

Minister for Health

Statement of Reasons

Pandemic Orders with effect on 22 September 2022

On 22 September 2022, I, Mary-Anne Thomas, Minister for Health, made the following pandemic orders under section 165A1 of the *Public Health and Wellbeing Act 2008*:

Pandemic (Public Safety) Order 2022 (No. 5)

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 each 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 section 165AE(1)), make any order that I believe is reasonably necessary to protect public health. The Premier made the initial pandemic declaration on 10 December 2021, and has extended this declaration three times, 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:
 - 2.1 on 9 January 2022, the Premier extended the pandemic declaration for three months from 12 January 2022;
 - 2.2 on 6 April 2022, the Premier extended the declaration again for a further three months from 12 April 2022;
 - 2.3 on 5 July 2022, the Premier extended the declaration again for a further three months from 12 July 2022.
- 3 On 29 August 2022, as requested by the Premier, the Chief Health Officer provided updated advice to assist the Premier in his consideration of whether the current Pandemic Declaration should remain in force under section 165E of the *Public Health and Wellbeing Act 2008* (Vic) until 11:59:00pm on 12 October 2022. In his advice, the Chief Health Officer advised that there remains a serious risk to public health from COVID-19 due to a high baseline of transmission and severe disease since January 2022 with the spread of the Omicron variant of concern (Omicron) and its subvariants, the recent peak in hospitalisations and deaths observed in July 2022, and the ongoing, substantial pressure faced by health services.¹
- 4 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.
- 5 On 7 September 2022, I received verbal advice from the Chief Health Officer with respect to self-isolation periods following the agreed outcomes from National Cabinet on the 31 August 2022.
- 6 On 21 September 2022, I received further verbal advice from the Chief Health Officer. This advice related to the current mandate on face coverings for public transport, in a commercial passenger vehicle or a licensed tourism operator vehicle and to the public health measures the Chief Health Officer recommends both continuing and introducing in Victoria. The advice reflects the current

¹ Department of Health, *Chief Health Officer Advice to Premier* (29 August 2022), p. 2

COVID-19 context in Victoria and was given in addition to any advice provided by the Chief Health Officer to the Premier regarding an extension of the declaration of the pandemic.

- 7 I have also reviewed the epidemiological data available to me on 21 September 2022 to affirm my positions on the orders made on 22 September 2022, to commence at 11:59pm.
- 8 Under section 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.
- 9 On the basis of the material provided to me by the Department of Health and the advice of the 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 section 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 also had regard to those principles when providing their advice.

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.²
- 12 My decision to make the pandemic orders has been informed by the expert advice of the Chief Health Officer about the serious risk to public health posed by COVID-19 and the public health measures that the 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 COVID-19 is a serious risk to public health, and it would not be appropriate to defer action on the basis that complete information is not yet available. In such circumstances, as the PHW Act sets out, a lack of full scientific certainty is not a reason for postponing measures to prevent or control the public health risks associated with COVID-19.

² Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 April 2022) p. 7.

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 The rise in new cases in Victoria over winter has been due primarily to the dominance of the BA.4 and BA.5 subvariants. The Chief Health Officer's advice states BA.4 and BA.5 are the most immune evasive lineages so far and have led to far higher reinfection rates than previous waves and that, in the likelihood of further waves in coming months, new variants and sub-variants may cause significant severe disease, hospitalisations and deaths, facilitated by ongoing immune evasion.³
- 17 Despite cases and hospitalisations trending down since the peak of the winter wave and appearing to stabilise,⁴ the Chief Health Officer's advice states that the proportion of reinfections has rapidly increased in recent weeks, and documented reinfection rates increased from approximately 0.8 per cent in January 2022 to 14.1 per cent in the period of 26 July to 25 August 2022.⁵
- 18 The Chief Health Officer's advice also states that evidence and experience to date indicate that similar waves of cases (similar to that seen in January 2022 and again in July 2022), hospitalisations and deaths are likely in coming months, due to the ongoing emergence of variants with greater immune-evasive properties; the limitations of naturally acquired and vaccine-induced immunity with each new variant; and the waning of vaccine-induced immunity.⁶
- 19 Having regard to these factors, 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.

Principle of accountability

- 20 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.
- 21 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.
- 22 To promote accountability in the making of pandemic orders, the PHW Act requires that a copy or written record of the Chief Health Officer's advice, a statement of reasons, and a human rights statement (Human Rights Statement) are published in the case of the making, variation or extension of an order.

³ Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), pp. 7 and 8

⁴ Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), p. 6.

⁵ Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), p. 8.

⁶ Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), p. 2

- 23 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

- 24 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.
- 25 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

- 26 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.
- 27 Throughout the pandemic, there has been ongoing consultation between the Chief Health Officers and the Deputy Chief Health Officers of the States and Territories, including through the Australian Health Protection Principal Committee (AHPPC).
- 28 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.
- 29 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. Consistency helps maintain public trust in government management of the COVID-19 pandemic and the application of public health and social measures. The proactive response by the new Commonwealth Government to these current challenges is welcomed and enables greater levels of cooperation and consistency across jurisdictions.

Part 8A objectives

- 30 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:
- 30.1 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;
- 30.2 supports proactive and responsive decision-making for the purposes of preventing and managing the outbreak and spread of pandemics and diseases with pandemic potential;

- 30.3 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;
- 30.4 promotes transparency and accountability in relation to decisions made and actions taken under Part 8A; and
- 30.5 safeguards contact tracing information that is collected when a pandemic declaration is in force.

Human Rights

- 31 Section 165A(2) of the PHW Act, recognises the importance of protecting human rights in managing the serious risk to life, public health and wellbeing presented by the outbreak or spread of pandemics and diseases of pandemic potential.
- 32 In addition, in making each pandemic order, I have proceeded on the basis that I should give proper consideration to relevant human rights under the *Charter of Human Rights and Responsibilities 2006* (Vic) (Charter). I therefore proceeded on the basis that, in making each order, I was required to take the following four steps:
 - 32.1 first, understand in general terms which human rights are relevant to the making of a pandemic order and whether, and if so, how those rights would be interfered with by a pandemic order;
 - 32.2 second, seriously turn my mind to the possible impact of the decision on human rights and the implications for affected persons;
 - 32.3 third, identify countervailing interests or obligations in a practical and common-sense way; and
 - 32.4 fourth, balance competing private and public interests as part of the exercise of ‘justification’.
- 33 This statement of reasons must be read together with the Human Rights Statement.
- 34 I also note that in providing his verbal advice of 21 September 2022, the Chief Health Officer had regard to the Charter.

Overview of public health advice

- 35 Following other jurisdictions, including South Australia, Queensland, and New South Wales removing mandates for face masks on public transport, I requested the Chief Health Officer’s advice under section 165AL of the PHW Act. I received the Chief Health Officer’s verbal advice on 21 September 2022.
- 36 The Chief Health Officer relevantly advised that face masks remain a low impost, low cost and high effective public health measure and have been generally well accepted by the Victorian community.

Masks remain an effective measure in reducing transmission and protecting the most at-risk members of our community. Mandates help support access for disabled and other at-risk populations to public transport and commercial passenger vehicles where they have no other option available.⁷

- 37 The Chief Health Officer noted that consistency across jurisdictions is an important consideration to ensure public confidence in restrictions to maintain compliance in higher-risk settings where face covering requirements will remain. The Chief Health Officer also noted that changes in neighbouring jurisdictions lead to obvious challenges and considerations of national consistency and the importance of public confidence in the science underpinning public health interventions.⁸
- 38 The Chief Health Officer advised that due to these considerations, it was open to me to consider easing the current mandate on public transport, in commercial passenger vehicles and on licensed tourism operators and to instead strongly encourage Victorians to continue wearing a face mask in these settings. The Chief Health Officer reaffirmed that mask requirements should remain in higher risk settings such as such as hospitals, healthcare settings and care facilities.⁹

Current context

- 39 The continuing priority for the COVID-19 response is enabling a systematic and scalable response to the ongoing and serious risk posed by COVID-19. This includes use of effective, targeted and proportionate public health measures aimed at controlling transmission, reducing hospital pressure and reducing severe disease and deaths, particularly in at-risk cohorts.¹⁰
- 40 Maintaining public trust in government management of the COVID-19 response is a vital and critical element of the actions that are taken. Therefore, consideration must be given to alignment across Australian jurisdictions where the local situation and epidemiology allow.
- 41 In considering these matters I also take note of previous advice of the Acting Chief Health Officer regarding the move towards a model that empowers individuals and industry to understand the risk, to utilise public health behaviours and measures to protect themselves, their loved ones, and the wider community.¹¹ With regular waves likely over the medium term and fewer PHSMs mandated, clear, consistent and evidence-based communication is key to empowering Victorians to make safe choices for themselves and their community. As a result, community can come together at crucial periods to apply downward pressure on transmission and lessen the human and economic toll of imminent waves.¹² An example of this is the recent Victorian Government's 'Winter Wellness Campaign' has sought to increase the population uptake of vaccination and mask-wearing and increase understanding of the significance of both COVID-19 and influenza. These campaigns can be

⁷ Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (21 September 2022).

⁸ Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (21 September 2022).

⁹ Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (21 September 2022).

¹⁰ Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), p. 5.

¹¹ Department of Health, *Acting Chief Health Officer Advice to Minister for Health* (7 July 2022), p.19.

¹² Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), pp. 20 – 21.

especially effective when their impact is measured, and the messages are repeated or refined in response to evaluation.¹³

- 42 With the gradual transition to a more community and industry led pandemic response, it is crucial that there is continued community engagement on prevention and response strategies in order to support this enduring change in behaviours and ensure communities are well equipped to mitigate risk, take action when required and reduce the chance of those most at risk being disproportionately affected by COVID-19.
- 43 I have considered the timing for implementing all the measures in the Chief Health Officer's advice. I have also taken into account external information (for example, AHPPC statements, with the most recent statement published on 8 September 2022) and consideration for ongoing national alignment regarding measures contained in the orders as the epidemiology evolves.
- 44 Based on the epidemiological data provided below, it is appropriate to broadly implement the advice provided by the Chief Health Officer on 29 August 2022 and 7 September 2022.
- 45 When making the pandemic orders, I have had regard to the verbal advice provided by the Chief Health Officer dated 7 September 2022 and on 21 September 2022.

Immediate situation: Continued management of the COVID-19 Pandemic

- 46 As at 21 September 2022:
- 46.1 There are 1,568 new locally acquired cases (340 from polymerase chain reaction (PCR) Test results).
- 46.2 The 7-day rolling average of new cases is 1,480. For the previous week, it was 1,751 people.
- 46.3 There are currently 8,510 active cases in Victoria, with 144 people hospitalised, 7 of which are in ICU.
- 46.4 The 7-day rolling average of hospitalisations is 169.
- 47 As at 21 September 2022, there were 4 COVID-related deaths were reported in the preceding 24-hour period, bringing the total number of COVID-related deaths identified in Victoria to 5,572.

Vaccinations

- 48 As at 21 September 2022:
- 48.1 94.8 per cent of eligible Victorians over the age of 12 have received two doses of a COVID-19 vaccination.

¹³ Department of Health, Chief Health Officer Advice to The Premier (29 August 2022) p. 20.

48.2 69.9 per cent of eligible Victorians over the age of 16 have received three doses (booster) of a COVID-19 vaccination.

49 As at 14 September 2022:

49.1 A total of 16,544,447 doses have been administered in Victoria including through the State's vaccination program.

49.2 A total of 63,342,668 doses have been administered nationally.

49.3 96.4 per cent of Australians aged 16 and over have received two doses of a COVID-19 vaccination.

49.4 71.8 per cent of eligible Australians have received three or more doses of a COVID-19 vaccination.¹⁴

The current global situation

50 The following situation update and data have been taken from the World Health Organisation, published 14 September 2022.

Statistic	
Global confirmed cumulative cases of COVID-19	Over 605 million
Global cumulative deaths	Over 6.4 million
Global trend in new weekly cases	Over 3.1 million (28 per cent lower than the previous week)
Country level: highest number of new weekly cases:	Japan (537,181 new cases; -54 per cent) Republic of Korea (435,695 new cases, -26 per cent) United State of America (430,048 new cases; -26 per cent) Russian Federation (337,187 new case; +4 per cent) China (263,288 new cases; +11 per cent)

Source: World Health Organisation, *WHO COVID-19 Weekly Epidemiology Update*, published 14 September 2022.

¹⁴ Department of Health and Aged Care, Australian Government, COVID-19 vaccine rollout update- 6 September 2022.

Reasons for decision to make pandemic orders

Overview

- 51 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.
- 52 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.
- 53 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.
- 54 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.¹⁵ 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.*'
- 55 Having had regard to the advice of the Chief Health Officer and considering the importance of national consistency, it is my view that making these pandemic orders is reasonably necessary to reduce the risk that COVID-19 poses.
- 56 Omicron remains the dominant variant of COVID-19 globally. Omicron has multiple sublineages, with the major subgroups being BA.1, BA.2 BA.3, BA.4 and BA.5. Since July 2022, BA.5 is the dominant circulating strain globally. Reinfections prior to the Omicron variant was relatively rare, however have become more common after the BA.1 and BA.2 subvariant waves¹⁶.
- 57 BA.4 and BA.5 are the most immune evasive lineages so far, which has led to far higher reinfection rates than previous waves. Internationally and in Victoria, emerging lineages are being monitored due to their potential to initiate further waves. Diagnoses of COVID-19 in Australia were amongst the highest per capita in the world during July, driven by the Omicron BA.4 and BA.5 subvariants.¹⁷
- 58 More than 200 descendent lineages of Omicron have emerged, and many are being monitored by the World Health Organisation. New lineages may demonstrate virological changes of significant

¹⁵ See *Public Health and Wellbeing Act 2008* (Vic), section 3(1) for the definition of 'serious risk to public health'.

¹⁶ Department of Health, Chief Health Officer Advice to The Premier (29 August 2022), p.9.

¹⁷ Department of Health, Chief Health Officer Advice to The Premier (29 August 2022) p.5.

public health concern, such as further immune evasion, increased inherent transmissibility, increased severity, diagnostic failure, treatment failure, or a combination of these characteristics.¹⁸

- 59 In Victoria, the proportion of reinfections has rapidly increased in recent weeks. Documented reinfection rates increased from approximately 0.8 per cent in January 2022 to 14.1 per cent in the period of 26 July to 25 August 2022.¹⁹
- 60 Since late June 2022, there has been a surge of deaths in Victoria. In July 2022, Victoria recorded the highest monthly deaths to date, with over 650 COVID-19 deaths recorded. This equates to over 12 per cent of all COVID-19 deaths in Victoria to date.²⁰
- 61 The recent COVID-19 winter wave caused significant mortality across Australia. In late July, Australia recorded the second highest per capita COVID-19 death rate in the world. As at 26 August 2022, Australia has recorded a total 13,648 COVID-19 associated deaths.²¹
- 62 I note the Chief Health Officer's advice that there is substantial evidence that long COVID-19 has broad and long-term impacts on individuals. Approximately five per cent of people with COVID-19 will experience long COVID and approximately 20 to 25 per cent of those who have long COVID will experience a more severe form, where their ability to undertake ordinary day-to-day activities including working is very limited. Most experience symptoms for three to five months while some continue to experience symptoms for considerably longer.²²
- 63 It is estimated that 3.3 per cent of the Victorian population are currently experiencing or have experienced long COVID at some point during 2022 and 0.6 per cent have experienced severe long COVID. There is currently no single pharmacological treatment recommended for long COVID. The current treatment is mainly aimed at symptom and complication management.²³
- 64 I note the Chief Health Officer's advice that this will increase health service demand through more frequent general practice visits and even hospital re-admissions. In addition, long COVID negatively impacts the financial security of affected individuals due to lost wages and redundancies. This flows through to place further pressure on workforce capacity being seen in many industries, including the healthcare workforce, through sick leave required with long COVID.²⁴

¹⁸ Department of Health, Chief Health Officer Advice to The Premier (29 August 2022) p.7.

¹⁹ Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p.8.

²⁰ Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p.10.

²¹ Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p.11.

²² Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p.17.

²³ Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p.17.

²⁴ Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p.17.

- 65 All of the above-mentioned factors, combined with the waning of the ‘hybrid immunity’ provided by vaccines and recent natural infection may lead to further waves resulting in high numbers of cases, hospitalisations and deaths in the coming months.²⁵
- 66 I also acknowledge the Chief Health Officer’s advice that ongoing efforts are necessary to continue monitoring the pandemic and enact proportionate public health interventions within the available resources and management frameworks.²⁶
- 67 The changes to the pandemic orders recognise the need for consistency across Australian jurisdictions, as consistency helps to maintain public trust in government management of the COVID-19 pandemic and use of public health and social measures.
- 68 On 21 September 2022 the Chief Health Officer relevantly advised that masks remain an effective measure in reducing transmission and protecting the most at-risk members of our community. The CHO noted that mandates help support access for disabled and other at-risk populations to public transport and commercial passenger vehicles where they have no other option available.²⁷
- 69 The Chief Health Officer noted that consistency across jurisdictions is an important consideration to ensure public confidence in restrictions to maintain compliance in higher-risk settings where face covering requirements will remain. The Chief Health Officer also noted that changes in neighbouring jurisdictions lead to obvious challenges and considerations of national consistency and the importance of public confidence in any public health and social measure.²⁸
- 70 The Chief Health Officer advised that due to the competing factor of national consistency and the need for confidence in the public health benefit and support from the community, it was open to me to consider easing the current mandate on public transport, in commercial passenger vehicles and on licensed tourism operators and to instead strongly encourage Victorians to continue wearing a face mask in these settings. The Chief Health Officer reaffirmed that mask requirements should remain in higher risk settings such as such as hospitals, healthcare settings and care facilities.²⁹
- 71 I accept the Chief Health Officer’s advice that masks remain a simple and effective measure in reducing transmission of COVID-19 and protecting the most at-risk members of our community. I also note past advice from the then Acting Chief Health Officer regarding the move towards a model that empowers individuals and industry to understand the risk, to utilise public health behaviours and measures to protect themselves, their loved ones, and the wider community.

²⁵ Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p.4.

²⁶ Department of Health, Chief Health Officer Advice to the Premier (29 August 2022), p.4.

²⁷ Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (21 September 2022).

²⁸ Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (21 September 2022).

²⁹ Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (21 September 2022).

- 72 I note the Chief Health Officer’s advice that COVID-19 cases and hospitalisations are at the lowest levels in the last nine months.³⁰ I recognise the importance of consistency in public health measures where possible across jurisdictions, especially those neighbouring Victoria.
- 73 In addition, I have had a number of conversations with the Hon. Ben Carroll MP, Minister for Transport, regarding COVIDSafe measures on public transport, most recently on Wednesday 21 September 2022. Minister Carroll and I agreed that potential confusion exists arising from the different settings in New South Wales and South Australia that risk eroding public trust in government responses to the COVID-19 pandemic.
- 74 Minister Carroll and I further noted, given current lower case numbers, that it is the right time to move away from mandates, requiring enforcement, to encouraging enduring behaviour change, including continuing to strongly recommend wearing face masks on public transport.
- 75 Having regard to the public interest of national alignment and of maintaining public confidence in the benefit for face masks, I no longer consider it reasonably necessary to mandate face masks on public transport, in commercial passenger vehicles and on licensed tourism operators in the current context.³¹ All actions taken in Victoria in response to the COVID-19 pandemic must be proportionate to the current epidemiology, and face masks have been generally well accepted and adopted by the Victorian community.
- 76 As Victoria continues to transition towards a model that empowers individuals and industry to use and promote public health behaviours and measures to protect themselves, their loved ones, and the wider community, we will continue to strongly recommend to the community that they wear a face mask in these settings.
- 77 I reflect on my own community and those who identify as more vulnerable and continue to wear masks in a range of settings. We will continue to support that normalisation, as we see in other nations and make an active decision to provide this guidance to the community.³²
- 78 In making these changes, I want them to take effect as soon as possible, noting that 23 September 2022 is the Grand Final eve public holiday in which many in the community will utilise public transport.³³

Risks of no action taken

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

³⁰ Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (21 September 2022).

³¹ Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (21 September 2022).

³² Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (21 September 2022).

³³ Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (21 September 2022).

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.³⁴

Schedules

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

³⁴ Taylor EH, Marson EJ, Elhadi M, Macleod KDM, Yu YC, Davids R, et al. Factors associated with mortality in patients with COVID-19 admitted to intensive care: a systematic review and meta-analysis. *Anaesthesia*. 2021;76(9):1224-32.

SCHEDULE 1 – REASONS FOR DECISION – PANDEMIC (PUBLIC SAFETY) ORDER 2022 (No. 5)

Summary of Order

- 81 This Order requires individuals to carry and wear face coverings in certain settings, prohibits certain visitors and workers from attending care facilities and requires the operator of a care facility to restrict visitor access for individuals who have not returned a negative COVID-19 test result and do not fall under a relevant exception.

Purpose

- 82 The purpose of the Order is to address the serious public health risk posed to the State of Victoria by the spread of COVID-19. The order aims to limit the transmission of COVID-19 and protect particularly vulnerable populations by requiring people in the State of Victoria to carry and wear face coverings in certain settings and restricting access to care facilities.

Obligations

- 83 This 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 the Workplace Order.
- 84 This Order requires individuals to wear a face covering in the following settings (unless an exception applies):
- 84.1 while in an indoor space that is a publicly accessible area of a healthcare premises;
 - 84.2 while working in an indoor space that is a publicly accessible area of a court or justice centre;
 - 84.3 while working in an indoor space at a prison, police gaol, remand centre, youth residential centre, youth justice centre or post-sentence facility;
 - 84.4 while working in an indoor space in a resident-facing role at a care facility, including when not interacting with residents;
 - 84.5 while visiting a hospital or a care facility;
 - 84.6 if the person is required to self-isolate, self-quarantine or is a close contact and is leaving the premises in accordance with the Quarantine, Isolation and Testing Order;
 - 84.7 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;
or
 - 84.8 where required to do so in accordance with any other pandemic orders in force.
- 85 Face coverings are not required to be worn in the State of Victoria:

- 85.1 by an infant or child under the age of 8 years;
- 85.2 by a prisoner in a prison (either in their cell or common areas), subject to any policies of that prison;
- 85.3 by a person detained in a remand centre, youth residential centre or youth justice centre (either in their room or common areas), subject to any policies of that centre;
- 85.4 by a resident in a post-sentence facility (either in their room or common areas), while they are at the facility subject to any policies of that post-sentence facility;
- 85.5 by a person who has a physical or mental health illness or condition, or disability, which makes wearing a face covering unsuitable;
- 85.6 where it is not practicable for the person to comply because the person is escaping harm or the risk of harm, including harm relating to family violence or violence of another person;
- 85.7 when a person is communicating with a person who is deaf or hard of hearing and visibility of the mouth is essential for communication;
- 85.8 when the nature of a person's work means that wearing a face covering creates a risk to their health and safety;
- 85.9 when the nature of a person's work means that clear enunciation or visibility of the mouth is essential;
- 85.10 when the person is working by themselves in an enclosed indoor space (unless and until another person enters that indoor space);
- 85.11 by a person who is a professional sportsperson when training or competing;
- 85.12 by a person engaged in any strenuous physical exercise;
- 85.13 by a person riding a bicycle or motorcycle;
- 85.14 by a person who is consuming medicine, food or drink;
- 85.15 by a person who is smoking or vaping (including e-cigarettes) while stationary;
- 85.16 by a person who is undergoing dental or medical care or treatment to the extent that such care or treatment requires that no face covering be worn;
- 85.17 by a person who is receiving a service and it is not reasonably practicable to receive that service wearing a face covering;
- 85.18 by a person who is providing a service and it is not reasonably practicable to provide that service wearing a face covering;

- 85.19 by a person who is asked to remove the face covering to ascertain identity;
 - 85.20 for emergency purposes;
 - 85.21 when required or authorised by law; or
 - 85.22 when doing so is not safe in all the circumstances.
- 86 This Order prohibits a person from entering or remaining on, the premises of a care facility unless:
- 86.1 the person is a resident of the facility; or
 - 86.2 the person is a care facility worker in relation to the facility and the entry is not otherwise prohibited under the Order; or
 - 86.3 the person is a visitor of a resident of the facility and the visit is not otherwise prohibited under the Order; or
 - 86.4 the person is visiting as a prospective resident of the facility, or a visitor that is a support person to a prospective resident of the facility and the visit is not otherwise prohibited under the Order; or
 - 86.5 the person is an essential visitor listed in the Benchmark Essential Visitors List; and their visit or entry is not otherwise prohibited under the Order.
- 87 This Order requires the operators of care facilities to not permit the following persons to enter, or remain at, the facility unless they have received a negative result from a COVID-19 rapid antigen test undertaken on the same day they attend the facility:
- 87.1 a visitor of a resident of the care facility; or
 - 87.2 a visitor who is visiting as a prospective resident of the care facility; or
 - 87.3 a visitor that is a support person to a prospective resident of the care facility; or
 - 87.4 a visitor who is an essential visitor listed in the Benchmark Essential Visitors List (unless the person is a care facility worker).
- 88 The above obligations do not apply to an operator in relation to the following persons:
- 88.1 a person who is visiting for the purpose of undertaking an end of life visit to a resident of the care facility; or
 - 88.2 a person that is seeking to enter the care facility for the purpose of providing urgent support for a resident's immediate physical, cognitive or emotional wellbeing, where it is not practicable for the person to take a COVID-19 rapid antigen test prior to entering the residential aged care facility; or

- 88.3 a person who has undertaken a COVID-19 PCR test within 24 hours prior to visiting the care facility and provided acceptable evidence of a negative result from that test to the operator of the care facility; or
- 88.4 a person providing professional patient care, including but not limited to:
 - 88.4.1 emergency workers in the event of an emergency; and
 - 88.4.2 ambulance workers; and
 - 88.4.3 visiting healthcare professionals; or
- 89 This Order defines care facility excluded person to mean a person who:
 - 89.1 is required to self-isolate or self-quarantine under the *Pandemic (Quarantine, Isolation and Testing) Order*; or
 - 89.2 has COVID-19 symptoms unless those symptoms are caused by an underlying health condition or medication; or
 - 89.3 is currently in the two-day period following a five-day period of self-isolation under the *Pandemic (Quarantine, Isolation and Testing) Order*; or
 - 89.4 in the case of a visitor—has been tested for COVID-19 and has not yet received the results of that test.
- 90 This Order requires that the following persons must not enter, or remain on, the premises of a care facility if they are a care facility excluded person:
 - 90.1 a care facility worker; or
 - 90.2 a visitor of a resident of the facility; or
 - 90.3 a prospective resident of the facility; or
 - 90.4 a visitor that is a support person to a prospective resident of the facility; or
 - 90.5 a visitor who is an essential visitor listed in the Benchmark Essential Visitors List.
- 91 A care facility excluded person who has COVID-19 symptoms (unless those symptoms are caused by an underlying health condition or medication) may be permitted to visit a care facility for the purposes of undertaking an end of life visit to a resident if authorised by an officer of the facility with the position of Director (or equivalent) and either the Chief Health Officer or Deputy Chief Health Officer, or a Director or Medical Lead of a designated Local Public Health Unit (LPHU). In this case, a person authorised to enter must comply with any directions or conditions to which that authorisation is subject. Additionally, a care facility officer must keep a record of that person's contact details, and the date and time they entered and exited the facility, for at least 28 days from the day this visit is authorised.

- 92 The operator of a care facility must take all reasonable steps to ensure that:
- 92.1 a person does not enter or remain on the premises of the facility if they are prohibited from doing so under the Order; and
 - 92.2 a person who is an essential visitor (as listed in the Benchmark Essential Visitors List) is permitted to enter, or remain on, the premises of the facility, including during an outbreak; and
 - 92.3 the facility facilitates 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.
- 93 The operator of a care facility must require visitors (or a parent, carer or guardian for visitors aged under 18 years) in relation to the facility to declare in writing at the start of each visit, but before entering any area of the care facility that is freely accessible to residents, whether the visitor:
- 93.1 is free of COVID-19 symptoms other than symptoms caused by an underlying health condition or medication; and
 - 93.2 has received a negative result from a COVID-19 rapid antigen test on the same day that they attend the facility; and
 - 93.3 is not currently required to self-isolate, self-quarantine or is a close contact but is not required to self-quarantine in accordance with the *Pandemic (Quarantine, Isolation and Testing) Order*.
- 94 Failure to comply with this Order may result in penalties.

Changes from Pandemic (Public Safety) Order 2022 (No. 4)

- 95 Removal of the requirement to wear a face covering while on public transport, in a commercial passenger vehicle or a licensed tourism operator vehicle.

Period

- 96 The Order will commence at 11:59:00pm on 22 September 2022 and end at 11:59:00pm on 12 October 2022.

Relevant human rights

Human rights that are limited

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

99 The Human Rights Statement also sets out:

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

99.2 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

100 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.

101 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

102 I have carefully read and considered the Chief Health Officer’s advice.

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

103.1 Face mask requirements should continue in high-risk settings to reduce the risk of onward transmission. Masks protect healthy individuals from inhaling infectious particles and protects others by containing particles exhaled from infectious individuals.³⁵

103.2 Face masks are a low impost measure to lower the risk of wearers transmitting or contracting COVID-19 and have been generally well accepted and adopted by the Victorian community. A survey of a sample of the Victorian population suggests that despite masks currently being mandated on public transport, only half of respondents reported “always” wearing masks. Parents of school-aged children where mask wearing has been recommended (Grade 3 to 6) were recently surveyed and only a third had been asking their children to wear masks at school.³⁶

~~103.3~~ Face masks should continue to be required in other sensitive settings including hospitals, care facilities, healthcare settings and custodial settings.³⁷

³⁵ Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 20.

³⁶ Department of Health, *Chief Health Officer Advice to the Minister for Health* (29 August 2022), pp. 19 and 20.

³⁷ Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (7 September 2022).

- 103.4 Mask requirements should be retained for cases, close contacts and those who are symptomatic and awaiting a COVID-19 test result when leaving their home or accommodation.³⁸
- 103.5 All current exceptions from wearing a mask should remain in place.³⁹
- 103.6 With regular waves likely over the medium term and fewer PHSMs mandated, clear, consistent and evidence-based communication is key to empowering Victorians to make safe choices for themselves and their community. The Chief Health Officer noted that public health campaigns can be especially effective when their impact is measured, and the messages are repeated or refined in response to evaluation.⁴⁰
- 103.7 Certain cohorts of the population continue to experience a higher risk of severe disease, death and other negative outcomes from COVID-19, due to a combination of individual risk factors and pre-existing socioeconomic and environmental factors. These cohorts include older populations, residents of residential aged care facilities, those with certain medical comorbidities and disabilities, and those experiencing socioeconomic disadvantage.⁴¹
- 103.8 For this reason, visitor entry requirements for care facilities should be retained to provide the strongest protection to individuals who are most at risk of severe morbidity and mortality. Visitor restrictions and testing requirements for entry in high-risk settings serve to minimise incursion and transmission of COVID-19.⁴² In the context of sustained community transmission, waning vaccine-induced and natural immunity among the general population and low fourth dose vaccination, these measures are appropriate and proportionate.
- 103.9 With these measures in place to limit viral incursion, it remains proportionate that visitor caps (numbers of visitors per resident) continue to be at the discretion of individual facilities. As the Acting Chief Health Officer has expressed previously, it is vital that care facilities apply a compassionate approach to visitor arrangements. This will ensure residents' health and wellbeing, while the ongoing risks posed by COVID-19 are mitigated.⁴³ As Victoria continues to experience a high rate of community transmission, RA tests remain an important measure to limit viral incursion into care facilities. RA tests are a useful screening tool as they are quick, convenient and exclude COVID-19 infection with a high level of accuracy. All visitors to care facilities should continue to have a negative RA test result on the day of visitation. Pre-entry testing can be undertaken prior to arriving at the facility to avoid additional staffing pressures. As part of the entry written attestation, the visitor should be required to attest that a test has been completed and returned a negative result.⁴⁴

³⁸ Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 21.

³⁹ Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 21.

⁴⁰ Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), p.20.

⁴¹ Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), pp. 3-4.

⁴² Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), p. 19.

⁴³ Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 28.

⁴⁴ Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 28.

- 103.10 Current exceptions to pre-entry RA testing should also be retained. This includes end of life visitation, individuals providing professional patient care or persons providing urgent support for a resident's immediate physical, cognitive, or emotional wellbeing and it is not practicable to undertake a RA test prior to entering the facility. Individuals who are excepted from testing requirements should be strongly recommended to complete a RA test after their visit as soon as is practicable. Individuals who have undertaken a PCR test within 24 hours prior to visiting a RACF should also be excepted from RA testing requirements.⁴⁵
- 103.11 In the event of an outbreak at a care facility, essential visitors should continue to be permitted to enter care facilities under the Benchmark Essential Visitors List, which outlines the minimum visitation requirements for care facility residents – in the context of COVID-19 risk – including when there are active outbreaks occurring within a facility. Visitors included as part of this essential visitors list who are attending a care facility should continue to be required to complete the care facility visitor pre-entry requirements.⁴⁶
- 104 I accept the advice of the Chief Health Officer and Acting Chief Health Officer above in relation to face coverings in high-risk settings, face coverings for cases and close contacts and proposed care facility requirements.
- 105 The Chief Health Officer provided further verbal advice on 21 September 2022 outlining:⁴⁷
- 105.1 Masks remain an effective measure in reducing transmission and protecting the most at-risk members of our community.
- 105.2 Mandates help support access for disabled and other at-risk populations to public transport and commercial passenger vehicles where they have no other option available.
- 105.3 Consistency across jurisdictions is an important consideration to ensure public confidence in restrictions to maintain compliance in higher-risk settings where face covering requirements will remain.
- 106 I accept the Chief Health Officer's advice that masks remain an effective measure in reducing transmission and protecting the most at-risk members of our community and will continue to mandate them in higher risk settings such as hospitals, healthcare settings and care facilities.⁴⁸
- 107 In the interest of national alignment and maintaining public confidence in the benefit for face masks, I no longer consider it reasonably necessary to mandate face masks on public transport, in commercial passenger vehicles and on licensed tourism operators in the current context.⁴⁹

⁴⁵ Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 28.

⁴⁶ Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), pp. 28-29.

⁴⁷ Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (21 September 2022).

⁴⁸ Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (21 September 2022).

⁴⁹ Department of Health, *Record of meeting between the Minister for Health and the Chief Health Officer* (21 September 2022).

108 As Victoria continues to transition towards a model that empowers individuals and industry to use and promote public health behaviours and measures to protect themselves, their loved ones, and the wider community, we will continue to strongly recommend to the community that they wear a face mask in these settings.

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

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

110 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.

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

111.1 Restrictions on who can visit care facilities "can amount to unfavourable treatment on the basis of disability, or association with a person with a disability (otherwise characterisable as a person imputed to have a disability), by prohibiting visits from diagnosed persons, people with certain COVID-19 symptoms, and close contacts (except in circumstances which remain limited despite having been eased from previous settings)."⁵⁰

111.2 "Freedom of movement of persons wishing to visit care facilities in Victoria is therefore limited because the Order does not allow a person to travel without impediment into places where people live, where other laws do not prohibit it." There is also "an incursion into the protection of families and children when they cannot meet face-to-face in a time when a relative who is a resident would appreciate the comfort and connection", and there may be an "incursion on the right of persons with a particular cultural, religious, racial or linguistic background to practice their culture, religion, or language to the extent that this can be done by face-to-face visits."⁵¹

111.3 Information collected under this Order would "would constitute personal and health information and its provision to gain access to the care facility would therefore be an interference with privacy."⁵²

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

112 I have considered the previous advice of the Acting Chief Health Officer that the Victorian public health response to COVID-19 continues to transition towards a model that empowers individuals

⁵⁰ Department of Health, *Human Rights Statement: Pandemic (Public Safety) Order* (8 September 2022).

⁵¹ Department of Health, *Human Rights Statement: Pandemic (Public Safety) Order* (8 September 2022).

⁵² Department of Health, *Human Rights Statement: Pandemic (Public Safety) Order* (8 September 2022).

and industry to understand their risk, utilise public health behaviours and measures to protect themselves, their loved ones, and the wider community.⁵³

- 113 I have considered what is necessary, appropriate and proportionate to the current context and forecasted impact of COVID-19 such as strengthened public communications and community engagement, targeted engagement, promoting and facilitating up to date vaccination, optimising safer indoor air through ventilation and/or filtration, facilitating access to COVID-19 therapies, face masks, COVIDSafe plans, test, trace, isolate and quarantine (TTIQ) and entry requirements to high risk settings as key to an effective pandemic response in Victoria.⁵⁴
- 114 In particular, I have considered the Acting Chief Health Officer's advice on 7 July 2022 that the Victorian response should continue to utilise, prioritise and exhaust less restrictive measures prior to implementing more stringent measures, wherever possible.⁵⁵
- 115 The Chief Health Officer advised that certain cohorts of the population continue to experience a higher risk of severe disease, death and other negative outcomes from COVID-19, due to a combination of individual risk factors and pre-existing socioeconomic and environmental factors. These cohorts include older populations, residents of residential aged care facilities, those with certain medical comorbidities and disabilities, and those experiencing socioeconomic disadvantage.⁵⁶
- 116 As the Acting Chief Health Officer advised previously, care facilities 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. 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. To ensure consistent safeguards across these settings, it is appropriate to place visitor requirements in this Order. However, the impact of the COVID-19 pandemic on the residential care sector has been significant because of the necessity, at times, for restrictions on visitation to keep residents safe.⁵⁷
- 117 An important balance must be achieved to ensure residents have vital personal, social, emotional and community support and connection when living in care facilities, whilst continuing to mitigate the risk of COVID-19 introduction and spread.⁵⁸ 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.

⁵³ Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 18.

⁵⁴ Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 5.

⁵⁵ Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 July 2022), p. 18.

⁵⁶ Department of Health, *Chief Health Officer Advice to the Premier* (29 August 2022), pp. 3 – 4, 10, 13.

⁵⁷ Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022), pp. 24–26.

⁵⁸ Department of Health, *Acting Chief Health Officer Advice to the Minister for Health* (7 April 2022), p. 26.

Conclusion

118 I accept the advice of the Chief Health Officer and Acting Chief Health Officer that the measures related to the following continue to be reflected in, or introduced to, pandemic orders:

118.1 face covering requirements in certain high-risk settings; and

118.2 restrictions on visitors to care facilities and access for essential visitors to care facilities.