaccinated,

259.2.2 an excepted person, or

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

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

### *Period*

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

### **Relevant human rights**

#### *Human rights that are limited*

262 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.

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

264 The Human Rights Statement also sets out:

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

264.2 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*

265 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.

266 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**

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

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

268.1 Given the greater risk of transmission in certain indoor settings and severity of outcomes of transmission in vulnerable populations, face covering requirements should remain in place in the following settings:

268.1.1 in indoor spaces regularly attended or occupied by vulnerable individuals such as hospitals, care facilities and correctional facilities due to the potential severity of transmission outcomes in these populations;

268.1.2 in potentially higher risk transmission environments such as public transport, commercial passenger vehicles, airports and aircrafts, where there is a relatively higher risk of coronavirus transmission due to reduced ventilation, close proximity, and greater density of persons;

268.1.3 for indoor entertainment events, which are also high transmission risk environments where ventilation may be suboptimal, high numbers of patrons are in attendance causing overcrowding and limiting adherence to COVIDSafe practices such as physical distancing.<sup>166</sup>

268.2 Masks should continue to be required in primary school settings for children in grades three to six in the context of high levels of community transmission and lower rates of vaccination coverage in primary school aged children (27.8% of those aged 5 to 11 have received two doses) compared to other age cohorts within the Victorian community (94.3% of those aged 12 years and above have received two doses).<sup>167</sup>

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<sup>166</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

<sup>167</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 15.

- 268.3 Maintaining face mask requirements for education settings limits the risk of transmission in these settings and therefore the potential consequences of exposure and infection, which include being required to isolate and the attendant disruptions to education, in addition to the rare risk of severe disease. Further, while severe disease and death due to COVID-19 are rare in children, the long-term potential consequences of infection, including of 'long COVID' are not yet well understood.<sup>168</sup>
- 268.4 Increasing evidence is demonstrating the benefits of mask wearing in schools. For example, a recent US multi-state-based study demonstrated a 72% reduction in secondary transmission in schools with universal masking compared to schools with optional mask policies. Similarly, another US-based study in Arizona found that schools without mask requirements were 3.5 times more likely to have COVID-19 outbreaks than schools that started the school year with mask requirements. While severe disease and death due to COVID-19 is rare in children, the long-term potential consequences of infection, including 'long COVID' are not well understood. This age group also continues to play a major role in disease transmission. With the commencement of term one school holidays on 9 April 2022, and as the epidemiological situation evolves, mask use in this setting will require ongoing review.<sup>169</sup>
- 268.5 Behavioural insight data indicates that face covering wearing and carrying has become habituated in the Victorian population. Data from January 2022 demonstrated that 89% of Victorians always or often wore a face covering in an indoor public place and 93% say they always or often take one when they leave their house. Despite the removal of requirements for face covering use in many indoor settings, given the high acceptability by patrons and in many workplace settings, there should be ongoing health promotion and education around the proven role of face coverings in reduction of transmission risk, and patrons and workers will be strongly encouraged to use masks in indoor settings, particularly where physical distancing cannot be maintained, or ventilation standards not considered optimal.<sup>170</sup>
- 268.6 Industries at higher risk of amplification, such as meat and seafood processing and cold food storage and distribution, are very strongly advised to consider their obligations from a work and safety perspective, even if these are not mandated. There will be more at-risk workers in these settings, and industries have an obligation to these workers and the broader community through the measures they recommend.<sup>171</sup>
- 268.7 Existing mask requirements for diagnosed persons, close contacts, or symptomatic persons awaiting the result of a COVID-19 test, remain in place where those individuals are leaving their premises. This is particularly important given the increased transmissibility of Omicron and BA.2.<sup>172</sup>

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<sup>168</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

<sup>169</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 15.

<sup>170</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

<sup>171</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

<sup>172</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 15.

268.8 In addition, existing requirements for diagnosed persons, close contacts, or symptomatic persons awaiting the result of a COVID-19 test, must remain in place where those individuals are leaving their premises. This is particularly important given the increased transmissibility of Omicron which currently dominates lineages identified in Victoria, due to the known effect of a face covering on reducing the spread of infectious aerosols or droplets to others. The Omicron variant is also associated with an increased risk of reinfection (following previous infection either with another variant or with Omicron) and of breakthrough infections (following previous vaccination). Face covering use reduces both the risk of an infected person transmitting to others, as well as protection against acquiring infection for their uninfected contacts.<sup>173</sup>

268.9 Early and consistent implementation of measures, such as face masks, is the best strategy to slow transmission and reduce the likelihood of more restrictive measures being required in the near future. I also continue to advise ongoing health promotion and education around the effectiveness of masks in the reduction of transmission risk. These measures may support individuals to feel empowered to make decisions on the circumstances in which they wear masks to reduce their own infection risk. Even when not required as part of Orders, masks should be strongly recommended, particularly in indoor settings and outdoor settings when unable to maintain physical distance from others such as at entry and exit points at large events.<sup>174</sup>

269 I accept this advice.

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

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

271 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.

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

272.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. "There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds."<sup>175</sup>

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<sup>173</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

<sup>174</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022), p. 15.

<sup>175</sup> Department of Health, Human Rights Statement: Pandemic (Movement and Gathering) (10 December 2021), at [136.2].

272.2 The order “may restrict the ability of [a] business to operate if some [of] their workforce are unable, or unwilling, to comply with the pandemic orders. The pandemic orders might in the short term reduce or affect the capacity of certain businesses to generate income from their real and personal property.”<sup>176</sup>

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

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

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

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

273.3 where wearing a face covering is not safe.

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

274 The Chief Health Officer has advised me about a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).<sup>177</sup>

275 The Chief Health Officer has advised that such measures alone are not sufficient to manage the serious risk to public health posed by COVID-19.<sup>178</sup>

276 Public education and health promotion can provide community members with an understanding of <sup>179</sup> behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.<sup>180</sup> However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.<sup>181</sup> COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health. behaviours are

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<sup>176</sup> Department of Health, Human Rights Statement: Pandemic (Movement and Gathering) (10 December 2021), at [66], [93], [119].

<sup>177</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), pp. 14 – 20.

<sup>178</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), pp. 10-11 [34]- [36].

<sup>179</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 15 at [52] – [53].

<sup>180</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), pp. 21 at [91]; p. 30 at [142] – [143].

<sup>181</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), pp. 15 at [62].

consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.

- 277 For example, the effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.<sup>182</sup> There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 278 Moreover, proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.<sup>183</sup> Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta VOC, and increasingly with the Omicron VOC.
- 279 In making this order, I considered the Chief Health Officer's Advice where advised me that "it would seem appropriate, given the interaction with vulnerable population groups that consideration be given to mandatory third dose booster vaccinations for healthcare workers, aged and disability care workers in the first instance."<sup>184</sup> This was due to the workforces "interaction with vulnerable population groups" and a concern of "waning immunity [that] is associated with an increased incidence in breakthrough infections."<sup>185</sup> As there has not been national agreement or ATAGI advice issued for mandating booster vaccines for healthcare, aged care and disability workers, I have decided not to make orders mandating booster vaccine doses for healthcare, aged care and disability workers. This does not prevent employers from making their own workplace rules about booster vaccines or other measures to protect their workers' and clients' health and safety.

## Other considerations

- 280 The mandatory vaccination requirement for Specified Workers, General Workers, Specified Facilities and Open Premises reduces the risk of transmission within the broader community. This provides greater community protection and certainty, which is an important consideration as the state economy begins to recover from the unprecedented impact of the pandemic.<sup>186</sup>
- 281 In making this order, I consider it reasonably necessary to maintain the mandatory vaccination requirements for Specified Workers, General Workers, Specified Facilities and Open Premises, as

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<sup>182</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>183</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), pp. 28 at [132]; p. 30 at [147].

<sup>184</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 30 at [147].

<sup>185</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 30 at [147].

<sup>186</sup> Department of Treasury and Finance, Coronavirus Economic Outlook [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021].

these requirements, such as self-isolation when symptomatic, wearing a face covering in certain settings and maintaining social distancing<sup>187</sup>

## Conclusion

- 282 Taking into account all of the above factors (including those contained in the Human Rights Statement) and weighing the public health benefits of the Order against the countervailing potential impacts on individuals and the community, I believe it was reasonably necessary to make the Order to protect public health.
- 283 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.

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

## Schedule 7 – Reasons for Decision – Pandemic (Open Premises) Order 2022 (No.6)

### Summary of Order

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

#### *Purpose*

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

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

285.2 patrons that attend those premises.

#### *Obligations*

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

286.1 adult education or higher education premises

286.2 amusement parks

286.3 arcades, escape rooms, bingo centres

286.4 casino

286.5 community premises

286.6 creative arts premises

286.7 drive-in cinemas

286.8 entertainment and function premises

286.9 food and drink premises

286.10 gaming machine premises

286.11 karaoke and nightclubs

286.12 physical recreation premises

286.13 restricted retail premises



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

#### *Changes from Pandemic (Open Premises) Order 2022 (No.5)*

- 290 Vaccination and COVID Check-in Marshal requirements do not apply to a space at an open premises that is used as a polling place for the purposes of voting in a State or Federal election.

#### *Period*

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

### Relevant human rights

#### *Human rights that are limited*

- 292 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.

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

294 The Human Rights Statement also sets out:

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

294.2 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*

295 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.

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

#### How the obligations imposed by the Order will protect public health

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

298 The Acting Chief Health Officer noted that vaccination has been shown to reduce the risk of severe COVID-19 related outcomes such as hospitalisation and death (World Health Organization (a), 2022) (United Kingdom Health Security Agency (c), 2022).<sup>188</sup>

299 I have considered the Acting Chief Health Officer's advice that there has been an increase in the COVID-19 cases observed in the recent weeks, which is likely due to a number of factors including the circulation of the more transmissible BA.2 sub-lineage and waning population level protection afforded from both COVID-19 vaccination and previous COVID-19 infection. This trend aligns with the experience reported internationally. The Acting Chief Health Officer also noted the forecasting which suggests Victoria is entering a period of rising case numbers which is likely to peak around mid-April, with hospitalisations peaking shortly thereafter.<sup>189</sup>

300 I have also considered the AHPPC has recently expressed concern about the upcoming winter season and the additional challenges that the health system may encounter due to the likely co-circulation of influenza and COVID-19.<sup>190</sup>

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<sup>188</sup> Department of Health, Acting Chief Health Officer Advice to the Minister for Health (7 April 2022) p.21

<sup>189</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p. 4.

<sup>190</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p. 9.

- 301 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.<sup>191</sup>
- 302 I have considered the following obligations on operators of certain open premises to ensure:
- 302.1 patrons who are not fully vaccinated or exempt cannot enter the premises;
  - 302.2 systems are in place for patrons over 18 years old to show evidence of their vaccination;
  - 302.3 any patron limits specified in the order are not exceeded;
  - 302.4 persons working at the premises are fully vaccinated or exempt (with partially vaccinated workers able to work on the premises with no patrons present);
  - 302.5 vaccination information for all workers is recorded.
- 303 In relation to the measures imposed by this Order, I have drawn on the previous advice that the Chief Health Officer has provided:
- 303.1 Vaccination requirements to enter open premises serve to protect the health of all who access these settings, including customers/patrons, workers and in particular those who are in a vulnerable population group or unable to be vaccinated.
  - 303.2 Businesses and public premises continue to be a primary area in which both workers and patrons mingle and interact for extended periods of time. People from different parts of Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community.
  - 303.3 Current settings are therefore to be maintained and as the current epidemiological situation continues to evolve, an ongoing review of vaccination requirements will ensure all measures remain proportionate and necessary to reduce the risk to public health.<sup>192</sup>
- 304 Patrons must be prohibited from entering open premises unless fully vaccinated (or medically exempt or ineligible for COVID-19 vaccination), except the following settings:<sup>193</sup>
- 304.1 non-essential retail (excluding hair, beauty and personal care services); and
  - 304.2 religious services, weddings and funerals.
- 305 In relation to the measures imposed by this Order, the Acting Chief Health Officer has advised as follows:

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<sup>191</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

<sup>192</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

<sup>193</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 31.

- 305.1 It is open to the Minister to consider the continuation of the current requirement for all workers that leave their home for work to have at least received their primary course of vaccination (two doses), or a valid medical exemption to attend work onsite.<sup>194</sup>
- 306 The Chief Health Officer advised that the below settings could be excluded from the open premises requirements:
- 306.1 Non-essential retail is excluded from this vaccine requirement due to the high vaccination rates in the community and the need for people to access goods and services. However, it is reasonable for hair, beauty and personal care services to continue with a vaccine requirement due to the close and prolonged contact that occurs between clients and workers who will not be required to wear face masks due to the nature of the activities.<sup>195</sup>
- 306.2 Religious gatherings, weddings and funerals, are important for the wellbeing needs of the attendees who are participating in religious and spiritual activities, attending important social milestones.<sup>196</sup>
- 306.3 As the risk from such activities is mitigated by the benefits of natural ventilation in outdoor settings, I do not believe that the Minister needs to consider these restrictions for outdoor spaces or venues.<sup>197</sup>
- 307 I have largely accepted the Chief Health Officer's and the Acting Chief Health Officer's advices.
- 308 I have excluded open premises from vaccination and COVID Check-in Marshal requirements to the extent that they are being used as polling sites for State or Federal elections to support enrolled Australians to vote in person for upcoming elections.
- 309 Finally, to assist with internal and national consistency, I have accepted the Acting Chief Health Officer's advice to include participants of COVID-19 vaccination clinical trials in vaccination exemptions, and to include the Sputnik V and Novavax vaccines in the definition of 'two-dose COVID-19 vaccine'. This is for the purpose of aligning policies at a national and interjurisdictional level, which will minimise confusion for the community and industry and therefore assist in compliance.<sup>198</sup>

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

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

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<sup>194</sup> Department of Health, Acting Chief Health Officer Advice to the Minister for Health (7April 2022) p.22

<sup>195</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 31.

<sup>196</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 31.

<sup>197</sup> Department of Health, Chief Health Officer Advice to Minister for Health (23 December 2021), p. 16.

<sup>198</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 14.

311 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.

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

312.1 Some individuals may object to receiving a COVID-19 vaccine for a variety of reasons, including religious, cultural and personal health views and other belief systems. "There are some belief systems which disagree with aspects of the way that certain vaccinations are made if they are made with human tissues, and some have beliefs, associated with the body of a person being sacred, that the human body should not be in receipt of foreign chemicals or compounds."<sup>199</sup>

312.2 The "practical effect [of the order] is to require a person to choose between being vaccinated or not being able to attend open premises, which includes a variety of venues including cinemas, restaurants, swimming pools and gyms."<sup>200</sup>

312.3 The order limits freedom of movement "because it prevents a person from attending a particular place — namely, open premises — if they are unvaccinated."<sup>201</sup>

313 In addition, I note that:

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

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

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

314 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).<sup>202</sup>

315 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.<sup>203</sup>

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<sup>199</sup> Department of Health, Human Rights Statement: Pandemic (Open Premises) Order (15 December 2021).

<sup>200</sup> Department of Health, Human Rights Statement: Pandemic (Open Premises) Order (15 December 2021).

<sup>201</sup> Department of Health, Human Rights Statement: Pandemic (Open Premises) Order (15 December 2021).

<sup>202</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), pp. 14-20.

<sup>203</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), pp. 10-11.

- 316 Public education and health promotion can provide community members with an understanding of<sup>204</sup> behaviours and actions, such as hand hygiene, staying home when unwell and testing when symptomatic.<sup>205</sup> However, onsite work for specified workers typically involves a significant amount of workforce interaction and movement.<sup>206</sup> In addition, it is possible for individuals to be asymptomatic and infectious. Education and practicing of COVIDSafe behaviours are consequently not sufficient to manage the risk high levels of workforce interaction poses to public health.
- 317 While epidemiology and monitoring is necessary to facilitate contact tracing to reduce the onward spread of COVID-19, the high levels of transmission currently in Victoria indicates there may be an ongoing substantial proportion of undiagnosed COVID-19 cases in the community. Ensuring high vaccination coverage for workers and patrons reduces the risk of individuals transmitting COVID-19 to others.
- 318 There are a number of challenges that prevent the combination of mask wearing and testing being an equally robust solution to the risks of exposure and transmission compared to vaccines.<sup>207</sup>
- 319 The effectiveness of face mask use in communities is influenced by the general compliance and appropriate monitoring and wearing of masks, in addition to education, communication and guidance campaigns.<sup>208</sup> There would be significant problems with providing sufficient resources to upscale and maintain the auditing processes across the general community to a level that is sufficient to ensure correct PPE use.
- 320 Proof of a past recent infection is not currently considered an acceptable reason for exemption from vaccination because immune response to natural infection is known to wane over time.<sup>209</sup> Reinfection following both infection and vaccination is likely to be of increasing concern with emerging variants, as already demonstrated with the Delta variant of concern, and increasingly with the Omicron variant of concern.
- 321 Negative point in time test results for COVID-19, while less onerous than a mandatory vaccination requirement, fails to provide the same protection for workforces.<sup>210</sup> Currently, PCR and RA tests are approved for use in Australia.
- 322 PCR is the gold standard diagnostic test. However, it is more resource intensive to deliver, requiring dedicated testing sites, healthcare worker administration, laboratory resources, and result-reporting pathways. PCR testing capacity is finite and can be overwhelmed as seen during the recent peak in cases early in January. Increased use would increase the burden on the system and

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<sup>204</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 15.

<sup>205</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 21, p. 30.

<sup>206</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 15.

<sup>207</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

<sup>208</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021

<sup>209</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021), p. 28, p. 30.

<sup>210</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

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

- 323 RA tests are also subject to potential false negative resulting from the assay itself.<sup>211</sup> While the sensitivity and specificity of RA testing varies by the assay being used, a recent prospective study of nearly 5000 cases found that the overall sensitivity of RA testing was 74 per cent, however lower pick-up rates were observed in cases who were asymptomatic (estimated 55 per cent). Systematic reviews, including a recent Cochrane review, have yielded similar findings – sensitivity varied markedly across studies, however, the average sensitivity for RA tests was 56.2 per cent (95 per cent confidence interval: 29.5-79.8 per cent).
- 324 In considering whether a combination of testing, distancing and screening might be sufficiently effective, although the risk of transmission is less in some settings – especially outdoors or places that were highly ventilated – not all workplaces and settings are.<sup>212</sup>

### Other considerations

- 325 The mandatory vaccination requirement for open premises reduces the risk of transmission within those settings and the broader community. This provides greater workforce protection and certainty. Importantly, patrons will have renewed confidence in entering these settings which will assist consumer spending.<sup>213</sup>
- 326 In making this order, I consider it reasonably necessary to retain the mandatory vaccination requirements for open premises to assist with public confidence in the overall administration of public health and results in overall improvements in community compliance for prosocial behaviour.<sup>214</sup>

### Conclusion

- 327 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.
- 328 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.

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<sup>211</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>212</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 14 December 2021.

<sup>213</sup> Department of Treasury and Finance, Coronavirus Economic Outlook [Online, 2021] Available at: <https://www.dtf.vic.gov.au/economic-and-financial-updates/coronavirus-economic-outlook> [Accessed 13 December 2021] – see Appendix 3.

<sup>214</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 30.

## Schedule 8 – Reasons for Decision – Pandemic (Quarantine, Isolation and Testing) Order 2022 (No.7)

### Summary of Order

- 329 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.
- 330 A probable case is someone who has received a positive result on a COVID-19 RA test.
- 331 Additionally, exposed persons, social contacts and symptomatic persons in the community are required to observe testing requirements issued by the Department.
- 332 There are different requirements for self-quarantine and testing depending on the level of exposure to a diagnosed person or probable case.

### *Purpose*

- 333 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*

- 334 The Order requires diagnosed persons to:
- 334.1 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;
  - 334.2 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
  - 334.3 notify the Department of the premises chosen to self-isolate and the contact details of any other residents at the premises; and
  - 334.4 notify any close contacts and social contacts, and any education facility where the person attended during the infectious period of their COVID-19 diagnosis.
- 335 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:
- 335.1 self-isolate at a suitable premises until the earlier of:
    - 335.1.1 seven days from the date on which they took a COVID-19 RA test that returned a positive result; or



- 335.1.2 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;
  - 335.2 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
  - 335.3 notify the Department of the premises chosen to self-isolate and the contact details of any other residents at the premises; and
  - 335.4 notify any education facility where the person attended an indoor space during their infectious period; and
  - 335.5 notify any close or social contacts, to the extent that they are reasonably able to ascertain and notify those contacts.
- 336 The Order requires close contacts to self-quarantine for a period of seven days.
- 337 The Order requires that the seven-day period for close contacts who self-quarantine with a diagnosed person or probable case starts from when:
- 337.1 the diagnosed person undertook their PCR test that confirmed they were a diagnosed person;  
or
  - 337.2 the probable case undertook their RA test and received a positive COVID-19 result.
- 338 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.
- 339 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
- 340 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.
- 341 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.
- 342 The Order authorises the CEO of Service Victoria to collect and display the necessary information to operate an app for use by persons to report and demonstrate a positive, negative or invalid rapid antigen test result.

### *Changes from Pandemic (Quarantine, Isolation and Testing) Order 2022 (No.6)*

343 Minor amendment to the application of this order to resolve a potential issue between the Detention Order whereby a person in detention that returns a positive test may have been able to determine their place of self-isolation, thus ending their detention.

#### *Period*

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

### Relevant human rights

#### *Human rights that are limited*

345 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.

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

347 The Human Rights Statement also sets out:

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

347.2 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*

348 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.

349 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

350 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".

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

- 351.1 Community education, engagement, and COVIDSafe behaviours such as vaccination, mask wearing, physical distancing, respiratory and hand hygiene, staying home and getting tested when unwell remain key to an effective pandemic response in Victoria.
- 351.2 The current test, trace, isolate and quarantine (TTIQ strategy) should continue to form a key pillar of the Victorian public health response to COVID-19. The TTIQ strategy aims to limit spread of COVID-19 by interrupting chains of transmission through rapid testing, contact tracing, quarantining exposed individuals and isolating people who have acquired infection.
- 351.3 The TTIQ strategy remains an important measure to protect the Victorian population and these measures are outlined in Victorian guidelines and aligns with the current CDNA guidelines, which are supported by the AHPPC (Communicable Diseases Network Australia (a), 2022) (Australian Health Protection Principal Committee (b), 2021).
- 351.4 Testing requirements for some cohorts remain necessary to support a rapid public health response. Individuals who have been exposed to a person with COVID-19 are at increased risk of acquiring infection and it is important to identify if they become infected early, to limit the spread of infection and limit exposure to others.
- 351.5 Close contacts should continue to have mandatory testing requirements as they are the highest risk of acquiring COVID-19 due to the nature and duration of their exposure to a case. All other contacts (workplace, educational or social) who are still at increased risk of infection, should be required to have a COVID-19 test if they develop symptoms.
- 351.6 To limit transmission of COVID-19 within the community, it is proportionate to continue to require isolation for persons who have COVID-19. Diagnosed cases (diagnosed via PCR) and probable cases (positive RA test) should be required to isolate for seven days to minimise onward transmission. This period aligns with current national CDNA guidelines (Communicable Diseases Network Australia (a), 2022), which were revised in January 2022 to incorporate the National Cabinet agreed COVID-19 Test and Isolation National Protocols (Department of Health (b), 2022).
- 351.7 Close contacts, also known as household and house-like contacts, are individuals who have spent four or more hours with a person with COVID-19 inside a private home, accommodation premises or care facility. Close contacts should continue to be required to quarantine for seven days. This close contact definition and period of quarantine also aligns with the current national CDNA guidelines and the National Cabinet agreed COVID-19 Test and Isolation National Protocols (Centers for Disease Control and Prevention (b), 2022) (Department of Health (b), 2022).
- 351.8 To ensure prompt identification of COVID-19 infection, it is necessary for close contacts to continue to test on days one and six of their quarantine.
- 351.9 The requirement for a COVID-19 positive case to notify the Department of Health of a positive diagnosis, infectious period and isolation address [is] reasonable as it empowers the Health Department to protect the health and safety of the community. Location details such as the case's address informs the Department's understanding of the spread of the virus across the community, transmission pathways, risk areas, and the potential impact or incursion into

sensitive settings, and further contributes towards data on secondary attack rates. It provides linkages into the Department's and community support programs such as the Household Engagement Program, COVID-19 Positive Pathway Program, and our Compliance and Enforcement Program.

351.9.1 There are numerous privacy protections that apply to information disclosed and held by the Department, education facilities and Service Victoria under the pandemic orders. The information is not shared outside of the scope and purpose of case, contact and outbreak management and only disclosed where necessary or required to be under law or direction.

351.9.2 The Privacy and Data Protection Act 2014 (Vic) and the Health Records Act 2001 (Vic) provide privacy protections. This is the primary legislation that regulates the information handling of personal and health information. The department manages information in accordance with the Information Privacy Principles and Health Privacy Principles that provide standards for information collection, storage, access, transmission, disclosure, use and disposal as prescribed within these Acts.

351.10 Individuals who are a confirmed or probable case should also continue to be required to inform their workplace or education facility that they have been diagnosed with COVID-19 if they attended the setting during their infectious period.

351.11 Individuals who have COVID-19 should also be required to inform any other persons who may be a close contact or a social contact, to the extent the diagnosed person is able to reasonably identify and notify these persons. This will allow identification of potential new cases and prevent onward transmission.

351.12 It is necessary to require employers and educational facilities to provide a general notification to individuals (or parents, guardians and carers) that they may have been exposed to a positive case. This measure supports the recent shift in the pandemic response towards empowering and educating the general public and businesses to manage outbreaks and protect staff, students and the community.

351.13 LHPU powers were recently extended to allow them to vary isolation or quarantine periods as well as the location of self-quarantine or isolation, and I advise that these powers should be retained.

352 I have also drawn on the advice previously provided by the Chief Health Officer:

- 352.1 To amend the definition of a recent confirmed case so that the period a person is considered a recent confirmed case is eight weeks from time of release from self-isolation (therefore is not considered a case or close contact in that time).<sup>215</sup>
- 353 I have broadly accepted the advice of the Acting Chief Health Officer. 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. I have also made minor amendments to the order to improve accuracy and clarity.
- 354 I note that the Acting Chief Health Officer has also advised the following changes to measures current contained in the Pandemic (Quarantine, Isolation and Testing) Order:
- 354.1 Recovered confirmed or probable cases should not need to be tested or managed as a close contact within 12 weeks after being released from isolation.<sup>216</sup>
- 354.2 local public health unit (**LHPU**) Directors and Medical Leads' powers are extended to grant temporary exemptions to close contacts and confirmed cases to vary the conditions of their self-isolation or quarantine period, for example, drive a dependent to school.<sup>217</sup>
- 355 In deciding not to action the above measures, I draw on the Acting Chief Health Officer's advice that:
- 355.1 Victoria is entering a period of rising case numbers which is likely to peak around mid-April, with hospitalisations peaking shortly thereafter.<sup>218</sup>
- 355.2 It is open to the Minister, however, to consider the timing for implementing the measures.<sup>219</sup>
- 355.3 the Minister may choose to draw on earlier advice or external information (for example, Australian Health Protection Principal Committee [**AHPPC**] statements) regarding current measures contained in the Orders as the epidemiology evolves.<sup>220</sup>
- 356 In the making of this pandemic order, I also took due consideration of the following:
- 356.1 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.

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<sup>215</sup> Text reflects verbal advice provided by the Chief Health Officer to Minister for Health (17 March 2022)

<sup>216</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p 17

<sup>217</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p 17

<sup>218</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p 4

<sup>219</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p 4

<sup>220</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p 4

356.2 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.

356.3 Although Victoria has achieved high vaccination coverage, and a substantial proportion of the population with a level of natural immunity from recent surging Omicron infections, the potential impacts of Omicron and the BA.2 sub-lineage discussed above mean that PHSMs continue to play a vital role by reducing the amount of contact between people and the risk of transmission during interactions, limiting further spread of COVID-19 and the potential impact on the health system.

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

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

358 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.

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

359.1 "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."<sup>221</sup>

359.2 "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."<sup>222</sup>

359.3 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.

359.4 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,

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<sup>221</sup> Department of Health, Human Rights Statement: Pandemic (Quarantine, Isolation and Testing) Order (30 December 2021) [71].

<sup>222</sup> Department of Health, Human Rights Statement: Pandemic (Quarantine, Isolation and Testing) Order (30 December 2021) [73.3].

some persons may not be residing with close contacts who are self-quarantining will have limited support if they experience mild symptoms.

359.5 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.

359.6 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.

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

360.1 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.

360.2 This Order does not physically force anyone to undergo medical treatment.

360.3 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

361 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.

362 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

363 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.

364 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 9 – Reasons for Decision – Pandemic (Victorian Border Crossing) Order 2022 (No.7)**

### *Summary of Order*

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

#### *Purpose*

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

#### *Obligations*

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

368 All international arrivals

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

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

368.1.2 monitor for COVID-19 symptoms;

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

368.1.4 comply with the International Arrivals and Aircrew Testing Requirements (as applicable); and

368.2 International passenger arrivals must carry and present specific documents on the request of an authorised officer, which are:

368.2.1 an acceptable form of identification;

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

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

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



- 368.3.1 an acceptable form of identification; and
  - 368.3.2 international acceptable evidence to show that they are fully vaccinated or international acceptable certification to show they are a medically exempt person.
- 368.4 For Australian-based international aircrew services workers who are not fully vaccinated or medically exempt, the document required is an acceptable form of identification.
- 369 Australian-based international aircrew services workers who are not fully vaccinated or medically exempt are additionally required to:
- 369.1 complete prescribed COVID-19 PCR tests or COVID-19 RA tests; and
  - 369.2 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.
- 370 International passenger arrivals who are not fully vaccinated must:
- 370.1 complete prescribed COVID-19 PCR tests or COVID-19 RA tests; and
  - 370.2 self-quarantine for the prescribed period of time.
- 371 This Order also sets out the conditions under which a person may be granted an exemption from this Order.
- 372 Failure to comply with this Order may result in penalties.

*Changes from Pandemic (Victorian Border Crossing) Order 2022 (No. 6)*

- 373 International maritime crew and passenger arrivals who are fully vaccinated or medically exempt are no longer required to complete hotel quarantine.
- 374 Requirements for fully vaccinated or medically exempt maritime crew align with fully vaccinated or medically exempt aircrew (must test if symptomatic within seven days of arrival). Requirements for fully vaccinated or medically exempt maritime passenger arrivals align with fully vaccinated or medically exempt air passenger arrivals (must test within 24 hours of arrival and self-quarantine until they receive a negative result).
- 375 The Secretary of the Department of Health is empowered to make a protocol that specifies requirements in relation to the use or operation of cruise ships.

*Period*

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

## Relevant human rights

### *Human rights that are limited*

377 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.

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

379 The Human Rights Statement also sets out:

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

379.2 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*

380 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.

381 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

382 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".

383 In relation to the restrictions that will be imposed by this Order, I have had regard to the Acting Chief Health Officer's advice and also considered, to the extent it is relevant to making my decision, previous advice provided by both the Acting Chief Health Officer and Chief Health Officer:

383.1 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.<sup>223</sup>

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<sup>223</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

- 383.2 Quarantine reduces the risk of exposure and transmission to the Victorian community by limiting international arrivals' interaction and movement for a defined period immediately following their arrival.<sup>224</sup>
- 383.3 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.<sup>225</sup>
- 383.4 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 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.<sup>226</sup>
- 383.5 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.<sup>227</sup>
- 383.6 Medically exempt individuals entering Australia should be treated as fully vaccinated for the purposes of determining their post-entry quarantine requirements. These individuals represent a small cohort that have a valid contraindication or acute illness that precludes them from receiving COVID-19 vaccines due to an unacceptable and heightened risk of harm to the individual. This group should not be disadvantaged for circumstances outside of their control through the imposition of quarantine requirements.<sup>228</sup>
- 383.7 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.
- 383.8 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

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<sup>224</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

<sup>225</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

<sup>226</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (10 January 2022) p. 30.

<sup>227</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) pp. 5-6.

<sup>228</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (16 December 2021) p. 6.

outbreaks persisting internationally, the risk of new variants emerging and entering the country remains.<sup>229</sup>

383.9 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.<sup>230</sup>

383.10 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.<sup>231</sup>

383.11 As the Commonwealth ban on international cruising may be lifted on 17 April 2022 (Department of Health, 2022), I advise that new measures are implemented to ensure the safe resumption of cruising.<sup>232</sup> International arrivals via air and sea should be managed according to their vaccination status due to the different level of public health risk posed.<sup>233</sup>

384 I broadly have accepted the advice of the Chief Health Officer and Acting Chief Health Officer, subject to the matters addressed in these reasons.

385 I note that the Acting Chief Health Officer has also advised the following changes to the Border Order:

385.1 Removal of pre-departure test for Australian based international aircrew are currently required to complete a pre-departure COVID19 test to align with recently announced removal

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<sup>229</sup> Text reflects advice provided by the Acting Chief Health Officer to the Minister of Health, 17 March 2022.

<sup>230</sup> Text reflects advice provided by the Acting Chief Health Officer to the Minister of Health, 17 March 2022.

<sup>231</sup> Text reflects advice provided by the Acting Chief Health Officer to the Minister of Health, 17 March 2022.

<sup>232</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p. 20.

<sup>233</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p. 19.

of pre—departure testing obligations for all international arrivals as per current Commonwealth requirements on 17 April 2022 (Department of Health, 2022).<sup>234</sup>

386 In deciding not to action the above measures, I draw on the Acting Chief Health Officer’s advice that:

386.1 Victoria is entering a period of rising case numbers which is likely to peak around mid-April, with hospitalisations peaking shortly thereafter.<sup>235</sup>

386.2 It is open to the Minister, however, to consider the timing for implementing the measures.<sup>236</sup>

386.3 If the Minister supports this change, that it is implemented at a time when all jurisdictions are aligned.<sup>237</sup>

386.4 the Minister may choose to draw on earlier advice or external information (for example, Australian Health Protection Principal Committee [AHPPC] statements) regarding current measures contained in the Orders as the epidemiology evolves.<sup>238</sup>

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

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

388 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.

389 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.”<sup>239</sup>

390 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.<sup>240</sup>

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<sup>234</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p. 19.

<sup>235</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p. 4.

<sup>236</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p. 4.

<sup>237</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p. 19.

<sup>238</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p. 4.

<sup>239</sup> Department of Health, Human Rights Statement: Pandemic (Victorian Border Crossing) Order (11 December 2021) [243.5].

<sup>240</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 26-27.

- 391 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.<sup>241</sup>
- 392 In making this Order, I have included international maritime passenger arrivals and international maritime services workers to be managed by their vaccination status rather than a blanket mandatory quarantine requirement. This is proportionate to the shifting Victorian epidemiological context and correspondingly, the relative risk posed by vaccinated international maritime arrivals is lower at this stage of the pandemic.
- 393 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.
- 394 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

- 395 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).<sup>242</sup>
- 396 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.<sup>243</sup>
- 397 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.<sup>244</sup> Education and practicing of <sup>245</sup> behaviours is consequently not sufficient in isolation to manage the risk posed by incoming international arrivals.
- 398 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

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<sup>241</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 26-27.

<sup>242</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 14 - 20.

<sup>243</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 10-11.

<sup>244</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 15.

<sup>245</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) p. 26.

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.<sup>246</sup>

399 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

400 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.

401 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.

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<sup>246</sup> Text reflects advice provided by the Acting Chief Health Officer to the Minister of Health, 17 March 2022.

## Schedule 10 – Reasons for Decision – Pandemic (Visitors to Hospitals and Care Facilities) Order 2022 (No.5)

### Summary of Order

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

#### *Purpose*

403 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*

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

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

404.2 require testing of visitors on entry in certain circumstances;

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

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

404.5 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;

404.6 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;

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

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

405 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. 4)*

406 There have been no changes to the obligations imposed by this order.



## *Period*

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

## Relevant human rights

### *Human rights that are limited*

408 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.

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

410 The Statement also sets out:

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

410.2 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*

411 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.

412 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

413 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".

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

414.1 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.

414.2 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.<sup>247</sup>

- 414.3 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.<sup>248</sup> 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.<sup>249</sup>
- 414.4 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.<sup>250</sup>
- 414.5 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.<sup>251</sup>
- 414.6 The direct and indirect impacts of COVID-19 continue to pressure the health system, with workforce availability a significant factor influencing capacity. While hospitalisations and ICU admissions related to COVID-19 had been gradually declining since 28 January 2022, hospitalisations and unplanned workforce absences have recently started to rise again.<sup>252</sup>
- 414.7 The health system is very likely to encounter additional strain as the winter months approach due to a number of factors. This includes an increase of influenza infections and influenza-related hospital admissions, increases in respiratory syncytial virus and other seasonal respiratory viruses that can increase hospitalisations in the winter months; other cold weather-related increases in cardiovascular and respiratory illness, alongside parallel demand due to BA.2 or another VOC that may emerge.<sup>253</sup>
- 414.8 The AHPPC has recently expressed concern about the upcoming winter season and the additional challenges that the health system may encounter due to the likely co-circulation of

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<sup>247</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 19 [80].

<sup>248</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [68].

<sup>249</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [69].

<sup>250</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 18 [76].

<sup>251</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 27 [107-108].

<sup>252</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 8.

<sup>253</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 8,9.

influenza and COVID-19 (Australian Health Protection Principal Committee (a), 2022). The AHPPC statement highlights that these challenges may be offset by increasing population level immunity from vaccination and natural infection and the availability of treatments which may mitigate against high hospital demand. AHPPC reinforced that the least restrictive PHSMs should be employed to support the health system to function.<sup>254</sup>

414.9 Care facilities, including but not limited to, residential aged care facilities (**RACF**), disability residential services, alcohol and drug residential services and homelessness residential services, commonly house and care for members of the community who may be frail, immunocompromised or have significant comorbidities and complex care needs, making them particularly susceptible to the negative impacts of COVID-19 infection, including severe disease and death. As such, these facilities are sensitive settings requiring specific consideration.<sup>255</sup>

414.10 In consideration of the above, and in the setting of high case numbers, the Acting Chief Health Officer advises that visitor restrictions remain in place for care facilities to reduce opportunities for viral incursion, given the higher risk of transmission, amplification and consequence should incursion occur. Visitor restrictions include entry requirements, face mask requirements and pre-entry RA testing.<sup>256</sup> While some public health measures in place for visitors to hospitals are intended to remain in some form, including limitations on the number of visitors and entry requirements such as vaccination or RA testing to help protect patients and staff, there are alternative mechanisms to Orders through which they can be implemented, for example, via health service policy and guidance materials to achieve the same intent. The Chief Health Officer continues to advise that measures be implemented to reduce the risk posed by visitors to hospital settings, particularly at times of increased community transmission, in this phase of the pandemic there are suitable alternatives to Orders, which can allow health services to implement their own tailored entry requirements or restrictions for visitors that are proportionate, compassionate and provide the best level of protection for their staff and at-risk patient populations in their specific setting. Consultation with relevant parts of the Department indicate high confidence that proportionate measures will be implemented through health service guidance and local policy. This should include, importantly, allowing an appropriate number of visitors in end-of-life scenarios.<sup>257</sup>

415 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.

416 The establishment of an essential visitors list for care facilities in the event of an outbreak with a continuation of the existing pre-entry requirements was included in the Chief Health Officer's advice

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<sup>254</sup> Department of Health, Acting *Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 9.

<sup>255</sup> Department of Health, Acting *Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 24.

<sup>256</sup> Department of Health, Acting *Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 25.

<sup>257</sup> Department of Health *Acting Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 14.

of the 12<sup>th</sup> of April. In considering this advice I have decided not to action this measure and draw on the Chief Health Officer's advice of the 12<sup>th</sup> of April:

416.1 Victoria is entering a period of rising case numbers which is likely to peak around mid-April, with hospitalisations peaking shortly thereafter.<sup>258</sup>

416.2 It is open to the Minister, however, to consider the timing for implementing the measures.<sup>259</sup>

416.3 the Minister may choose to draw on earlier advice or external information (for example, Australian Health Protection Principal Committee [AHPPC] statements) regarding current measures contained in the Orders as the epidemiology evolves.<sup>260</sup>

417 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.<sup>261</sup>

418 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 (if 18 years and over).<sup>262</sup> Such screening measures further mitigate risk and enable consideration for greater visitor numbers to balance the social isolation and wellbeing of residents.<sup>263</sup>

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

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

420 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.

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

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<sup>258</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p 4

<sup>259</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p 4

<sup>260</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health (7 April 2022) p 4

<sup>261</sup> Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

<sup>262</sup> Text reflects advice provided by the Acting Chief Health Officer to the Minister for Health, 17 March 2022.

<sup>263</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 18-19 [76].

- 421.1 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).”<sup>264</sup>
- 421.2 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.”<sup>265</sup>
- 421.3 “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.”<sup>266</sup>
- 421.4 “Where children seek to have family contact, limitations on their visitation rights may not be in their best interests in every circumstance.”<sup>267</sup>
- 421.5 “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.”<sup>268</sup>
- 421.6 “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.”<sup>269</sup>
- 421.7 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.”<sup>270</sup>
- 421.8 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

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<sup>264</sup> Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [53].

<sup>265</sup> Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [54.1].

<sup>266</sup> Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [55.3].

<sup>267</sup> Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [55.4].

<sup>268</sup> Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [57.1].

<sup>269</sup> Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [57.2].

<sup>270</sup> Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [59.2].

wellbeing of residents, patients, and families with the potential risks of COVID-19 incursions due to visitors.<sup>271</sup>

421.9 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.<sup>272</sup>

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

422.1 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.

422.2 “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.”<sup>273</sup>

422.3 “Persons in care facilities are vulnerable to serious illness or serious physical, mental, or social consequences of illness. Hospitals and care facilities are both high-density and high-contact forms of accommodation involving both residents and staff, and COVID-19 can spread quickly in such settings. COVID-19 has also spread among healthcare workers who are highly trained, not easily replaced, and valued members of their families and community in their own right.”<sup>274</sup>

422.4 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.<sup>275</sup>

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<sup>271</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [70].

<sup>272</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 at [71].

<sup>273</sup> Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [55.1].

<sup>274</sup> Department of Health, *Human Rights Statement: Pandemic (Visitors to Hospitals and Care Facilities) Order* (30 December 2021) [65].

<sup>275</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (23 December 2021), p. 14 [66].

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

- 423 In his advice, the Acting Chief Health Officer sets out a range of measures, including measures which do not have a restrictive element (such as health promotion<sup>276</sup>, education,<sup>277</sup> epidemiology and monitoring).<sup>278</sup>
- 424 The CHO has clearly stated that such measures alone will not be sufficient to manage the serious risk to public health posed by COVID-19.<sup>279</sup>
- 425 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.<sup>280</sup>
- 426 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 government's dedicated coronavirus website is heavily utilised, indicating the continued need to provide up to date public health messaging and information.<sup>281</sup>
- 427 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.<sup>282</sup>

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<sup>276</sup> Department of Health, Acting Chief Health Officer Advice to Minister for Health April 2022 pp. 60.

<sup>277</sup> Department of Health, Chief Health Officer Advice to Minister for Health April 2022 pp. 68 and 64

<sup>278</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 14-20.

<sup>279</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 10-11.

<sup>280</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 14-15 [52]-[56].

<sup>281</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 14-15 [52]-[56].

<sup>282</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 16 [64].

- 428 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.<sup>283</sup>
- 429 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.
- 430 The Chief Health Officer has previously relevantly 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.<sup>284</sup>
- 431 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

- 432 Considering all 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.
- 433 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.

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<sup>283</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 23 [105]-[106], p. 27 [124].

<sup>284</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 16 [63]-[64].



## Schedule 11 – Reasons for Decision – Pandemic (Workplace) Order 2022 (No.7)

### Summary of Order

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

#### *Purpose*

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

#### *Obligations*

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

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

438 An employer must take reasonable steps to:

438.1 ensure all workers carry and wear a face covering where appropriate; and

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

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

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

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

440 A worker who has received a positive result from a COVID-19 PCR test or a COVID-19 RA test must notify the operator of their work premises of their status as a diagnosed person or probable case if they attended an indoor space at the work premises during their Infectious Period.

441 After becoming aware of a diagnosed person or a probable case who has attended the work premises in the Infectious Period, the operator must notify all workers who were present at the same indoor space that they may have been exposed to COVID-19 and advise the exposed persons

to comply with relevant obligations under the “Testing Requirements for Contacts and Exposed Persons” document as amended from time to time, and support a worker to do so.

442 Failure to comply with the Order may result in penalties.

#### *Changes from Pandemic (Workplace) Order 2022 (No. 6)*

443 Empowering the Secretary of the Department of Health to create a protocol governing the cruise ship industry.

#### *Period*

444 The Order will commence at 11:59:00pm on 12 April 2022 and end at 11:59:00pm on 12 July 2022.

### Relevant human rights

#### *Human rights that are limited*

445 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.

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

447 The Human Rights Statement also sets out:

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

447.2 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*

448 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.

449 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

450 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”.

- 451 I have considered the Acting Chief Health Officer's advice that there has been an increase in the COVID-19 cases observed in the recent weeks, which is likely due to a number of factors including the circulation of the more transmissible BA.2 sub-lineage and waning population level protection afforded from both COVID-19 vaccination and previous COVID-19 infection. This trend aligns with the experience reported internationally. The Acting Chief Health Officer also noted the forecasting which suggests Victoria is entering a period of rising case numbers which is likely to peak around mid-April, with hospitalisations peaking shortly thereafter.<sup>285</sup>
- 452 I have also considered the AHPPC has recently expressed concern about the upcoming winter season and the additional challenges that the health system may encounter due to the likely co-circulation of influenza and COVID-19.<sup>286</sup>
- 453 The Acting Chief Health Officer noted that the health system is likely to encounter additional strain as the winter months approach due to a number of factors. This includes an increase of influenza infections and influenza-related hospital admissions, increases in respiratory syncytial virus and other seasonal respiratory viruses that can increase hospitalisations in the winter months; other cold weather-related increases in cardiovascular and respiratory illness, alongside parallel demand due to BA.2 or another VOC that may emerge.<sup>287</sup>
- 454 In relation to the measures imposed by this Order, the Acting Chief Health Officer relevantly advised:
- 454.1 Employers should continue to be required to maintain an up-to-date COVIDSafe Plan for each work premise where workers are onsite, to mitigate COVID-19 risk. As the COVID-19 response continues to transition from Orders towards empowering individuals and industry to utilise protective behaviours and measures, however, COVIDSafe Plan requirements should transition at the earliest reasonable juncture from Orders and be implemented via alternative such as workplace requirements, guidance materials and strong engagement, to achieve the same intent.<sup>288</sup>
- 454.2 It is necessary to continue the current requirement for employers and educational facilities to provide a general notification to individuals (or parents, guardians and carers) that they may have been exposed to a positive case. This measure supports the recent shift in the pandemic response towards empowering and educating the general public and businesses to manage outbreaks and protect staff, students and the community.<sup>289</sup>
- 454.3 As the Commonwealth ban on international cruising will be lifted on 17 April 2022 (Department of Health, 2022), new measures should be implemented to ensure the safe resumption of cruising. The Health Departments across Victoria, New South Wales and Queensland (Eastern Seaboard States) have been working together to achieve alignment on policy positions relating to the return of local and international cruising. There has also been

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<sup>285</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 4.

<sup>286</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) p. 9.

<sup>287</sup> Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022) pp. 8,9.

<sup>288</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 16.

<sup>289</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 18.

close consultation with the cruise industry on the requirements that should apply to cruise operations.<sup>290</sup>

455 In relation to the measures imposed by this Order, I have drawn on previous advice that the Chief Health Officer and Acting Chief Health Officer have provided:

455.1 Businesses are and will continue to be a primary area in which both workers and patrons interact. People from different parts of Victoria meet in these settings, and any infections that occur can be carried back to different parts of the community.<sup>291</sup>

455.2 Workplaces pose a transmission risk particularly where there are common areas.<sup>292</sup>

455.3 All workplaces require some level of obligations to help in both preventing transmission and reduce the risk of outbreaks if a confirmed case of COVID-19 enters a workplace, given the continued levels of transmission within Victoria.<sup>293</sup>

455.4 Evidence-based measures such as hand hygiene, physical distancing, use of personal protective equipment, restricted workplace access, contact tracing and isolation and quarantine have been recommended by WHO to mitigate these risks.<sup>294</sup>

455.5 The requirement for operators and employers to notify the department of health once outbreak thresholds should increase to help instigate public health measures while normalising operations.<sup>295</sup>

455.6 The continuation of the QR code check-in system is recommended in higher risk settings (such as hospitality, entertainment, event and function venues, gaming venues, hair and beauty retail premises and physical recreation facilities) to allow rapid identification of high-risk transmission events. This is in the context of returning either to a lower-case prevalence environment, or a high-case prevalence environment due to an emerging variant, in which QR codes may once again support a more centralised model of Testing, Tracing, Isolation and Quarantine (TTIQ) and to anticipate near-term scenarios such as a seasonal winter wave. This also ensures the infrastructure of the system remains in place should it be required to be rapidly reinstated across a setting if required.<sup>296</sup>

455.7 However, enabling employers to continue to use the QR code check-in system when they are no longer required to by Public Health Orders allows flexibility for employers who wish to continue to manage the risks of COVID-19 transmission at their specific worksite using the

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<sup>290</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 20.

<sup>291</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

<sup>292</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

<sup>293</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) p. 19.

<sup>294</sup> Department of Health, *Chief Health Officer Advice to Minister for Health* (10 December 2021) pp. 18-19.

<sup>295</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (10 January 2022) p. 33.

<sup>296</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 15 February 2022.

Service Victoria platform. This will allow individual businesses time to adjust to the shift towards increasing industry and individual responsibility of COVIDSafe practices.<sup>297</sup>

456 I note the Chief Health Officer has acknowledged it was reasonable for me to take operational impacts and social license into account, when considering changes to QR code check-in requirements, especially the risk that more complex changes may impede understanding of and compliance with the Orders.<sup>298</sup>

457 I note the Acting Chief Health Officer has left it open to me to consider the timing for implementing the measures set out in his advice.<sup>299</sup> I have decided to retain the COVIDSafe plan requirements given the increase in COVID-19 cases observed in recent weeks, which is likely due to a number of factors including the circulation of the more transmissible BA.2 sub-lineage and waning population level protection afforded from both COVID-19 vaccination and previous COVID-19 infection.<sup>300</sup>

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

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

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

460 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.

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

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

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

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<sup>297</sup> Text reflects verbal advice provided by the Chief Health Officer to the Minister for Health, 21 February 2022.

<sup>298</sup> Text reflects email advice provided by the Chief Health Officer, 16 February 2022.

<sup>299</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 4.

<sup>300</sup> Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 4.

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

- 462 The Chief Health Officer has advised me a range of measures, including measures which do not have a restrictive element (such as health promotion, education, epidemiology and monitoring).<sup>301</sup>
- 463 The Chief Health Officer has advised that such measures alone are not sufficient to manage the serious risk to public health posed by COVID-19.<sup>302</sup>
- 464 On the basis of the Chief Health Officer's advice, I considered that that there were no other reasonably available means by which to manage the spread of COVID-19 in workplaces that would be less restrictive of freedoms. However, even if there were to be less restrictive measures, I have considered that the measures imposed by the Order are within the range of reasonably available alternatives to achieve the purpose.

## Conclusion

- 465 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.
- 466 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.

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<sup>301</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 14-15.

<sup>302</sup> Department of Health, Chief Health Officer Advice to Minister for Health (10 December 2021) pp. 10-11.